

Central Brooklyn Independent Democrats Judicial Candidate Questionnaire

Please return to richbennett12@gmail.com by February 8
. Feel free to call (7183441434) or email with any questions

A1. Candidate Name	Betsey Jean-Jacques
A2. Campaign Manager name/ Campaign treasurer name	Marvin Jean-Jacques, Campaign Treasurer
A3. Campaign Contact Information: Address, Telephone, Fax, Email, Website	Betsey For Civil Court Judge 400 Jay Street, #131, Brooklyn, New York 11201 betseyforjudge2023@gmail.com
A4. Office for which the endorsement is requested / Jurisdiction	Kings County Civil Court Judge, County Wide
A5. Are you the incumbent?	No.
A6. Have you been endorsed by CBID before? If so, in what year(s) and for what office(s)?	No.
A7. As of now what funds have you raised to support your efforts? (b) What do you expect to spend in support of your candidacy?	As a judicial candidate, the ethical rules do not permit to me to know who donates to my campaign nor the amount donated. As of now I am still working on my budget.
A8. What endorsements from community leaders, elected officials, political organizations or newspapers have you received thus far?	I am supported by the Thomas Jefferson Club and its leaders. I am still in the process of meeting with community leaders, political organizations and elected officials.
A9. Is your candidacy receiving any support from the Kings County Democratic Party? If so, what type?	To my knowledge, the Kings County Democratic party has not yet disclosed the candidates it will support in this coming election.
A10. What sitting Supreme Court Justice of the US do you most admire and why?	I greatly respect Justice Sonia Sotomayor. Beside being an excellent and learned jurist, Justice Sotomayor has become a role model for countless people. Her story and children's books encourage children to believe in their own power and strenght.

<p>A11. If you were President Biden who would you nominate to the US supreme Court to fill the current vacancy and why?</p>	<p>To the extent that at the time of this application, President Biden has already filled the vacancy on the US Supreme Court with Ketanji Brown Jackson, I fully support his choice. From the articles I have read regarding her path to the Supreme Court, Justice Brown Jackson is more than qualified to fulfill this role.</p>
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<p>B1. Please include as a link or attachment the following documents: a). Citations for your three most significant decisions (if a judge). b). Resume c). Any published articles pertinent to the office you seek. d). Any application filled out for other organizations</p>	<p>a) Not applicable b) Please see attached. c) I have no published article regarding my judicial candidacy. d) I completed an application to the Democratic Screening Committee, but that application is confidential and therefore I am unable share it in this forum.</p>
<p>B2. How many trials have you participated in within the last ten years? Please include citations</p>	<p>For the last five years, as a principal law clerk to Justice Francois A. Rivera in the Kings County Supreme Court, Civil Term. I have assisted in a number of bench and jury trials including but not limited to conducting pre-trial conferences, settlement conferences and by preparing jury charges. As an associate attorney with Mental Hygiene legal service, I regularly participated in special proceedings and have tried more than 1000 cases. Many of these cases are protected by Health Insurance Portability and Accountability Act (HIPAA).</p>
<p>B3. How many written motions have you made citing legal authority in last 5 years? Please provide copies of 3 most recent motions and/or memoranda</p>	<p>B3. As a principal law clerk, I prepare draft decision for Justice Rivera. I have included three drafts decisions.</p>
<p>B4. Have you had any court sanctions or disciplinary sanctions in your career? If so, please provide an explanation.</p>	<p>No. I have not had any court sanctions or disciplinary sanctions in my career.</p>
<p>B5. If you are currently serving as a Judge please list the names of the lawyers involved in the last three written opinions that you have issued.</p>	<p>1) Not Applicable. 2) 3)</p>

<p>B6. Provide citations to your last 5 published opinions. If you have less than 5, please provide copies of enough unpublished opinions to bring the total to 5. All published decision first, then fill in the balance with the most recent unpublished decisions.</p>	<p>1)</p> <p>2)</p> <p>3)</p> <p>4)</p> <p>5)</p>
<p>C1. Are you a member of a political club? If yes, what is the name of the club? And what positions have you held? Please include dates.</p>	<p>I am a member of the Thomas Jefferson Democratic Club. I have not held any positions.</p>
<p>C2. Have you been elected to any public office or political party position? If so, please describe the office or position.</p>	<p>No.</p>
<p>C3. Have you performed any pro bono work in the past three years? Please describe the type of pro bono work you have performed.</p>	<p>I have worked as a public servant with the Unified Court System for almost sixteen years and have not engaged in provided legal services out this. However, I assist Justice Rivera with training college juniors and seniors for law school. I prepare their weekly assignments which allow the students to learn how to review cases like a first year law students. In some cases I have tutored these students one on one outside of my work hours.</p>
<p>C4. What Civic Organizations do you belong to? Please describe that the organization does, and what role you play within the organization.</p>	<p>I am not a member of any civic organizations.</p>
<p>C5. For each Civic Organization, provide contact information for the Executive Director, CEO or organization head. If you are the executive Director or organization leader, please provide the contact information for at least one Board Member.</p>	

<p>D1. What bar associations do you belong to? What sections or committees do you belong to? What is your role with the section or committee?</p>	<p>I belong to number of bar associations, please see my resume for a complete list. I am a member of the Brooklyn Women's Bar Association (BWBA), the Staten Island Women's Bar Association and the Women's Bar Association of the State of New York (WBASNY). I currently serve on the Convention Committee for WBASNY. I am on the Black History Committee for the BWBA. I have previously served as Continuing Legal Education Chair for the BWBA. Diversity Co-Chair and Membership Co-Chair for WBASNY. I am also the incoming President of the Catholic Lawyers Guild of Kings County.</p>
<p>D2. List any CLE's that you have taught within the last three years, if any. Please provide a syllabus if one is available.</p>	<ul style="list-style-type: none"> • “Implicit Bias: What is It? Do I Have It? Can I get rid of it?” The Discussion Continues” [2020] • “Who Me? Biased, Reflecting on Implicit Biases” [2021] • “Who Me, Biased? Understanding and Addressing the Implications of Implicit Bias [2021] <p>Please see attached.</p>

BETSEY JEAN-JACQUES

1936 BERGEN AVENUE, APT 1D, BROOKLYN, NY 11234 • (646) 831-8916 • BETSEYFORJUDGE2023@GMAIL.COM

EDUCATION

Syracuse University College of Law

Syracuse University College of Health and Human

Services: School of Social Work

Juris Doctor/Master of Social Work

Certificate of Coursework: Family Law and Social Policy

Syracuse, New York

May 2006

Fordham University

Bachelor of Arts in Political Science

New York, New York

May 2002

Admitted to practice in New York State

2007

LEGAL EXPERIENCE

KINGS COUNTY SUPREME COURT CIVIL TERM

Principal Law Clerk to the Honorable Francois A. Rivera

Brooklyn, New York

February 2018-Present

- Draft decisions on pre-trial motions; research and analyze legal issues in civil matters; draft and prepare civil jury charges and verdict sheets; conduct case conferences on issues including ready motions, status, settlement, discovery, and trial.

MENTAL HYGIENE LEGAL SERVICE

APPELLATE DIVISION SECOND DEPARTMENT

Associate Attorney

March 2007-February 2018

Brooklyn, New York

- Have tried over 1,200 cases.
- Represented and advocated for adults and children with mental illness within psychiatric facilities under Article 9 of the Mental Hygiene Law (MHL).
- Liaised with hospital administration, doctors, and other agencies on behalf of patients.
- Reviewed hospital admission papers and incident reports.
- Assisted in the monitoring of Kings County Hospital's compliance with the US Department of Justice 2010-2017 Settlement Agreement of Sidney Hirschfeld, Director of Mental Hygiene Legal Service, Second Judicial Department v. New York City Health and Hospitals Corp., et al (2007)
- Advised and advocated for individuals residing in the Office of Mental Health-operated residences.
- Served as Counsel or Court evaluator in MHL Article 81 Guardianships.
- Served as Respondent's counsel in emergency medical procedure bedside hearings.
- Represented individuals in Kendra's Law Assisted Outpatient Treatment examinations and hearings.
- Prepared and presented cases under MHL Article 10 Civil Commitment.
- Assisted with interviewing, supervising, and training attorneys, support staff, and interns.
- Served as the volunteer Exposure Control trainer for Brooklyn, Queens, and Staten Island. Prepared and gave presentations regarding the risk of communicable diseases in the workplace; coordinated paperwork associated with Tuberculosis/Hepatitis B testing and inoculation.
- Served as a member of the Children's Committee that assisted with formulating policies regarding children in psychiatric facilities.
- Provided information regarding the Mental Hygiene Law to the members of the community.
- Assumed supervisory duties of Principal Attorney including supervising attorneys, managing the office, and reviewing monthly statistical reports.
- Researched legal issues and prepared court documents. Prepared and presented cases before trial courts (in bench and jury trials).

ADDITIONAL EXPERIENCE

NEW YORK CITY SMALL CLAIMS COURT

Brooklyn, New York

Volunteer Arbitrator

2013-2019

- Heard and decided every day small claim disputes in Brooklyn including conducting inquests on various issues.

CONTINUING LEGAL EDUCATION PROGRAMS

- Presented the following continuing legal education presentations at various associations.

“The Ins and Outs of Mental Hygiene:

Hospitalizations to Civil Commitment and So Much More”

Columbian Lawyers Association

2018

“Implicit Bias: Overcoming Social

Cognition & Applying Cultural Sensitivity to Legal Practice”

Women’s Bar Association of the State of New York

2018

“Mental Hygiene Overview 2019”

Bay Ridge Lawyers Association

2019

“Implicit Bias: What is It? Do I Have It?

Can I get rid of it?”

Brooklyn Women’s Bar Association

2019

“Implicit Bias: What is It? Do I Have It?

Can I get rid of it?” The Discussion Continues”

Brooklyn Women’s Bar Association

2020

“Who Me? Biased, Reflecting on Implicit Biases”

Columbian Lawyers Association

2021

“Who Me, Biased? Understanding and Addressing the Implications of Implicit Bias”

Appellate Division First Department

2021

CITY UNIVERSITY OF NEW YORK: COLLEGE OF STATEN ISLAND

Staten Island, New York

Guest Lecturer

March 2015, 2016

- Presented lectures to Social Work students regarding the NYS Mandated Reporter statute and Article 9 of the Mental Hygiene Law.

MERCY FIRST: PREVENTIVE SERVICES

Queens, New York

Case Worker II

January 2007-March 2007

- Provided counseling and support to families with a child between the ages of 13 and 16 years old in need of preventive services.

ONONDAGA PASTORAL COUNSELING CENTER

Syracuse, New York

Clinical Intern

August 2005-May 2006

- Provided counseling and therapy to individuals, families, and groups diagnosed with mental illness.

ONONDAGA COUNTY DISTRICT ATTORNEY: APPEAL BUREAU

**Syracuse, New York
August 2004-May 2005**

Law Extern

- Conducted legal research and wrote memoranda on various issues including criminal procedure and evidence.
- Drafted motions in response to criminal appeals.

VERA HOUSE NEW DIRECTIONS: RAPE CRISIS & SEXUAL ASSAULT SERVICES

**Syracuse, New York
September 2004-May 2005**

Law Extern

- Organized and presented educational lectures on personal safety to children ages 4-13 years at Elementary and Junior High Schools in Onondaga County.
- Facilitated and directed a children’s group ages 4-8 years old, for victims of sexual trauma.
- Counseled individuals affected by sexual trauma.
- Participated in the Sexual Trauma Task Force with other agencies including the District Attorney’s office and Child Protective Services.
- Worked on the preparation of the Onondaga County Sexual Trauma Task Force Children’s Manual.

LEGAL AID SOCIETY: CRIMINAL DEFENSE DIVISION

**New York, New York
June 2004- August 2004**

Law Intern

- Conducted legal research regarding various criminal defense issues.
- Interviewed clients and witnesses. Surveyed incident areas to gather information.
- Drafted pleadings and motions.
- Worked with the Mentally Ill Chemically Addicted Project (MICA).

ASSOCIATIONS

Brooklyn Bar Association **2022-Present**

Member

Columbian Lawyers Association of Brooklyn **2015-Present**

Member

Catholic Lawyers Guild, Kings County Chapter **2015-Present**

Incoming President for 2023

Board Member

Haitian American Lawyers Association of New York **2020-Present**

Member

Metropolitan Black Bar Association **2016-Present**

Member

**The Association of Law Secretaries to the Justices of the Supreme Court
and Surrogate’s Courts in the City of New York** **2020-Present**

Member

The Cervantes Society **2019-2022**

Member

Thomas Jefferson Democratic Club **2015-Present**

Member

Women’s Bar Association of the State of New York **2015-Present**

WBASNY Legislative Committee, Member [2015-2017]

WBASNY Membership Committee, Co-Chair [2018-2019]

WBASNY Diversity Committee, Co-Chair [2016-2018]

WBASNY Convention Committee, Member [2022-Present]

Brooklyn Chapter (Brooklyn Women's Bar Association)

<i>Board Member</i>	[2022-Present]
<i>Treasurer</i>	[2020-2022]
<i>Continuing Legal Education Committee, Chair</i>	[2018-2019]
<i>Black History Committee, Member</i>	[2020-Present]

Staten Island Chapter (Staten Island Women's Bar Association)

<i>Corresponding Secretary</i>	[2017-2018]
<i>WBASNY Director</i>	[2015-2017]

SKILLS AND INTERESTS

- Conversational Haitian Creole.
- Proficient in Lexis Advance, Westlaw, and Microsoft Office.
- Interests include reading, knitting, music appreciation, and movies.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of June 2022

HONORABLE FRANCOIS A. RIVERA

-----X
YURIY MISHCHANCHUK

Petitioner,

For leave to commence an action pursuant
To Section 5218 of the Insurance Law

DECISION & ORDER
Index No. 526739/2021

- against -

THE MOTOR VEHICLE ACCIDENT
INDEMNIFICATION CORPORATION,

Respondent.

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By order to show cause and petition, filed on October 20, 2021, under motion sequence one, petitioner Yuriy Mishchanchuk (hereinafter petitioner or Mishchanchuk) seeks an order pursuant to Insurance Law 5218, (1) permitting the petitioner to bring an action against respondent the Motor Vehicle Accident Indemnification Corporation (hereinafter MVAIC), or (2) compelling MVAIC to assume the defense indemnification in a lawsuit against the known owner/operator. This application is opposed by MVAIC.

- Order to Show Cause
- Affirmation in Support
- Petition
- Exhibit A to E
- Affirmation in Opposition
- Exhibits A to C
- Reply

BACKGROUND

On October 20, 2021, Mishchanchuk commenced the instant special proceeding by electronically filing an order to show cause and verified petition with annexed exhibits (hereinafter the commencement papers) with the Kings County Clerk's office (KCCO).

The commencement papers allege the following salient facts. On October 21, 2018, at approximately 10:58 p.m., Mishchanchuk, a bicyclist, was struck by a motor vehicle on Avenue K near the intersection of Coney Island Avenue in Brooklyn, New York (hereinafter the accident). Mishchanchuk alleges that he suffered serious injuries due to the accident.

The petition refers to an annexed uncertified police accident report, which identifies the vehicle operator as Ezra Baraka, and the motor vehicle as a 2018 GMC registered to Next Gear Inc. bearing the State of Louisiana registration number DI78664.

On November 20, 2018, within 90 days of the accident, Mishchanchuk served a Notice of Intention to Make a Claim on MVAIC. The petitioner alleges that the motor vehicle had no insurance coverage at the time of the accident.

Mishchanchuk alleges that by letter received in June 2019 MVAIC determined him to be a “qualified person” pursuant to Insurance Law 5202. Upon this determination, Mishchanchuk’s counsel forwarded his medical records and other documents in support of his claims of damages.

On October 19, 2021, the petitioner commenced an action against Ezra Baraka and Next Gear Inc. in the Kings County Supreme Court, under Index Number 526685/2021.

The petition further alleges that a previous application for similar relief was filed on September 20, 2021, in Kings County Supreme Court.

MOTION PAPERS

The petitioner's papers consist of an order to show cause, a verified petition, an affirmation of counsel, and five annexed exhibits labeled A through E. Exhibit A is a copy of an uncertified Police Accident Report dated October 21, 2018. Exhibit B is a copy of a four-page document titled Notice of Intention to Make Claim. Exhibit C is described as a License Plate search. Exhibit D consists of a letter from MVAIC dated June 3, 2019, and copies of a series of emails. Exhibit E is a copy of the summons and verified complaint in the matter of Yuriy Mishchanchu v. Ezra Baraka and Next Gear Inc., under Index Number 526685/2021.

MVAIC's opposition papers consist of an affirmation of counsel and three annexed exhibits labeled A through C. Exhibit A is described as a copy of Insurance Law Article 52, "The Motor Vehicle Accident Indemnification Act." Exhibit B is a copy of an uncertified Police Accident Report dated October 21, 2018. Exhibit C consists of three pages titled Notice of Intention to Make Claim.

LAW AND APPLICATION

Article 52 of the Insurance Law is known as the "Motor Vehicle Accident Indemnification Corporation Law." It was created to compensate innocent qualified victims for accidents caused by uninsured motor vehicles, unidentified motor vehicles that leave the scene of an accident, and motor vehicles operated without the permission of the owner (*Archer v Motor Veh. Acc. Indem. Corp.*, 118 AD3d 5, 8-9 [2d Dept 2014]),

citing Insurance Law § 5201[b]; see *Quiridumbay v Motor Veh. Acc. Indem. Corp.*, 176 AD3d 717, 717-18 [2d Dept 2019]).

Leave To Sue MVAIC

Insurance Law § 5218, which is titled “Procedure for Hit and Run Cases,” provides that:

Any qualified person having a cause of action for death or personal injury arising out of the ownership, maintenance or use of a motor vehicle in this state, when the identity of the motor vehicle and of the operator and owner cannot be ascertained or it is established that the motor vehicle was at the time of the accident, in the possession of a person without the owner's consent and that the identity of such person cannot be ascertained may, upon notice to the corporation, apply to a court for an order permitting an action therefor against the corporation in that court.

A petitioner seeking leave of court to commence an action against MVAIC has the initial burden of demonstrating that he or she is a “qualified person” within the meaning of the Insurance law and making an evidentiary showing that he or she has satisfied any other statutory requirements (*Mele v Motor Veh. Acc. Indem. Corp.*, 186 AD3d 1375 [2nd Dept 2020], citing *Matter of Hernandez v Motor Veh. Acc. Indem. Corp.*, 120 AD3d 1347, 1349 [2nd Dept 2014]). In a special proceeding, the court is empowered to make a summary determination to the extent that no triable issues of fact are raised (*Mele*, 186 AD3d at 1376, citing CPLR 409[b]). If triable issues of fact are raised, an evidentiary hearing must be held (*Mele*, 186 AD3d at 1376, citing CPLR 410).

In the instant matter, the petitioner contends that although he knows the identity of the owner and operator of the vehicle involved in the accident that he is a “qualified”

person as he has determined that the alleged tortfeasors are uninsured, and he should be permitted to bring a direct action against MVAIC.

Notwithstanding the petitioner's contentions, Insurance Law § 5218 only permits a suit directly against MVAIC where a person has been injured by an automobile and the identity of the owner and operator cannot be established or the vehicle was used without the owner's consent by an unknown person (*Quiridumbay*, 176 AD3d at 718). The petitioner's submissions establish that the accident was not a hit and run, and the vehicle and its operator were identified (*see Abdul S. v Motor Veh. Acc. Indem. Corp.*, 166 AD3d 402, 403 [1st Dept 2018]). Accordingly, the procedures pursuant to Insurance Law 5218 cannot be applied here.

Compelling MVAIC to Defend and Indemnify

In the alternative, the petitioner seeks an order compelling MVAIC to assume the defense indemnification in a lawsuit against the known owner/operator. When a petitioner knows the identity of the driver or the owner of the offending vehicle, the petitioner must first exhaust the available remedies against those individuals before seeking relief from MVAIC (*Hauswirth v Am. Home Assur. Co.*, 244 AD2d 528, 529 [2nd Dept 1997], citing *Matter of Troches v Motor Vehicle Acc. Indem. Corp.*, 171 AD2d 873 [2nd Dept 1991]; *see also Matter of Frankl v Motor Vehicle Acc. Indem. Corp.*, 53 AD2d 614 [2nd Dept 1976]).

Although neither the petition nor the affirmation of counsel cites any specific provisions for the remedy requested, Insurance Law §§ 5209 and 5210 contemplates when an action has been commenced against an offending motorist.

Insurance Law § 5209 authorizes MVAIC to defend an action against a defaulting uninsured motorist (*see Archer v Motor Veh. Acc. Indem. Corp.*, 118 AD3d 5, 9 [2nd Dept 2014]). MVAIC may do so on its own or pursuant to a motion to compel brought by the qualified injured plaintiff (*see Naula v Dela Puente*, 48 AD3d 434 [2nd Dept 2008], citing *Viuker v Allstate Insurance Co.*, 70 AD2d 295 [2nd Dept 1979]).

“Where judgment has been entered against an uninsured defendant in favor of a qualified person, Insurance Law § 5210 provides that a qualified person may petition the court to compel MVAIC to pay the amount of a judgment against that uninsured defendant that remains unpaid, subject to the limitations contained therein” (*Baker v Motor Veh. Acc. Indem. Corp.*, 161 AD3d 1070, 1072 [2nd Dept 2018], quoting *Archer v Motor Veh. Acc. Indem. Corp.*, 118 AD3d 5, 9 [2nd Dept 2014]).

The petitioner’s submissions include a summons and complaint, verified by his counsel, for an action against the uninsured operator and owner, in the matter of *Yuriy Mishchanchu v. Ezra Baraka and Next Gear Inc.*, under a separate index number (hereinafter Offending Vehicle Action). In opposition, MVAIC contends that the petitioner has not established that it exhausted all remedies against the offending vehicle and that the petitioner’s application must be denied.

The instant petition verified by Mishchanchuk does not provide any information regarding the status or disposition of the offending vehicle action. The petitioner has not demonstrated that the offending vehicle action failed due to lack of proof of the identity of the owner or operator (*see Graves v MVAIC*, 197 AD3d 943, 944 [4th Dept 2021]). The petitioner has not established that a judgment was rendered against the uninsured owner or operator in the offending vehicle action that remains unpaid (*see id.*, citing *Acosta-Collado*, 103 AD3d at 716). Furthermore, the petitioner has not demonstrated the uninsured operator or owner has defaulted in the offending vehicle action (*Villanueva v Muniz*, 136 AD2d 546 [2nd Dept 1988]). Therefore, the petitioner has not met his burden to compel MVAIC to defend or indemnify.

CONCLUSION

The application of petitioner Yuriy Mishchanchuk for an order pursuant to Insurance Law 5218 permitting the petitioner to bring an action against respondent the Motor Vehicle Accident Indemnification Corporation is denied.

The application of petitioner Yuriy Mishchanchuk for an order compelling respondent the Motor Vehicle Accident Indemnification Corporation to assume the defense indemnification in a lawsuit against the known owner/operator is denied.

ENTER:

J.S.C.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December 2021

HONORABLE FRANCOIS A. RIVERA

-----X

CLARENCE STEWART and RUTH ANN CRAWFORD,

Plaintiffs,

DECISION & ORDER
Index No. 520631/2018

- against -

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, AS TRUSTEE For PENNYMAC LOAN TRUST 2011-, NPL1, PENNYMAC LOAN TRUST 2011- NPL1, PENNYMAC FINANCIAL SERVICES, INC., PENNYMAC LOAN SERVICES, LLC, WILMINGTON SAVINGS FUND SOCIETY, FEIN, SUCH & CRAIN and FAY SERVICING, LLC

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on June 16, 2021, under motion sequence number five, by plaintiffs Clarence Stewart and Ruth Ann Crawford (hereinafter collectively as plaintiffs) for an order: vacating the stipulation of consent; vacating the order confirming the stipulation of consent; restoring the motion to the calendar; and upon restoration a reasonable time to oppose the motion. This motion is opposed by defendant Fay Servicing, LLC (hereinafter Fay).

- Notice of Motion
- Affirmation in Support
- Exhibits A to B
- Fay's Affirmation in Opposition
- Memorandum of Law in Opposition
- Exhibits A to D
- Reply Affirmation
- Exhibit A

MOTION PAPERS

Plaintiffs' motion papers consist of a notice of motion, an affirmation of counsel and two annexed exhibits labeled A to B. Exhibit A is a copy of an email from chambers directing the parties to appear for oral argument before this Court on June 10, 2021. Exhibit B is a copy a Notice of Motion to Dismiss by Fay dated April 22, 2021.

Fay's opposition papers consist of an affirmation of counsel, memorandum of law, and four annexed exhibits labeled A through D. Exhibit A is 232 pages. It includes a printout from the NYSCEF system dated April 22, 2021, at 1:35 P.M., listing NYSCEF document numbers 93 to 106. It also includes Fay's notice of motion to dismiss dated April 22, 2021, an affirmation in support, a memorandum of law in support, and exhibits A through J. Exhibit B is a copy of the certified transcript of the proceedings held on June 10, 2021, via Microsoft Teams. Exhibit C includes the Notice of Entry, dated June 16, 2021, and an Order of this Court dated June 10, 2021. Exhibit D includes the Notice of Entry, dated March 23, 2021, and an Order of this Court dated November 19, 2020, under Index Number 509473/2020.

BACKGROUND

On October 18, 2018, the plaintiffs commenced the instant action (hereinafter the 2018 Action) by electronically filing a summons with notice with the Kings County Clerk's office (hereinafter the KCCO).

On November 27, 2018, defendant Fein, Such & Crane, L.L.P. i/s/h/a Fein, Such & Crain filed a notice of appearance and a demand for a complaint.

On December 4, 2018, defendants PennyMac Loan Services, LLC, PennyMac Financial Services, Inc., PennyMac Loan Trust 2011-NPL1 and Christiana Trust, A Division of Wilmington Savings Fund Society, as Trustee for PennyMac Loan Trust 2011-NPL1'S filed a demand for a complaint.

On April 10, 2019, defendant Fay filed a demand for a complaint.

Shortly thereafter on April 12, 2019, defendants PennyMac Loan Services, LLC, PennyMac Financial Services, Inc., PennyMac Loan Trust 2011-NPL1 and Christiana Trust, a Division of Wilmington Savings Fund Society, as Trustee for PennyMac Loan Trust 2011-NPL1 filed a pre-answer motion seeking to dismiss the plaintiffs' complaint pursuant to CPLR 3012 (b) (hereinafter motion sequence one).

On May 1, 2019, the plaintiffs electronically filed a verified complaint containing sixty-seven allegations of fact in support of three causes of action and ten annexed exhibits labeled A through J with the KCCO. The first cause of action is for malicious prosecution. The second cause of action alleges, inter alia, that the defendants acted in bad faith and that the plaintiffs seek punitive damages. The third cause of action claims

that the defendants were grossly negligent and engaged in malicious prosecution and abuse of process.

On May 16, 2019, defendant Fein, Such & Crane, LLP s/h/a Fein, Such & Crain filed a pre-answer motion to dismiss the claims as asserted against it pursuant to CPLR 3012 (b) (hereinafter motion sequence two).

On June 17, 2019, defendant Fay filed a pre-answer motion to dismiss the plaintiff's complaint as asserted against it pursuant to CPLR 3012 (b), CPLR 308, and CPLR 312-a (hereinafter motion sequence three).

By Order of this Court dated July 19, 2019, the Court granted motion sequences one and two to dismiss the complaint asserted against those defendants. The order also denied motion sequence three and Fay was given twenty days to answer the plaintiffs' complaint.

On August 8, 2019, Fay interposed an answer to the complaint.

On June 6, 2020¹, the plaintiffs commenced a subsequent action by electronically filing a summons², a verified complaint and eight annexed exhibits labeled A through J, with the KCCO (hereinafter the 2020 Action). Fay is also a named defendant in the 2020 action.

¹ The NYSCEF system under Index Number 509473/2020 indicates that the summons and complaint was filed on June 6, 2020 and received on June 8, 2020.

² Document number one in the NYSCEF system, under Index Number 509473/2020, is listed as a summons. However, the document is titled summons with notice.

On July 1, 2020, Fay filed a pre answer motion to dismiss the 2020 action pursuant to CPLR 3211 (a) (4). This motion was later withdrawn by Fay on July 20, 2020, prior to the return date.

On July 20, 2020, Fay filed a subsequent pre answer motion to dismiss the 2020 Action pursuant to CPLR 3211 (a) (1), (4) and (7) (hereinafter Fay's July 2020 Motion).

By Order of this Court, dated November 19, 2020, Fay's July 2020 Motion to dismiss was granted to the extent that the plaintiffs' complaint in the 2020 Action was discontinued against Fay.

On April 22, 2021, Fay filed a motion to dismiss the 2018 action pursuant to CPLR 3211 (a) (7) (hereinafter Fay's April 2021 Motion).

On June 10, 2021, this Court signed the following order (hereinafter the June 10 Order): “[a]fter a virtual hearing held on June 10, 2021, Defendant's Motion to Dismiss the Complaint is withdrawn. The Plaintiff stipulates on the record to discontinue this action as against Defendant Fay Servicing, LLC without prejudice.”

LAW AND APPLICATION

In the instant motion, the plaintiffs seek to vacate the June 10 Order, restore Fay's April 2021 Motion to the calendar, and upon restoration of Fay's April 2021 Motion, an opportunity to oppose the motion. The motion is supported by an affirmation of their counsel, Regina Felton, Esq. (hereinafter Felton), a copy of an email notice from the Court regarding the scheduled oral argument of the motion on June 10, 2021, and the Notice of Motion for Fay's April 2020 Motion.

A stipulation of settlement between parties is a binding contract enforceable by the court and, as such, is favored and not lightly cast aside (*Rogers v Malik*, 126 AD3d 874, 875 [2nd Dept 2015] [internal quotations omitted], citing *Hallock v New York*, 64 NY2d 224, 230 [1984]). This is especially true where the party seeking to vacate the stipulation was represented by counsel (*Rogers*, 126 AD3d at 875, citing *Matter of Mercer*, 113 AD3d 772 [2nd Dept 2014]). “A stipulation made by the attorney may bind a client even where it exceeds the attorney's actual authority if the attorney had apparent authority to enter into the stipulation” (*121 Willow, LLC v Bd. of Assessors of County of Nassau*, 181 AD3d 587, 588 [2nd Dept 2020], quoting *Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819, 819 [2nd Dept 2007]).

Moreover, stipulations of settlement, which are made in open court and whose terms are placed upon the record by parties who are represented by counsel, are judicially favored (*Davenport v Davenport*, 199 A3d 637 [2nd Dept 2021]; *see also Haik v Haik*, 197 AD3d 465 [2nd Dept 2021]). Particularly “in the case of open court stipulations...where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process” (*Matter of Roach*, 190 AD3d 978, 979 [2nd Dept 2021], quoting *McSherry v McSherry*, 163 AD3d 650, 651 [2nd Dept 2018]).

Furthermore, an open-court stipulation is an independent contract between the parties ... and will be enforced according to its terms (*Lenge v Eklecco Newco, LLC*, 172 AD3d 843, 844 [2nd Dept 2019]). A party seeking to set aside such a stipulation will be granted such relief only upon a showing of good cause sufficient to invalidate a contract

(*Dom Ben Realty Corp. v New York City Loft Bd.*, 177 AD3d 731, 736 [2nd Dept 2019], quoting *Macaluso v Macaluso*, 62 AD3d 963, 963, [2nd Dept 2009]). Accordingly, “[a]bsent a showing of fraud, overreaching, mistake, or duress, the stipulation should not be disturbed by the court” (*Davenport*, 199 AD3d at 637, quoting *Hymowitz v Hymowitz*, 119 A.D.3d 736, 740 [2nd Dept 2014]).

Here, the plaintiffs seek to rescind their attorney’s stipulation of consent to discontinue on the record due to a series of purportedly “anomalies.” Felton’s affirmation describes the “anomalies” as follows: 1) the motion to dismiss was not delivered to Felton; 2) June 10, 2021, was the first time the motion appeared on the calendar and Felton only became aware of the motion on that day; 3) the notice for the appearance for the motion was less than 24 hours; and 4) the Court’s calendar day was changed to Thursday. Felton contends that she believed the motion to dismiss was Fay’s motion under the 2020 Action. Felton further contends that the Court advised her that she was confused during the oral argument.

Nevertheless, a party seeking reformation or rescission of a contract by reason of a mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake, or a unilateral mistake induced by the other party's fraudulent misrepresentation (*Mooney v Manhattan Occupational, Physical and Speech Therapies, PLLC*, 166 AD3d 957, 960 [2nd Dept 2018], citing *Moshe v Town of Ramapo*, 54 AD3d 1030, 1031[2nd Dept 2008], quoting *Yu Han Young v Chiu*, 49 AD3d 535, 536, [2nd Dept 2008]; *Perretta v Perretta*, 187 AD3d 1076, 1078 [2nd Dept 2020]).

Fay's opposition includes among other things the certified transcript of the proceedings on June 10, 2021. On June 10, 2021, Felton appeared on behalf of the plaintiffs and Quenten Gillam, Esq. on behalf of Fay. While the transcript reveals that Felton was under the initial misapprehension that Fay's motion to dismiss in the 2018 Action was resolved in 2019 (Pargament Tr at 4, lines 21-22), the Court through its independent recollection, review of its motion calendar and the NYSCEF documents under the 2018 Action clarified with both parties that the 2018 Action had not been dismissed as to Fay. Felton later clarifies that she is not confused and later stipulates to withdraw the 2018 Action against Fay.

Here, contrary to the plaintiffs' contentions, they have failed to establish by clear and convincing evidence that the stipulation in open court and on the record was executed due to mistake, fraud, overreaching, or duress (*see Davenport*, 199 A3d 637; *see also Dom Ben Realty Corp.*, 177 AD3d at 736). The claims set forth in the affirmation submitted by Felton have failed to establish a basis to relieve the plaintiffs of the consequences of the stipulation of discontinuance (*see Rogers*, 126 AD3d at 875, citing *Hallock*, 64 NY2d at 230; *see also 121 Willow, LLC*, 181 AD3d 587, 588.) The Court notes that pursuant to its Part Rules as cited on the New York State Courts' website that its regular motion calendar is Thursday. There is no dispute that Felton appeared on June 10, 2021, having received an email notice of same from the Court on June 9, 2021. Furthermore, when Felton's virtual connection was interrupted during the morning calendar, the matter was moved to the afternoon calendar to allow Felton to participate

fully in the proceedings. The certified transcript also indicates that Felton was given an opportunity to oppose Fay's motion but instead chose to withdraw the 2018 Action.

CONCLUSION

The motion of plaintiffs Clarence Stewart and Ruth Ann Crawford for an order: vacating the stipulation of consent; vacating the order confirming the stipulation of consent; restoring the motion to the calendar; and upon restoration a reasonable time to oppose the motion is denied.

ENTER:

J.S.C.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of August 2022

HONORABLE FRANCOIS A. RIVERA

-----X

In the Matter of the Application of

KEITH KAPLAN

Petitioner,

DECISION & ORDER

Index No. 513947/2021

- against -

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES of the New York City Employees' Retirement System, THE MEDICAL BOARD of the New York City Employees Retirement System, and THE CITY OF NEW YORK,

Respondents.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of petition and verified petition, filed on June 9, 2021, under motion sequence one, petitioner Keith Kaplan seeks the following:

1. A judgment pursuant to CPLR Article 78:
 - A. Reviewing and annulling the action of respondents the New York City Employees' Retirement System, the Board of Trustees of The New York City Employees' Retirement System, the Medical Board of the New York City Employees Retirement System, and the City of New York (hereinafter respondents) denying petitioner, an Accidental Disability Retirement pursuant to New York Retirement and Social Security Law § 605-b, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful; and

- B. Directing and ordering respondents to retire petitioner with an Accidental Disability Retirement pension; or in the alternative
- C. Directing and ordering respondents, by way of remand, to review petitioner's application for an Accidental Disability Retirement benefit.

- Notice of Petition
- Petition
- Exhibits A to K
- Petitioner's Memorandum of Law
- Respondents' answer
- Exhibit A to N
- Respondents' Memorandum of Law
- Memorandum of Law in Reply

BACKGROUND

On June 9, 2021, petitioner Keith Kaplan (hereinafter Kaplan or petitioner) commenced the instant CPLR Article 78 proceeding against respondents the New York City Employees' Retirement System (hereinafter NYCERS), the Board of Trustees of the New York City Employees' Retirement System (hereinafter the Board of Trustees), the Medical Board of the New York City Employees Retirement System (hereinafter the Medical Board), and the City of New York (hereinafter collectively as the NYCERS respondents), by electronically filing a notice of petition, verified petition, eleven annexed exhibits labeled A through K, (hereinafter the commencement papers) and a request for judicial intervention with the Kings County Clerk's office (hereinafter KCCO). On August 13, 2021, petitioner electronically filed a memorandum of law in support of his application.

On February 25, 2022, the NYCERS respondents filed their verified answer with fourteen annexed exhibits labeled A through N and a memorandum of law. Their verified answer contains ninety-four allegations of fact and eight affirmative defenses.

Kaplan's verified petition alleges the following salient facts. On April 17, 2000, Kaplan was appointed as a sanitation worker with the New York City Department of Sanitation. Prior to his appointment, he demonstrated the requisite psychological and physical fitness to fulfill his duties as a sanitation worker. Kaplan was considered a member of the Pension Fund and made all his required contributions pursuant to the New York City Administrative Code § 13-104.

On April 28, 2015, Kaplan suffered an injury to his left knee during the course of his employment at a garbage pick stop. Kaplan lifted refuse bags and stepped on a large rock which caused his left knee to give out. He was taken to emergency room and imaging was done. The petitioner contends that this injury did not prevent him from performing his job as a sanitation worker.

On October 1, 2015, Kaplan experienced some left knee pain that his treating orthopedic surgeon, Dr. Steven Small (hereinafter Dr. Small) attributed to gout based on his medical records. In an October 15, 2015, medical report, Dr. Small reviewed an MRI and diagnosed Kaplan with a lateral meniscus tear and recommended an arthroscopic debridement¹ to help with the pain. On October 22, 2015, Kaplan underwent left knee arthroscopy.

On November 30, 2015, Dr. Small cleared the petitioner to return to work. However, on the following day, Kaplan complained of continued problems in his left knee and

¹ Merriam Webster's dictionary defines Arthroscopy as a "a minimally invasive surgical procedure involving visual examination of the interior of a joint with an arthroscope to diagnose or treat various conditions or injuries of a joint and to repair or remove damaged or diseased tissue or bone." <https://www.merriam-webster.com/dictionary/arthroscopy>.

requested an additional two weeks to be kept out of work and recuperate. Kaplan was later cleared to work as of December 21, 2015.

The petition alleges that the injuries at issue occurred on January 6, 2016. Kaplan alleges that he was asked to operate a sweeper during his overtime shift. Prior to beginning his route, Kaplan observed that the right mirror was defective and broken. He reported the defect to his supervisors but was told to continue with his route using the mirror. Kaplan contends that the distortion of the mirror affected his ability to navigate. On January 6, 2016, Kaplan collided with a pillar while operating the sweeper (hereinafter the January 2016 incident). The impact of the collision caused him to hit a panel in the cab of the sweeper with his left knee. After this incident, Kaplan visited the emergency room two times complaining of knee pain. Kaplan was treated by Dr. Small between January and June of 2016. Dr. Small indicated that the petitioner's left knee was exacerbated by the accident. On October 27, 2016, petitioner underwent left knee replacement surgery.

On October 26, 2016, Kaplan filed an application for Accidental Disability Retirement (hereinafter ADR) pursuant to Retirement and Social Security Law § 605-b.

On May 16, 2017, the Medical Board reviewed the petitioner's application and recommended that it be denied. The Medical Board agreed that the petitioner was "disabled from performing the duties of a Sanitation Worker with the Department of Sanitation due to a left total knee replacement." However, after reviewing the petitioner's medical records including MRIs from 2015 and January 2016, the Medical Board did not find evidence of an acute injury that occurred as a result of the January 2016 incident.

On January 16, 2018, the Medical Board reevaluated the petitioner's application which included a report from Dr. Small dated November 24, 2017, wherein Dr. Small concluded the petitioner had lost 50% of the use of knee and noted that the incident of January 16, 2016 was the final straw which necessitated his knee replacement. The Medical Board concluded that the petitioner's condition was aggravated by pre-existing conditions including gout and osteoarthritis. The Medical Board reaffirmed their denial of Kaplan's application.

On May 31, 2018, the petitioner submitted a memorandum of law to the Board of Trustees and later presented his arguments on June 14, 2018. Kaplan contended that the Medical Board acted in an arbitrary and capricious manner in denying his application. Kaplan's memorandum of law stated that "the pre-existence of gout or osteoarthritis does not prevent an ADR award if the accident exacerbated the condition." Kaplan contended that the Medical Board failed to consider the Court of Appeals case of *Tobin v Steisel* (64 NY2d 254 [1985]), which Kaplan argued stood for the proposition that an accident that aggravates an underlying or pre-existing condition is the cause for disability. On October 13, 2020, the Medical Board adhered to its prior determination.

On January 22, 2021, the petitioner submitted a letter to the Board of Trustees reiterating his position that the January 2016 incident was an accident that was the proximate cause of his disability. On February 16, 2021, NYCERS sent a letter denying the petitioner's application.

In the instant special proceeding, Kaplan seeks, among other things, to review and annul the determination by NYCERS, which denied him a pension of three quarters of his salary as required by the Retirement and Social Security Law § 605-b.

MOTION PAPERS

Petitioner's papers consist of a notice of petition, verified petition, eleven annexed exhibits labeled A through K, and a memorandum of law. Exhibit A is described as Line of Duty Injury Report. It consists of five pages. Exhibit B is described as Pre-Line Duty Injury Records. Exhibit C is described as Sanitation Progress Notes, with dates ranging from September 6, 2016, to September 24, 2011. Exhibit D is described as Post Line of Duty Injury Records. Exhibit E is described as Hospital Records. Exhibit F is a copy of a NYCERS Application for Disability Retirement, Tier 4 Members, dated October 26, 2016. Exhibit G is described as NYCERS Medical Board Reports. Exhibit H is a letter to the Board of Trustees dated May 31, 2018, from Seelig Law Offices, LLC, counsel for petitioner. It includes a memorandum of law titled, Member's Memorandum of Law. Exhibit I is a letter to the Ms. Karina Yu, Manager of the NYCERS Medical Unit dated August 28, 2018, from Seelig Law Offices, LLC, counsel for petitioner. Exhibit J is a letter to the Board of Trustees dated January 22, 2021, from Seelig Law Offices, LLC, counsel for petitioner. Exhibit K is a letter from NYCERS to Kaplan dated February 16, 2021.

The NYCERS respondents' answering papers consist of a verified answer, fourteen annexed exhibits labeled A through N, and a memorandum of law. Exhibit A is described as a Pension Membership Application. Exhibit B consist of a three-page, Line of Duty Injury Report. Exhibit C is a copy of a NYCERS Application for Disability Retirement, Tier 4

Members. It includes a date stamp of October 26, 2016, at 4:58 p.m. and is marked “Rec’d NYCERS Medical.” Exhibit D is a letter from NYCERS to Kaplan dated October 18, 2016. Exhibit E is a copy of a Medical Board Report addressed to the Board of Trustees, dated May 16, 2017. Exhibit F is described as Medical Records. It contains 401 pages of documents. Exhibit G is a copy of a Medical Board Report addressed to the Board of Trustees, dated January 16, 2018. Exhibit H is a copy of the petitioner’s memorandum of law before the Board of Trustees. Exhibit I is a copy of the NYCERS Board of Trustees minutes dated June 14, 2018. Exhibit J is described as the petitioner’s letter to the Board of Trustees dated August 21, 2018. Exhibit K is a copy of a NYCERS Medical Board Report addressed to the Board of Trustees, dated October 13, 2020. Exhibit L is described as the petitioner’s letter to the Board of Trustees dated January 22, 2021. Exhibit M is a copy of the Board of Trustees minutes dated February 11, 2021. Exhibit N is described as the Board of Trustees denial of the petitioner’s application.

Kaplan’s reply papers consist of a memorandum of law.

LAW AND APPLICATION

In the instant CPLR Article 78 proceeding, Kaplan seeks judicial review and annulment of the determination by NYCERS to deny him accidental disability benefits pursuant to Retirement and Social Security Law § 605-b.

An award of accidental disability retirement benefits to an applicant, such as Kaplan, involves a two-step process (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996], citing Administrative Code of City of N.Y. § 13–168[a]). The first step involves a fact finding by the Medical Board after completion of its own

medical examination of the applicant and any evidence submitted in support of the claim (*Matter of Borenstein*, 88 NY2d at 760, citing Administrative Code §§13–123[a], 13–168[a]). The Medical Board must certify whether the applicant is physically or mentally incapacitated for the performance of city-service (*Matter of Borenstein*, 88 NY2d at 760, quoting Administrative Code §13–168[a] [internal quotation marks omitted]). Upon a finding that the applicant is disabled, the Medical Board must make a recommendation to the Board of Trustees as to whether the disability was “a natural and proximate result of an accidental injury received in such city-service” (*id.*).

The second step of this process involves the Board of Trustees (*Matter of Borenstein*, 88 NY2d at 760, citing Administrative Code §§13–103[b]). The Board of Trustees is bound by the Medical Board's determination as to whether an applicant is disabled (*Matter of Vargas v New York City Employees' Retirement Sys.*, 95 AD3d 1345, 1346 [2nd Dept 2012], citing *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1–B Pension Fund*, 90 NY2d 139, 144 [1997]). Nevertheless, where the Medical Board certifies that an applicant is disabled, the Board of Trustees must make its own evaluation as to the Medical Board's recommendation regarding causation (*Matter of Vargas*, 95 AD3d at 1346, quoting *Matter of Borenstein*, 88 NY2d at 760).

Kaplan contends that the January 2016 incident, caused an aggravation of a preexisting condition which led him to have left knee replacement surgery. The petitioner contends that the conclusion by the Medical Board and Board of Trustees that the January 6,

2016, incident did not aggravate preexisting conditions in his left knee is arbitrary, capricious, and irrational.

Generally, in a proceeding pursuant to CPLR Article 78, judicial review of factual findings made by an administrative agency following an evidentiary hearing is limited to consideration of whether the findings are supported by substantial evidence (*Sekul v City of Poughkeepsie*, 195 AD3d 622, 624 [2nd Dept 2021], citing CPLR 7803[4]; *Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045 [2018]). Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently (*Matter of Haug*, 32 NY3d at 1046). Moreover, the court must only ascertain whether there is a rational basis for the determination or whether it is arbitrary and capricious (*Halloran v NYC Employees' Retirement Sys.*, 172 AD3d 715, 716-17 [2nd Dept 2019], citing *Flacke v. Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

In an Article 78 proceeding challenging a disability determination, the applicant for accident disability retirement has the burden of establishing that the disability is causally connected to a line-of-duty accident (*Halloran*, 172 AD3d 715, 716 citing *Matter of Doorley v Kelly*, 106 AD3d 554, 554 [1st Dept 2013]). In determining the question of causal connection, the test is the existence of some credible evidence to support the findings of the agency denying the application (*Halloran*, 172 AD3d at 716, citing *Matter of Drayson v Board of Trustees of Police Pension Fund of City of N.Y.*, 37 AD2d 378, 380 [1st Dept 1971]). The agency's determination can be set aside upon judicial review only if it can be

determined on the record as a matter of law that the disability was the natural and proximate result of a service-related accident (Halloran, 172 AD3d at 716, citing Retirement and Social Security Law § 605–b[b][1]). A line-of-duty accident is considered the natural and proximate cause of a petitioner's disability if the accident “either precipitated the development of a latent condition or aggravated a preexisting condition.... [w]here the medical evidence with respect to causation is equivocal, the burden has not been sustained” (Halloran, 172 AD3d at 716, quoting *Matter of Kmiotek v Board of Trustees of N.Y. City Fire Dep., Art. 1–B Pension Fund*, 232 AD2d 640, 641 [2nd Dept 1996]).

Accordingly, the Medical Board’s determination regarding disability as well as the decision of the Board of Trustees as to the cause of an applicant’s disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious (*Boyd v New York City Employees’ Retirement Sys.*, 202 AD3d 1082, 1082-83 [2nd Dept 2022], citing *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351; see also *Bradley v New York City Employees’ Retirement Sys.*, 193 AD3d 847 [2nd Dept 2021]). “Substantial evidence” in this context refers to “some credible evidence” (*Boyd*, 202 AD3d 1082, 1082-83 [2nd Dept 2022], citing *Matter of Borenstein*, 88 NY2d at 760; see also *Matter of Gibbs v New York City Employees’ Retirement Sys.*, 161 AD3d 981 [2nd Dept 2018]). The Court of Appeals has described the substantial evidence standard as a minimal standard that is than a preponderance of the evidence (*Matter of Haug*, 32 NY3d 1045, 1046, citing *Matter of FMC Corp. v Unmack*, 92 NY2d 179, 188 [1998]; *Matter of Kelly v DiNapoli*, 30 NY3d 674, 684 [2018]). Furthermore, substantial evidence demands

only that a given inference is reasonable and plausible, not necessarily the most probable (*Matter of Haug*, 32 NY3d at 1046, citing *Matter of Ridge Rd. Fire Dist. v Schiano*, 16 N.Y.3d 494, 499 [2011]).

Accordingly in reviewing a disability determination, the Court may not weigh the medical evidence or substitute its own judgment for that of the Medical Board (*Giuliano v New York Fire Dept. Pension Fund*, 185 AD3d 812, 814 [2nd Dept 2020], citing *Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art.1–B Pension Fund*, 217 AD2d 660, 660, [2nd Dept 1995]). Even a conflict in the medical opinions of physicians does not provide a basis to set aside the Medical Board’s determinations (*Bradley*, 193 AD3d at 847). The resolution of any conflicts in medical evidence are within the sole province of the Medical Board (*id*).

Here, the burden is upon Kaplan to establish that his injuries were the result of the incident on January 6, 2016 (*see Halloran*, 172 AD3d at 715-16). In May 2016, the Medical Board, after consideration of clinical and documentary evidence, found that Kaplan was disabled from performing the full duties of a sanitation worker with the Department of Sanitation due to a left total knee replacement. However, the Medical Board found that the January 2016 incident, was not the cause of the petitioner’s disability. The Medical Board noted the following regarding causation:

“Keith Kaplan did not have a dormant condition of the left knee, which included a meniscal tear in the past as well as gout that required arthroscopy, multiple drainage of the knee effusions respectively, and he had just returned to work between two and three weeks prior to the incident of January 7, 2016. We note that an MRI performed in January 2016 and compared to an MRI prior to the incident on October 12, 2015, not to show any significant change. There was no evidence of new acute injury. We do not find that the incident of January 7, 2016, was

a competent casual factor of his disability. We note that he had arthritic disease and cystic changes on his MRI that preexisted the incident.”

The Medical Board determined that the petitioner’s disabling condition was not caused by a line of duty left knee injury sustained on January 2016 incident and recommended the denial of the petitioner’s accidental benefit application. The Medical Board noted that Kaplan had a history of arthritic disease, a meniscal tear and gout that required arthroscopy and multiple drainage of the knee effusions. Kaplan had only returned to work two to three weeks prior to the January 2016 incident having been on employment leave dealing with ongoing medical issues with his left knee. Furthermore, the Medical Board noted that MRI scans of Kaplan’s knee in 2015 when compared to scans in January 2016 did not demonstrate an acute injury nor any significant changes.

Upon the petitioner’s appeal of the May 2016’s recommendation, the Medical Board reevaluated the petitioner’s application which included additional documentation, among other things, including a report by Dr. Steven Small, the petitioner’s orthopedic surgeon. The Medical Board noted that Dr. Small “believes what necessitated Keith Kaplan to undergo knee replacement was the accident of January 2016 without supporting evidence.” As stated earlier, the Medical Board has the sole province to resolve any conflicts in medical evidence or opinion (*see Bradley*, 193 AD3d at 847). Accordingly, the Medical Board was privileged to disregard Dr. Small’s opinion in favor of its own medical assessments and adhere to its prior determinations in 2016 that “gout and osteoarthritis ultimately” resulted in the petitioner’s knee replacement (*id.*). Similarly, in its October 13, 2020, report the Medical Board reviewed Kaplan’s medical records, supporting documentation and

interviewed the petitioner. The Medical Board recommended the denial of Kaplan's application and cited its prior reasoning regarding prior history of left knee complications.

The reports of the Medical Board between 2016 and 2020, among other things, demonstrate that Kaplan was interviewed, afforded the opportunity to present evidence including a memorandum of law to the Board of Trustees and that based upon this process the resulting Medical Board determinations were based on substantial evidence and therefore not irrational, arbitrary or capricious.

Therefore, the NYCERS respondents' determination to deny the petitioner accident disability retirement benefits pursuant to Retirement and Social Security Law § 605-b based upon the credible evidence of the Medical Board was neither irrational nor arbitrary or capricious (*see Matter of Imbriale v Bd. of Trustees of New York City Employees' Retirement Sys.*, 29 AD3d 995, 995-96 [2nd Dept 2006]).

CONCLUSION

The petition of Keith Kaplan for judgment pursuant to CPLR Article 78 to review and annul the action of respondents the New York City Employees' Retirement System, the Board of Trustees of The New York City Employees' Retirement System, the Medical Board of the New York City Employees Retirement System, and the City of New York denying petitioner, an Accidental Disability Retirement pursuant to New York Retirement and Social Security Law § 605-b, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful is denied.

The petition of Keith Kaplan for judgment pursuant to CPLR Article 78 directing and ordering respondents the New York City Employees' Retirement System, the Board of

Trustees of The New York City Employees' Retirement System, the Medical Board of the New York City Employees Retirement System, and the City of New York to retire petitioner with an Accidental Disability Retirement pension is denied.

The petition of Keith Kaplan for judgment pursuant to CPLR Article 78 directing and ordering respondents the New York City Employees' Retirement System, the Board of Trustees of The New York City Employees' Retirement System, the Medical Board of the New York City Employees Retirement System, and the City of New York, by way of remand, to review petitioner's application for an Accidental Disability Retirement benefit is denied and the petition is dismissed.

ENTER:

J.S.C.

WHO ME, BIASED?

REFLECTING ON IMPLICIT BIASES



**HON. JOANNE D. QUIÑONES
BETSEY JEAN-JACQUES, ESQ.**

**Columbian Lawyers Association of Brooklyn
April 7, 2021**

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¹ Felicity Menzies, Include-Empower.com, *'A-ha' Activities for Unconscious Bias Training*, <https://cultureplusconsulting.com/2018/08/16/a-ha-activities-for-unconscious-bias-training/> [last accessed on Apr. 3, 2021]

WAYS TO COMBAT OR REDUCE IMPLICIT BIASES

In our presentation, we discuss varying tips and solutions on ways to combat or reduce implicit bias. The information below is only a short synopsis from varying sources for your reference. We encourage you to continue to learn more about reducing bias by referring to and reading the complete articles referenced below.

“Implicit Bias and Diversity in the Legal Profession” Panel

(NYSBA Commercial & Federal Litigation Section - Jan. 24, 2018)

“Looking in the Mirror” presents strategies used to bring biases into a person’s conscious awareness and create new habits and responses to people and ideas. The strategies are listed as follows:

- ❖ The first step is to recognize the bias and interrupt the unconscious thoughts or actions to counter stereotypes.
- ❖ The second step is to think as an individual by reflecting on unsupported beliefs.
- ❖ The third step is to change the source of your unsupported beliefs.
- ❖ The fourth step is to challenge yourself by acknowledging your own biases.
- ❖ The fifth step is to regularly review the outcomes of your decisions or policies.

“No I’m Not the Court Reporter: Tips for Tackling Implicit Bias”

(Shayon T. Smith and Shevon D.B. Rockett, *No I’m Not the Court Reporter: Tips for Tackling Implicit Bias*, NYLJ, January 7, 2020 at S6, col. 1)

In this New York Law Journal article, authors Smith and Rockett (hereinafter the authors) provide tools to deal with the common micro-aggressions and implicit biases females and other “diverse” groups experience. A few of their recommended tactics are described as follows:

“Straight Up, No Chaser”: This is the authors recommendation to be direct when you face overt and unambiguous bias or discrimination.

- ❖ “Micro-Affirmation”: The authors’ recommend challenging implicit bias with tangible examples that contradict the actor’s assertions. One example they provide involves a situation where a colleague who questions a female attorney’s ability to join a trial team due to the fact that she has children should be responded to by reminding the colleague that the attorney handled several depositions for key witnesses in the last week.
- ❖ “Humorous Retort”: The authors recognize that addressing bias can be difficult but even harder when you have a relationship with the actor. Therefore, they recommend in certain situations using a prompt humorous retort to dismantle bias and micro-aggressions.

“Who Me, Biased? Recognizing and Responding to Bias & Microaggression in the Legal Profession” Panel

(Equal Justice Conference sponsored by National Legal Aid and Defender Association, May 11, 2018)

The recommendations by the panelists included “forming new habits to combat your bias” as follows:

- ❖ Practice non-judgment of yourself and others by identifying and challenging assumptions and focus on facts.
- ❖ Give Benefit of the Doubt by being curious about the other person’s true meaning.
- ❖ Acknowledge that “practice makes progress.” You can only form new habits by steadily practicing your new habits.

“What Can Judges Do to Avoid Unconscious Bias?”

(Sarah E. Redfield, *Enhancing Justice: Reducing Bias*, at Chapter 5 [2017])

Judge Andrew T. Wistrich and Jeffrey J. Rachlinski, authors of the chapter titled *Implicit Bias in Judicial Decision Making*, recommend ways of combating bias both directly and indirectly. Their list is provided below:

Combating Implicit Bias Directly

- ❖ Exposure to Stereotype-Incongruent Models
- ❖ Testing and Training
- ❖ Auditing
- ❖ Altering Courtroom Practices
- ❖ Mindfulness Meditation
- ❖ Consider-the-Opposite
- ❖ Perspective Taking
- ❖ Foster Diversity in Private Life
- ❖ Creating a Constructive Courtroom Environment
- ❖ Reminders of Professional Norms

Combating Implicit Bias Indirectly

- ❖ Reduce Time Pressure
- ❖ Opinion Writing

Project Implicit

Learn more about your own biases by taking the Implicit Association Test by Project Implicit available online at: <https://implicit.harvard.edu/implicit/takeatest.html>

Presentation Citations

1. American College of Cardiology, Cardiology Magazine, *Implicit Bias: Recognizing the Unconscious Barriers to Quality Care and Diversity in Medicine*, [Jan. 24, 2020], <https://www.acc.org/latest-in-cardiology/articles/2020/01/01/24/42/cover-story-implicit-bias-recognizing-the-unconscious-barriers-to-quality-care-and-diversity-in-medicine>
2. Liz Burton, *What is Unconscious Bias in Recruitment?* [Dec. 18, 2017] <https://www.highspeedtraining.co.uk/hub/types-of-unconscious-bias/>
3. Terry Carter, *Implicit bias is a challenge even for judges*, ABA Journal, [Aug. 5, 2016 9:58 pm], https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges
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