SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 20, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

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_____	950/17	CA 17 00249	ANN VANYO V BUFFALO POLICE BENEVOLENT ASSOCIATI
_____	923	CA 19 00700	VICTORIA C. ARMSTRONG V UNITED FRONTIER MUTUAL INS
_____	1041	CAF 18 02251	TAMEKA N. H. V JESUS R.
_____	1130	KA 17 01067	PEOPLE V JAMIE URRUTIA
_____	1159	CA 18 02309	TROY A. DUNN V KANDEY COMPANY, INC.
_____	1165	CA 18 02233	TROY A. DUNN V COVANTA NIAGARA I, LLC
_____	1203	CAF 18 02136	TRICIA WLOCK V MICHAEL JOSEPH KING, JR.
_____	1204	CAF 19 01408	TRICIA WLOCK V MICHAEL JOSEPH KING, JR.
_____	1241	KA 17 00414	PEOPLE V KEVIN DOGAN
_____	1256	TP 19 01064	BUFFALO BAIL BONDS AGENCY INC. V MARIA T. VULLO
_____	1272	CA 19 01353	BRUNILDA LOPEZ V KARL SCHULTZ
_____	1277	CA 19 00045	DURHAM COMMERCIAL CAPITAL CORP. V KRISHNAN ARUNACHALAM
_____	26	KA 15 01963	PEOPLE V DAVID TETRO, JR.
_____	49	KA 16 01229	PEOPLE V THOMAS SEARS
_____	76	CAF 18 01607	JAMES V. WILLIAMS V KRYSTAL D. RICHARDSON
_____	100	KA 15 00207	PEOPLE V DANTE H. RANKIN
_____	113	CA 19 00299	LECHASE CONSTRUCTION SERVICES, LLC V JM BUSINESS ASSOCIATES CORP.
_____	134	CA 19 00313	DEANNA LETRAY V NEW YORK STATE DIVISION OF HUMAN
_____	147	KA 15 01500	PEOPLE V JASON R. WILLIAMS
_____	148	KA 16 01486	PEOPLE V CHRISTOPHER GORDON
_____	162	KA 19 00074	PEOPLE V SAMMY L. BROWN
_____	191	CA 19 00936	MAUREEN LATINI V DAVID P. BARWELL
_____	192	CAF 18 02040	Mtr of JANETTE G.

_____	197	CA 19 00854	CHRISTA CONSTRUCTION, LLC V VANGUARD LIGHT GAUGE
_____	198	CA 19 01793	CHRISTA CONSTRUCTION, LLC V VANGUARD LIGHT GAUGE
_____	199	CA 19 01912	CHRISTA CONSTRUCTION, LLC V VANGUARD LIGHT GAUGE
_____	212	CAF 18 00354	Mtr of DANTE S.
_____	213	CAF 18 00749	CHAUTAUQUA COUNTY DEPARTMENT OF HEA V DANTE S.
_____	217	CA 19 00460	LAURENCE GUTTMACHER, M.D. V JAMES M.
_____	219	CA 19 00335	ROGER DOYLE V GEORGE A. NOLE AND SON, INC.
_____	226	KA 18 00668	PEOPLE V DOUGLAS MARTIN
_____	244	CA 19 00826	AMANDA TAYLOR V KWIK FILL - RED APPLE A DIVISION
_____	275	KA 14 00854	PEOPLE V DARRIEN E. WILSON
_____	275.1	CA 19 01071	DARRYL L. MACKAY V 155 EAST MAIN ST., LLC
_____	276	KA 19 00334	PEOPLE V DEQUAWN R. MCKENZIE
_____	277	KA 19 00926	PEOPLE V DEQUAWN R. MCKENZIE
_____	283	KA 18 00411	PEOPLE V PERRY TOLBERT
_____	286	CAF 18 01791	JESSICA CHASE V SILVIA CHASE
_____	287	CAF 18 01792	JOSEPH S. DRESSNER V PATRICIA A. MOONEY-TIRAO
_____	288	CAF 18 01794	ROSE M. CHASE V SILVIA CHASE
_____	295	CA 19 01649	DARRYL L. MACKAY V 155 EAST MAIN ST., LLC
_____	298	KA 19 00862	PEOPLE V DALTON WILKE
_____	305	KA 15 00983	PEOPLE V WILLIE GRAY
_____	315	CA 19 01322	THEODORE NALBONE V VANDERBILT PROPERTIES, INC.
_____	317	CA 19 00754	PATRICK J. WHELAN V TIMOTHY G. DYSTER, M.D.
_____	323	KA 19 00702	PEOPLE V JOHN R. GEIL
_____	331	CAF 19 00143	TRONDELL WALLACE V MADARIA EURE
_____	341	KA 17 00346	PEOPLE V ANTHONY COLE
_____	342	KA 17 00347	PEOPLE V ANTHONY COLE
_____	354	CA 19 01722	DEEPIKA REDDY V WSYR NEWSCHANNEL 9
_____	357	KA 18 01953	PEOPLE V ANTHONY MAUND
_____	365	CA 18 01698	GLASCO WRIGHT V STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

950/17

CA 17-00249

PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

ANN VANYO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., AND CITY OF BUFFALO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

JAMES OSTROWSKI, BUFFALO, FOR PLAINTIFF-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR DEFENDANT-RESPONDENT BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF BUFFALO.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 5, 2016. The order and judgment granted the motions of defendants to dismiss the complaint and amended complaint. The order and judgment was affirmed by order of this Court entered March 16, 2018 in a memorandum decision (159 AD3d 1448 [4th Dept 2018]), and the Court of Appeals on December 17, 2019 modified the order and remitted the case to this Court for consideration of an argument raised but not addressed on the appeal to this Court (34 NY3d 1104 [2019]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order and judgment so appealed from is unanimously modified on the law by denying that part of the motion of defendant Buffalo Police Benevolent Association, Inc. seeking dismissal of the first cause of action and reinstating that cause of action and by denying that part of the motion of defendant City of Buffalo seeking dismissal of the second cause of action and reinstating that cause of action and as modified the order and judgment is affirmed without costs.

Memorandum: On remittitur from the Court of Appeals, we are to consider the contention of defendant Buffalo Police Benevolent Association, Inc. (PBA), which was "raised but not addressed on the appeal to [this] Court, that plaintiff's first cause of action should be dismissed pursuant to CPLR 3211 (a) (7)" (*Vanyo v Buffalo Police Benevolent Assn., Inc.*, 34 NY3d 1104, 1105 [2019]). Upon giving the

amended complaint a liberal construction, accepting the allegations as true, and providing plaintiff with the benefit of every favorable inference (*see Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]), we conclude that plaintiff has stated a cause of action for breach of the duty of fair representation (*see generally Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 196 [1984]). We therefore modify the order and judgment by denying that part of the motion of the PBA seeking dismissal of the first cause of action and reinstating that cause of action and, in accordance with the Court of Appeals' memorandum, we further modify the order and judgment by denying that part of the motion of defendant City of Buffalo seeking dismissal of the second cause of action and reinstating that cause of action.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

923

CA 19-00700

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

VICTORIA C. ARMSTRONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 1, 2018. The order granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motions of plaintiff for summary judgment and to amend her complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff owned a home insured by defendant. After the home was destroyed by two fires that occurred within 12 hours of each other, defendant denied plaintiff's claim for coverage. Plaintiff thereafter commenced this action alleging that defendant breached its contract with her by failing to pay benefits on the claim. Defendant answered, asserting several affirmative defenses including that plaintiff failed to submit a sworn proof of loss as required by the policy, that the fires were the result of arson, and that plaintiff failed to cooperate as required by the policy.

Defendant thereafter moved for summary judgment dismissing the amended complaint on the ground, inter alia, that plaintiff's failure to submit a sworn proof of loss constituted a complete defense to an action on the complaint. Plaintiff cross-moved for summary judgment on her breach of contract cause of action. She also sought, in the alternative, summary judgment striking the affirmative defenses of arson and failure to cooperate. Plaintiff subsequently filed a second cross motion in which she sought to amend her amended complaint to add causes of action for anticipatory breach of contract and waiver.

Supreme Court granted defendant's motion and denied plaintiff's

cross motions, and plaintiff appeals. We conclude that the court erred in granting defendant's motion with respect to the breach of contract cause of action, and we therefore modify the order accordingly.

We note at the outset that plaintiff on appeal does not raise any issue concerning the dismissal of her second and third causes of action, and thus any challenge to that part of the order is deemed abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

With respect to the breach of contract cause of action, we conclude that defendant failed to meet its initial burden on the motion of demonstrating that it was justified in denying plaintiff's claim based on her failure to submit a sworn and notarized proof of loss statement. It is well settled that, "absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 210 [1984]), an insured's failure to comply with an insurance policy provision requiring the submission of a proof of loss provides the insurer with an "absolute defense to [an] action on the policy" (*Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457 [4th Dept 2012]; *see Lentini Bros. Moving & Stor. Co. v New York Prop. Ins. Underwriting Assn.*, 76 AD2d 759, 761 [1st Dept 1980], *affd* 53 NY2d 835 [1981]).

Although defendant contends that plaintiff failed to submit *any* proof of loss form, defendant submitted evidence in support of its motion that an unsworn form was in fact submitted to defendant's attorney. Viewing the evidence in the light most favorable to plaintiff (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we thus conclude that defendant's own submissions raise an issue of fact whether the unsworn form was submitted. The issue then becomes whether the use of a sworn form was required under the policy and Insurance Law § 3407 (a).

We note that, absent a requirement "in either the Insurance Law or the policy herein" that plaintiff submit a sworn proof of loss, no such requirement could be imposed on plaintiff by defendant's letter request for a sworn proof of loss (*Charlton v United States Fire Ins. Co.*, 223 AD2d 404, 404 [1st Dept 1996]). Further, we agree with plaintiff that neither the insurance policy nor Insurance Law § 3407 (a) explicitly required her to submit a *sworn* proof of loss. Insurance Law § 3407 (a) merely requires that an insured furnish a proof of loss "as specified in [the] contract" of insurance. The policy required plaintiff to submit "an acceptable proof of loss, within 60 days after ***our*** request." The policy does not define what constitutes an acceptable proof of loss.

The term "acceptable" as used in the policy is, in our view, ambiguous inasmuch as it is "susceptible of [at least] two reasonable interpretations," and thus "the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for

the trier of fact" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). "[I]f the tendered extrinsic evidence is itself conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court . . . [and,] [u]nder those circumstances, the ambiguity must be resolved against the insurer which drafted the contract" (*id.*).

Here, defendant failed to submit sufficient extrinsic evidence to demonstrate that the term "acceptable" required plaintiff to submit a sworn proof of loss. We thus resolve the ambiguity against defendant and conclude that the policy did not require plaintiff to submit a sworn proof of loss (*see id.*; *Lobello v New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 1206, 1209 [4th Dept 2017]; *BN Partners Assoc., LLC v Selective Way Ins. Co.*, 148 AD3d 1592, 1593-1594 [4th Dept 2017]; *Nicastro v New York Cent. Mut. Fire Ins. Co.*, 148 AD3d 1737, 1738 [4th Dept 2017]).

Inasmuch as there are triable issues of fact whether plaintiff submitted any proof of loss form, however, we are compelled to address plaintiff's further contentions that any defect in her compliance with the proof of loss requirement was cured by her subsequent actions or that defendant's repudiation of the insurance policy relieved her of the contractual obligation to submit such a form. Contrary to plaintiff's contention, the failure to submit a proof of loss form could not be cured by plaintiff's subsequent testimony at an examination under oath or by her submission of a sworn inventory list (*see Maleh v New York Prop. Ins. Underwriting Assn.*, 64 NY2d 613, 614 [1984]; *Darvick v General Acc. Ins. Co.*, 303 AD2d 540, 541 [2d Dept 2003]).

Moreover, there is no evidence that defendant repudiated the insurance policy. "[R]epudiation of a policy exists only where a plaintiff establishes that the insurer has committed an anticipatory breach by disclaim[ing] the intention or the duty to shape its conduct in accordance with the provisions of the contract" (*Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 43 AD3d 23, 32 [1st Dept 2007] [internal quotation marks omitted]; *see generally New York Life Ins. Co. v Viglas*, 297 US 672, 676 [1936]; *Wurm v Commercial Ins. Co. of Newark, N.J.*, 308 AD2d 324, 328 [1st Dept 2003], *lv denied* 3 NY3d 602 [2004]). Here, defendant did not disclaim its duty to shape its conduct in accordance with the insurance policy but, rather, investigated and denied the claim based on its belief that plaintiff had failed to comply with the policy.

Inasmuch as plaintiff's claim of repudiation or anticipatory breach lacks merit, we further conclude that the court properly denied that part of plaintiff's second cross motion that sought to add a cause of action for anticipatory breach (*see Hanover Ins. Co. v Finnerty*, 225 AD2d 1054, 1054 [4th Dept 1996]), even if that cross motion had been timely (*see* CPLR 2214 [b]).

We agree with plaintiff that, regardless of whether she submitted the proof of loss form, as she contends, there are triable issues of fact whether defendant waived or is estopped from asserting the policy

provision requiring the submission of a proof of loss as a basis for denying plaintiff's claim. As a preliminary matter, we reject defendant's contention that plaintiff failed to plead facts supporting her waiver and estoppel contentions (*see generally Sasse v Order of United Commercial Travelers of Am.*, 168 App Div 746, 754-759 [1st Dept 1915]). In the amended complaint, plaintiff alleged that defendant's agents or representatives "repeatedly represented to [her] that she did not need to do anything further for her claim," "that she had complied with the terms of the insurance policy," and that "no other action was required for her claim." We therefore conclude that plaintiff may rely on those theories even though her second cross motion was properly denied (*see* CPLR 2214 [b]).

With respect to the merits of the waiver and estoppel contentions, we conclude that defendant failed to establish as a matter of law that it did not waive or is not estopped from asserting plaintiff's failure to submit the form as a basis to deny the claim. "Defendant, as the party seeking summary judgment, [had the] initial burden on the motion [of] establishing that plaintiff failed to provide [the] proof of loss within the requisite time . . . *and* that defendant did not waive the requirement" (*Finley v Erie & Niagara Ins. Assn.*, 162 AD3d 1644, 1645 [4th Dept 2018] [emphasis added]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Most of the evidence supporting plaintiff's allegations of waiver and estoppel appears in documents submitted by defendant. Within those documents, there is evidence that defendant's agents affirmatively represented to plaintiff that she had complied with all of the insurance policy's requirements. In our view, such allegations raise triable issues of fact whether defendant waived or should be estopped from asserting plaintiff's purported failure to provide a proof of loss as a basis for denying her claim (*see e.g. Travis v Allstate Ins. Co.*, 280 AD2d 394, 395 [1st Dept 2001]; *Gilbert Frank Corp. v Federal Ins. Co.*, 91 AD2d 31, 34 [1st Dept 1983]).

We therefore modify the order by denying that part of defendant's motion with respect to the breach of contract cause of action and reinstating that cause of action. Inasmuch as there are triable issues of fact whether plaintiff submitted a proof of loss form and whether defendant waived or is estopped from asserting the lack of a proof of loss form as a basis for denying the claim, however, we further conclude that the court properly denied plaintiff's first cross motion insofar as it sought summary judgment on the breach of contract cause of action.

Contrary to plaintiff's further contention, the court properly denied her first cross motion insofar as it sought summary judgment striking two affirmative defenses. With respect to the affirmative defense of noncooperation, we conclude that there are triable issues of fact whether plaintiff failed to submit truthful disclosures in her inventory statement. Plaintiff gave defendant a sworn inventory list in which she listed various items that had been damaged or destroyed and, in support of her cross motion, she submitted her deposition testimony in which she testified that the document was accurate.

Defendant, however, submitted the deposition testimony of plaintiff's roommate, who testified that some of the items on plaintiff's list either never existed or belonged to the roommate. Inasmuch as a party's " 'failure to make fair and truthful disclosures in reporting the [loss] constitutes a breach of the cooperation clause . . . of the insurance policy as a matter of law' " (*Nationwide Mut. Ins. Co. v Posa*, 56 AD3d 1143, 1144 [4th Dept 2008]; *see also Government Empls. Ins. Co. v Fisher*, 54 AD2d 1087, 1087 [4th Dept 1976]), we conclude that the court properly denied plaintiff's first cross motion insofar as it sought dismissal of that affirmative defense.

We also reject plaintiff's contention that the court erred in denying her first cross motion insofar as it sought to strike the affirmative defense of arson. Plaintiff failed to establish as a matter of law either that the fire was not intentionally started or that she did not participate in the arson. To the contrary, the evidence in the record establishes that both fires were intentionally set, and there are triable issues of fact whether plaintiff participated in the arson (*see Morley Maples, Inc. v Dryden Mut. Ins. Co.*, 130 AD3d 1413, 1413-1414 [3d Dept 2015]; *see generally R.C.S. Farmers Mkts. Corp. v Great Am. Ins. Co.*, 56 NY2d 918, 920 [1982]).

We have reviewed the parties' remaining contentions and conclude that they lack merit.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1041

CAF 18-02251

PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF TOMEKA N.H., PETITIONER-APPELLANT,

V OPINION AND ORDER

JESUS R. AND BRENDA S., RESPONDENTS-RESPONDENTS.

MAUREEN N. POLEN, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), AND THE LGBT BAR ASSOCIATION OF GREATER NEW YORK, NEW YORK CITY, FOR PETITIONER-APPELLANT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-RESPONDENT JESUS R.

AMY E. SCHWARTZ-WALLACE, ROCHESTER, FOR EMPIRE JUSTICE CENTER, AND SHANNON P. MINTER, SAN FRANCISCO, CALIFORNIA, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, FOR NATIONAL CENTER FOR LESBIAN RIGHTS, AMICI CURIAE.

Appeals from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered August 9, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed "the petition and amended petition."

It is hereby ORDERED that the order so appealed from is affirmed without costs.

Opinion by CENTRA, J.P.: The issue in this case is whether petitioner has standing to seek joint custody of, and visitation with, the subject child, which would result in a tri-custodial arrangement among respondents, who are the biological mother and the biological father of the child, and petitioner. We conclude that petitioner cannot establish standing under Domestic Relations Law § 70 (a) in such circumstances.

FACTS

Petitioner and respondent mother were in a relationship and became engaged in 2009, but they never married because, at that time, same-sex marriage was not recognized under New York law. Their

romantic relationship ended amicably in early 2010, and petitioner moved out of their residence. That summer, the mother engaged in sexual relations with respondent father, resulting in her becoming pregnant with the child who is the subject of this proceeding. According to petitioner and the mother, the father wanted nothing to do with the child, so the mother asked petitioner to raise the child with her, and petitioner agreed. The father, on the other hand, testified that he was not certain whether he was the father of the unborn child, but he concededly did nothing to establish his status as the father. Petitioner moved back in with the mother in September 2010 and helped her prepare for the baby's arrival. Petitioner and the mother also became intimate once again. Petitioner was at the hospital when the baby was born. She helped cut the umbilical cord and helped choose the child's name, and the child was given a hyphenated last name that combined the last names of the mother and petitioner. Petitioner took on the role of a parent when she and the mother took the child home, but petitioner moved out of the mother's home in the spring of 2012 when their romantic relationship again ended. Nevertheless, petitioner continued to regularly care for the child at petitioner's home.

Meanwhile, the father saw the child once or twice during the first year and a half of her life. In June 2013, the mother filed a paternity petition against the father, and Family Court issued an order of filiation in December 2013. Since then, there have been orders of custody and visitation between the mother and the father entered upon consent, whereby the mother and the father have joint custody, the mother has primary residency of the child, and the father has visitation with the child. It is undisputed that, since 2014, the father has visited with the child. The most recent order of custody gives the mother and the father shared equal access with the child.

In March 2017, petitioner filed a petition seeking an order granting her visitation with the child and, in October 2017, she filed an amended petition seeking custody and visitation. Petitioner argued that the doctrine of equitable estoppel gave her standing to seek custody and visitation and that it was in the best interests of the child for her to have custody and visitation. Petitioner did not seek to sever the father's rights to the child. Instead, she sought "tri-custody." The mother supported the amended petition, while noting that she did not wish to terminate the father's rights. The Attorney for the Child (AFC) also supported the amended petition, noting that the child had a very strong relationship with petitioner and viewed her as a parent.

The father moved to dismiss the amended petition for lack of standing, and petitioner, the mother, and the AFC all opposed the motion. After holding a hearing on the issue of standing, the court granted the motion and dismissed the "petition and amended petition" (*Matter of T.H. v J.R.*, 61 Misc 3d 775, 788 [Fam Ct, Monroe County 2018]). Petitioner and the AFC now appeal. We affirm, but for reasons different from those stated by the court.

Analysis and Discussion

I.

To obtain custody or visitation with a child, a party must establish standing; it is not enough to assert that such custody or visitation would be in the best interests of the child. The only ways to establish such standing are: (1) pursuant to Domestic Relations Law § 70 as a parent; (2) pursuant to Domestic Relations Law § 71 as a sibling; (3) pursuant to Domestic Relations Law § 72 as a grandparent; or (4) by showing extraordinary circumstances pursuant to *Matter of Bennett v Jeffreys* (40 NY2d 543, 549 [1976]). Petitioner is not a sibling or a grandparent, and she does not allege extraordinary circumstances; thus, only Domestic Relations Law § 70 is applicable here.

Domestic Relations Law § 70 (a) provides as follows:

> "Where a minor child is residing within this state, *either* parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to *either* parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in *either* parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly" (emphasis added).

In *Matter of Alison D. v Virginia M.* (77 NY2d 651, 656-657 [1991]), the Court of Appeals held that a "parent" within the meaning of Domestic Relations Law § 70 (a) meant only a biological or adoptive parent. In 2016, however, the Court of Appeals overruled *Alison D.* and held that, "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 14 [2016]). The Court noted that the statute did not define "parent," leaving it to be defined by the courts (*id.* at 18), and that the Court's definition of that term in *Alison D.* was "needlessly narrow" (*id.* at 24). In each of the two cases before the Court in *Brooke S.B.*, the petitioner alleged that "the parties [had] entered into a pre-conception agreement to conceive and raise a child as co-parents" (*id.* at 27). The Court held that those allegations, if proven by clear and convincing evidence, were sufficient for the petitioners to establish

standing (*see id.*). The Court further held:

> "Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record" (*id.* at 28).

Petitioner and the AFC argue that the facts of this case are a natural extension of the reasoning in *Brooke S.B.* They argue that, although there was no pre-conception agreement, there was a post-conception agreement for petitioner to raise the child as a parent. We conclude, however, that petitioner cannot establish standing because Domestic Relations Law § 70 (a) simply does not contemplate a court-ordered tri-custodial arrangement.

The wording of Domestic Relations Law § 70 (a) is clear and straightforward. It states that "either" parent may seek custody or visitation (*id.*). It is a well-settled principle of statutory construction that "[w]ords of ordinary import used in a statute are to be given their usual and commonly understood meaning" (McKinney's Cons Laws of NY, Book 1, Statutes § 232; *see Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]; *Matter of Village of Chestnut Ridge v Howard*, 92 NY2d 718, 723 [1999]). The common dictionary definition of "either" when used as an adjective has two senses, i.e., "being the one and the other of *two*" and "being the one or the other of *two*" (Merriam-Webster Online Dictionary, either [https://www.merriam-webster.com/dictionary/either] [emphasis added]). In addition, when the Court of Appeals stated in *Brooke S.B.* that section 70 does not define the critical term "parent," it added the following in a footnote: "We note that by the use of the term 'either,' the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time" (*Brooke S.B.*, 28 NY3d at 18 n 3). In our view, the clear wording of section 70 (a), which was expressly recognized by the Court of Appeals, precludes any relief to petitioner here because there are already two parents: the mother and the father. Under section 70 (a), there simply can be no more. We are therefore in agreement with the Third Department's recent decision determining that to allow three parents to "simultaneously have standing to seek custody . . . does not comport with the holding in *Matter of Brooke S.B.*" (*Matter of Shanna O. v James P.*, 176 AD3d 1334, 1335 [3d Dept 2019]).

The AFC contends that we should not address the issue whether Domestic Relations Law § 70 (a) allows more than two parents to have standing because the father raised that contention for the first time on appeal. The father's contention, however, presents an issue of law appearing on the face of the record that could not have been " 'obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). Although the AFC contends that petitioner could have taken legal countersteps such as seeking standing by showing extraordinary circumstances under *Bennett*, the petition and amended petition did not make any allegations to show standing under that theory. There were thus no legal countersteps that petitioner could have taken to defeat the father's motion to dismiss *this* amended petition for lack of standing.

II.

We respectfully disagree with our dissenting colleague that "tri-custodial arrangements are a logical and necessary evolution" of the principles set forth in *Brooke S.B.* First, the Court was not faced with a third party seeking to establish custody and/or visitation when there were already two legally recognized parents, and the Court in fact emphasized that it is important to "protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children" (*Brooke S.B.*, 28 NY3d at 26). That is a particularly relevant concern here, where the father opposes petitioner's amended petition seeking custody and visitation. During the hearing, the father testified that he was not aware that petitioner was caring for the child for long periods of time.

Second, the dissent's reliance on *Brooke S.B.* is misplaced inasmuch as nothing in the Court's decision signaled that it would ever countenance a tri-custodial arrangement, and in fact the decision shows the opposite. As noted, the Court highlighted that Domestic Relations Law § 70 was limited to two parents (*Brooke S.B.*, 28 NY3d at 18 n 3). In the language we quoted from the decision earlier, the Court stated that a petitioner may establish standing where he or she proved that he or she "agreed with the biological *parent* of the child to conceive and raise the child as *co-parents*" (*id.* at 28 [emphasis added]). The Court did not say biological *parents*, and its use of the term *co-parents* means just two. Even in the quote relied upon by the dissent, the Court was again considering just two parents when it stated that it was not then deciding "whether, in a case where a biological or adoptive *parent* consented to the creation of a parent-like relationship between *his or her partner* and child after conception, the partner can establish standing to seek visitation and custody" (*id.* [emphasis added]). The dissent improperly expands that language to suggest that standing would be established if *two* parents consented to the creation of a parent-child relationship between one parent's partner and the child.

Third, the dissent's reliance on *Brooke S.B.* to support a tri-custodial arrangement is misplaced because, as explained earlier, the Court was interpreting the term "parent," which was not defined in the

statute (28 NY3d at 18). It was the absence of the definition of that "critical term" (*id.*) in Domestic Relations Law § 70 that allowed the Court in *Brooke S.B.* to expand the "needlessly narrow" (*id.* at 24) definition it had given to that term in *Alison D.* The statute, however, explicitly uses the term "either" as a modifier of "parent" (§ 70 [a]), which the dissent glosses over as not in harmony with the "spirit and purpose" of section 70. "[T]he plain language of [a] statute provides the best evidence of legislative intent" (*Kimmel v State of New York*, 29 NY3d 386, 397 [2017]). The dissent makes no attempt to suggest that the legislature ever intended that a tri-custodial arrangement would be permissible under section 70. We agree with the father that a tri-custodial arrangement raises a host of issues, including child support, that are best left addressed by the legislature.

The dissent's reliance on two Appellate Division cases to support a tri-custodial arrangement is also unpersuasive. In *Matter of Jaylanisa M.A. (Christopher A.)* (157 AD3d 497, 498 [1st Dept 2018]), the issue was whether the appellant, the purported father of the child, established standing to seek visitation or custody. The appellant never filed a paternity petition or an acknowledgment of paternity (*id.*). The First Department held that the appellant did not prove by clear and convincing evidence that he and the mother "agreed to conceive and raise the child together, or that the mother consented to the post-conception creation of a parent-like relationship between appellant and the child" (*id.*). Thus, the issue of the appellant's standing involved consideration of whether there was an agreement between the parent and her partner, not between two parents and one parent's partner. In *Matter of Frank G. v Renee P.-F.* (142 AD3d 928, 929 [2d Dept 2016], *lv dismissed* 28 NY3d 1050 [2016]), the mother agreed to be a surrogate for her brother and his domestic partner. After the brother and his partner separated, the brother petitioned for custody of the twin children, which his partner opposed (*id.* at 929-930). The Second Department held that the brother established by clear and convincing evidence that he and his partner entered into a pre-conception agreement to conceive the children and raise them together as parents, which gave him standing pursuant to *Brooke S.B.* (*id.* at 930-931). That was the only issue before the court. The court stated that the mother had also filed for custody of the children, but there was nothing further mentioned regarding that petition (*id.* at 929-931). It is therefore unclear whether that case would have ended up with a tri-custodial arrangement.

III.

Petitioner and the AFC contend that the father should be estopped from challenging the amended petition. "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). "Equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest[s] of the child" (*Matter of K.G. v C.H.*, 163 AD3d 67, 82

[1st Dept 2018]; *see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 6 [2010]; *Matter of Chimienti v Perperis*, 171 AD3d 1047, 1049 [2d Dept 2019], *lv denied* 33 NY3d 912, 913 [2019]). While we agree with petitioner and the AFC that an equitable estoppel argument is a logical extension of *Brooke S.B.*, the doctrine must be considered within the confines of Domestic Relations Law § 70 (*see generally K.G.*, 163 AD3d at 79), and section 70 (a) does not allow a tri-custodial arrangement.

Petitioner's reliance on two recent cases invoking equitable estoppel when there were three parties is misplaced. Both cases involved same-sex married couples and sperm donors, where the sperm donors agreed with the couples that the sperm donors would not seek custody or visitation of any child born from the artificial insemination procedure, but after a child was born they brought petitions seeking to establish paternity and also seeking either custody or visitation (*Matter of Christopher YY. v Jessica ZZ.*, 159 AD3d 18, 20-21 [3d Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Joseph O. v Danielle B.*, 158 AD3d 767, 767-768 [2d Dept 2018]). Both the Third Department and the Second Department held in those cases that the sperm donors were equitably estopped from asserting paternity rights and dismissed the relevant petitions (*Christopher YY.*, 159 AD3d at 28-34; *Joseph O.*, 158 AD3d at 771-772). Thus, there remained only two parents of the child in each case, not three. Neither petitioner nor the mother in this case raised an equitable estoppel argument to prevent the father from being adjudicated the father of the child or to prevent him from seeking custody and visitation. In fact, it was the mother who commenced the paternity proceeding against the father and, once he was determined to be the father of the child, he sought custody and visitation, and the mother consented to the custody and visitation orders.

IV.

The dissent details the positive relationship between petitioner and the child and concludes that petitioner has become "the most stable parent the child has known." We note, however, that there was conflicting testimony regarding the extent of each party's relationship with the child. But even if we agreed with the dissent's characterization, petitioner's situation is neither novel nor unique. For example, stepparents often form close parental bonds with their stepchildren, and sometimes a stepparent may become the most important parental figure a child has. Yet if a stepparent and a biological parent separate, the unfortunate result sometimes is the severing of that relationship between the stepparent and the stepchild if the biological parents are unwilling for that relationship to continue. There is no indication that has been the case here inasmuch as the mother continues to allow petitioner to see the child during the mother's parenting time.

The dissent also states that a tri-custodial agreement is the only result that would protect "the fundamental liberty interest the child has in preserving her family-like bonds." In so stating, the dissent essentially ignores "perhaps the oldest of the fundamental

liberty interests" recognized by the Supreme Court, i.e., "the interest of parents in the care, custody, and control of their children" (*Troxel v Granville*, 530 US 57, 65 [2000]). When the Court of Appeals expanded the definition of "parent" in *Brooke S.B.*, it was careful to both recognize and protect that interest (28 NY3d at 26). It stated that "the fundamental nature of those rights mandates caution in expanding the definition of th[e] term [parent] and makes the element of consent of the biological or adoptive parent critical" (*id.* at 26). Here, the father has never consented to petitioner being a parent to his child.

V.

We accordingly affirm the order on the ground that petitioner does not have standing to seek custody of, or visitation with, the child.

CARNI and TROUTMAN, JJ., concur with CENTRA, J.P.; CURRAN, J., concurs in the following opinion: I concur entirely with the majority's statutory analysis and conclusions. I write separately to highlight what I perceive to be a critical underpinning of my dissenting colleague's rationale. As I understand it, the dissent partly relies on "the fundamental liberty interest the child has in preserving her family-like bonds" in concluding that petitioner has standing to seek joint custody of the child. The dissent also relies on respondent mother's efforts to encourage and foster "a parent-child relationship between petitioner and the child since before the child was born and throughout the child's life."

I respectfully disagree with the dissent's supposition that either the United States Supreme Court or the New York Court of Appeals has held that a child has a "fundamental liberty interest . . . in preserving [his or] her family-like bonds." I further disagree that any such liberty interest possessed by the child may be lawfully elevated to such a height that it could outweigh a parent's rights, like in the circumstances presented by this case.

I respectfully submit that the dissent's analysis mixes up the requirement that the courts consider the child's best interests—an analysis only embarked upon once standing first has been established—with the existence of a separate fundamental liberty interest purportedly endowed upon the child. In my view, that would cause us to enter dangerous and uncharted territory. Instead, because petitioner relied on her own rights to establish standing to seek joint custody, not the liberty interest of the child, I respectfully submit that the dissent's central reliance on the child's purported liberty interest is misplaced.

WINSLOW, J., dissents and votes to reverse in accordance with the following opinion: I respectfully dissent. I would reverse the order, deny the motion, reinstate the amended petition, and remit the matter to Family Court for a hearing on custody and visitation.

By concluding that petitioner lacks standing to seek joint

custody of, or visitation with, the subject child notwithstanding that petitioner has parented that child for more than seven years, we defeat the spirit and purpose of Domestic Relations Law § 70. The majority's interpretation of the term "either" in the statute as necessarily prohibiting the child from having more than two parents at one time contravenes the rationale espoused by the Court of Appeals in *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1, 14 [2016]) and replicates the inequitable results caused by the rule established in *Matter of Alison D. v Virginia M.* (77 NY2d 651, 656-657 [1991]). Such an inequitable result is precisely what the Court sought to remedy. Domestic Relations Law § 70 must be read to effectuate the welfare and best interests of children, particularly those like the subject child who are raised in nontraditional families. By stripping petitioner of the right to fight for the ability to continue to be a parent to the child she has raised since birth, the determination of the majority not only fails to promote the welfare of the child, it works to the detriment of the child by severing the " 'strongly formed bonds between children and adults with whom they have parental relationships' " (*Brooke S.B.*, 28 NY3d at 24, quoting *Debra H. v Janice R.*, 14 NY3d 576, 606 [2010, Ciparick, J., concurring], *rearg denied* 15 NY3d 767 [2010], *cert denied* 562 US 1136 [2011]).

When respondent mother informed respondent father that she was pregnant with the child, the father declined to acknowledge his paternity and refused to accept responsibility for the child. The mother subsequently asked petitioner if she would be willing to raise the child with the mother because the father had made it clear that he did not want to be involved. The mother and petitioner thereafter entered into a post-conception agreement pursuant to which petitioner would be a parent to the child. Petitioner moved in with the mother and, together, they prepared for the arrival of the child. Among other things, petitioner attended the prenatal appointments with the mother and helped care for the mother throughout her pregnancy with the child. Petitioner read books and talked to the child while the child was in utero. She drove the mother to the hospital when the mother went into labor and was present in the delivery room when the child was born in February 2011. Petitioner cut the umbilical cord and held the child immediately after her birth, and petitioner and the mother named the child together. The child was given a hyphenated last name, which incorporated both the mother's and petitioner's last names.

In the days, weeks, months, and years following the child's birth, petitioner, although a non-biological and non-adoptive parent, established a parent-child relationship with the child and shared with the mother all the rights and responsibilities of parenthood. The child considers petitioner to be her parent, and petitioner considers the child to be her child. When the child was a newborn, petitioner and the mother shared the duties of caring for an infant, including daytime and nighttime feedings, diaper changes, clothing the child, bathing the child, and taking the child to her many doctor's appointments. In April 2012, petitioner moved out of the home that she shared with the mother, and the mother and petitioner entered into a co-parenting agreement, pursuant to which petitioner shared custody

of the child with the mother. Petitioner never wavered in her commitment to parent the child, and the parent-child bond between petitioner and the child continued to flourish. Petitioner cared for the child's basic needs, attended parent-teacher conferences, transported the child to school and activities, helped the child with her homework, and served as an emergency contact for the child. Petitioner taught the child to ride a bike and to roller-skate, and enrolled the child in gymnastics lessons. The child spent most holidays with the mother, petitioner, and petitioner's family. Throughout the child's life, petitioner has remained a consistent, stable, loving, and capable parent.

The father did not have a relationship with the child during the first two years and nine months of her life. Although he was aware of the child's birth, the father did not attempt to establish a relationship with the child or seek a legal determination of his parentage, and he did not pay child support. In Family Court in 2013, the father denied that he was the child's father until a paternity test proved otherwise. An order of filiation was entered in December 2013, and the father began to exercise visitation with the child shortly before her third birthday. The child and the father eventually developed a relationship, and the mother, petitioner, and the father have each established parental bonds with the child. The child's nontraditional family unit grew with the addition of the father, and petitioner, the mother, and the Attorney for the Child are all in favor of a tri-custodial arrangement, which would allow petitioner, the mother, and the father to continue to grow their parental bonds with the child. The father, however, moved to dismiss petitioner's amended petition seeking custody and visitation with the child on the ground that petitioner lacked standing. In my view, the court erred in granting the father's motion.

In *Brooke S.B.*, the Court of Appeals sought to correct the infliction of "disproportionate hardship on the growing number of nontraditional families across our state" (28 NY3d at 25), noting the trauma that children suffer as a result of separation from a primary attachment figure, such as a de facto parent (*see id.* at 25-26). The Court recognized the importance of protecting the substantial and fundamental right of biological parents to control the upbringing of their children but left unanswered the question "whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody" (*id.* at 28).

Here, the father effectively "consented to the post-conception creation of a parent-child relationship between [petitioner] and the child" (*Matter of Jaylanisa M.A. [Christopher A.]*, 157 AD3d 497, 498 [1st Dept 2018]) when he abdicated the responsibility of parenting the child to the mother. The mother allowed, encouraged, and fostered the development of the parent-child relationship between petitioner and the child, and the father's decision not to be involved in the child's life until she was almost three years old paved the way for the child to develop a primary attachment to petitioner, who became the most

stable parent the child has known. If the principles set forth in *Brooke S.B.* are to be followed, tri-custodial arrangements are a logical and necessary evolution (*see Matter of Frank G. v Renee P.-F.*, 142 AD3d 928, 930-931 [2d Dept 2016], *lv dismissed* 28 NY3d 1050 [2016]; *Matter of David S. v Samantha G.*, 59 Misc 3d 960, 965-966 [Fam Ct, NY County 2018]; *Dawn M. v Michael M.*, 55 Misc 3d 865, 869-870 [Sup Ct, Suffolk County 2017]). I reject the position of the majority that *Brooke S.B.* dictates otherwise.

While the Court in *Brooke S.B.* recognized the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children, the Court also acknowledged that children have fundamental liberty interests in preserving "intimate family-like bonds" and that children's interests must "inform the definition of 'parent' " (28 NY3d at 26). The Court specifically sought to overrule and repair the " 'permanent[ ] sever[ing of] strongly formed bonds between children and adults with whom they have parental relationships' " (*id.* at 24) and end the need for " 'deft legal maneuvering' " to reach a child's best interests and take into account principles of equity (*id.* at 26). Although the Court did not specifically reference a tri-custodial arrangement, it did identify nontraditional families as the very families it sought to protect (*see id.* at 25).

Contrary to the view of the majority, I have not ignored the fundamental liberty interests of parents to make decisions concerning the care, custody, and control of their children. I have simply considered that which the majority has ignored, i.e., the child's liberty interest in preserving her strong primary attachment to petitioner, which developed long before the father became one of only "two legally recognized parents" in the child's life. If the law kept pace with the realities of families today, and if *Brooke S.B.* had been decided before the child was born, it is likely that petitioner would have established her parental relationship with the child during the years when the father desired no contact with the child and that the father would have been estopped from becoming the child's second parent.

The decision of the Supreme Court in *Troxel v Granville* (530 US 57 [2000]) is distinguishable and does not prevent petitioner from establishing standing here. In *Troxel*, grandparents who did not have parental relationships with the subject children sought visitation with the children after their only living parent limited the grandparents' visitation with them (*id.* at 60-61). The Court in *Troxel* ruled on the constitutionality of a state statute that, as applied, allowed a judge to disregard and overturn the parent's decision to limit the grandparents' visitation, while giving no special weight to the parent's decision, based solely on the judge's determination of the children's best interests (*id.* at 67-68). Unlike in *Troxel*, the mother of the child here has allowed, encouraged, and fostered the development of a parent-child relationship between petitioner and the child since before the child was born and throughout the child's life. Moreover, when petitioner and the child formed that parent-child relationship, the mother and petitioner were

the only two parents in the child's life.

To legally sever the strongly formed bond between petitioner and the child based upon the definition of the term "either" perpetuates the "widespread harm to children predicted by Judge Kaye's dissent [in *Alison D.*]" (*Brooke S.B.*, 28 NY3d at 22; *see Alison D.*, 77 NY2d at 657-658 [Kaye, J., dissenting]) and noted by Judge Ciparick in her concurrence in *Debra H.* (14 NY3d at 606-607). The stated intent of *Brooke S.B.* was to *stop* narrowly defining "parent" as determined by biology, marriage, or adoption. The Court left the door open for consideration of other factual scenarios when it stated that the question whether a partner without a pre-conception agreement can establish standing would be "left for another day, upon a different record" (*Brooke S.B.*, 28 NY3d at 28). The implication of the majority that the Court of Appeals would never countenance a tri-parent arrangement ignores the Court's focus to define "parent" in such a way that the best interests of the child could be reached in appropriate cases where principles of equity would take into consideration the social changes that have occurred in the last quarter century that have redefined family. In my view, to determine that the amended petition here does not warrant consideration on the merits is to sidestep the legislative intent of Domestic Relations Law § 70 to "protect the 'best interest[s]' and 'welfare and happiness' " of the child (*Debra H.*, 14 NY3d at 609 [Ciparick, J., concurring]).

Although the Court in *Brooke S.B.* recognized in a footnote that the plain language of the term "either" limits a child to two parents, and no more than two, at any given time (28 NY3d at 18 n 3), that footnote is not part of the Court's holding in the case. The question of how the Court would decide a case such as this—where the petitioner seeks to maintain the strong attachment bond of a parent by today's definition, which was formed with the child *before* the father had any relationship with the child and *before* the father was recognized as a parent—remains unanswered.

The Third Department case *Matter of Shanna O. v James P.* (176 AD3d 1334 [3d Dept 2019]), cited by the majority, concerned a child whose father, after leaving the child's mother, obtained sole custody of the child and then raised the child with a woman he later married, i.e., the child's stepmother, for approximately eight and a half years (*id.* at 1334). When the father separated from the stepmother, he left the child in the stepmother's care and then informed the child's mother that he had done so. Approximately 10 months after learning that the child was no longer living with the father, the mother, who had seen the child only sporadically over the years, filed a petition for custody and, subsequently, the stepmother also filed a petition for custody (*id.* at 1334, 1337). Family Court awarded custody to the stepmother, with visitation to the mother and father. On appeal, the Third Department determined that the court erred in basing its custody determination on the premise that the stepmother was a de facto parent who had standing to seek custody under Domestic Relations Law § 70 (a) (*id.* at 1334-1335). Nevertheless, the Third Department determined that the stepmother established standing based on extraordinary

circumstances inasmuch as the mother had very little contact with the child while the child was at a formative age and the child was raised largely by the stepmother (*id.* at 1337). The Third Department then conducted a best interests analysis and, upon determining, inter alia, that the stepmother had been the most consistent parental figure in the child's life and would maintain stability for the child, affirmed the award of custody to the stepmother (*id.* at 1337-1338). In my view, the Third Department erroneously concluded that a child cannot have three parents at once under Domestic Relations Law § 70 (a) and, by conducting a best interests analysis based upon its finding of extraordinary circumstances, the Third Department engaged in the type of " 'deft legal maneuvering' " that *Brooke S.B.* sought to end (*Brooke S.B.*, 28 NY3d at 26).

The legislature could not have anticipated the many changes that would occur with respect to what constitutes an American family when Domestic Relations Law § 70 was enacted in 1909 or even when it was amended in 1964. Still, "one thing the [l]egislature *did* include in the statute was its intention that the courts 'shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness' " (*Debra H.*, 14 NY3d at 608 [Ciparick, J., concurring], quoting Domestic Relations Law § 70 [a]; *see also Alison D.*, 77 NY2d at 659 [Kaye, J., dissenting]). As the Court of Appeals noted in *Brooke S.B.*, the term "either parent" was added in 1964 to expand the scope of the statute, which had previously limited standing in custody and visitation matters to "a legally separated, resident 'husband and wife' pair" (28 NY3d at 24). A key tenet of statutory interpretation is that "courts normally accord statutes their plain meaning, but 'will not blindly apply the words of a statute to arrive at an unreasonable or absurd result' " (*People v Santi*, 3 NY3d 234, 242 [2004], quoting *Williams v Williams*, 23 NY2d 592, 599 [1969]). As the Court of Appeals has noted, in the past, the legislature has made changes to conform section 70 to the courts' preexisting equitable practices (*see Brooke S.B.*, 28 NY3d at 24, citing L 1964, ch 564, § 1; Mem of Joint Legis Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Other courts have recognized families with more than two parents (*see Frank G.*, 142 AD3d at 929-931),[1] and we should refuse to apply the statute so literally here.

The majority's reasons for denying petitioner standing to seek a tri-custodial arrangement are reminiscent of the reasons for which same-sex parents were denied standing in the past, but our response to the question before us now should recognize the realities of modern life and families of today. In *Alison D.*, the Court's definition of the term "parent" did not include an adult who was unrelated to a child by biology or adoption (77 NY2d at 657). The Court's decision there severed the bond that had developed over the course of six years

[1] The majority misconstrues the reason this case is cited. It is not because the issue of standing there is identical to the issue here, but rather because the decision, which affirmed the underlying order of Family Court, Orange County, resulted in the subject children having more than two parents.

and had formed as a result of a joint decision between the petitioner, Alison D., and her partner, respondent Virginia M., to have and co-parent a child together, and share all parental responsibilities. The respondent's attorney argued that Alison D. was not a parent, and the Court referred to her as a third party and held that only the legislature could expand the definition of "parent" to change Alison D.'s status from a biological stranger to a parent (*id.* at 656-657). It took 25 years to put an end to the damage done to children in nontraditional families, and it is more than disconcerting that the majority's decision will result in a continuation of such damage. While the majority adopts the position that a tri-custodial arrangement would raise a host of issues, negotiating difficulties between parties is the daily business of the family courts, and the family courts are well suited to grapple with such issues. Under the circumstances presented here, no other result protects the fundamental liberty interest the child has in preserving her family-like bonds (*see Brooke S.B.*, 28 NY3d at 26, citing *Troxel*, 530 US at 88-89 [Stevens, J., dissenting]). Thus, I conclude that petitioner has standing to seek custody and visitation.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1130

KA 17-01067

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE URRUTIA, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 9, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]). Defendant contends that Supreme Court erred in denying his motion for a mistrial after one of the prosecutors, in violation of the court's prior ruling, improperly cross-examined the codefendant's witness regarding defendant's participation in the crime. We reject that contention. "[T]he decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]). Here, the court did not abuse its discretion in denying defendant's motion for a mistrial and instead providing the jury with a curative instruction directing them to disregard the improper testimony, which "the jury is presumed to have followed" (*People v DeJesus*, 110 AD3d 1480, 1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *see People v Johnson*, 118 AD3d 1502, 1502-1503 [4th Dept 2014], *lv denied* 24 NY3d 1120 [2015]).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct based on the improper cross-examination of the codefendant's witness and allegedly improper comments made by the other prosecutor during summation. Defendant's contention is preserved for our review only in part inasmuch as he did not object to the alleged improprieties during summation (*see People v Lewis*, 154 AD3d 1329, 1330 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]; *People v Kerce*, 140 AD3d 1659, 1660 [4th Dept 2016], *lv denied* 28 NY3d 1028

[2016]). In any event, defendant's contention is without merit inasmuch as "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*Kerce*, 140 AD3d at 1660 [internal quotation marks omitted]).

Although we conclude that reversal is not warranted on the abovementioned grounds, we nevertheless take this opportunity to admonish the prosecutors and remind them that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388 [4th Dept 2012], *lv denied* 20 NY3d 1099 [2013], quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[T]he jury was in the best position to assess the credibility of the witnesses" (*People v Carrasquillo*, 170 AD3d 1592, 1593 [4th Dept 2019], *lv denied* 33 NY3d 1029 [2019] [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495) and, contrary to defendant's contention, "minor inconsistencies in the testimony of the People's witnesses do not render the verdict against the weight of the evidence" (*People v McAvoy*, 70 AD3d 1467, 1468 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010]).

Defendant contends that, in light of a statement made by the prosecutor during summation, the court erred in its jury instruction by failing to identify the specific type of dangerous instrument allegedly used by defendant during the assault. That contention is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1159

CA 18-02309

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

TROY A. DUNN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COVANTA NIAGARA I, LLC, ET AL., DEFENDANTS,
AND KANDEY COMPANY, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (JOSEPH D. MORATH, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 2, 2018. The order, among other things, granted that part of plaintiff's motion seeking partial summary judgment against defendant Kandey Company, Inc.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action to recover for personal injuries sustained by plaintiff in an accident at a work site, Kandey Company, Inc. (defendant) appeals from an order that, inter alia, granted plaintiff's motion insofar as it sought partial summary judgment on liability against defendant. We affirm. Contrary to defendant's contention, Supreme Court properly granted plaintiff's motion to that extent inasmuch as plaintiff met his initial burden thereon and defendant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Even if triable issues of fact exist as to comparative negligence, such issues do not preclude partial summary judgment on liability against defendant (*see Rodriguez v City of New York*, 31 NY3d 312, 317-325 [2018]). Defendant's contentions that plaintiff's motion was procedurally defective and premature are raised for the first time on appeal and are therefore not properly before us (*see Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624 [4th Dept 2009]; *Avraham v Allied Realty Corp.*, 8 AD3d 1079, 1079 [4th Dept 2004]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1165

CA 18-02233

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

TROY A. DUNN, PLAINTIFF,

V MEMORANDUM AND ORDER

COVANTA NIAGARA I, LLC, LPCIMINELLI, INC.,
DEFENDANTS-APPELLANTS,
KANDEY COMPANY, INC., PINTO CONSTRUCTION
SERVICES, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (W. SETH CALLERI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT KANDEY COMPANY, INC.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT PINTO CONSTRUCTION SERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 2, 2018. The order, insofar as appealed from, denied that part of the cross motion of defendants Covanta Niagara I, LLC and LPCiminelli, Inc. seeking summary judgment on their cross claims for contractual defense and indemnification against defendants Kandey Company, Inc. and Pinto Construction Services, Inc.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and the cross motion is granted in part with respect to the cross claims for contractual defense and indemnification against defendants-respondents.

Memorandum: In this action to recover for personal injuries sustained by plaintiff in an accident at a work site, defendants-appellants (movants) appeal from an order insofar as it denied, as premature, that part of their cross motion seeking summary judgment on their cross claims for contractual defense and indemnification against defendants-respondents (nonmovants). We reverse the order insofar as appealed from.

We agree with the movants that Supreme Court erred in denying as premature their cross motion with respect to the relevant cross claims. The nonmovants failed "to demonstrate that discovery might

lead to relevant evidence or that the facts essential to justify opposition to the [cross] motion were exclusively within the knowledge and control of the movant[s] . . . , and the [m]ere hope that somehow the [nonmovants] will uncover evidence that will [help their] case is insufficient for denial of the [summary judgment] motion" as premature (*Gannon v Sadeghian*, 151 AD3d 1586, 1588 [4th Dept 2017] [internal quotation marks omitted]). We further agree with the movants that they established their entitlement to judgment as a matter of law on their cross claims for contractual defense and indemnification and that the nonmovants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

All concur except WHALEN, P.J., and PERADOTTO, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. In our view, Supreme Court properly denied that part of the cross motion of defendants-appellants (movants) seeking summary judgment on their cross claims for contractual defense and indemnification against defendants-respondents. Movants' own submissions, which included plaintiff's testimony, raise a triable issue of fact whether movants were free from negligence (*see State of New York v Santaro Indus., Inc.*, 48 AD3d 1101, 1102-1103 [4th Dept 2008]) and, moreover, plaintiff has not had the opportunity to depose representatives of movants regarding whether movants were negligent and whether any liability on their part was vicarious only (*see* CPLR 3212 [f]; *Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531-1532 [4th Dept 2010]). We would therefore affirm.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1203

CAF 18-02136

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TRICIA WLOCK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL JOSEPH KING, JR., AND GIOVANNA
ROSE SICILIANO, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (RYAN S. SUSER OF COUNSEL), FOR PETITIONER-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-RESPONDENT GIOVANNA ROSE SICILIANO.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

LATHAM & WATKINS, NEW YORK CITY, AND BRETT FIGLEWSKI, THE LGBT BAR ASSOCIATION OF GREATER NEW YORK, AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered October 2, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the amended petition for custody.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner, the ex-girlfriend of respondent mother, commenced this proceeding by filing a petition seeking visitation with the biological child of the mother and respondent father, which was superseded by an amended petition seeking, inter alia, custody of the child. Petitioner and the mother began their romantic relationship after the mother was already pregnant with the child. That relationship continued for almost three years, until May 2017, when the mother moved out of their residence. The father was incarcerated prior to the birth of the child and remained incarcerated until October 2017. His paternity of the child was established during that time, and he and the mother agreed in February 2017 that the mother would have sole custody of the child. He began visiting the child upon his release from incarceration. Petitioner commenced this proceeding in June 2017, and the mother moved to dismiss the amended petition based on lack of standing. Petitioner opposed the motion,

arguing that she had standing pursuant to *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1 [2016]) under an equitable estoppel theory. The Court Attorney Referee issued a report and recommendation that found that equitable estoppel was potentially applicable to the case and denied the motion, and Family Court issued an order confirming that report and recommendation.

After a trial, the Referee found that petitioner established standing under equitable estoppel inasmuch as the mother created, fostered, furthered, and nurtured a parent-like relationship between petitioner and the child. The Referee further found that the father also fostered that relationship through his inaction inasmuch as he had no contact with the child until after petitioner's amended petition was filed and did not provide financial support for the child. The Referee found that equitable estoppel could be used to create a three-parent arrangement. Upon the return of the Referee's posttrial report and recommendation, the court rejected that report and recommendation and concluded that petitioner did not have standing. Petitioner now appeals from an order dismissing the amended petition. We affirm.

Initially, we reject petitioner's contention that the court was bound to apply equitable estoppel as the law of the case because it had denied the mother's motion to dismiss. The motion to dismiss was in a different procedural posture from a determination made after a trial, and the court was not precluded from coming to a different conclusion after the trial (*see Matter of K.G. v C.H.*, 163 AD3d 67, 77 [1st Dept 2018]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434 [1st Dept 2013]). On the merits, we reject petitioner's contention that equitable estoppel applies to grant her standing. As we explain in *Matter of Tomeka N.H. v Jesus R.* (— AD3d —, — [Mar. 20, 2020] [4th Dept 2020]), while an equitable estoppel argument is a logical extension of *Brooke S.B.*, the doctrine must be considered within the confines of Domestic Relations Law § 70 (*see generally K.G.*, 163 AD3d at 79). By the use of the phrase "either parent" in section 70, the legislature has limited standing under that statute to only two parents at any given time; the statute simply does not contemplate a court-ordered tri-custodial arrangement (*see Tomeka N.H.*, — AD3d at —; *Matter of Shanna O. v James P.*, 176 AD3d 1334, 1335 [3d Dept 2019]). Here, the child already has two legally recognized parents, i.e., the mother and the father, and thus petitioner cannot establish standing under that statute.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1204

CAF 19-01408

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TRICIA WLOCK,
PETITIONER-APPELLANT,

V ORDER

MICHAEL JOSEPH KING, JR., AND GIOVANNA
ROSE SICILIANO, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (RYAN S. SUSER OF COUNSEL), FOR PETITIONER-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-RESPONDENT GIOVANNA ROSE SICILIANO.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

LATHAM & WATKINS, NEW YORK CITY, AND BRETT FIGLEWSKI, THE LGBT BAR ASSOCIATION OF GREATER NEW YORK, AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLANT.

Appeal from a corrected order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 29, 2019 in a proceeding pursuant to Family Court Act article 6. The corrected order, inter alia, dismissed the amended petition for custody.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1241

KA 17-00414

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN DOGAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael F. Pietruszka, J.), dated December 16, 2016. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of assault in the first degree and robbery in the first degree (three counts).

It is hereby ORDERED that the order so appealed from is affirmed.

Memorandum: Defendant appeals from an order summarily denying his CPL 440.10 motion seeking to vacate a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), and three counts of robbery in the first degree (§ 160.15 [4]). We affirm.

Initially, we reject defendant's contention that we should grant the motion and vacate the judgment of conviction on the ground that he received ineffective assistance of counsel during the suppression hearing. At that proceeding, defense counsel made the appropriate motions, engaged in effective cross-examination of the People's witnesses, and presented an argument in favor of suppression based on what he perceived to be the strategically strongest arguments. Viewing the evidence, law, and circumstances of the case in totality as of the time of the representation, we conclude that defendant received meaningful representation with respect thereto (*see generally People v Turner*, 5 NY3d 476, 480 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, we also conclude that County Court did not err in denying the CPL 440.10 motion without a hearing. Defendant contends that defense counsel was ineffective because he failed to advise defendant, prior to the guilty plea, of a

potentially viable affirmative defense concerning the operability of the firearm used in the robberies (*see generally* Penal Law § 160.15 [4]). Defendant did not submit, however, the statutorily-required "sworn allegations" of "the existence or occurrence of facts" in support of his motion to warrant such a hearing (CPL 440.30 [1] [a]; *see* CPL 440.30 [4] [b]; [5]). The rule that a CPL 440.10 motion must be predicated on sworn allegations is a fundamental statutory requirement that a defendant must satisfy to be entitled to a hearing (*see generally People v Ozuna*, 7 NY3d 913, 915 [2006]; *People v Ford*, 46 NY2d 1021, 1023 [1979]). Absent sworn allegations substantiating defendant's contentions, the court did not abuse its discretion in summarily denying the motion (*see Ozuna*, 7 NY3d at 915; *People v Chelley*, 137 AD3d 1720, 1721 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]; *see generally People v Friedgood*, 58 NY2d 467, 470 [1983]).

Specifically, defendant did not aver in his initial motion papers that he would have rejected the favorable plea deal and insisted on proceeding to trial had he been made aware of the potentially viable affirmative defense. Inasmuch as defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014] [internal quotation marks omitted]; *see People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]; *People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), his failure to swear that he would have done so is fatal to his motion, and thus the court did not err in denying it without a hearing (*see generally* CPL 440.30 [1] [a]; *Ozuna*, 7 NY3d at 915; *Ford*, 46 NY2d at 1023; *Chelley*, 137 AD3d at 1721).

We have considered defendant's remaining contentions and conclude that they do not warrant modification or reversal of the order.

All concur except WHALEN, P.J., and BANNISTER, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. Although the sworn allegations in defendant's pro se CPL 440.10 motion did not include the particular litany noted by the majority, defendant did aver that he did not knowingly enter his guilty plea. He further averred that defense counsel failed to advise him regarding the affirmative defense, that his knowledge of this affirmative defense was essential to a knowing guilty plea, and that he "entered the guilty plea based on" counsel's errors. In our view, those allegations are sufficient to "show that there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial" (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014] [internal quotation marks omitted]), and it would defeat the purpose of the statute to insist that a pro se defendant use certain magic words when his intention is clear from the totality of the motion.

Inasmuch as defendant raised issues of fact in support of his motion with respect to whether his guilty plea was not knowing,

voluntary and intelligent on the ground that defense counsel was ineffective for failing to advise him prior to the plea regarding a potentially viable affirmative defense, we conclude that County Court erred in denying his motion without conducting a hearing (*see People v Cooperwood*, 98 AD3d 1278, 1278-1279 [4th Dept 2012]; *People v Liggins*, 56 AD3d 1265, 1265-1266 [4th Dept 2008]). We would therefore reverse the order and remit the matter to County Court for a hearing on defendant's motion.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1256

TP 19-01064

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BUFFALO BAIL BONDS AGENCY INC.,
AND GEORGE ADU-GYAMFI, AS SUBLICENSEE,
PETITIONERS,

V MEMORANDUM AND ORDER

MARIA T. VULLO, AS SUPERINTENDENT OF DEPARTMENT
OF FINANCIAL SERVICES, AN AGENCY OF STATE OF
NEW YORK, RESPONDENT.

ANTHONY L. PENDERGRASS, BUFFALO, FOR PETITIONERS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [James H. Dillon, J.], entered March 28, 2017) to review a determination of respondent. The determination found, inter alia, that petitioners had committed various statutory and regulatory violations.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioners guilty of charge 1, specification A and vacating the penalty imposed thereon, and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioners commenced this CPLR article 78 proceeding seeking review of a determination revoking their license to do business as a bail bonds agency, unless they paid a penalty of $11,450, based on findings that petitioners committed various statutory and regulatory violations. Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g).

Contrary to petitioners' contention, we conclude that there is substantial evidence supporting the determination with respect to charge 1, specification C, which alleges that, from August 2011 through November 2012, petitioners violated Insurance Law § 2324 by allowing persons to delay paying part of their premium for the posting of a bail bond (*see generally* CPLR 7803 [4]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of B.P. Global Funds, Inc. v New York State Liq. Auth.*, 169 AD3d 1506,

1506-1507 [4th Dept 2019]). Contrary to petitioners' further contentions, there is also substantial evidence supporting the determination with respect to charge 1, specification D, which alleges that petitioners violated CPL 520.20 (4) by submitting 21 bail affidavits from April through November 2012 that contained untrue information regarding the premiums paid by petitioners' bail clients, and with respect to charge 1, specification E, which alleges that petitioners violated 11 NYCRR 28.2 by failing to follow proper receipt-issuing procedures (*see generally* CPLR 7803 [4]; *Pell*, 34 NY2d at 231; *B.P. Global Funds*, 169 AD3d at 1506). Respondent's " 'rational construction' " of the relevant statutes and regulation is entitled to deference (*Matter of Wind Power Ethics Group [WPEG] v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282, 1283 [4th Dept 2009], quoting *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]), and we conclude that respondent's construction of the statutes and regulation "is neither irrational nor unreasonable" (*id.*).

Petitioners contend that the fines imposed by respondent exceeded the statutory limits set forth in Insurance Law § 2127 (a). We reject that contention. Insurance Law § 2127 (a) provides that respondent may impose "a penalty in a sum not exceeding five hundred dollars for each offense, *and* a penalty in a sum not exceeding twenty-five hundred dollars in the aggregate for all offenses" (emphasis added), and similar language is used in Insurance Law § 6802 (l). Thus, contrary to petitioners' contention, respondent is not limited to imposing a total of $2,500 in penalties for all violations. Rather, "the use of the conjunction 'and' in the statute[s] permits a penalty of up to $2,500 *in addition* to the penalty of up to $500 for each offense" (*Matter of Hroncich v Corcoran*, 158 AD2d 274, 276 [1st Dept 1990]; *see Matter of Fox v Corcoran*, 172 AD2d 523, 524 [2d Dept 1991]).

Respondent correctly concedes that the determination with respect to charge 1, specification A, which alleges that petitioners violated 18 USC § 1033 (e) (1) (A) and (B) by willfully permitting a person previously convicted of a felony involving dishonesty to participate in their bail bond business without respondent's written consent, must be annulled in light of the decision of the United States Supreme Court in *Rehaif v United States* (— US —, 139 S Ct 2191 [2019]). Under *Rehaif*, in order to determine that petitioners violated 18 USC § 1033 (e) (1) (A) and (B) and were therefore guilty of charge 1, specification A, respondent was required to determine that petitioners had knowledge that the subject person had been convicted of a felony involving dishonesty (*see Rehaif*, — US at —, 139 S Ct at 2195-2196). Here, however, respondent determined only that petitioners had knowingly employed the subject person, and respondent did not make a determination whether petitioners knew that the subject person had been convicted of a felony involving dishonesty. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding petitioners guilty of charge 1, specification A and vacating the penalty imposed thereon, and we remit the matter to respondent to redetermine charge 1, specification A, in light of the standard set forth in *Rehaif* (*see generally Lihs*

Beverages v New York State Liq. Auth., 202 AD2d 1050, 1050 [4th Dept 1994]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1272

CA 19-01353

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

BRUNILDA LOPEZ, AS PARENT AND NATURAL GUARDIAN OF WILSON MORALES, AN INFANT, AND WILSON MORALES, PLAINTIFFS-RESPONDENTS,

V ORDER

KARL SCHULTZ, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, JASON WHITENIGHT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, CITY OF BUFFALO AND BUFFALO POLICE DEPARTMENT, DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 24, 2019. The order, among other things, denied defendants' motion for summary judgment dismissing plaintiffs' complaints.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 2, 2020,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1277

CA 19-00045

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

DURHAM COMMERCIAL CAPITAL CORP.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KRISHNAN ARUNACHALAM, ET AL., DEFENDANTS.

KRISHNAN ARUNACHALAM, THIRD-PARTY PLAINTIFF,

V

BANK OF AMERICA, N.A., THIRD-PARTY
DEFENDANT-RESPONDENT.

PAUL F. SHANAHAN, PITTSFORD, FOR PLAINTIFF-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (CHRISTOPHER A. PRIORE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 20, 2018. The judgment, among other things, granted the cross motion of third-party defendant for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action asserting in an amended complaint three direct causes of action against third-party defendant Bank of America, N.A. (Bank of America), i.e., fraud and aiding and abetting fraud, negligent misrepresentation, and fraud in the inducement. In those causes of action, plaintiff alleged, inter alia, that Bank of America and/or its employees or agents did not exercise reasonable care when notarizing certain signatures and/or knew the purported signatures were false, but nevertheless notarized the subject documents. Plaintiff moved for summary judgment on the amended complaint against Bank of America, and Bank of America cross-moved for summary judgment dismissing the amended complaint against it. Supreme Court, upon determining that Georgia law applies to this action, denied plaintiff's motion, granted Bank of America's cross motion, and dismissed plaintiff's amended complaint against Bank of America. We affirm.

Preliminarily, plaintiff contends that the court erred in

concluding that its prior choice of law determination involving the third-party action constituted the law of the case. Even assuming, arguendo, that the court correctly applied the doctrine of law of the case, we are "not bound by the doctrine of law of the case, and may make [our] own determinations" (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017] [internal quotation marks omitted]; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]).

Contrary to plaintiff's contention, the court correctly determined that Georgia law applies to this action. At the time of the alleged improper notarizations, plaintiff was a domiciliary of New York and Bank of America was a domiciliary of North Carolina (*see generally U.S. Bank N.A. v Bank of Am., N.A.*, 2012 WL 6136017, *1, 2012 US Dist LEXIS 176157, *3 [SD NY, Dec. 11, 2012, No. 12-Civ-4873 (CM)]). The situs of the alleged torts is in Georgia. No issues with respect to the notary laws in North Carolina have been advanced by the parties. As relevant here, there is a conflict between the law of New York and the law of Georgia with respect to whether an employer may be liable for the misconduct of employees acting as notaries public (*compare Maloney v Stone*, 195 AD2d 1065, 1068 [4th Dept 1993], *with Anthony v American Gen. Fin. Servs., Inc.*, 287 Ga 448, 451-452, 697 SE2d 166, 169-170 [2010]), and the conflicting laws relate to the allocation of losses among the parties rather than the regulation of conduct (*see generally Schultz v Boy Scouts of Am.*, 65 NY2d 189, 192, 196-198 [1985]). If the conflicting laws regulate conduct, the law of the place of the tort applies because of the "locus jurisdiction's interests in protecting the reasonable expectations of the parties" and "the admonitory effect that applying its law will have on similar conduct in the future" (*id.* at 198). Where, however, the conflicting laws relate to the allocation of losses, then "considerations of the State's admonitory interest and party reliance are less important" (*id.*). Nevertheless, pursuant to the third rule set forth in *Neumeier v Kuehner* (31 NY2d 121, 128 [1972]), i.e., where the parties are domiciled in different states with conflicting laws, the law of the place of the tort normally applies, unless displacing it "will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants" (*id.* [internal quotation marks omitted]). We conclude that plaintiff "failed to establish that the exception applies to warrant a departure from the locus jurisdiction rule" (*Bodea v TransNat Express*, 286 AD2d 5, 11 [4th Dept 2001]), and thus the third *Neumeier* rule warrants the application of the law of Georgia in this action (*see generally Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 63 [4th Dept 2009]).

Contrary to plaintiff's further contentions, the court properly denied its motion and granted Bank of America's cross motion based on the application of Georgia law. Plaintiff's causes of action against Bank of America hinge upon a theory of respondeat superior, and Georgia law provides for no such responsibility under the circumstances of this case. Under Georgia law, "a corporation or other non-notary may not be *directly* liable for violations of [the relevant Georgia statute providing protection to consumers of notarial

services], and a corporation or other employer may not be *vicariously* liable for violations committed by an employee notary" (*Anthony*, 287 Ga at 452, 697 SE2d at 170; *see also Branch Banking & Trust Co. v Morrisroe*, 323 Ga App 248, 250, 746 SE2d 859, 861 [2013]). While, under Georgia law, "the corporation (or other person) may still be liable if it *participates in or procures* the notary's violations" (*Anthony*, 287 Ga at 452, 697 SE2d at 170), the record establishes that Bank of America did not engage in any such conduct.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

26

KA 15-01963

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID TETRO, JR., DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID TETRO, JR., DEFENDANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LISA E. FLEISCHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered October 28, 2015. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree, welfare fraud in the third degree and offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In this prosecution arising from allegations that defendant and his codefendant took advantage of an elderly woman—whom they had befriended and provided with care—by liquidating her assets and appropriating her funds for their own use, defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the second degree (Penal Law § 155.40 [1]), welfare fraud in the third degree (§ 158.15), and offering a false instrument for filing in the first degree (former § 175.35). We affirm.

Defendant contends in his main and pro se supplemental briefs that he was deprived of a fair trial by County Court's purported failure to adequately control the proceedings, as evidenced by certain exchanges between the court and defense counsel, and by the court's intemperate and denigrating remarks, which allegedly impressed upon the jury that the court held an unfavorable opinion of defense counsel and defendant. Defendant failed to preserve that contention for our review (*see People v Charleston*, 56 NY2d 886, 887-888 [1982]; *People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]). In any event, defendant's contention lacks merit. The record establishes that the court properly intervened "to keep the proceedings within the reasonable confines of the issues and to

encourage clarity rather than obscurity in the development of proof" (*People v Moulton*, 43 NY2d 944, 945 [1978]; *see People v Gonzalez*, 38 NY2d 208, 210-211 [1975]). Although the court, at times, criticized defense counsel's conduct in the presence of the jury and made some intemperate remarks "that would better have been left unsaid," we conclude upon our review of the record as a whole that "the jury was not prevented from arriving at an impartial judgment on the merits" (*Moulton*, 43 NY2d at 946; *see People v Oquendo*, 152 AD3d 1220, 1220 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]; *People v Majors*, 64 AD3d 1085, 1087 [3d Dept 2009], *lv denied* 13 NY3d 860 [2009]; *People v Martinez*, 35 AD3d 156, 157 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]).

Defendant also contends in his main brief that the court committed reversible error by depriving him of the constitutional right to counsel when it prohibited him from communicating with defense counsel about his testimony during overnight recesses while defendant was in the midst of testifying in his defense. Defendant failed to preserve that contention for our review inasmuch as defense counsel was " 'present and available to register a protest' to [the] restriction on communication that would [have] provide[d] the court with an opportunity to rectify its error" but did not make a timely protest (*People v Umali*, 10 NY3d 417, 423 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]; *see People v Narayan*, 54 NY2d 106, 112-114 [1981]; *People v Tetro*, 175 AD3d 1784, 1787 [4th Dept 2019]). Under the circumstances of this case, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Stewart*, 68 AD3d 1438, 1440 [3d Dept 2009], *lv denied* 14 NY3d 773 [2010]). Contrary to defendant's related contention in his main brief, we conclude under the circumstances of this case that defense counsel's failure to timely object to the prohibition on communication was not so "egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see Stewart*, 68 AD3d at 1440).

Defendant further contends in his main and pro se supplemental briefs that the evidence is not legally sufficient to support the conviction and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The jury was entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant's witnesses, including that of defendant himself, and we perceive no reason to disturb those credibility determinations (*see Tetro*, 175 AD3d at 1788).

Defendant further contends in his main brief that he was denied

meaningful representation. We conclude, however, that defendant "failed to 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings," and that, upon objective evaluation, it cannot be said that defense counsel's strategy was "inconsistent with the actions of a reasonably competent attorney" (*People v Henderson*, 27 NY3d 509, 513-514 [2016]; *see Martinez*, 35 AD3d at 157). Although we agree with defendant that defense counsel on various occasions employed boorish, hostile, intolerant, and unprofessional remarks and questions, we nonetheless conclude that, contrary to defendant's assertion, " '[t]here is no indication that [defense] counsel's style of trying the case prevented defendant from receiving a fair trial' " (*Martinez*, 35 AD3d at 157; *see People v Calderon*, 55 AD3d 321, 323 [1st Dept 2008]). We note that the court repeatedly instructed the jury that remarks of counsel did not constitute evidence and further instructed that the jury was not to allow any objectionable remarks by counsel to interfere with its duty to be impartial and fair to both sides, and the jury is presumed to have followed those instructions (*see People v Baker*, 14 NY3d 266, 274 [2010]; *People v Heesh*, 94 AD3d 1159, 1163 [3d Dept 2012], *lv denied* 19 NY3d 961 [2012]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). To the extent that defendant's contention that he was denied effective assistance of counsel during jury selection is based on matters outside the record on appeal, it must be raised, if at all, by way of a motion pursuant to CPL article 440 (*see People v Tuff*, 156 AD3d 1372, 1378 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]; *People v Rivera*, 45 AD3d 1487, 1488 [4th Dept 2007], *lv denied* 9 NY3d 1038 [2008]).

Defendant also contends in his main brief that he was denied a fair trial by prosecutorial misconduct. Defendant moved for a mistrial after the prosecutor pointed out in the presence of the jury that defendant and codefendant were writing notes and whispering to their attorneys about what questions to ask and requested that the court prohibit them from doing so. "[R]eversal is warranted only if the misconduct has caused such substantial prejudice to defendant that he was denied due process of law" (*People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]). " 'In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached' " (*id.* at 1825-1826). Here, we conclude that the alleged misconduct was not severe, and the court took appropriate curative action to dilute any prejudice to defendant by instructing the jury that there was nothing inappropriate about defendant and codefendant speaking with their attorneys and that such conduct was not to be held against them (*see id.*; *People v Stanton*, 43 AD3d 1299, 1300 [4th Dept 2007], *lv denied* 9 NY3d 993 [2007]). We thus conclude that the alleged prosecutorial misconduct did not warrant reversal and that the court therefore did not abuse its discretion by denying the motion for a mistrial (*see generally*

Griffin, 151 AD3d at 1826). Defendant failed to preserve for our review his contention with respect to the remaining instances of alleged prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in his main brief, the court did not abuse its discretion in denying, without a hearing, his motion pursuant to CPL 330.30 (2) to set aside the verdict based on alleged juror misconduct. The court properly concluded that "[t]he moving papers [did] not contain sworn allegations of all facts essential to support the motion" (CPL 330.40 [2] [e] [ii]; *see People v Blalark*, 126 AD3d 1124, 1127 [3d Dept 2015], *lv denied* 27 NY3d 992 [2016]; *People v Kerner*, 299 AD2d 913, 913 [4th Dept 2002], *lv denied* 99 NY2d 583 [2003]).

We have reviewed the remaining contentions raised in defendant's pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Defendant failed to preserve for our review his contention that, in determining the sentence to be imposed, the court penalized him for exercising his right to a jury trial, inasmuch as defendant did not raise that contention at sentencing (*see People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

49

KA 16-01229

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS SEARS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered May 10, 2016. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20), grand larceny in the fourth degree (§ 155.30 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [1]). At the time defendant committed those felony offenses, he was participating in a drug treatment court program in connection with three other misdemeanor charges. Defendant entered into a plea agreement whereby he agreed to plead guilty to the felony charges and to continue his participation in drug treatment court. Defendant failed to successfully complete the drug treatment court program, and the court sentenced defendant on the felony charges to a term of imprisonment and dismissed the misdemeanor charges "as being satisfied by the plea and sentence." Defendant contends that the judgment of conviction must be reversed because the court-assigned attorney who represented him in the preliminary stages with respect to the misdemeanor charges later joined the Onondaga County District Attorney's Office and was assigned to the drug treatment court while defendant's cases were pending there. We agree.

It is well established that a criminal defendant's right to counsel is violated when a defense attorney who actively participated

in the preliminary stages of the defendant's defense becomes employed as an assistant district attorney by the office that is prosecuting the defendant's ongoing case (*see People v Shinkle*, 51 NY2d 417, 420-421 [1980]; *People v Good*, 62 AD3d 1041, 1042 [3d Dept 2009]; *People v Gaines*, 277 AD2d 900, 900 [4th Dept 2000]; *see also People v Herr*, 86 NY2d 638, 641 [1995]). In those circumstances, the defendant and the public are given "the unmistakable appearance of impropriety and [the situation] create[s] the continuing opportunity for abuse of confidences entrusted to the attorney during the [period] of his [or her] active representation of defendant" (*Shinkle*, 51 NY2d at 420; *see Good*, 62 AD3d at 1042; *Gaines*, 277 AD2d at 900-901). Disqualification is required when there is "the appearance of impropriety and the risk of prejudice attendant on abuse of confidence, however slight" (*Shinkle*, 51 NY2d at 421). "The rule is necessary to prevent situations in which [a] former client[] must depend on the good faith of [his or her] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship. In those situations the risk of abuse is obvious" (*Herr*, 86 NY2d at 641; *see Good*, 62 AD3d at 1042).

Here, we conclude that defendant's right to counsel was violated (*see Gaines*, 277 AD2d at 901). The People concede that the attorney who had represented defendant with respect to the misdemeanor charges was employed by the District Attorney's Office at the time defendant entered into the plea agreement that resolved those misdemeanor charges as well as the felony charges. Thus, on this record, we conclude that there is an "appearance of impropriety and . . . risk of prejudice attendant on abuse of confidence" (*Shinkle*, 51 NY2d at 421), and defendant should not have been required to "depend on the good faith of [his] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship" (*Herr*, 86 NY2d at 641; *see Gaines*, 277 AD2d at 901). Therefore, the judgment of conviction must be reversed, the plea vacated and the matter remitted to County Court for further proceedings on the indictment.

Defendant also contends that the court failed to conduct an adequate inquiry into his request for substitution of the counsel who represented him at the time that he entered the guilty plea. Inasmuch as there is no indication in the record that the court ruled on that request, we direct the court on remittal to rule on defendant's request for substitution of counsel (*see People v Morris*, 176 AD3d 1635, 1636 [4th Dept 2019]; *see generally People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]).

In light of our determination, defendant's remaining contentions have been rendered academic.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

76

CAF 18-01607

PRESENT: WHALEN, P.J., WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JAMES V. WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KRYSTAL D. RICHARDSON, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered August 2, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted respondent sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the words "upon the default of the petitioner and" from the paragraph preceding the ordering paragraphs, and as modified the order is affirmed without costs.

Memorandum: Petitioner father commenced this proceeding seeking to modify a prior order of custody that, inter alia, awarded sole legal and physical custody of the subject child to respondent mother. The father now appeals from an order that, inter alia, continued sole legal and physical custody of the subject child with the mother.

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Abdo v Ahmed*, 162 AD3d 1742, 1743 [4th Dept 2018] [internal quotation marks omitted]). We therefore modify the order accordingly.

Contrary to the father's further contention, however, the court did not abuse its discretion in conducting the hearing in his absence inasmuch as he appeared by counsel and had notice of the hearing (*see Matter of Triplett v Scott*, 94 AD3d 1421, 1422 [4th Dept 2012]). We similarly reject the father's contention that the court erred in continuing sole legal and physical custody of the child with the mother. The father failed to establish the requisite change in

circumstances (*see Matter of Porter v Nesbitt*, 74 AD3d 1786, 1787 [4th Dept 2010]), and thus an inquiry into the best interests of the child was not warranted (*see generally Matter of Pierre N. v Tasheca O.*, 173 AD3d 1408, 1408-1409 [3d Dept 2019], *lv denied* 34 NY3d 902 [2019]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

100

KA 15-00207

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANTE H. RANKIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered January 23, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 18 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish defendant's intent to kill inasmuch as such intent " 'may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]). In addition to certain statements of defendant from which the jury could infer that he intended to kill the victim, the People presented evidence that he was identified as the shooter by several witnesses, that he and the victim were members of rival gangs, and that he had several prior altercations with the victim, some of which involved firearms (*see People v Chase*, 158 AD3d 1233, 1235 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, County Court did not err in admitting in evidence a recorded jailhouse telephone call made

by defendant. Inasmuch as he was informed of the monitoring and recording of his telephone calls while incarcerated, defendant had "no objectively reasonable constitutional expectation of privacy in the content of those calls" (*People v Diaz*, 33 NY3d 92, 95 [2019], *cert denied* — US —, 140 S Ct 394 [2019]). Thus, the correctional facility could "record and monitor [his] calls, as well as share the recordings with law enforcement officials and prosecutors, without violating the Fourth Amendment" (*id.*; *cf. People v Harrell*, 87 AD2d 21, 26-27 [2d Dept 1982], *affd* 59 NY2d 620 [1983]).

We agree with defendant, however, that the sentence imposed, an indeterminate term of incarceration of 23 years to life, is unduly harsh and severe. Under the circumstances of this case, including that defendant was 18 years old at the time of the incident, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 18 years to life (*see generally* CPL 470.15 [6] [b]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

113

CA 19-00299

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

LECHASE CONSTRUCTION SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JM BUSINESS ASSOCIATES CORP.,
DEFENDANT-APPELLANT.

JOSEPH FRANCIS BERGH, SYRACUSE, FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 17, 2019. The order granted the amended motion of plaintiff insofar as it sought a default judgment on liability.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action for, inter alia, breach of contract, defendant appeals from an order granting plaintiff's amended motion to the extent that it sought a default judgment on liability. Initially, we note that, pursuant to CPLR 5511, "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party," and thus, in general, "[n]o appeal lies from an order entered upon the default of the appealing party" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). That rule does not apply, however, " '[w]here, as here, a party appears and contests an application for entry of a default judgment' " (*Spano v Kline*, 50 AD3d 1499, 1499 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008], *lv denied* 12 NY3d 704 [2009]; *see Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, 1483-1484 [4th Dept 2009]). Consequently, defendant's contentions on appeal are properly before us to the extent that defendant contested plaintiff's amended motion in Supreme Court (*see e.g. Spano*, 50 AD3d at 1499; *Jann v Cassidy*, 265 AD2d 873, 874 [4th Dept 1999]). Nevertheless, we affirm.

This action arises out of a construction project, with respect to which plaintiff, the prime contractor on the project, entered into a subcontract with defendant to perform certain carpentry work. During the course of the project, plaintiff sent defendant several demands

claiming that defendant's work did not conform to the subcontract's specifications and, thereafter, defendant left the work site without completing the required work, despite the existence of a contractual provision requiring the subcontractor to continue work under such circumstances. Plaintiff then commenced this action and, after defendant failed to file an answer or otherwise respond to the summons and complaint, plaintiff moved for, inter alia, a default judgment on liability. In support of the amended motion, plaintiff submitted, in addition to evidence establishing the default of defendant and "proof of the facts constituting the claim" (CPLR 3215 [f]; *cf. Cary v Cimino*, 128 AD3d 1460, 1461 [4th Dept 2015]; *see generally Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 899 [2d Dept 2019]), the affidavit of a process server, who averred that he served defendant by delivering a copy of the summons and complaint to the office of the Secretary of State pursuant to Business Corporation Law § 306 (b) (1), and an affidavit of additional mailing establishing that a copy of the summons and complaint was also sent to defendant's mailing address pursuant to CPLR 3215 (g) (4). In opposition, defendant asserted that it was entitled under CPLR 317 to be relieved from its default in pleading, and defendant submitted an affidavit in which its president averred, insofar as relevant to the issue of service, that defendant had not received the summons and complaint prior to receipt of plaintiff's initial notice of motion for a default judgment.

We reject defendant's contention that the court erred in granting the amended motion insofar as it sought a default judgment on liability. Plaintiff met its initial burden on its amended motion of establishing its entitlement to enter a default judgment against defendant (*see Kircher v William Penn Life Ins. Co. of N.Y.*, 165 AD3d 1241, 1242 [2d Dept 2018]; *PNC Bank, N.A. v Harmonson*, 154 AD3d 1347, 1348 [4th Dept 2017]). Under these circumstances, in order to be relieved of a default in pleading under CPLR 317, defendant was required to show, among other things, that it did not receive actual notice of the process in time to defend the action (*see* CPLR 317; *Matter of Hamilton Equity Group, LLC v Southern Wellcare Med., P.C.*, 158 AD3d 1214, 1215 [4th Dept 2018], *lv dismissed* 32 NY3d 1140 [2019]). It is well settled that a "process server's affidavit constitute[s] prima facie evidence of proper service on the Secretary of State" (*Hamilton Equity Group, LLC*, 158 AD3d at 1215), and thus defendant was required to rebut the presumption of proper service (*see id.*; *Lange v Fox Run Homeowners Assn., Inc.*, 127 AD3d 823, 824 [2d Dept 2015]). Here, the "self-serving affidavit [of defendant's president], which merely denied receipt, is insufficient to rebut [that] presumption" (*Hamilton Equity Group, LLC*, 158 AD3d at 1215; *see Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]; *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1081-1082 [2d Dept 2011]). In light of our determination, defendant's remaining contentions are academic.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

134

CA 19-00313

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF DEANNA LETRAY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
CITY OF WATERTOWN POLICE DEPARTMENT, AND
JEFFERSON COUNTY SHERIFF'S OFFICE,
RESPONDENTS-RESPONDENTS.

ERIN BETH HARRIST, NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY, FOR PETITIONER-APPELLANT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (ERIN SOBKOWSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF WATERTOWN POLICE DEPARTMENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 28, 2019 in a proceeding pursuant to Executive Law § 298. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner filed an administrative complaint with respondent New York State Division of Human Rights (SDHR) alleging illegal discrimination during petitioner's arrest and subsequent prearraignment incarceration by respondent City of Watertown Police Department in a facility owned by respondent Jefferson County Sheriff's Office. SDHR dismissed the administrative complaint for lack of jurisdiction, and petitioner then commenced this proceeding to annul that determination as arbitrary, capricious, and affected by an error of law (*see generally* Executive Law § 298). Supreme Court dismissed the petition, and we now affirm.

SDHR has jurisdiction to, inter alia, investigate and adjudicate complaints of unlawful discrimination in the provision of any "public accommodation, resort or amusement" (Executive Law § 296 [2] [a]; *see* § 295 [6]; *Matter of Staten Is. Alliance for Mentally Ill v Mercado*, 273 AD2d 36, 36-37 [1st Dept 2000]). For purposes of the Human Rights Law, a "public accommodation, resort or amusement" offers "

'conveniences and services to the public' " and is "generally open to all comers" (*Matter of Cahill v Rosa*, 89 NY2d 14, 21 [1996]), and it defies logic to suggest that law enforcement is providing " 'conveniences' " or " 'services' " to those arrested and detained (*id.*). Nor is arrest and detention "open to all comers" in any sense (*id.*; *see generally Carmelengo v Phoenix Houses of N.Y., Inc.*, 54 AD3d 652, 653 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]). Indeed, it well established that "prison facilities do not cater or offer [their] goods to the general public" (*CHRO ex rel. Vargas v State Dept. of Correction*, 2014 WL 564478, *3 [Conn Super Ct 2014]). To the contrary, arrest and detention is *imposed upon* a person by law enforcement and the criminal courts, not *provided to* those arrested and detained as a service for their benefit. The process of arresting and incarcerating a person is, "by its very nature," a governmentally decreed "separat[ion of] the general public from the individuals who are compelled by our penal system to be confined" (*id.* at *4).

In short, although we note SDHR's concession at oral argument that governmental entities such as police agencies could provide public accommodations within the meaning of the Human Rights Law under certain circumstances, we join the consensus of courts nationwide in concluding that arrest and incarceration are "properly viewed as *the antithesis* of a . . . 'public accommodation' " (*State ex rel. Naugles v Missouri Commn. on Human Rights*, 561 SW3d 48, 54 [Mo Ct App 2018]; *see Skaff v West Virginia Human Rights Commn.*, 191 W Va 161, 163-164, 444 SE2d 39, 41-42 [1994]; *Blizzard v Floyd*, 149 Pa Commw 503, 505-507, 613 A2d 619, 620-621 [1992]; *Vargas*, 2014 WL 564478 at *1-9; *Napier v State*, 2002 WL 32068249, *6-8 [Me Super Ct 2002]; *see also Department of Corrections v Human Rights Commn.*, 181 Vt 225, 236-241, 917 A2d 451, 460-463 [2006, Burgess, J., dissenting]; *Carmelengo*, 54 AD3d at 653). SDHR therefore properly concluded that it lacked jurisdiction over petitioner's narrowly-drawn administrative complaint of illegal discrimination in the course of an arrest and subsequent detention, and we agree with the court that SDHR's dismissal of that complaint was thus not arbitrary, capricious, or affected by an error of law (*see generally Matter of Tessy Plastics Corp. v State Div. of Human Rights*, 47 NY2d 789, 791 [1979]; *Matter of Majchrzak v New York State Div. of Human Rights*, 151 AD3d 1856, 1857 [4th Dept 2017]; *Matter of Devany v New York State Div. of Human Rights*, 135 AD2d 713, 714 [2d Dept 1987], *appeal dismissed* 71 NY2d 889 [1988], *lv denied* 72 NY2d 804 [1988]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

147

KA 15-01500

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON R. WILLIAMS, ALSO KNOWN AS ERROL BOWRY,
DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 12, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that the evidence is legally insufficient to support the conviction because the People did not establish that he entered the victim's home with intent to commit a crime therein. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). It is well established that "[a] defendant's intent to commit a crime may be inferred from the circumstances of the entry . . . , as well as from defendant's actions and assertions when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]). Here, we conclude that there is legally sufficient evidence from which a jury could infer defendant's criminal intent, i.e., the victim testified that she saw defendant, who was on the premises without permission, climbing out of her bedroom window, defendant fled when the victim made noise as she walked toward the bedroom, and a television had been moved across the bedroom and was sitting near the window (*see generally People v Beaty*, 89 AD3d 1414, 1416-1417 [4th Dept 2011], *affd* 22 NY3d 918 [2013]; *People v Pendarvis*, 143 AD3d 1275, 1275 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v Hymes*, 132 AD3d 1411, 1411-1412 [4th Dept 2015], *lv denied* 26 NY3d 1146 [2016]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not

against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We also reject defendant's contention that Supreme Court erred in its instruction to the jury in response to a jury note requesting a legal definition of the word "enter." The court responded to the note by reading a definition from case law, i.e., that "[t]he entry element of burglary is satisfied 'when a person intrudes within a [dwelling], no matter how slightly, with any part of his or her body' " (*People v Sterina*, 108 AD3d 1088, 1090 [4th Dept 2013], quoting *People v King*, 61 NY2d 550, 555 [1984]). We conclude that the court "respond[ed] meaningfully to the jury's request" (*People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]), and that "the charge as a whole adequately conveyed to the jury the appropriate standards" (*People v Adams*, 69 NY2d 805, 806 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

148

KA 16-01486

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER GORDON, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 17, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a forged instrument in the second degree (two counts) and criminal impersonation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). The conviction arises from defendant's use of a forged materials receipt and a forged certificate of insurance while holding himself out as a contractor.

Defendant concedes on appeal that the two documents at issue here, i.e., the materials receipt and certificate of insurance, are "undeniably false," but he contends that his conviction of criminal possession of a forged instrument in the second degree is based on insufficient evidence because, as a matter of law, the two documents do not constitute instruments within the meaning of Penal Law § 170.10 (1). We reject that contention. "A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he [or she] utters or possesses any forged instrument of a kind specified in section 170.10" (§ 170.25). Although neither "materials receipt" nor "certificate of insurance" are on the enumerated list of types of instruments set forth in section 170.10 (1), that section contains a catchall clause concerning "other instrument[s] which do[ ] or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status," which encompasses both of the documents at issue here.

With respect to the forged materials receipt, i.e., a receipt for building materials purportedly purchased from a certain company, an employee from that company testified that the materials receipt was necessary to show it was purchased from the company and to return the materials for a refund. We therefore conclude that the materials receipt "evidence[s] . . . or otherwise affect[s] a legal right, interest, obligation or status" (Penal Law § 170.10 [1]; *see generally People v Watts*, 32 NY3d 358, 364-365 [2018]; *People v DeRue*, 179 AD2d 1027, 1029 [4th Dept 1992]). With respect to the forged certificate of insurance, an insurance expert testified for the People that the falsified certificate of insurance was necessary for defendant to conduct business as a contractor, and that it evidenced a contract of insurance between defendant and the insurance company and thus evidenced defendant's status as an insured. We therefore likewise conclude that the certificate of insurance falls within the catchall clause of section 170.10 (1). Thus, the two documents at issue do constitute "forged instrument[s] of a kind specified in section 170.10" (§ 170.25) and, contrary to defendant's contention, County Court properly denied defendant's motion for a trial order of dismissal (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that a comment from the court during defense counsel's summation deprived defendant of a fair trial is not preserved for our review (*see People v Charleston*, 56 NY2d 886, 887 [1982]; *People v Wilson*, 243 AD2d 316, 316 [1st Dept 1997], *lv denied* 91 NY2d 1014 [1998]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, the court's charge to the jury with respect to the definition of an instrument under Penal Law § 170.10 (1) did not deprive defendant of a fair trial. We note that the court's charge tracked the language of the pattern charge set forth in the Criminal Jury Instructions and conveyed the correct definition to the jury (*see* CJI2d[NY] Penal Law § 170.25; *see generally People v Regan*, 21 AD3d 1357, 1358 [4th Dept 2005]). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

162

KA 19-00074

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMMY L. BROWN, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 5, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted robbery in the first degree (two counts), burglary in the first degree (two counts), criminal use of a firearm in the first degree, attempted robbery in the second degree, attempted grand larceny in the third degree, criminal mischief in the third degree and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), defendant contends that County Court erred in refusing to suppress statements that he made to police investigators because those statements were made after he invoked his right to counsel and he did not thereafter validly waive that right. Specifically, defendant contends that the court was required to suppress several statements that he made to police investigators on July 13, 2017, because he invoked his right to counsel during an interview on July 12. It is undisputed that defendant requested an attorney during the conversation on July 12. Defendant, however, contends that he was placed in custody on July 12 and that the events of July 12-13 comprised a single, continuous block of custodial interrogation by the investigators, and therefore he could not knowingly, voluntarily, and intelligently waive his right to counsel without an attorney present. We conclude that the court properly declined to suppress the statements at issue.

We reject defendant's initial contention that suppression was required because he requested counsel while in custody on July 12. Although defendant is correct that, once an uncharged individual

requests counsel while in police custody, his or her constitutional right to counsel cannot thereafter be waived without counsel present (*see People v Ramos*, 99 NY2d 27, 32-33 [2002]; *People v Cunningham*, 49 NY2d 203, 208-210 [1980]), the court determined that defendant was not in custody on July 12 (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Giving due deference to the court's credibility determinations (*see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]), we conclude that the evidence at the *Huntley* hearing establishes that defendant was not in custody when he requested counsel (*see generally People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *People v Strong*, 27 AD3d 1010, 1012 [3d Dept 2006], *lv denied* 7 NY3d 763 [2006]).

We reject defendant's further contention that the court erred in concluding that he withdrew his request for counsel before speaking with the police investigators on July 13. The Court of Appeals has stated that a defendant who asserts his or her right to counsel while out of custody may later withdraw that assertion without an attorney present and speak to law enforcement agents (*see People v Davis*, 75 NY2d 517, 522-523 [1990]). A hearing court may infer that a defendant has withdrawn a request for counsel when the defendant's conduct unambiguously establishes such a withdrawal, which requires consideration of all relevant factors, including "whether defendant was fully advised of his or her constitutional rights before invoking the right to counsel and subsequently waiving it, whether the defendant who has requested assistance earlier has initiated the further communication or conversation with the police . . . , and whether there has been a break in the interrogation after the defendant has asserted the need for counsel with a reasonable opportunity during the break for the suspect to contact an attorney" (*id.* at 523). Here, defendant was repeatedly advised of his rights, including twice immediately before he resumed speaking with the police. Moreover, after an overnight break in questioning, defendant initiated the conversation with the police to inquire about taking a polygraph examination, and he provided his own transportation to the investigators' office. Consequently, we conclude that the court properly determined that defendant withdrew his assertion of his right to counsel (*see id.*; *People v White*, 27 AD3d 884, 886 [3d Dept 2006], *lv denied* 7 NY3d 764 [2006]; *cf. People v Lewis*, 153 AD3d 1615, 1616-1617 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). We reject defendant's contention that a different result is required because he did not cause the break in the interrogation. The relevant consideration is not which party caused the break in the questioning, rather it is whether there was "a reasonable opportunity during the break for the suspect to contact an attorney" (*Davis*, 75 NY2d at 523), and in this case defendant had such an opportunity during the overnight break in questioning.

Defendant failed to preserve for our review his contention that the court erred in permitting a prosecution witness to testify that the victim was shot by a left-handed shooter and that defendant was left-handed (*see generally People v Houk*, 225 AD2d 1085, 1085 [4th Dept 1996], *lv denied* 90 NY2d 940 [1997]). He also failed to preserve

his contention concerning an alleged violation of his right of confrontation (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant did not request a *Dunaway* hearing and thus failed to preserve his contention that the court erred in failing to conduct one (*see People v Mitchell*, 303 AD2d 422, 423 [2d Dept 2003], *lv denied* 100 NY2d 564 [2003], *reconsideration denied* 100 NY2d 597 [2003]). Similarly, defendant did not request a *Darden* hearing or challenge the identity of the confidential informant (*see People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]), and thus he also failed to preserve his contention that the court erred in failing to conduct such a hearing (*see* CPL 470.05 [2]; *People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). In any event, defendant's contentions that the court erred in failing to conduct those hearings lack merit. The evidence at the suppression hearing establishes that no *Dunaway* hearing was required because defendant's "statement on its face shows probable cause for defendant's arrest, and defendant failed to controvert it" by submitting motion papers addressing the issue (*People v Lopez*, 5 NY3d 753, 754 [2005]; *see People v Bakerx*, 114 AD3d 1244, 1246 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]). Similarly, no *Darden* hearing was necessary because the evidence from the suppression hearing establishes that the police had probable cause to arrest defendant that was independent of any information gleaned from the confidential informant (*see generally People v Farrow*, 98 NY2d 629, 630-631 [2002]).

Defendant further contends that he was denied effective assistance of counsel due to his attorney's failure to object to the testimony regarding the left-handed shooter or to request *Dunaway* and *Darden* hearings. We reject that contention. It is well settled that a defendant is not denied effective assistance of counsel due to his counsel's failure to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), and it is equally well settled that the failure to move for a particular hearing does not, in and of itself, constitute ineffective assistance of counsel, particularly "where, as here, such endeavor was potentially futile" (*People v Jackson*, 48 AD3d 891, 893 [3d Dept 2008], *lv denied* 10 NY3d 841 [2008]; *see People v Smith*, 128 AD3d 1434, 1434-1435 [4th Dept 2015], *lv denied* 26 NY3d 1011 [2015]). Furthermore, defendant "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings" (*People v Dickeson*, 84 AD3d 1743, 1743 [4th Dept 2011], *lv denied* 19 NY3d 972 [2012]; *see People v Markwick*, 178 AD3d 1439, 1440 [4th Dept 2019]; *People v Streeter*, 166 AD3d 1509, 1511 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]; *People v Murphy*, 43 AD3d 1334, 1334 [4th Dept 2007], *lv denied* 9 NY3d 1037 [2008]).

We note that "[d]efendant's challenge to the court's denial of a missing witness charge is unpreserved because defense counsel never

requested the charge" (*People v Roseboro*, 151 AD3d 526, 526 [1st Dept 2017], *lv denied* 30 NY3d 983 [2017]). In any event, we conclude that the "court did not err in refusing to give a missing witness charge with respect to a witness whose testimony would have constituted hearsay" (*People v Cephas*, 107 AD3d 821, 821 [2d Dept 2013], *lv denied* 21 NY3d 1041 [2013]; *see People v Andolina*, 171 AD3d 1201, 1202 [2d Dept 2019], *lv denied* 33 NY3d 1102 [2019]).

Defendant also failed to preserve for our review his contention that the court erred in failing to instruct the jury that a prosecution witness was an accomplice as a matter of law and that his testimony therefore required corroboration (*see People v Taylor*, 57 AD3d 1518, 1518 [4th Dept 2008], *lv denied* 12 NY3d 822 [2009]; *People v Smith-Merced*, 50 AD3d 259, 259 [1st Dept 2008], *lv denied* 10 NY3d 939 [2008]). In any event, even assuming, arguendo, that the prosecution witness was an accomplice as a matter of law, we conclude that "his testimony was sufficiently corroborated by, inter alia, defendant's admissions" (*People v Elder*, 108 AD3d 1117, 1117 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *see People v Reed*, 115 AD3d 1334, 1336 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]; *People v Fortino*, 61 AD3d 1410, 1411 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]). Defendant's related contention that he was denied effective assistance of counsel due to counsel's failure to request such a charge lacks merit inasmuch as it is well settled that an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152 [2005]; *see Elder*, 108 AD3d at 1117).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, contrary to defendant's contention, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury had the opportunity to assess the testimony and credibility of the accomplice, who received favorable treatment in exchange for his testimony (*see People v Pace*, 305 AD2d 984, 985 [4th Dept 2003], *lv denied* 100 NY2d 585 [2003]), as well as the other witnesses, and the jury's credibility determination is entitled to great deference (*see People v Romero*, 7 NY3d 633, 644 [2006]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that "the jury failed to give the evidence the weight it should be accorded" (*People v Jackson*, 162 AD3d 1567, 1567 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]; *see generally Bleakley*, 69 NY2d at 495).

We have considered defendant's remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

191

CA 19-00936

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

MAUREEN LATINI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID P. BARWELL, DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (MATTHEW A. LOUISOS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 5, 2019. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when the vehicle she was driving was rear-ended by a vehicle operated by defendant. Plaintiff alleged that, as a result of the motor vehicle accident, she sustained injuries to her cervical spine and head under, inter alia, the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories as defined in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. Supreme Court denied defendant's motion, and we affirm.

Contrary to defendant's contention, we conclude that the court properly denied his motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. With respect to plaintiff's alleged cervical spine injury, we conclude that defendant met his initial burden on the motion "by submitting evidence that plaintiff sustained only a temporary cervical strain, rather than any significant injury to h[er] nervous system or spine, as a result of the accident" (*Williams v Jones*, 139 AD3d 1346, 1347 [4th Dept 2016]; *see Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]). With respect to plaintiff's alleged head injury, we conclude that defendant met his initial burden by submitting the affirmed report of an expert physician who examined plaintiff on defendant's behalf, wherein the physician opined that plaintiff did not sustain a concussion in the accident or have

postconcussion syndrome (*see Cohen v Bayer*, 167 AD3d 1397, 1401-1402 [3d Dept 2018]; *Flanders v National Grange Mut. Ins. Co.*, 124 AD3d 1035, 1035-1036 [3d Dept 2015]; *Smith v Reeves*, 96 AD3d 1550, 1551 [4th Dept 2012]). Although plaintiff correctly asserts that defendant's expert relied on unsworn medical records and reports, the expert properly relied on medical records and reports prepared by plaintiff's treating physicians in rendering his opinion (*see generally Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 29-30 [2d Dept 2005]) and, even though those records and " 'reports were unsworn, the . . . medical opinion[] relying on . . . [them is] sworn and thus competent evidence' " (*Harris v Carella*, 42 AD3d 915, 916 [4th Dept 2007], quoting *Brown v Dunlap*, 4 NY3d 566, 577 n 5 [2005]; *see generally Cook*, 137 AD3d at 1597). Further, the opinion of defendant's expert physician need not be discounted in its entirety due to the alleged errors in his report. Any "perceived deficiencies therein raised matters of credibility that are not amenable to resolution on a motion for summary judgment" (*Cline v Code*, 175 AD3d 905, 907 [4th Dept 2019]; *see Cook*, 137 AD3d at 1597).

We conclude, however, that plaintiff's submissions in opposition to the motion raised issues of fact whether she sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff submitted, inter alia, the affirmation of her treating physician, who opined that plaintiff sustained cervical spine "sprain/strains" as a result of the accident and examinations of plaintiff conducted almost four years after the accident revealed "severe muscle spasms," which constitute objective evidence of injury (*see Armella v Olson*, 134 AD3d 1412, 1413 [4th Dept 2015]; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543 [4th Dept 2011]). With respect to plaintiff's alleged head injury, her treating physician opined that plaintiff was properly diagnosed with a concussion and postconcussion syndrome, and he opined that plaintiff continued to suffer from those conditions four years after the accident. "It is well settled that 'postconcussion syndrome, posttraumatic headaches, and cognitive dysfunction' as a result of a collision *can* constitute a significant limitation" (*Snyder v Daw*, 175 AD3d 1045, 1047 [4th Dept 2019]; *see Jackson v Mungo One*, 6 AD3d 236, 236 [1st Dept 2004]). Moreover, plaintiff testified at her deposition, which occurred three years after the accident, that she continued to suffer from her accident-related injuries, and thus an issue of fact exists whether plaintiff's injuries are permanent (*see Snyder*, 175 AD3d at 1047). Viewing the evidence in the light most favorable to plaintiff, we conclude that issues of fact exist that preclude summary judgment (*see id.*; *Flanders*, 124 AD3d at 1037-1038).

Finally, with respect to the 90/180-day category, we reject defendant's contention that he met his initial burden of establishing that plaintiff was able to perform substantially all of the material acts that constituted her usual and customary daily activities during no less than 90 days of the 180 days following the accident (*see generally* Insurance Law § 5102 [d]). "To qualify as a serious injury

under the 90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . [,] as well as evidence that plaintiff's activities were curtailed to a great extent" (*Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011] [internal quotation marks omitted]). Defendant's own submissions included evidence that plaintiff was out of work approximately nine months following the accident and that plaintiff was unable to do her daily activities, such as simple chores, during that time period (*see id.*). Because defendant failed to meet his initial burden on the motion with respect to the 90/180-day category, there is "no need to consider the sufficiency of plaintiff's opposition thereto" (*Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

192

CAF 18-02040

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JANETTE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JULIE G., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 16, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. We affirm.

We reject the mother's contention that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into [his or her] care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596,

1597 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *see generally* § 384-b [3] [g] [i]). The mother contends that, because of her possible mental health issues, petitioner was required to do more than merely provide her referrals for services and leave her to manage them on her own. However, petitioner's evidence established that it did more than just give her referrals. Among other things, petitioner regularly checked the mother's progress, repeatedly encouraged her to actively participate in the recommended services despite her unwillingness to do so and her refusal to accept the need for those services, and attempted to send the mother transportation stipends. Thus, petitioner provided what services it could under the circumstances presented here (*see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1305-1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]; *Matter of Holden W. [Kelly W.]*, 81 AD3d 1390, 1390 [4th Dept 2011], *lv denied* 16 NY3d 712 [2011]).

Contrary to the further contention of the mother, we conclude that, despite petitioner's diligent efforts, the mother failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). "At a minimum, parents must 'take steps to correct the conditions that led to the removal of the child from their home' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *see Matter of Crystal Q.*, 173 AD2d 912, 913 [3d Dept 1991], *lv denied* 78 NY2d 855 [1991]). Here, " 'there is no evidence that [the mother] had a realistic plan to provide an adequate and stable home for the child[ ]' " (*Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020]; *see Matter of Micah Zyair F.W. [Tiffany L.]*, 110 AD3d 579, 579 [1st Dept 2013]).

Finally, the record supports Family Court's decision to terminate the mother's parental rights rather than to grant a suspended judgment " 'inasmuch as any progress made by the [mother] prior to the dispositional determination was insufficient to warrant any further prolongation of the [child's] unsettled familial status' " (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627-1628 [4th Dept 2017], *lv denied* 20 NY3d 911 [2018]; *see Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

197

CA 19-00854

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

CHRISTA CONSTRUCTION, LLC, PLAINTIFF-RESPONDENT,

V ORDER

VANGUARD LIGHT GAUGE STEEL BUILDINGS, A DIVISION OR SUBSIDIARY OF SHELTER2HOME, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KUSHNICK PALLACI PLLC, BOHEMIA (JEFFREY A. LHUILLIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered November 6, 2018. The order, among other things, struck defendant's answer and counterclaims, granted plaintiff judgment on the issue of liability on its first cause of action for breach of contract, and set a date for an inquest on damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

198

CA 19-01793

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

CHRISTA CONSTRUCTION, LLC, PLAINTIFF-RESPONDENT,

V ORDER

VANGUARD LIGHT GAUGE STEEL BUILDINGS, A DIVISION OR SUBSIDIARY OF SHELTER2HOME, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KUSHNICK PALLACI PLLC, BOHEMIA (JEFFREY A. LHUILLIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 7, 2019. The order awarded plaintiff damages in the amount of $82,270.24 plus interest from November 26, 2014.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

199

CA 19-01912

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

CHRISTA CONSTRUCTION, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VANGUARD LIGHT GAUGE STEEL BUILDINGS, A DIVISION OR SUBSIDIARY OF SHELTER2HOME, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

KUSHNICK PALLACI PLLC, BOHEMIA (JEFFREY A. LHUILLIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 19, 2019. The judgment awarded plaintiff the sum of $114,468.11.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Defendant appeals from a judgment entered following an inquest on damages, which was held after Supreme Court granted plaintiff's motion to strike defendant's answer and counterclaims based on its failure to comply with discovery demands. On appeal, defendant contends that the court erred in striking its answer and counterclaims. We conclude that the appeal must be dismissed. "It is incumbent upon an appellant to assemble a proper record, including the relevant documents that were before the lower court, and appeals will be dismissed when the record is incomplete" (*Matter of Pratt v Anthony*, 30 AD3d 708, 708 [3d Dept 2006]; *see Fink v Al-Sar Realty Corp.*, 175 AD3d 1820, 1820-1821 [4th Dept 2019]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Specifically, "[t]he record on appeal 'must include any relevant transcripts of proceedings before the [court]' " (*Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, 1586 [4th Dept 2011], *lv dismissed in part and denied in part* 17 NY3d 899 [2011], *rearg denied* 18 NY3d 878 [2012]). Here, defendant failed to include in the record transcripts of several court appearances during which counsel for the parties discussed, inter alia, whether defendant complied with a conditional order to strike and, if not, whether it demonstrated a reasonable excuse for that failure and the existence of a meritorious defense to the action (*see generally Legarreta v Neal*, 108 AD3d 1067, 1070 [4th Dept 2013]). Without those

transcripts, this Court cannot undertake meaningful review of defendant's contentions on appeal (*see Vanyo v Vanyo*, 120 AD3d 1536, 1537 [4th Dept 2014]), and we thus dismiss the appeal (*see Mergl*, 19 AD3d at 1147).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

212

CAF 18-00354

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DANTE S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T. AND TIMOTHY S.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT-APPELLANT KATHERYNE T.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT TIMOTHY S.

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Chautauqua County (Michael F. Griffith, A.J.), entered August 9, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had derivatively neglected the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Matter of Dante S. [Kathryne T.]*, ([appeal No. 2] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

213

CAF 18-00749

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DANTE S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T. AND TIMOTHY S.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT-APPELLANT KATHRYNE T.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT TIMOTHY S.

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Chautauqua County (Michael F. Griffith, A.J.), entered January 26, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the subject child's placement with petitioner.

It is hereby ORDERED that said appeal of respondent Kathryne T. from the order insofar as it concerns disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother and respondent father each appeal from an order entered after a fact-finding hearing that found that the subject child, their youngest, had been derivatively neglected (*see* Family Ct Act § 1012 [f] [i] [B]). In appeal No. 2, respondents each appeal from an order of disposition that, inter alia, determined that it would be in the child's best interests to remain in the care of petitioner.

Respondents' appeals from the order in appeal No. 1 must be dismissed inasmuch as the appeals from the dispositional order in appeal No. 2 bring up for review the propriety of the fact-finding order in appeal No. 1 (*see Matter of Jaime D. [James N.]* [appeal No. 2], 170 AD3d 1524, 1525 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]).

Contrary to the respondents' contentions in appeal No. 2, we conclude that the court properly determined that the subject child is

a derivatively neglected child. Petitioner presented evidence that two of respondents' other children were determined to be neglected children (*see Matter of Amber C.*, 38 AD3d 538, 540 [2d Dept 2007], *lv denied* 8 NY3d 816 [2007], *lv dismissed* 11 NY3d 728 [2008]; *see generally* Family Ct Act § 1046 [a] [i]), as well as evidence of respondents' inability to make consistent changes regarding their self-prioritizing, their continued failure to manage daily living without the assistance of third-parties, and their ongoing mental health issues (*see Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1439 [4th Dept 2011]). Petitioner further established that " 'the neglect . . . of the child's older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed' " (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568 [4th Dept 2014]; *see Matter of Sasha M.*, 43 AD3d 1401, 1402 [4th Dept 2007]). Thus, contrary to respondents' contentions, there was sufficient evidence to establish that respondents derivatively neglected the subject child inasmuch as " 'the evidence of . . . neglect of [the older] child[ren] indicates a fundamental defect in [the parents'] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [their] care' " (*Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1514 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]).

The mother further contends on her appeal that the court erred in continuing the child's placement with petitioner. The mother's appeal from the order in appeal No. 2 insofar as it concerns the disposition must be dismissed as moot, however, because that part of the order has expired by its terms (*see Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136 [4th Dept 2013]).

We have considered the father's remaining contentions on his appeal and conclude that none warrants reversal or modification of the order in appeal No. 2.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

217

CA 19-00460

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF
LAURENCE GUTTMACHER, M.D., CLINICAL DIRECTOR
OF ROCHESTER PSYCHIATRIC CENTER, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT,

FOR AN ORDER AUTHORIZING THE INVOLUNTARY
TREATMENT OF JAMES M., RESPONDENT-APPELLANT.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (JANINE E. RELLA OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, A.J.), entered January 14, 2019. The order authorized the Rochester Psychiatric Center to administer medication to respondent over his objection.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking, inter alia, authorization to administer antipsychotic and mood-stabilizing medications to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734-1735 [4th Dept 2009]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). We conclude that Supreme Court properly granted the petition. Contrary to respondent's contention, petitioner met his burden of establishing by clear and convincing evidence that respondent lacks "the capacity to make a reasoned decision with respect to [the] proposed treatment" (*Rivers*, 67 NY2d at 497). Petitioner's evidence included proof that respondent suffered from, inter alia, bipolar disorder and antisocial personality disorder with narcissistic tendencies and that respondent was delusional and lacked insight regarding his illness (*see Matter of William S.*, 31 AD3d 567, 568 [2d Dept 2006]; *Matter of Mausner v William E.*, 264 AD2d 485, 486 [2d Dept 1999]). Indeed, petitioner established that respondent believed that he had cured himself of any mental illness whatsoever, thereby highlighting that respondent was unable even to perceive his mental illness, much less understand its effect on him and those around him (*see Sawyer*, 68 AD3d at 1734; *Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 426 [2d Dept 2006]; *Matter of McConnell*, 147 AD2d 881, 882 [3d Dept 1989], *lv*

dismissed in part and denied in part 74 NY2d 759 [1989]). Although an expert physician testified on respondent's behalf that respondent does not suffer from any mental illness that is amenable to treatment, we perceive no reason to disturb the court's findings to the contrary based on petitioner's evidence (*see Matter of Beverly F. [Creedmoor Psychiatric Ctr.]*, 150 AD3d 998, 998 [2d Dept 2017]; *William S.*, 31 AD3d at 568). We reject respondent's related contention that the physician testifying in support of the petition gave conclusory or insufficient testimony on the issue of respondent's capacity (*cf. Matter of Michael L.*, 26 AD3d 381, 382 [2d Dept 2006]).

Contrary to respondent's further contention, petitioner established by clear and convincing evidence that the proposed treatment was "narrowly tailored to give substantive effect to [his] liberty interest" (*Rivers*, 67 NY2d at 497; *see Sawyer*, 68 AD3d at 1735). An evaluation prepared by respondent's treating physician in support of the petition outlined for the court the medications that the physician proposed using for respondent's treatment, including the order in which such medications would be tried in the event that some were not tolerated by respondent or were ineffective. The evaluation further outlined the proposed benefits of treatment and any reasonably foreseeable adverse effects, and it also included other precautions such as monitoring respondent for adverse side effects through, inter alia, regular blood work and organ function tests. Another physician testifying in support of the petition stated that dosages of the medications "generally start low . . . often below . . . the recommended dose" to allow the treatment providers to observe and minimize any side effects. Moreover, the court's treatment order requires reports from respondent's treating hospital every three months after treatment is commenced so that the court can monitor the progress of respondent's treatment, and the court left open the possibility that the treatment order could be terminated if the court determines that respondent is not benefitting from continued treatment.

We have examined respondent's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

219

CA 19-00335

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

ROGER DOYLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE A. NOLE AND SON, INC.,
DEFENDANT-RESPONDENT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), dated February 8, 2019. The order granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, a subcontractor on a construction project, commenced this action seeking compensation, under several legal theories, for extra work performed on the project. He appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

Initially, we note that plaintiff does not address in his brief the propriety of the dismissal of his claims for recovery under theories of quantum meruit or account stated, and thus plaintiff has abandoned any issue with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

With respect to the remaining claims, we conclude that defendant met its initial burden on the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "It is well settled that [c]ontract clauses that require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties . . . are . . . conditions precedent to suit or recovery" (*Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1352 [4th Dept 2014] [internal quotation marks omitted]), and "a condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' " (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d

640, 645 [2009]; *see Accadia Site Contr., Inc.*, 115 AD3d at 1352). Here, defendant established that the parties entered into a written subcontract for a construction project and that defendant paid plaintiff the full amount due under the subcontract plus additional amounts for extra work that was pre-approved by defendant. Defendant further established that the subcontract provided that plaintiff would be compensated only for extra work that had been previously approved in writing by defendant's principal, that plaintiff was required to submit written notice of claim for payment for such extra work within 10 days of receiving notice that the extra work was required, and that plaintiff's "claim for price adjustment shall be waived" if no such written notice of claim was timely provided. Finally, defendant established that plaintiff neither received a written change order for the extra work that is the subject of this action nor submitted a timely notice of claim regarding such work.

Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Even assuming, arguendo, that the document that plaintiff prepared and allegedly showed to defendant's principal was sufficient to constitute a written claim within the meaning of the contract, we conclude that, by "failing to submit any evidence demonstrating which work was performed pursuant to the original fixed price contract, and which work was performed in addition to the work contemplated in the original contract, plaintiff failed to establish [his] right to recover for the extra work performed" (*Ludemann Elec., Inc. v Dickran*, 74 AD3d 1155, 1156 [2d Dept 2010]). Consequently, plaintiff failed to "raise an issue of fact whether [he] performed the extra work with the implied or express promise that [he] would be paid for it over and above the subcontract amount" (*Adonis Constr., LLC v Battle Constr., Inc.*, 103 AD3d 1209, 1210-1211 [4th Dept 2013]).

Finally, we conclude that plaintiff failed to submit evidence that would raise a triable issue of fact "that defendant, by its words or conduct, waived the written notice of claim provision or told plaintiff that the claim did not have to be in writing" (*Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc.*, 16 AD3d 813, 815 [3d Dept 2005]).

We have considered plaintiff's remaining contentions and conclude that they lack merit.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

226

KA 18-00668

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS MARTIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 4, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that the waiver of the right to appeal is invalid and that County Court erred in denying his suppression motion. Contrary to defendant's contention, the waiver of the right to appeal is valid because during the colloquy the court established, through more than a mere single reference, that the right to appeal was "separate and distinct" from those rights automatically forfeited by the plea (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Richards*, 93 AD3d 1240, 1240 [4th Dept 2012], *lv denied* 20 NY3d 1014 [2013]), and the court's language did not " 'mischaracterize[] the nature of the right . . . defendant [was] being asked to cede' " (*People v Smalley*, 38 AD3d 1281, 1282 [4th Dept 2007]). Moreover, the court ascertained on the record that defendant had reviewed and signed the written waiver of the right to appeal (*see People v Elmer*, 19 NY3d 501, 510 [2012]), which explained in detail the right that he was waiving.

The valid waiver of the right to appeal encompasses defendant's challenges to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *People v Beardsley*, 173 AD3d

1722, 1723 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

244

CA 19-00826

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

AMANDA TAYLOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KWIK FILL - RED APPLE A DIVISION AND WHOLLY OWNED SUBSIDIARY OF UNITED REFINING COMPANY, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JON LOUIS WILSON, LOCKPORT (JON LOUIS WILSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 1, 2019. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she sustained when she fell in a snowy parking lot in the Village of Medina. Defendant moved for summary judgment dismissing the complaint, contending that it had no duty to clear ice and snow from the lot because there was a storm in progress at the time of the fall. Defendant's evidentiary submissions included the affidavit of a meteorologist, who opined within a reasonable degree of professional certainty that it was snowing in Medina at the time of the fall. The data on which the meteorologist relied included weather records from Buffalo, Rochester, and Niagara Falls, and observations made in Lyndonville, Albion, and Lockport, but defendant's meteorologist did not rely on records from or observations made in Medina. In opposition, plaintiff submitted the affidavit of a different meteorologist, who opined that based on the available data there was no way to state within a reasonable degree of professional certainty that it was snowing in Medina at the time of the fall.

Contrary to defendant's contention, we conclude that Supreme Court properly denied the motion. Defendant failed to meet its initial burden of establishing that there was a storm in progress at the time of the fall (*see Govenettio v Dolgencorp of N.Y., Inc.*, 175 AD3d 1805, 1806 [4th Dept 2019]; *Casey-Bernstein v Leach & Powers, LLC*, 170 AD3d 651, 652 [2d Dept 2019]), particularly because the

opinion of defendant's meteorologist has "no evidentiary support in the record" (*Wrobel v Tops Mkts., LLC*, 155 AD3d 1591, 1592 [4th Dept 2017] [internal quotation marks omitted]). Furthermore, defendant failed to meet its initial burden of establishing that it lacked actual or constructive notice of the dangerous condition (*see Dolinar v Kaleida Health*, 155 AD3d 1576, 1577 [4th Dept 2017]; *Depczynski v Mermigas*, 149 AD3d 1511, 1512 [4th Dept 2017]). Because defendant failed to meet its initial burden, the court properly denied the motion regardless of the sufficiency of plaintiff's opposing submissions (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

275.1

CA 19-01071

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

DARRYL L. MACKAY AND JOANNE MACKAY, PLAINTIFFS,

V MEMORANDUM AND ORDER

155 EAST MAIN ST., LLC, ET AL., DEFENDANTS.

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155 EAST MAIN ST., LLC, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

DHD VENTURES MANAGEMENT COMPANY, INC., THIRD-PARTY DEFENDANT, COMFORT SYSTEMS USA (SYRACUSE), INC., DOING BUSINESS AS BILLONE MECHANICAL CONTRACTORS, THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 1, 2019. The order, among other things, granted the motion of defendant-third-party plaintiff in part, granted third-party plaintiff leave to amend the third-party complaint, precluded third-party defendant Comfort Systems USA (Syracuse), Inc., doing business as Billone Mechanical Contractors, from introducing any evidence at trial on the issue of contractual indemnification and imposed sanctions on nonparty Lisa J. Black, Esq.

It is hereby ORDERED that said appeal from the order insofar as it imposed sanctions on nonparty Lisa J. Black, Esq. is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiffs commenced an action against defendant-third-party plaintiff (155 East Main), among others, seeking damages for injuries Darryl L. MacKay (plaintiff) sustained as a result of an accident at a construction site on property owned by 155 East Main. That action has settled. After being sued by plaintiffs, 155 East Main commenced a third-party action and, as relevant to this appeal,

asserted a cause of action for contractual indemnification against third-party defendant Comfort Systems USA (Syracuse), Inc., doing business as Billone Mechanical Contractors (Billone), which was plaintiff's employer and a subcontractor on the project. Thereafter, 155 East Main filed motions seeking, inter alia, sanctions against Billone pursuant to CPLR 3126 and costs and attorneys' fees pursuant to 22 NYCRR 130-1.1 (sanctions motion) and seeking summary judgment on its contractual indemnification cause of action against Billone.

In appeal No. 1, Billone appeals from an order that, inter alia, granted the sanctions motion in part, precluded Billone from introducing evidence at trial on the issues of its subcontract and contractual indemnification, and sanctioned Billone's attorney for, among other things, frivolous motion practice. In appeal No. 2, 155 East Main appeals from a further order that denied 155 East Main's motion for summary judgment. We affirm in both appeals.

Initially, we conclude that Billone's contention in appeal No. 1 that Supreme Court erred in imposing sanctions on its attorney is not properly before us. The attorney did not appeal from the order in appeal No. 1, and therefore the appeal from that order insofar as it imposed sanctions on the attorney must be dismissed because Billone "is not aggrieved by that portion of the order" (*Vigo v 501 Second St. Holding Corp.*, 100 AD3d 872, 873 [2d Dept 2012]; *see* CPLR 5511; *Scopelliti v Town of New Castle*, 92 NY2d 944, 945 [1998]; *Matter of Kyle v Lebovits*, 58 AD3d 521, 521 [1st Dept 2009], *lv dismissed in part and denied in part* 13 NY3d 765 [2009], *cert denied* 559 US 938 [2010]).

For reasons stated in the decision at Supreme Court, we reject Billone's further contention in appeal No. 1 that the court erred in precluding it from introducing the evidence at issue.

In appeal No. 2, 155 East Main contends that the court erred in denying its motion for summary judgment on its cause of action for contractual indemnification against Billone. We reject that contention. Pursuant to its subcontract with the project's general contractor, Billone is obligated to indemnify 155 East Main, among others, against any liability "caused by the negligent acts or omissions" of Billone. 155 East Main failed to meet its initial burden on the motion of establishing as a matter of law "that the negligence of [Billone] was a proximate cause of the accident" (*Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 755 [2d Dept 2014]; *see also Anton v West Manor Constr. Corp.*, 100 AD3d 523, 524 [1st Dept 2012]), and the "[f]ailure to make such a [prima facie] showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Mastrogiacomo v Geoghan*, 129 AD3d 1035, 1036-1037 [2d Dept 2015]; *see also 291 Broadway Realty Assoc. v Weather Wise Conditioning Corp.*, 118 AD3d 469, 470 [1st Dept 2014]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

275

KA 14-00854

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRIEN E. WILSON, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 7, 2013. The appeal was held by this Court by order entered June 16, 2017, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (151 AD3d 1836 [4th Dept 2017]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to make and state for the record a determination of whether defendant is a youthful offender (*People v Wilson*, 151 AD3d 1836, 1837 [4th Dept 2017]; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]). On remittal, the court denied defendant youthful offender treatment. Specifically, it found that there were no mitigating circumstances bearing directly on the manner in which the crime was committed and, therefore, defendant was not an eligible youth upon his conviction of criminal sexual act in the first degree (Penal Law § 130.50 [3]), an offense in which he was the sole participant (*see* CPL 720.10 [2] [a] [iii]; [3]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). We conclude that the court did not thereby abuse its discretion (*see generally Middlebrooks*, 25 NY3d at 526-527; *People v Garcia*, 84 NY2d 336, 342-343 [1994]; *People v Dukes*, 156 AD3d 1443, 1443 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]).

Similarly, we conclude that the court did not abuse its discretion in refusing to grant defendant's request for an updated presentence report (*see generally People v Kuey*, 83 NY2d 278, 282-283 [1994]; *People v Campbell*, 111 AD3d 1253, 1253-1254 [4th Dept 2013], *lv denied* 23 NY3d 1018 [2014]). Here, even though seven years had

elapsed since the preparation of the original presentence report, the court had before it all the information necessary regarding the manner in which the crime was committed to make a determination of defendant's eligibility for youthful offender treatment (*see People v Perry*, 278 AD2d 933, 933 [4th Dept 2000], *lv denied* 96 NY2d 866 [2001]; *People v Allen W.*, 129 AD2d 867, 868 [3d Dept 1987]; *cf. People v Jarvis*, 170 AD3d 1622, 1623 [4th Dept 2019]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

276

KA 19-00334

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEQUAWN R. MCKENZIE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 19, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v McKenzie* ([appeal No. 2] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

277

KA 19-00926

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEQUAWN R. MCKENZIE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 23, 2019. The judgment convicted defendant of criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the matter is remitted to Jefferson County Court for further proceedings on the indictment.

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), as a lesser included offense of criminal sale of a controlled substance (CSCS) in the third degree, charged in count one of the indictment. After sentence was imposed in that matter, County Court learned that the sentence was illegal because defendant had a prior violent felony conviction, rather than a prior felony conviction as the prosecution had alleged in a second felony offender information. Consequently, the court directed that the matter be restored to the docket, granted the prosecution's motion to vacate the plea of guilty with defendant's consent, and granted the prosecution's further motion to amend the second felony offender information to a second violent felony offender information. The court then sentenced defendant as a second violent felony offender upon his conviction, purportedly entered on his plea of guilty, of CSCS in the fifth degree (§ 220.31), as a lesser included offense of count one of the indictment. In appeal No. 2, defendant appeals from the judgment entered upon that conviction.

Initially, we conclude that inasmuch as the court, with defendant's consent, vacated the judgment in appeal No. 1, defendant's appeal from that judgment is moot and therefore must be dismissed (*see*

People v Wilson, 159 AD3d 1542, 1542 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Pimental*, 189 AD2d 788, 788 [2d Dept 1993]).

In appeal No. 2, defendant contends that he did not actually plead guilty to the amended charge of CSCS in the fifth degree and thus the judgment of conviction in that appeal must be reversed. Initially, assuming, arguendo, that defendant's waiver of the right to appeal the judgment in appeal No. 1 would apply to the judgment in appeal No. 2, we conclude that, as defendant correctly contends and as the People correctly concede, the waiver is invalid (*see People v Bumpars*, 178 AD3d 1379, 1379-1380 [4th Dept 2019]; *People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]). Furthermore, although defendant failed to preserve his contention that he never entered a plea of guilty to CSCS in the fifth degree, "defendant's claims . . . implicat[e] rights of a constitutional dimension directed to the heart of the proceedings—i.e., a mode of proceedings error for which preservation is not required" (*People v Tyrell*, 22 NY3d 359, 364 [2013]). Additionally, no preservation is required here inasmuch as "defendant could not have brought a CPL 220.60 (3) plea withdrawal motion . . . because the [purported] plea and sentence occurred during the same proceeding, [and] he could not have filed a CPL 440.10 motion because the error . . . was 'clear from the face of the . . . record' " (*id.*; *see People v Conceicao*, 26 NY3d 375, 382 [2015]).

With respect to the merits, we agree with defendant that the record establishes that he did not enter a plea of guilty in appeal No. 2. After granting, with defendant's consent, the prosecutor's motion to withdraw defendant's plea in appeal No. 1 to attempted CSCS in the third degree, the court inquired about defendant's statements at the time of that plea and then sentenced defendant on a different crime, i.e., CSCS in the fifth degree. Thus, we conclude that "no plea proceeding had taken place[in appeal No. 2 and, i]nasmuch as there is no conviction (*see generally* CPL 1.20 [13]), . . . the subsequent sentence . . . and the imposition of a term of imprisonment are void" (*People v Vanalst* [appeal No. 1], 148 AD3d 1658, 1658 [4th Dept 2017]; *cf. People v Keitz*, 99 AD3d 1254, 1255 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013], *reconsideration denied* 21 NY3d 913 [2013], *cert denied* 571 US 993 [2013]; *see also People v Beniquez*, 110 AD3d 1143, 1144 [3d Dept 2013]). Consequently, we reverse the judgment in appeal No. 2 and remit the matter to County Court for further proceedings on the indictment (*see Vanalst*, 148 AD3d at 1658; *see generally Tyrell*, 22 NY3d at 366).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

283

KA 18-00411

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERRY TOLBERT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRITTNEY CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 7, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his conviction of that crime is not supported by legally sufficient evidence because the People failed to establish his intent to sell the drugs that were found in his apartment. We reject that contention. The jury was entitled to infer defendant's intent to sell the drugs based on the quantity of cocaine found in the apartment, i.e., an aggregate weight of 2.291 grams; the division of the drugs into a bulk amount hidden in the battery compartment of a toy and a smaller amount kept by the apartment door; and the presence of packaging materials and a digital scale (*see People v Freeman*, 28 AD3d 1161, 1162 [4th Dept 2006], *lv denied* 7 NY3d 788 [2006]; *see also People v Hicks*, 172 AD3d 1938, 1939 [4th Dept 2019]).

Furthermore, viewing the evidence in light of the elements of that count as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict convicting him of that count is not against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "The contention of defendant at trial that the drugs could have been for his personal use merely raised an issue of credibility for the

jury to resolve" (*People v Bell*, 296 AD2d 836, 837 [4th Dept 2002], *lv denied* 98 NY2d 766 [2002]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

286

CAF 18-01791

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF JESSICA CHASE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SILVIA CHASE, RESPONDENT-RESPONDENT,
ROSE CHASE, RESPONDENT-APPELLANT,
AND PATRICIA A. MOONEY-TIRAO, RESPONDENT.
(APPEAL NO. 1.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH S. DRESSNER, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 20, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted joint custody of the subject child to petitioner and respondent Silvia Chase.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Matter of Chase v Chase* ([appeal No. 3] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

287

CAF 18-01792

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF ATTORNEY FOR THE CHILD
JOSEPH S. DRESSNER, ESQ., ON BEHALF OF THE
MINOR CHILD, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. MOONEY-TIRAO, SILVIA CHASE,
RESPONDENTS-RESPONDENTS,
ROSE M. CHASE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH S. DRESSNER, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 20, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that respondent Patricia A. Mooney-Tirao's visitation with the subject child be supervised.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Matter of Chase v Chase* ([appeal No. 3] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

288

CAF 18-01794

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF ROSE M. CHASE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SILVIA CHASE AND PATRICIA A. MOONEY-TIRAO,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

JOSEPH S. DRESSNER, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 20, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the petition to modify a prior order of custody and visitation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and substituting therefor the language in the first ordering paragraph of the order of Family Court, Ontario County, entered on May 26, 2015, and as modified the order is affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 6, Rose M. Chase (mother), a respondent in appeal Nos. 1 and 2 and the petitioner in appeal No. 3, appeals from three orders. In the order in appeal No. 1, Family Court, inter alia, granted the petition of petitioner Jessica Chase, the subject child's paternal aunt, seeking joint custody of the child. In the order in appeal No. 2, the court, inter alia, granted the petition of petitioner Attorney for the Child (AFC) seeking to modify the prior order of custody and visitation (prior order) by reducing the visitation of respondent Patricia A. Mooney-Tirao, the child's maternal grandmother, to one supervised visit per month with the child. In the order in appeal No. 3, the court, among other things, summarily dismissed the mother's petition seeking modification of the prior order by, inter alia, allowing her to communicate with the child.

We note that the mother is currently incarcerated on her conviction of murder in the second degree for killing the child's father (*see People v Chase*, 158 AD3d 1233 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]), and her access to the child consists only of

receiving the child's report cards and his photographs from school and extracurricular activities. Thus, the orders in appeal Nos. 1 and 2 did not alter the mother's circumstances or "otherwise affect[her] legal rights or direct interests" (*Matter of Cheryle HH. v Benjamin II.*, 174 AD3d 983, 984 [3d Dept 2019]), and we therefore dismiss those appeals inasmuch as she is not aggrieved by those orders (*see* CPLR 5511; *Cheryle HH.*, 174 AD3d at 984; *Matter of Johnson v Jimerson*, 171 AD3d 1498, 1499 [4th Dept 2019]).

Contrary to the mother's contention in appeal No. 3, the court properly dismissed her modification petition without a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order . . . and, here, the [mother] failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Gworek v Gworek* [appeal No. 1], 158 AD3d 1304, 1304 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Noble v Paris*, 143 AD3d 1288, 1288-1289 [4th Dept 2016], *lv denied* 29 NY3d 904 [2017]). Moreover, the mother failed to set forth allegations rebutting the presumption in Domestic Relations Law § 240 (1-c) that visitation is not in the child's best interests (*see Matter of Pajek v Feketi*, 170 AD3d 1625, 1626 [4th Dept 2019]).

We agree with the mother, however, that there is a conflict between the order in appeal No. 3 and the court's oral decision. In its decision, the court directed that the provisions in an order entered on May 26, 2015 regarding the mother's access to the child's report cards and his photographs from school and extracurricular activities, which the mother was to receive via the AFC, "will continue." In the order in appeal No. 3, however, the court ordered that the mother "shall continue to receive an annual school picture of the child . . . , as well as a copy of his report card, with said items to [be] provided directly from the child's school." Thus, the order in appeal No. 3 altered the materials to which the mother is entitled and the method by which she is to receive those materials, and it must therefore be modified to conform with the May 26, 2015 order (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

295

CA 19-01649

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

DARRYL L. MACKAY AND JOANNE MACKAY, PLAINTIFFS,

V MEMORANDUM AND ORDER

155 EAST MAIN ST., LLC, ET AL., DEFENDANTS.

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155 EAST MAIN ST., LLC, THIRD-PARTY PLAINTIFF-APPELLANT,

V

DHD VENTURES MANAGEMENT COMPANY, INC., THIRD-PARTY DEFENDANT, AND COMFORT SYSTEMS USA (SYRACUSE), INC., DOING BUSINESS AS BILLONE MECHANICAL CONTRACTORS, THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered August 7, 2019. The order denied defendant-third-party plaintiff's motion for summary judgment against third-party defendant Comfort Systems USA (Syracuse), Inc., doing business as Billone Mechanical Conractors.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *MacKay v 155 East Main St., LLC* ([appeal No. 1] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

298

KA 19-00862

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALTON WILKE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered January 29, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends, and the People correctly concede, that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders or the People (*see People v Chrisley*, 172 AD3d 1914, 1915-1916 [4th Dept 2019]; *People v Hackett*, 89 AD3d 1479, 1480 [4th Dept 2011]). The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment (*see* § 168-n [3]; *People v David W.*, 95 NY2d 130, 136-138 [2000]). Here, no allegations were made either in the risk assessment instrument (RAI) or by the People at the SORA hearing that defendant should be assessed 30 points under risk factor 3, and defendant learned of the assessment of the additional points under that risk factor for the first time when the court issued its decision (*see Chrisley*, 172 AD3d at 1916; *Hackett*, 89 AD3d at 1480).

Even assuming, arguendo, that the harmless error doctrine applies in this context (*see People v Baxin*, 26 NY3d 6, 11 [2015]), the error here cannot be deemed harmless inasmuch as we further agree with defendant that the court's alternative basis for the risk level determination also violated defendant's right to due process. The

court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Because those factors were not presented as bases for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to them (*see generally People v Baldwin*, 139 AD3d 1352, 1353-1354 [4th Dept 2016]). We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights (*see Chrisley*, 172 AD3d at 1916; *Hackett*, 89 AD3d at 1480).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

305

KA 15-00983

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE GRAY, ALSO KNOWN AS WILLIE L. GRAY,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered March 6, 2015. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). We affirm. County Court's oral colloquy, together with " 'all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused,' " reveal that defendant's waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *4 [2019], quoting *People v Seaberg*, 74 NY2d 1, 11 [1989]). Because defendant's waiver of the right to appeal was "manifestly intended" to cover all waivable aspects of the case, his challenge to the court's suppression ruling is precluded (*People v Kemp*, 94 NY2d 831, 833 [1999]; *see People v Sampson*, 156 AD3d 1484, 1484 [4th Dept 2017], *lv denied* 31 NY3d 1017 [2018]; *People v Payne*, 148 AD3d 1226, 1227 [3d Dept 2017], *lv denied* 29 NY3d 1084 [2017]). We note that the certificate of conviction incorrectly states that defendant was sentenced on March 6, 2025, and it must be amended to reflect the correct sentencing date of March 6, 2015 (*see People v Curtis*, 162 AD3d 1758, 1758 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

315

CA 19-01322

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THEODORE NALBONE AND JENNIFER NALBONE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VANDERBILT PROPERTIES, INC., AND DAVID HOME
BUILDERS, INC., DEFENDANTS-RESPONDENTS.

VANDERBILT PROPERTIES, INC, THIRD-PARTY
PLAINTIFF,

V

CMC CONCRETE, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.

DAVID HOME BUILDERS, INC.,
THIRD-PARTY PLAINTIFF,

V

CMC CONCRETE, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

TREVETT CRISTO, ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 24, 2019. The order and judgment, among other things, dismissed the complaint in its entirety.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages

for injuries that Theodore Nalbone (plaintiff) sustained while working on a construction project. Plaintiffs appeal from an order and judgment that, inter alia, effectively denied their cross motion for partial summary judgment on their Labor Law § 240 (1) cause of action and granted those parts of the respective motion and cross motion of defendants-third-party plaintiffs and of third-party defendant CMC Concrete, LLC (collectively, defendants) for summary judgment dismissing the section 240 (1) and 241 (6) causes of action. We affirm.

Contrary to plaintiffs' contention, Supreme Court properly concluded that section 240 (1) is inapplicable to this case because plaintiff was not injured as a result of an elevation-related risk (*see Desharnais v Jefferson Concrete Co., Inc.*, 35 AD3d 1059, 1060 [3d Dept 2006]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]). Contrary to plaintiffs' further contention, the court properly determined that defendants were entitled to judgment as a matter of law on the section 241 (6) cause of action inasmuch as defendants demonstrated that 12 NYCRR 23-1.7 (a) (1); 23-6.1 (e); 23-9.3 (d) and (e); and 23-9.7 (d) are all inapplicable to the facts of this case (*see McLaughlin v Malone & Tate Bldrs., Inc.*, 13 AD3d 859, 861 [3d Dept 2004]; *Flihan v Cornell Univ.*, 280 AD2d 994, 994 [4th Dept 2001]; *Brechue v Town of Wheatfield*, 241 AD2d 935, 936 [4th Dept 1997], *lv denied* 94 NY2d 759 [2000]), and plaintiffs failed to raise a triable issue of fact in opposition.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

317

CA 19-00754

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

PATRICK J. WHELAN AND SHIRLEY P. WHELAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MOUNT ST. MARY'S HOSPITAL OF NIAGARA FALLS,
TIMOTHY G. DYSTER, M.D., AND NIAGARA FRONTIER
RADIOLOGIC ASSOCIATES, PC, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered April 16, 2019. The order denied the motion of plaintiffs to compel defendant Timothy G. Dyster, M.D. to attend a further deposition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted.

Memorandum: Supreme Court erred in denying the motion of plaintiffs to compel defendant Timothy G. Dyster, M.D. to attend a further deposition and answer questions regarding the subsequent treatment of Patrick J. Whelan (plaintiff) at the Naples Community Hospital and Jackson Memorial Hospital. We agree with plaintiffs that Dr. Dyster may be questioned at a further deposition as an expert in the field of radiology regarding plaintiff's subsequent CT and contrast CT imaging and reports, the subsequent medical records, and the findings documented in the angiogram report (*see Johnson v New York City Health & Hosps. Corp.*, 49 AD2d 234, 236-237 [2d Dept 1975]; *see generally McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 26-30 [1964]). We also agree with plaintiffs that any such questions would not relate solely to the negligence of another defendant physician (*see Clack v Sayegh*, 148 AD3d 1664, 1665 [4th Dept 2017]; *Carvalho v New Rochelle Hosp.*, 53 AD2d 635, 635 [2d Dept 1976]) and are relevant to plaintiffs' contention that defendants' negligent diagnosis and failure to adequately treat and care for plaintiff was the proximate cause of plaintiff's injuries (*see Forgays v Merola*, 222

AD2d 1088, 1088 [4th Dept 1995]; *cf. Dare v Byram*, 284 AD2d 990, 991 [4th Dept 2001]). We therefore reverse the order and grant the motion to compel Dr. Dyster to submit to a further deposition after he has had an opportunity to review the medical records related to plaintiff's subsequent treatment.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

323

KA 19-00702

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. GEIL, DEFENDANT-APPELLANT.

JAMES A. NAPIER, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, A.J.), dated July 10, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We note that County Court granted the People's request for an upward departure from his presumptive classification as a level two risk based on " 'an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (*People v Gillotti*, 23 NY3d 841, 853 [2014]; *see People v Dressner*, 170 AD3d 1632, 1633 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]; *People v Harrell*, 168 AD3d 890, 890 [2d Dept 2019], *lv denied* 33 NY3d 904 [2019]). Defendant's sole contention on appeal is that the court erred in determining that he was a presumptive level two risk because it should not have assessed points against him under factors 1, 7, and 12 of the risk assessment instrument. Because defendant does not challenge the upward departure, his challenge to the presumptive risk level is academic.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

331

CAF 19-00143

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF TRONDELL WALLACE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MADARIA EURE, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

CATHERINE M. SULLIVAN, BALDWINSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (William Rose, R.), entered December 24, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, granted petitioner father's amended petition for sole legal and physical custody of the child. Even assuming, arguendo, that the order on appeal was not properly entered on the mother's default, we note that while this appeal was pending, Family Court entered an order upon the consent of the parties that continued custody with the father while granting the mother specific periods of visitation, including multiple nights of overnight visitation each week, thereby effectively superseding the order on appeal and rendering this appeal moot (*see Matter of Dawley v Dawley* [appeal No. 2], 144 AD3d 1501, 1502 [4th Dept 2016]; *Matter of Biasutto v Biasutto*, 75 AD3d 671, 672 [3d Dept 2010]; *cf. Matter of Christopher Y. v Sheila Z.*, 173 AD3d 1396, 1397 [3d Dept 2019]). We conclude that the exception to the mootness doctrine does not apply (*see Dawley*, 144 AD3d at 1502; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

341

KA 17-00346

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY COLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Robert L. Bauer, A.J.), rendered February 3, 2017. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class D felony.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]). In appeal No. 2, defendant purports to appeal from a judgment revoking the sentence of probation previously imposed upon his conviction of DWI as a class E felony (§§ 1192 [3]; 1193 [1] [c] [i]) and imposing a sentence of incarceration upon his admission that he violated the terms and conditions of his probation.

With respect to appeal No. 1, defendant contends that his waiver of the right to appeal is invalid and that the sentence in that appeal is unduly harsh and severe. With respect to appeal No. 2, defendant concedes that the sentence in that appeal has been discharged. Inasmuch as defendant does not raise any contentions with respect to the judgment in appeal No. 2, we dismiss the appeal therefrom (*see People v Bertollini* [appeal No. 2], 141 AD3d 1163, 1164 [4th Dept 2016]).

In appeal No. 1, we agree with defendant that his waiver of the right to appeal is invalid. During the plea proceeding, County Court mischaracterized the waiver of the right to appeal, portraying it in effect as an "absolute bar" to the taking of an appeal (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *8 [2019]). Nonetheless,

we conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

342

KA 17-00347

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY COLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Robert L. Bauer, A.J.), rendered February 3, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Cole* ([appeal No. 1] — AD3d — [Mar. 20, 2020] [4th Dept 2020]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

354

CA 19-01722

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

DEEPIKA REDDY, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

WSYR NEWSCHANNEL 9, NEWPORT TELEVISION, LLC, AND CHRISTIE CASCIANO,
DEFENDANTS-RESPONDENTS-APPELLANTS.

DEEPIKA REDDY, PLAINTIFF-APPELLANT-RESPONDENT PRO SE.

FINNERTY OSTERREICHER & ABDULLA, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 19, 2019. The order denied the motion of plaintiff to, inter alia, vacate the prior order of the court and denied the cross motion of defendants for vexatious litigator injunctive relief and sanctions.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

357

KA 18-01953

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MAUND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 26, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had committed a continuing course of sexual misconduct, i.e., risk factor 4 on the risk assessment instrument (RAI) (*see generally* § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571 [2009]). The sole evidence presented by the People in support of that risk factor was the case summary prepared by the Board of Examiners of Sex Offenders. At the SORA hearing, however, defendant specifically denied the allegation within the case summary that he engaged in a continuing course of sexual misconduct, and instead testified that he engaged in one instance only. Indeed, it is undisputed that defendant was charged with and pleaded guilty to one count of rape in the third degree (Penal Law § 130.25 [2]) stemming from a specific instance of intercourse that occurred on one specified day. We conclude that "the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here, defendant contested the factual allegations related to [the] risk factor" (*People v Judson*, 50 AD3d 1242, 1243 [3d Dept 2008]; *see People v Hubel*, 70 AD3d 1492, 1493 [4th Dept 2010]; *cf. People v Bethune*, 108 AD3d 1231, 1231-1232 [4th Dept 2013], *lv denied*

22 NY3d 853 [2013]).

Thus, Supreme Court erred in assessing 20 points on the RAI for risk factor 4 and defendant's score on the RAI must be reduced from 110 to 90, rendering him a presumptive level two risk (*see generally People v Coger*, 108 AD3d 1234, 1236 [4th Dept 2013]). We therefore modify the order accordingly.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

365

CA 18-01698

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

GLASCO WRIGHT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126445.)

GLASCO WRIGHT, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 5, 2018. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Claimant, a pro se inmate, appeals from an order granting defendant's motion to dismiss the claim. We affirm. Claimant concedes that he served the claim by regular mail. Because he served the claim by regular mail, "the Court of Claims was deprived of subject matter jurisdiction and thus properly dismissed the claim" (*Tuszynski v State of New York*, 156 AD3d 1472, 1472-1473 [4th Dept 2017]; *see generally* Court of Claims Act § 11 [a]).

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court