SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 11, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED AUGUST 11, 2023

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_____	412	CA 22 01295	MELINDA B. ABATE V ELIZABETH S. BLACK WOLF
_____	413	CA 22 01567	MELINDA B. ABATE V ELIZABETH S. BLACK WOLF
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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

342

KA 17-00978

PRESENT: WHALEN, P.J., PERADOTTO, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PEDRO RODRIGUEZ, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 26, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third 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 criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]).

Defendant contends that County Court erred in summarily denying that part of his omnibus motion that sought to suppress tangible evidence. Contrary to defendant's contention, the court properly determined, without a hearing, that defendant lacked standing to seek suppression of the cocaine found inside the discarded jacket. Defendant's motion did not contain sworn allegations of fact supporting the conclusion that he had standing to contest the search of the jacket (*see People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Caldwell*, 78 AD3d 1562, 1563 [4th Dept 2010], *lv denied* 16 NY3d 796 [2011]). Defendant further contends that he was denied effective assistance of counsel because defense counsel failed to request that the court revisit the issue whether defendant was entitled to a suppression hearing. We reject that contention. Defense counsel "was not ineffective in failing to [pursue] a suppression motion 'that ha[d] little or no chance of success' " (*People v Mitchell*, 132 AD3d 1413, 1415 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]).

Defendant's contention that the court abused its discretion in

its *Sandoval* ruling is not preserved for our review (*see* CPL 470.05 [2]; *People v Walker*, 66 AD3d 1331, 1332 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]). In any event, we conclude that defendant's contention lacks merit. The court's *Sandoval* compromise "reflects a proper exercise of the court's discretion" (*People v Thomas*, 305 AD2d 1099, 1099 [4th Dept 2003], *lv denied* 100 NY2d 600 [2003]).

We also reject defendant's contention that certain statements made by the prosecutor in summation deprived him of a fair trial. The statements in question were " 'fair comment on the evidence and did not exceed the broad bounds of rhetorical comment permissible in closing argument' " (*People v Jones*, 208 AD3d 1632, 1634 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]). Even assuming, arguendo, that the prosecutor's statements were improper, we conclude that, viewing the prosecutor's "summation as a whole, those comments were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]).

Defendant's contention that the evidence is legally insufficient to support the conviction is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

400

CA 22-01123

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

LARDON CONSTRUCTION CORP., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK CERRONE, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

GEFFREY GISMONDI LLC, TONAWANDA (GEFFREY GISMONDI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered April 11, 2022. The judgment awarded defendant Mark Cerrone, Inc. the sum of $439,499.76 as against plaintiff.

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

Memorandum: Defendant Mark Cerrone, Inc. (Cerrone), a general contractor, entered into a subcontract with plaintiff pursuant to which plaintiff agreed to perform certain site clearing work in connection with a landfill expansion project. Plaintiff commenced this action for, inter alia, breach of contract, and defendants answered and asserted various counterclaims. Plaintiff now appeals from a judgment awarding Cerrone the sum of $439,499.76 as against plaintiff. That judgment was entered pursuant to a "decision, order, and judgment" that granted the motion of defendants for summary judgment dismissing plaintiff's complaint and on their breach of contract counterclaim.

Contrary to plaintiff's contention, we conclude that defendants established on their motion that plaintiff's clearing and grubbing work was contemplated within the subcontract and that, therefore, plaintiff is not entitled to extra costs in connection with such work (*see Savin Bros. v State of New York*, 62 AD2d 511, 516 [4th Dept 1978], *affd* 47 NY2d 934 [1979]). In opposition, plaintiff failed to raise a triable issue of fact with respect to that issue (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). There is no merit to plaintiff's argument that it did not read or was unaware of the project specifications (*see Renee Knitwear Corp. v ADT Sec. Sys., Northeast*, 277 AD2d 215, 216 [2d Dept 2000]). In any

event, we further conclude, with respect to the issue of extra costs, that "defendant[s] established as a matter of law that plaintiff was obligated to seek compensation for the [alleged] extra work pursuant to the terms of the [sub]contract," which it failed to do in a timely manner (*Adonis Constr., LLC v Battle Constr., Inc.*, 103 AD3d 1209, 1210 [4th Dept 2013]). Plaintiff failed to raise a triable issue of fact in that respect as well (*see generally Zuckerman*, 49 NY2d at 562). If plaintiff believed that the clearing and grubbing work was a change to its contracted work, plaintiff could have requested a change order with respect to such work pursuant to the terms of the subcontract, which it did not do.

Contrary to plaintiff's further contention, defendants established on their motion that plaintiff did not perform its screening work under the subcontract and is thus not entitled to recover lost profits in connection with such work. Plaintiff failed to raise a triable issue of fact in opposition in that respect, inasmuch as plaintiff's president made only conclusory statements regarding the screening work in his opposing affidavit (*see Milstein v Montefiore Club of Buffalo*, 47 AD2d 805, 805 [4th Dept 1975]).

Finally, we conclude that Supreme Court properly granted that part of the motion with respect to defendants' counterclaim for breach of contract. Contrary to plaintiff's contention, defendants established that plaintiff breached the subcontract, and defendants further submitted admissible evidence of their costs, establishing the amount due pursuant to plaintiff's breach (*see generally J & J Structures v Callanan Indus.*, 215 AD2d 890, 892 [3d Dept 1995], *lv denied* 86 NY2d 708 [1995]). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

412

CA 22-01295

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

MELINDA B. ABATE, MATTHEW C. ABATE,
PLAINTIFFS-RESPONDENTS,
AND PETER TUBIOLO,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ELIZABETH S. BLACK WOLF, ALSO KNOWN AS
ELIZABETH BLACK, DEFENDANT-RESPONDENT,
1840 RESTAURANT, LLC, 1840 RESTAURANT, LLC,
DOING BUSINESS AS COMPANE BRICK OVEN BISTRO,
DEFENDANTS-APPELLANTS,
AND COMPANE LLC, DEFENDANT.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (STACY A. MARRIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered July 25, 2022. The order denied in part the motion of defendants 1840 Restaurant, LLC and 1840 Restaurant, LLC, doing business as Compane Brick Oven Bistro seeking summary judgment and granted the motion of defendant Elizabeth S. Black Wolf for summary judgment dismissing the complaint of plaintiff Peter Tubiolo against her.

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

Memorandum: Plaintiffs Melinda B. Abate and Matthew C. Abate, as well as plaintiff Peter Tubiolo, commenced separate actions which were later consolidated against defendants 1840 Restaurant, LLC and 1840 Restaurant, LLC, doing business as Compane Brick Oven Bistro (collectively, restaurant defendants) and defendant Elizabeth S. Black Wolf, also known as Elizabeth Black, seeking damages for injuries

allegedly sustained by Melinda B. Abate and Tubiolo in a chain-reaction motor vehicle accident. The accident occurred when a vehicle driven by Black Wolf rear-ended a vehicle driven by Melinda B. Abate, which then collided with a vehicle driven by Tubiolo.

In appeal No. 1, the restaurant defendants and Tubiolo appeal from an order that, inter alia, denied in part the restaurant defendants' motion for summary judgment dismissing the complaints and all cross-claims against them and granted Black Wolf's motion for summary judgment dismissing Tubiolo's complaint against her.

In appeal No. 2, the restaurant defendants appeal from an order denying their motion to bifurcate the trial with respect to the issues of liability and damages.

In appeal No. 1, the restaurant defendants contend on their appeal that Supreme Court erred in denying the parts of their motion seeking summary judgment dismissing the causes of action against them for violation of the Dram Shop Act. We reject that contention because the restaurant defendants did not satisfy their initial burden on their motion of establishing that they did not procure or sell alcohol to Black Wolf or that she was not visibly intoxicated when she was furnished alcohol.

Under the Dram Shop Act, anyone "who shall, by unlawful selling to or unlawfully assisting in procuring liquor for [an] intoxicated person, have caused or contributed to such intoxication" is liable for injuries caused to third parties by reason of that person's intoxication (General Obligations Law § 11-101 [1]). Alcoholic Beverage Control Law § 65 (2) provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away, any alcoholic beverages to any visibly intoxicated person."

Contrary to their contention, the evidence submitted by the restaurant defendants in support of their motion raised questions of fact whether they sold alcohol to or assisted in procuring alcohol for Black Wolf (*see generally D'Amico v Christie*, 71 NY2d 76, 84 [1987]), and whether Black Wolf was visibly intoxicated at that time (*see Calagiovanni v Carello*, 177 AD3d 1286, 1287 [4th Dept 2019]). Further, even if the restaurant defendants met their initial burden on their motion, we conclude that plaintiffs raised a triable issue of fact in their respective responses (*see Sheehan v Gilray*, 152 AD3d 1179, 1180 [4th Dept 2017]; *Kish v Farley*, 24 AD3d 1198, 1199-1200 [4th Dept 2005]).

Also in appeal No. 1, contrary to Tubiolo's contention on his appeal, the court properly granted Black Wolf's motion for summary judgment dismissing his complaint against her. Black Wolf met her initial burden on her motion of establishing by competent medical evidence that Tubiolo did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident (*see Henderson v Cuyler*, 207 AD3d 1208, 1208 [4th Dept 2022]; *Lamar v Anastasi*, 188 AD3d 1637, 1637-1638 [4th Dept 2020]; *see generally Perl*

v Meher, 18 NY3d 208, 218 [2011]). In opposition to the motion, Tubiolo submitted the affirmation of his treating physician who opined that Tubiolo suffered injuries to his cervical and thoracic spine as a result of the accident that constitute both a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member, but the treating physician's opinion was based solely upon Tubiolo's subjective complaints of pain. "[S]ubjective complaints alone are not sufficient" to establish a serious injury within the meaning of Insurance Law § 5102 (d) (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *see Tully v Kenmore-Tonawanda Union Free Sch. Dist.*, 207 AD3d 1215, 1217 [4th Dept 2022]; *Velez v Cohan*, 203 AD2d 156, 157-158 [1st Dept 1994]). Thus, Tubiolo failed to raise a triable question of fact in opposition to the motion.

Finally, in appeal No. 2, we conclude that the court did not abuse its discretion in denying the restaurant defendants' motion to bifurcate the trial with respect to the issues of liability and damages. "As a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately" (*Almuganahi v Gonzalez*, 156 AD3d 1491, 1492 [4th Dept 2017] [internal quotation marks omitted]; *see generally* CPLR 603; 22 NYCRR 202.42 [a]). However, a bifurcated trial is not warranted where " 'the nature of the injuries has an important bearing on the issue of liability' " (*Fox v Frometa*, 43 AD3d 1432, 1432 [4th Dept 2007]), or where "bifurcation would not assist in clarification or simplification of the issues or a more expeditious resolution of the action" (*Zbock v Gietz*, 162 AD3d 1636, 1636 [4th Dept 2018]). " 'The decision whether to conduct a bifurcated trial rests within the discretion of the trial court' " (*Wright v New York City Tr. Auth.*, 142 AD3d 1163, 1163 [2d Dept 2016]; *see DeAngelis v Martens Farms, LLC*, 104 AD3d 1131, 1131 [4th Dept 2013]). We conclude that the court did not abuse its discretion in denying the motion because trying the issues of liability and damages together will result in a "more expeditious resolution of the action" (*Blajszczak v McGhee-Reynolds*, 191 AD3d 1339, 1340 [4th Dept 2021] [internal quotation marks omitted]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

413

CA 22-01567

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

MELINDA B. ABATE, MATTHEW C. ABATE AND
PETER TUBIOLO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ELIZABETH S. BLACK WOLF, ALSO KNOWN AS
ELIZABETH BLACK, ET AL., DEFENDANTS,
1840 RESTAURANT, LLC, AND 1840 RESTAURANT, LLC,
DOING BUSINESS AS COMPANE BRICK OVEN BISTRO,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS MELINDA B. ABATE AND MATTHEW C. ABATE.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT PETER TUBIOLO.

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered September 27, 2022. The order denied the motion of defendants 1840 Restaurant, LLC and 1840 Restaurant, LLC, doing business as Compane Brick Oven Bistro for an order bifurcating the trial with respect to the issues of liability and damages.

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

Same memorandum as in *Abate v Black Wolf* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

418

CA 22-00364

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

MATTHEW ROSENTHAL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, SYRACUSE UNIVERSITY DEPARTMENT OF PUBLIC SAFETY, DETECTIVE "JOHN" HILL, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

SEGAL LAW FIRM, P.C., NEW YORK CITY (JASON A. RICHMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered February 9, 2022. The order granted the motion of defendants Syracuse University, Syracuse University Department of Public Safety, and Detective "John" Hill, for summary judgment and dismissed 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 he sustained from an alleged assault that occurred on Marshall Street in the City of Syracuse. Supreme Court granted the motion of Syracuse University (SU), Syracuse University Department of Public Safety (DPS), and James Hill, incorrectly sued as Detective "John" Hill (collectively, defendants) for summary judgment dismissing the complaint. Plaintiff appeals.

Contrary to plaintiff's contention, defendants established that they did not voluntarily assume a duty to plaintiff by patrolling that section of Marshall Street where the assault occurred (*see generally Fitzsimons v Brennan*, 169 AD3d 873, 875 [2d Dept 2019]). "In order for a party to be negligent in the performance of an assumed duty, . . . the plaintiff must have known of and detrimentally relied upon the defendant's performance, or the defendant's actions must have increased the risk of harm to the plaintiff" (*Arroyo v We Transp., Inc.*, 118 AD3d 648, 649 [2d Dept 2014]; *see Gauthier v Super Hair*, 306 AD2d 850, 851 [4th Dept 2003]). Here, defendants submitted evidence that the incident occurred one week before SU classes officially started and that, at that time, DPS had not begun working special

weekend details on Marshall Street. Defendants therefore established that they did not voluntarily assume a duty to plaintiff (*see Fitzsimons*, 169 AD3d at 875). In opposition to the motion, plaintiff failed to raise an issue of fact that he relied on DPS patrols of Marshall Street to his detriment, or that the actions of defendants increased the risk of harm to plaintiff (*see generally Dalmau v Vertis, Inc.*, 148 AD3d 1799, 1800 [4th Dept 2017]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

428.1

KA 23-01185

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL J. SAELI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SAMUEL J. SAELI, DEFENDANT-APPELLANT PRO SE.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ERIK D. BENTLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Chautauqua County Court (Paul Wojtaszek, J.), rendered February 26, 2019. Defendant was resentenced upon his conviction of kidnapping in the second degree and kidnapping in the second degree as a sexually motivated felony.

It is hereby ORDERED that the resentence so appealed from is unanimously vacated.

Same memorandum as in *People v Saeli* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

428

KA 19-00015

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL J. SAELI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SAMUEL J. SAELI, DEFENDANT-APPELLANT PRO SE.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ERIK D. BENTLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (Paul Wojtaszek, J.), rendered September 13, 2018. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and kidnapping in the second degree as a sexually motivated felony.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is reversed on the law, that part of the motion seeking to suppress evidence obtained pursuant to the search warrant is granted and a new trial is granted on both counts of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20) and kidnapping in the second degree as a sexually motivated felony (§§ 130.91, 135.20) arising from an incident in which defendant allegedly lured a young boy with disabilities from a store when he was separated from his family and sexually abused him. In appeal No. 2, defendant appeals from a resentence.

At the outset, we note that, inasmuch as the resentence in appeal No. 2 supersedes the original sentence in appeal No. 1, "the appeal from the judgment in appeal No. [1] insofar as it imposed sentence must be dismissed" (*People v Hazzard* [appeal No. 1], 173 AD3d 1763, 1764 [4th Dept 2019]).

We reject defendant's contention in his main brief in appeal No. 1 that County Court erred in denying his challenges for cause with respect to four prospective jurors. "CPL 270.20 (1) (b) provides that a party may challenge a potential juror for cause if the juror 'has a

state of mind that is likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial' " (*People v Harris*, 19 NY3d 679, 685 [2012]). " '[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that [they] can be fair and impartial' " (*id.*, quoting *People v Chambers*, 97 NY2d 417, 419 [2002]; *see People v Warrington*, 28 NY3d 1116, 1119-1120 [2016]). Thus, " 'where [a] prospective juror[ ] unambiguously state[s] that, despite preexisting opinions that might indicate bias, [they] will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible' " (*Warrington*, 28 NY3d at 1120 [emphasis omitted]).

Here, the statements by the prospective jurors were made in the context of a question posed by defense counsel whether the prospective jurors believed that defendant, as he sat in the courtroom before them, must have done something wrong. The four prospective jurors raised their hands expressing agreement with the statement. However, the second and third prospective jurors explained that they raised their hand because they believed that defendant must have been accused of doing something wrong and neither of them expressed any personal belief against defendant. Thus, because those jurors did not express any doubt concerning their ability to be fair and impartial, the court properly denied the for-cause challenges (*see People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]). The first and fourth prospective jurors expressed their agreement with the proposition that defendant is presumed to be innocent, and they indicated that they considered defendant not guilty as he sat before them prior to trial. Those assurances were sufficient to overcome the potential doubt they expressed on their impartiality and, thus, the court did not err in denying defendant's challenges for cause as to those jurors (*see People v Williams*, 107 AD3d 746, 747 [2d Dept 2013], *lv denied* 21 NY3d 1047 [2013]; *cf. People v Clark*, 171 AD3d 1530, 1531 [4th Dept 2019]).

Defendant contends in his main brief in appeal No. 1 that the court erred in denying his motion during trial seeking to suppress evidence of, inter alia, internet searches made by defendant that were discovered by police during the execution of a search warrant of defendant's cellular phone. Defendant's contention is that the search warrant, inter alia, lacked particularity. A warrant must be "specific enough to leave no discretion to the executing officer" (*People v Gordon*, 36 NY3d 420, 429 [2021] [internal quotation marks omitted]). To meet the particularity requirement, a warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" (*United States v Galpin*, 720 F3d 436, 445-446 [2d Cir 2013] [internal quotation marks omitted]; *see generally People v Madigan*, 169 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019]). Here, the search warrant simply stated that the police were directed to search defendant's cellular phone for "digital and/or electronic evidence from August 13, 2016 to August 15, 2016." The warrant

contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion of the search to the executing officers (*see People v Melamed*, 178 AD3d 1079, 1081 [2d Dept 2019]; *see generally Gordon*, 36 NY3d at 429). While the search warrant application contained information about the crime and defendant's possession of the phone during the crime, the search warrant application was not incorporated into the search warrant and therefore "does not save the warrant from its facial invalidity" (*Melamed*, 178 AD3d at 1083 [internal quotation marks omitted]; *see United States v George*, 975 F2d 72, 76 [2d Cir 1992]). We therefore conclude that the court should have suppressed the evidence obtained by the police pursuant to the search warrant. Consequently, we reverse the judgment of conviction and a new trial is granted on both counts (*see People v Stokeling*, 165 AD3d 1180, 1181 [2d Dept 2018], *lv denied* 32 NY3d 1178 [2019]).

We agree with defendant that his conviction of kidnapping in the second degree was an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony (*see People v MacLeod*, 162 AD3d 1751, 1752 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018]). The court upon retrial should submit to the jury the kidnapping in the second degree count in the alternative only (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Piccione*, 78 AD3d 1518, 1519 [4th Dept 2010]).

We have reviewed defendant's remaining contentions in his main brief and the contentions in his pro se supplemental brief in appeal No. 1 and conclude that none warrants dismissal of the indictment.

In light of our determination that reversal of the judgment in appeal No. 1 is required, we vacate the resentence in appeal No. 2 (*see generally People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

434

CA 22-01752

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

STEPHEN WARNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PORT BYRON CENTRAL SCHOOL DISTRICT, PORT BYRON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

FERRARA FIORENZA P.C., EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEITZ & LUXENBERG, P.C., NEW YORK CITY (JASON P. WEINSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Deborah A. Chimes, J.), entered October 14, 2022. The order, insofar as appealed from, granted in part the motion of plaintiff for leave to file and serve an amended complaint.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually abused from 1982 to 1984 by a teacher while he attended programs at a school located within defendant Port Byron Central School District. Plaintiff moved for leave to file and serve an amended complaint to, inter alia, amend the caption and add additional defendants. Port Byron Central School District and Port Byron Central School District Board of Education (collectively, defendants) cross-moved for summary judgment dismissing the complaint or proposed amended complaint. Supreme Court granted plaintiff's motion in part and denied defendants' cross-motion. Defendants now appeal, as limited by their notice of appeal, from that part of the court's order granting in part plaintiff's motion for leave to file and serve an amended complaint. Defendants contend that the court erred in failing to dismiss plaintiff's eighth cause of action, which alleges that defendants failed to report allegations of sexual abuse under, inter alia, Social Services Law § 413. Notably, the eighth cause of action was contained in the original complaint and retained against defendants in the proposed amended complaint.

CPLR 5515 (1) requires that a notice of appeal designate, inter

alia, the judgment or order, or specific part of the judgment or order, from which the appeal is taken, and that requirement is jurisdictional (*see City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 517 [2d Dept 1997]; *see generally Bomer v Dean*, 195 AD3d 1518, 1521 [4th Dept 2021]). Here, defendants limited their appeal to that part of the order granting in part plaintiff's motion to file and serve an amended complaint. Thus, defendants' contention that the eighth cause of action should have been dismissed on the merits is not properly before this Court (*see generally Vandergrand Props. Co., L.P. v Warnock*, 206 AD3d 597, 598 [1st Dept 2022]; *Weichert v Delia*, 1 AD3d 1058, 1058-1059 [4th Dept 2003], *lv denied* 1 NY3d 509 [2004]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00007

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

SAMSON MCA LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. RUSSO M.D. P.C./IV THERAPEUTICS PLLC, DOING BUSINESS AS ASPIRE MED SPA, ET AL., DEFENDANTS, AND MARCO V. BEATRICE, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

KHC LLC, NONPARTY.

AMOS WEINBERG, GREAT NECK, FOR DEFENDANT-APPELLANT.

R3M LAW, LLP, NEW YORK CITY (HOWARD A. MAGALIFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), dated April 8, 2022. The order granted the motion of plaintiff for summary judgment and denied the cross-motion of defendants for summary judgment.

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

Same memorandum as in *Samson MCA LLC v Joseph A. Russo M.D. P.C./IV Therapeutics PLLC* ([appeal No. 2] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

457

CA 23-00008

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

SAMSON MCA LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. RUSSO M.D. P.C./IV THERAPEUTICS PLLC, DOING BUSINESS AS ASPIRE MED SPA, ET AL., DEFENDANTS, AND MARCO V. BEATRICE, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

KHC LLC, NONPARTY.

AMOS WEINBERG, GREAT NECK, FOR DEFENDANT-APPELLANT.

R3M LAW, LLP, NEW YORK CITY (HOWARD A. MAGALIFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered May 10, 2022. The judgment awarded plaintiff money damages.

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

Memorandum: In appeal No. 1, defendant Marco V. Beatrice appeals from an order granting plaintiff's motion for summary judgment on the complaint and denying defendants' cross-motion for summary judgment dismissing the complaint. In appeal No. 2, Beatrice appeals from a judgment awarding plaintiff money damages.

These appeals arise from the execution of and performance under two revenue purchase agreements between plaintiff and defendants Joseph A. Russo M.D. P.C./IV Therapeutics PLLC, doing business as Aspire Med Spa (collectively, entity defendants). Both agreements were personally guaranteed by defendants Joseph Russo and Beatrice (collectively, individual defendants), who guaranteed compliance with performance of the agreements.

Under both agreements, plaintiff advanced a monetary amount to the entity defendants in exchange for 25% of the future revenues of their business, until the purchased amount, i.e., an agreed-upon amount that was greater than the advanced amount, was paid to plaintiff. There was no interest rate or payment schedule and no time period during which the purchased amount was to be collected by

plaintiff. Each agreement contained a weekly remittance amount, which constituted "a good faith estimate of [plaintiff's] share of the future revenue stream." Each agreement contained an acknowledgment "that [plaintiff] may never receive the [p]urchased [a]mount in the event that [the entity defendants' business] does not generate sufficient revenue" and, for the most part, there would be no recourse for plaintiff in the event of bankruptcy by the entity defendants. Each agreement also contained two reconciliation clauses, whereby the weekly remittance would be modified both retroactively and prospectively upon request and with proof of earned revenue amounts.

Plaintiff commenced this action, alleging that the entity defendants breached the agreements and that the individual defendants bore financial responsibility because they guaranteed performance by the entity defendants. Thereafter, as noted, plaintiff moved for summary judgment on the complaint, and defendants cross-moved for summary judgment dismissing the complaint, contending that the agreements were actually "criminally usurious loan[s]" that are unenforceable and that plaintiff lacked standing because plaintiff was not registered to conduct business in New York. The court granted plaintiff's motion, denied defendants' cross-motion and awarded judgment to plaintiff.

Initially, inasmuch as Beatrice's right to appeal from the order in appeal No. 1 terminated upon the entry of the judgment in appeal No. 2, the appeal from that order must be dismissed (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The appeal from the judgment brings up for review the propriety of the order in appeal No. 1 (*see generally* CPLR 5501 [a] [1]).

On appeal, Beatrice contends that the agreements are void because they are criminally usurious loans and that the court therefore erred in granting plaintiff's motion and denying defendants' cross-motion with respect to him. Thus, the central question before us is whether the two agreements were, in fact, revenue purchase agreements or whether they were, instead, loans.

In determining whether a transaction constitutes a loan, courts must determine whether the plaintiff " 'is absolutely entitled to repayment under all circumstances' "; "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-666 [2d Dept 2020]; *see Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). "Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy" (*LG Funding, LLC*, 181 AD3d at 666; *see Principis Capital, LLC*, 201 AD3d at 754).

Contrary to Beatrice's contention, plaintiff established as a matter of law that the agreements were revenue purchase agreements rather than loans, and Beatrice failed to raise a triable issue of

fact with respect thereto (*see Principis Capital, LLC*, 201 AD3d at 754). Here, the agreements submitted by plaintiff contained reconciliation provisions requiring the adjustment of the remittance amount upon request based on changes to the entity defendants' revenues, and had no finite term and no payment schedule. Additionally, as noted, each agreement contained an acknowledgment "that [plaintiff] may never receive the purchased amount in the event that [the entity defendants' business] does not generate sufficient revenue" and, for the most part, plaintiff did not have recourse in the event that the entity defendants declared bankruptcy (*see Streamlined Consultants, Inc. v EBF Holdings LLC*, 2022 WL 4368114, *5 [SD NY, Sept. 20, 2022, No. 21-CV-9528 (KMK)]).

We have reviewed Beatrice's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00242

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

JAZMON E., INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF K.W.,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

STEPHEN MECHTLER, M.D.,
DEFENDANT-RESPONDENT-APPELLANT,
KALEIDA HEALTH, DOING BUSINESS AS MILLARD
FILLMORE SUBURBAN HOSPITAL,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

BROWN CHIARI, LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

EAGAN & HEIMER PLLC, BUFFALO (LAUREN A. HEIMER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 21, 2022. The order, among other things, granted the motion of, among others, defendant Kaleida Health, doing business as Millard Fillmore Suburban Hospital, for summary judgment dismissing the complaint against it, and denied in part the motion of defendant Stephen Mechtler, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is affirmed without costs for reasons stated at Supreme Court.

All concur except OGDEN, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent, in part, in this medical malpractice action, wherein plaintiff seeks to recover damages for injuries allegedly sustained by plaintiff's child during birth. Plaintiff appeals and defendant Stephen Mechtler, M.D. cross-appeals from an order that, among other things, denied Mechtler's motion for summary judgment dismissing the complaint against him, except for certain allegations in plaintiff's bill of particulars for failure to address those allegations in opposition to the motion, and granted the motion of defendant Kaleida Health, doing business as Millard Fillmore Suburban Hospital

(Kaleida), among others, insofar as it sought summary judgment dismissing the complaint against it.

When reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party (*see Robinson v Strong Mem. Hosp.*, 98 AD2d 976, 976 [4th Dept 1983]). Assuming, arguendo, that Kaleida met its initial burden on the motion insofar as it sought summary judgment dismissing the complaint against it, I agree with plaintiff that her submission of the expert affidavit raised a triable issue of fact (*see Atkins v Piazza*, 281 AD2d 884, 884 [4th Dept 2001]), and thus Supreme Court erred in granting the motion to that extent. I would therefore modify the order accordingly.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01505

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, ET AL., DEFENDANTS,
JOHN ELLIS, M.D., INDIVIDUALLY AND AS AN AGENT,
OFFICER AND/OR EMPLOYEE OF ROME MEDICAL RADIOLOGY,
DOING BUSINESS AS RADIOLOGY ASSOCIATES OF NEW
HARTFORD, LLP, RADIOLOGY ASSOCIATES OF NEW
HARTFORD, LLP, THOMAS K. WEIDMAN, M.D., INDIVIDUALLY
AND AS AN AGENT, OFFICER AND/OR EMPLOYEE OF UPSTATE
UNIVERSITY HOSPITAL AND/OR UPSTATE EMERGENCY
MEDICINE, INC., AND UPSTATE EMERGENCY MEDICINE, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS THOMAS K. WEIDMAN, M.D., AND UPSTATE EMERGENCY MEDICINE, INC.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CAYLEY M. YOUNG OF COUNSEL), FOR DEFENDANTS-APPELLANTS JOHN ELLIS, M.D. AND RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 21, 2022. The order granted plaintiff's motion insofar as it sought to preclude defendants from presenting evidence or eliciting testimony at trial relating to the negligence of nonparty providers affiliated with Upstate University Hospital and from listing those providers on the verdict sheet.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion insofar as it sought to preclude defendants from presenting evidence or eliciting testimony at trial relating to the negligence of the nonparty providers affiliated with Upstate University Hospital and from listing those providers on the verdict sheet is denied.

Memorandum: Plaintiff, who had presented and received care at defendant Rome Memorial Hospital (RMH) and nonparty Upstate University Hospital (Upstate), subsequently commenced this medical malpractice

action seeking damages for injuries allegedly sustained as a result of defendants' negligence in timely diagnosing and treating plaintiff's spinal infection with epidural abscesses that ultimately rendered him quadriplegic. In appeal No. 1, defendants John Ellis, M.D., individually and as an agent, officer and/or employee of Rome Medical Radiology, doing business as Radiology Associates of New Hartford, LLP (Ellis), and Radiology Associates of New Hartford, LLP (collectively, RANH defendants), as well as defendants Thomas K. Weidman, M.D., individually and as an agent, officer and/or employee of Upstate and/or Upstate Emergency Medicine, Inc., and Upstate Emergency Medicine, Inc. (collectively, UEM defendants), appeal from an order that granted plaintiff's motion to preclude certain evidence insofar as it sought to preclude defendants from presenting evidence or eliciting testimony at trial relating to the negligence of certain nonparty medical providers affiliated with Upstate and from listing those providers on the verdict sheet. Supreme Court reserved decision with respect to all other issues presented by plaintiff's motion. In appeal No. 2, RMH, the UEM defendants, and the RANH defendants appeal from an order that granted another motion of plaintiff to strike certain bills or supplemental bills of particulars—including those of RMH, the UEM defendants, and Ellis—each of which had sought, post-note of issue, to particularize the asserted affirmative defense pursuant to CPLR article 16. The order in appeal No. 2 also granted that motion insofar as it sought to preclude certain defendants from offering evidence or arguing at the time of trial that the nonparty providers caused or contributed to plaintiff's injuries and from listing the nonparty providers on the verdict sheet. In appeal No. 3, the UEM defendants appeal from an order that denied their motion seeking an order compelling plaintiff to accept their bill of particulars and directing that the nonparty providers be included on the verdict sheet. In appeal No. 4, RMH appeals from an order that denied its cross-motion seeking an order compelling plaintiff to accept its supplemental bill of particulars. In appeal No. 5, the RANH defendants appeal from an order that denied their motion seeking an order compelling plaintiff to accept their bill of particulars. In appeal No. 6, defendant Michele Lisi, M.D., individually and as an agent, officer and/or employee of Upstate and/or Upstate Emergency Medicine, Inc., appeals from an order that denied her motion seeking, inter alia, an order compelling plaintiff to accept her supplemental bill of particulars. In appeal No. 7, defendant Emergency Physician Services of New York, P.C. (EPS), appeals from an order that denied its cross-motion to include the nonparty providers on the verdict sheet and denied its separate cross-motion to compel plaintiff to accept its supplemental bill of particulars.

Preliminarily, we agree with RMH, the UEM defendants, and the RANH defendants that the pretrial orders in appeal Nos. 1 and 2 are appealable as of right. "Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Dischiavi v Calli*, 125 AD3d 1435, 1436 [4th Dept 2015] [internal quotation marks omitted]; *see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 223 [4th Dept 2003]). There is, however, "a distinction between an order that 'limits the

admissibility of evidence,' which is not appealable . . . , and one that 'limits the legal theories of liability to be tried' or the scope of the issues at trial, which is appealable" (*Scalp & Blade*, 309 AD2d at 224; *see Dischiavi*, 125 AD3d at 1436). Here, the orders in appeal Nos. 1 and 2 limited the theories of liability to be tried or the scope of issues at trial because they precluded defendants from presenting evidence, eliciting testimony, or arguing during trial in support of their affirmative defenses pursuant to CPLR article 16 that the negligence of the nonparty providers caused or contributed to plaintiff's injuries (*see Dischiavi*, 125 AD3d at 1436; *Muhammad v Fitzpatrick*, 91 AD3d 1353, 1353-1354 [4th Dept 2012]). Those orders, which decided motions made upon notice, are thus appealable as of right inasmuch as they "involve[ ] some part of the merits" (CPLR 5701 [a] [2] [iv]) and "affect[ ] a substantial right" (CPLR 5701 [a] [2] [v]; *see Johnson v Guthrie Med. Group, P.C.*, 125 AD3d 1445, 1446 [4th Dept 2015]; *Muhammad*, 91 AD3d at 1353-1354).

On the merits, we conclude that, contrary to the court's determination in appeal Nos. 1 and 2, defendants are entitled to assert their CPLR article 16 defenses regarding the nonparty providers. "As provided in CPLR 1601 (1), a defendant may raise the CPLR article 16 defense regarding a nonparty tortfeasor, provided that the plaintiff could obtain jurisdiction over that party" (*Mancuso v Kaleida Health*, 172 AD3d 1931, 1934 [4th Dept 2019], *affd* 34 NY3d 1020 [2019]). Here, defendants are entitled to raise their pleaded affirmative defenses pursuant to CPLR article 16 (*see generally Ryan v Beavers*, 170 AD2d 1045, 1045-1046 [4th Dept 1991]) because plaintiff could have sought to maintain an action against the nonparty providers in Supreme Court (*see Morell v Balasubramanian*, 70 NY2d 297, 301 [1987]).

The crux of the issue on appeal is whether defendants were required, in response to plaintiff's demands for bills of particulars, to particularize the pleaded CPLR article 16 defense, and thus whether the court properly precluded them from asserting that defense at trial when they did not timely particularize that defense. We conclude that no such particularization was required under the circumstances of this case, and thus that the court erred in precluding defendants from asserting the CPLR article 16 defense at trial. In each of plaintiff's demands to defendants, he requested that each defendant "[s]pecifically set forth [d]efendant's basis for claiming that the injuries and damages sustained by [p]laintiff were not caused by [d]efendant herein." Noticeably absent from each demand, however, was any reference to the CPLR article 16 defenses pleaded as affirmative defenses by defendants. In fact, the demand could be interpreted as improperly soliciting an expert opinion from each defendant on the issue of causation, which was the basis for at least one of defendants' objections (*see generally Sonnenberg Gardens v Eldredge, Fox & Porretti, LLP*, 52 AD3d 1211, 1212 [4th Dept 2008]). More importantly, unlike other demands for bills of particulars that seek particularization of an CPLR article 16 defense, plaintiff's demands here are not specific at all in that regard (*cf. Helton v Hirschman*, 17 AD3d 987, 988 [4th Dept 2005]; *Ryan*, 170 AD2d at 1045-1046). Contrary to plaintiff's assertion, none of his other demands were

sufficient to apprise defendants that he was seeking information pertaining to their CPLR article 16 defenses.

Consequently, we conclude that defendants had no obligation to particularize their CPLR article 16 defenses, and thus the court erred in appeal No. 1 by granting plaintiff's motion insofar as it sought to preclude defendants from presenting evidence or eliciting testimony at trial relating to the negligence of the nonparty providers and from listing those providers on the verdict sheet. We therefore reverse the order in appeal No. 1. In appeal No. 2, we conclude that the court erred in granting plaintiff's motion insofar as it sought to preclude certain defendants from offering evidence or arguing at the time of trial that the nonparty providers caused or contributed to plaintiff's injuries and from listing the nonparty providers on the verdict sheet, and we therefore modify the order in appeal No. 2 accordingly. We note that, although only the UEM defendants and the RANH defendants appeal in appeal No. 1 and only those defendants and RMH appeal in appeal No. 2, "this is one of those cases where relief to . . . nonappealing part[ies] is appropriate" (*Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009] [internal quotation marks omitted]; *see generally Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]).

In light of our determination that defendants are entitled under the circumstances of this case to assert their CPLR article 16 defenses regardless of whether they particularized those defenses in bills of particulars, the issue raised in appeal No. 2 regarding plaintiff's motion insofar as it sought to strike RMH's supplemental bill of particulars, the UEM defendants' bill of particulars, and Ellis's bill of particulars, and the issues raised in appeal Nos. 3 and 7 regarding the motion and cross-motion insofar as they sought to compel plaintiff to accept such bills of particulars, have been rendered moot (*see generally Wagner v Waterman Estates, LLC*, 128 AD3d 1504, 1505, 1507 [4th Dept 2015]; *Matter of Elniski v Niagara Falls Coach Lines, Inc.*, 101 AD3d 1722, 1723 [4th Dept 2012]; *Khoury v Chouchani*, 27 AD3d 1071, 1073 [4th Dept 2006]). We therefore dismiss the appeals from the orders in appeal Nos. 2, 3 and 7 to that extent. In light of our determination, we likewise dismiss the appeals from the orders in appeal Nos. 4 through 6.

Moreover, even assuming, arguendo, that both the UEM defendants and EPS seek affirmative relief in appeal Nos. 3 and 7, respectively, i.e., an order directing that the nonparty providers be included in the verdict sheet, we conclude that such relief would be premature (*see generally Strait v Ogden Med. Ctr.*, 246 AD2d 12, 14 [3d Dept 1998]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01507

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, THOMAS K. WEIDMAN, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER, AND/OR EMPLOYEE OF UPSTATE UNIVERSITY HOSPITAL AND/OR UPSTATE EMERGENCY MEDICINE, INC., UPSTATE EMERGENCY MEDICINE, INC., JOHN ELLIS, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER AND/OR EMPLOYEE OF ROME MEDICAL RADIOLOGY, DOING BUSINESS AS RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP, RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-APPELLANT ROME MEMORIAL HOSPITAL.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS THOMAS K. WEIDMAN, M.D., AND UPSTATE EMERGENCY MEDICINE, INC.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CAYLEY M. YOUNG OF COUNSEL), FOR DEFENDANTS-APPELLANTS JOHN ELLIS, M.D., AND RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 21, 2022. The order, among other things, granted plaintiff’s motion insofar as it sought to preclude certain defendants from offering evidence or arguing at the time of trial that the nonparty providers affiliated with Upstate University Hospital caused or contributed to plaintiff’s injuries and from listing the nonparty providers on the verdict sheet.

It is hereby ORDERED that said appeal from the order insofar as it relates to the second, sixth, and seventh ordering paragraphs is unanimously dismissed and the order is modified on the law by denying the motion insofar as it sought to preclude certain defendants from offering evidence or arguing at the time of trial that the nonparty

providers affiliated with Upstate University Hospital caused or contributed to plaintiff's injuries and from listing the nonparty providers on the verdict sheet and as modified the order is affirmed without costs.

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

481

CA 22-01508

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, ET AL., DEFENDANTS, THOMAS K. WEIDMAN, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER, AND/OR EMPLOYEE OF UPSTATE UNIVERSITY HOSPITAL AND/OR UPSTATE EMERGENCY MEDICINE, INC., AND UPSTATE EMERGENCY MEDICINE, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 3.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 21, 2022. The order denied the motion of defendants Upstate Emergency Medicine, Inc. and Thomas K. Weidman, M.D. for an order compelling plaintiff to accept service of their bill of particulars and directing that nonparty providers be included on the verdict sheet.

It is hereby ORDERED that said appeal from the order insofar as it denied that part of the motion seeking an order compelling plaintiff to accept the bill of particulars is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

482

CA 22-01511

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 4.)

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 21, 2022. The order denied the cross-motion of defendant Rome Memorial Hospital to compel plaintiff to accept service of its supplemental bill of particulars.

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

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

483

CA 22-01512

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, ET AL., DEFENDANTS,
JOHN ELLIS, M.D., INDIVIDUALLY AND AS AN AGENT,
OFFICER AND/OR EMPLOYEE OF ROME MEDICAL RADIOLOGY,
DOING BUSINESS AS RADIOLOGY ASSOCIATES OF NEW
HARTFORD, LLP AND RADIOLOGY ASSOCIATES OF NEW
HARTFORD, LLP, DEFENDANTS-APPELLANTS.
(APPEAL NO. 5.)

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CAYLEY M. YOUNG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), rendered September 21, 2022. The order denied the motion of defendants John Ellis, M.D. and Radiology Associates of New Hartford, LLP to compel plaintiff to accept service of their bill of particulars.

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

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

484

CA 22-01513

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, ET AL., DEFENDANTS, AND MICHELE LISI, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER AND/OR EMPLOYEE OF UPSTATE UNIVERSITY HOSPITAL AND/OR UPSTATE EMERGENCY MEDICINE, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 6.)

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 20, 2022. The order denied the motion of defendant Michele Lisi, M.D. to compel plaintiff to accept service of her supplemental bill of particulars.

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

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

485

CA 22-01554

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, ET AL., DEFENDANTS,
AND EMERGENCY PHYSICIAN SERVICES OF NEW YORK, P.C.,
DEFENDANT-APPELLANT.
(APPEAL NO. 7.)

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY S. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 26, 2022. The order denied the cross-motion of defendant Emergency Physician Services of New York, P.C. to include nonparty providers on the verdict sheet and denied that defendant's cross-motion to compel plaintiff to accept service of its supplemental bill of particulars.

It is hereby ORDERED that said appeal from the order insofar as it denied the cross-motion seeking an order compelling plaintiff to accept the supplemental bill of particulars is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Harris v Rome Mem. Hosp.* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

525.1

CA 22-00816

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, AND MONTOUR, JJ.

WEBSTER GOLF CLUB, INC., AND B&C GOLF, INC.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

MONROE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT-RESPONDENT,
O'BRIEN & GERE ENGINEERS, INC.,
LECHASE CONSTRUCTION SERVICES, LLC,
FISHER ASSOCIATES, P.E., L.S., L.A., D.P.C.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

HARRIS BEACH PLLC, SYRACUSE (ALLISON B. FIUT OF COUNSEL), FOR DEFENDANT-RESPONDENT O'BRIEN & GERE ENGINEERS, INC.

ADAMS LECLAIR LLP, ROCHESTER (RICHARD T. BELL OF COUNSEL), FOR DEFENDANT-RESPONDENT LECHASE CONSTRUCTION SERVICES, LLC.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT FISHER ASSOCIATES, P.E., L.S., L.A., D.P.C.

Appeal and cross-appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered March 29, 2022. The order and judgment, among other things, denied in part and granted in part the motion of defendant Monroe County Water Authority for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Monroe County Water Authority seeking summary judgment dismissing the fifth cause of action and seeking summary judgment dismissing the sixth and seventh causes of action insofar as they are based on the diversion of water, and dismissing those causes of action to that extent, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff Webster Golf Club, Inc. operates a golf

club on property owned by plaintiff B&C Golf, Inc. (B&C). A stream running through the property feeds ponds on the golf course, which are used to irrigate the golf course. The stream is fed by two tributaries, one of which—the western tributary—originates on nearby property owned by defendant Monroe County Water Authority (MCWA). Around 2010, MCWA began working on a water supply project that included the construction of a water treatment plant and MCWA and B&C entered into an easement permitting MCWA to place a backwash pipe on B&C's property. Pursuant to the easement, MCWA agreed to compensate B&C for damage caused by "installing, maintaining, operating, constructing, or repairing" the pipe. Defendants O'Brien & Gere Engineers, Inc., LeChase Construction Services, LLC, and Fisher Associates, P.E., L.S., L.A., D.P.C. (collectively, construction defendants) were involved in the design and construction of the MCWA project, which was completed in September 2013.

Plaintiffs commenced this action against MCWA in November 2015 and filed a supplemental summons and amended complaint adding the construction defendants, among others, in August 2017. The amended complaint asserted four causes of action against defendants, for private nuisance, public nuisance, negligence, and trespass, and three causes of action against MCWA only, for a de facto taking, violation of 42 USC § 1983, and breach of contract with respect to the easement. Primarily, plaintiffs alleged that MCWA's water treatment project and the construction defendants' design and construction thereof diminished the flow of water from MCWA's property to plaintiffs' stream. Secondarily, plaintiffs alleged that the construction activities caused silt or sediment to be deposited into plaintiffs' ponds, reducing their capacity.

MCWA moved for summary judgment dismissing the amended complaint against it. The construction defendants each moved for summary judgment dismissing the amended complaint and any cross-claims against them. Plaintiffs cross-moved for summary judgment on the amended complaint. Supreme Court granted MCWA's motion in part by dismissing the first, second, third, and fourth causes of action as time-barred. The court denied MCWA's motion with respect to the fifth, sixth, and seventh causes of action. The court granted the construction defendants' motions on the ground that plaintiffs' causes of action against them were time-barred. The court denied plaintiffs' cross-motion.

Addressing first MCWA's appeal, we agree with MCWA that the court erred in determining that plaintiffs have riparian rights to the surface waters collecting on MCWA's property. "The owners of land on a water-course, are not owners of the water which flows in it" (*Barkley v Wilcox*, 86 NY 140, 146 [1881]), and "the law has always recognized a wide distinction, between the right of an owner, to deal with surface water falling or collecting on [its] land, and [an owner's] right in the water of a natural water-course" (*id.* at 147). "In such [surface] water, before it leaves [the owner's] land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and [the owner] may appropriate it to [its] exclusive use, or get rid of it in any way [it] can,

provided only that [the owner] does not cast it by drains, or ditches, upon the land of [its] neighbor; and [the owner] may do this, although by so doing [it] prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to . . . other proprietors on the stream" (*id.*; *see Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 590 [1958]; *Hanley v State of New York*, 193 AD3d 1397, 1397-1398 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]).

Here, plaintiffs alleged that MCWA prevented water from flowing off of its property, which diminished the flow of water into the western tributary and thus diminished the amount of water entering the stream located on plaintiffs' property. According to the amended complaint, the water "originate[d] on the property of [MCWA]," and the western tributary was fed by "wetlands on MCWA property, rainwater, groundwater and/or underground springs." Thus, MCWA established, through plaintiffs' own pleadings, that "[t]here was no natural water-course over [its] lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount . . . passed upon, and over" MCWA's property (*Barkley*, 86 NY at 144).

In opposition, plaintiffs failed to raise a triable issue of fact inasmuch as their own submissions described the contested water as "groundwater" and "surfacewater" that flowed from "wetlands" on MCWA's property. Similarly, plaintiffs' causation expert opined that plaintiffs' stream was diminished due to MCWA's act of "block[ing] off drainage" from its property and "due to changes in the surface and groundwater flow," not by interference with a pre-existing watercourse on MCWA's land.

Thus, MCWA established its entitlement to judgment as a matter of law dismissing plaintiffs' fifth cause of action, which alleged a de facto taking based solely on plaintiffs' riparian rights and "MCWA's restriction of water flowing into the Stream." Similarly, to the extent that plaintiffs' sixth and seventh causes of action are predicated on allegations that MCWA prevented or impeded plaintiffs from exercising their riparian rights, those causes of action must also be dismissed. We therefore modify the order and judgment accordingly.

MCWA further contends that the court erred in denying its motion insofar as it sought summary judgment dismissing plaintiffs' sixth cause of action, alleging a violation of 42 USC § 1983, as untimely. We reject that contention. To the extent that plaintiffs' sixth cause of action alleges that MCWA caused silt and sediment to be deposited into plaintiffs' ponds, which diminished their holding capacity, we conclude that MCWA failed to meet its initial burden on the motion of establishing that the cause of action was untimely inasmuch as there are questions of fact whether the alleged silt and sediment were discharged more than three years before the action was commenced against MCWA (*see generally Chavis v Syracuse Community Health Ctr., Inc.*, 96 AD3d 1489, 1490 [4th Dept 2012]; *Glacial Aggregates LLC v Town of Yorkshire*, 72 AD3d 1644, 1645-1646 [4th Dept 2010], *appeal*

dismissed 16 NY3d 760 [2011]; *Zayatz v Collins*, 48 AD3d 1287, 1290 [4th Dept 2008]).

MCWA further contends that the court erred in denying its motion for summary judgment on the seventh cause of action, for breach of contract. As noted above, the motion must be granted to the extent that it seeks summary judgment dismissing the seventh cause of action insofar as it is based on MCWA's alleged retention or diversion of surface waters. However, the seventh cause of action also alleges that MCWA breached the easement by discharging silt or sediment into the ponds without remediating that condition or compensating B&C for the cost of remediation. Although the easement does not obligate MCWA to remediate any conditions other than those caused by the backwash pipe, the amended complaint relevantly alleges that the construction of the backwash pipe "resulted in . . . the release of contaminants, including silt, into the [s]tream." MCWA argues that the allegation is based on pure speculation, but MCWA's submissions on its motion did not demonstrate that the construction of the backwash pipe did not result in the release of contaminants. As the proponent of the motion for summary judgment, MCWA cannot meet its initial burden on the motion only by noting gaps in the non-movants' proof (*see Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]). Thus, we conclude that the court did not err in denying MCWA's motion to the extent that it sought summary judgment dismissing the seventh cause of action insofar as it alleges that MCWA breached the easement with respect to silt or sediment deposited in the ponds by virtue of the installation of the backwash pipe.

On their cross-appeal, plaintiffs contend that the court erred in granting MCWA's and the construction defendants' respective motions insofar as they sought summary judgment dismissing the first four causes of action as untimely. In light of our determination that plaintiffs had no right to the surface water on MCWA's property and, therefore, no viable claims against MCWA and the construction defendants based on the alleged diversion of that water, we address plaintiffs' contentions with respect to the first four causes of action only insofar as those causes of action are based on the alleged discharge of silt and sediment into the ponds, and we reject those contentions. Defendants, as the movants for summary judgment, "bore the initial burden of establishing their entitlement to judgment dismissing the [amended] complaint as time-barred as a matter of law" (*Citibank, N.A. v Gifford*, 204 AD3d 1382, 1383 [4th Dept 2022] [internal quotation marks omitted]). The construction defendants met their initial burden of establishing that plaintiffs' first four causes of action against them were untimely insofar as the allegations were based on the alleged deposit of sediment into the ponds inasmuch as the action was commenced against them over three years from the date of the alleged injury (*see* CPLR 214 [4]). In response, plaintiffs failed to raise an issue of fact (*see generally Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]). Plaintiffs contend that those causes of action accrued in August 2014 when plaintiffs first noticed the diminished stream, because that is the time at which the injury occurred. We reject that contention. Plaintiffs' claims against the construction defendants, based on

defective design and construction, accrued at the time the sediment was allegedly deposited into the ponds, thereby decreasing their capacity, which occurred at the latest upon the substantial completion of the construction (*see Suffolk County Water Auth. v J.D. Posillico, Inc.*, 267 AD2d 301, 302 [2d Dept 1999]; *see generally City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538 [1995]; *Farash Constr. Corp. v Stanndco Developers*, 139 AD2d 899, 900 [4th Dept 1988], *lv dismissed* 73 NY2d 918 [1989]). Inasmuch as plaintiffs commenced the action against the construction defendants "more than three years after substantial completion of the work, irrespective of when the damage was actually discovered," the court properly granted the construction defendants' motions (*Suffolk County Water Auth.*, 267 AD2d at 302).

Similarly, MCWA established its entitlement to judgment as a matter of law inasmuch as plaintiffs' first four causes of action, insofar as they are based on the release of sediment, are time-barred because the action was commenced beyond the 1 year and 90 days' statute of limitations (*see* Public Authorities Law § 1109 [1]; *Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 65 [2009]).

We further conclude that plaintiffs did not raise triable issues of fact with respect to the timeliness of their causes of action for nuisance and trespass based on the application of the continuing wrong doctrine. "[I]njuries to property caused by a continuing nuisance involve a 'continuous wrong' and, therefore, generally give rise to successive causes of action that accrue each time a wrong is committed" (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013], *rearg denied* 23 NY3d 934 [2014]). The "continuing wrong doctrine" applies " 'in certain cases such as nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed' " (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014], quoting *Covington v Walker*, 3 NY3d 287, 292 [2004], *cert denied* 545 US 1131 [2005]; *see Bratge v Simons*, 167 AD3d 1458, 1460 [4th Dept 2018]). However, "[t]he doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Matter of Salomon v Town of Wallkill*, 174 AD3d 720, 721 [2d Dept 2019] [internal quotation marks omitted]; *see EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.*, 159 AD3d 1567, 1569 [4th Dept 2018]). The "distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks omitted]; *see generally Bratge*, 167 AD3d at 1460).

Here, we reject plaintiffs' contention that the continuing wrong doctrine applies to the first, second, and fourth causes of action insofar as they are based on the alleged discharge of silt and sediment into the ponds. With respect to the discharge of silt and sediment, MCWA and the construction defendants established that any such discharge was a discrete act that occurred during the construction of the water treatment facility, which was completed in September 2013. Thus, the continuous wrong doctrine cannot save

plaintiffs' first, second, and fourth causes of action.

We have considered plaintiffs' remaining contentions on their cross-appeal and conclude that they are without merit.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01011

PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF KATRINA TUTTLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINE WORTHINGTON, DONALD WORTHINGTON,
ANDREW WORTHINGTON, RESPONDENTS-APPELLANTS,
AND ALLEGANY COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

MICHAEL J. CAPUTO, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.
(APPEAL NO. 1.)

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENTS-APPELLANTS KRISTINE WORTHINGTON AND DONALD WORTHINGTON.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT ANDREW WORTHINGTON.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered May 16, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner custody of the subject child.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Same memorandum as in *Matter of Tuttle v Worthington* ([appeal No. 2] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

536

CAF 22-01012

PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF KATRINA TUTTLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINE WORTHINGTON, DONALD WORTHINGTON,
ANDREW WORTHINGTON, RESPONDENTS-APPELLANTS,
AND ALLEGANY COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

MICHAEL J. CAPUTO, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.
(APPEAL NO. 2.)

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENTS-APPELLANTS KRISTINE WORTHINGTON AND DONALD WORTHINGTON.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT ANDREW WORTHINGTON.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an amended order of the Family Court, Allegany County (Terrence M. Parker, J.), entered May 16, 2022, in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, awarded petitioner custody of the subject child.

It is hereby ORDERED that the amended order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Allegany County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking modification of a prior order, entered more than three years earlier, that awarded joint custody of the subject child to her, respondent Andrew Worthington, i.e., the child's father, and respondents Kristine Worthington and Donald Worthington, i.e., the child's paternal grandparents, with "primary placement" of the child with the grandparents and "secondary placement" with the mother and with the father. In her amended petition for a change in custody, the mother seeks a continuation of the joint custody arrangement but modification of the child's

placement with primary placement of the child awarded to the mother.

Following a hearing, Family Court determined that the mother established a change in circumstances since entry of the prior order and that the grandparents failed to meet their burden of establishing extraordinary circumstances, without which they lacked standing to seek custody. The court therefore awarded custody to the mother without addressing the best interests of the child. In appeal No. 1, the grandparents, the father, and the attorney for the child (AFC) appeal from an order awarding custody of the child to the mother with "secondary placement" to the father and grandmother. In appeal No. 2, the same parties appeal from an amended order issued a week later that made the same award of custody to the mother with secondary placement to the father and grandmother. Inasmuch as the amended order superseded the original order, appeal No. 1 should be dismissed (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

With respect to appeal No. 2, we conclude that, although the court properly determined that the mother established a change in circumstances since entry of the prior order (*see generally Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022]), the court erred in determining that the grandparents failed to establish extraordinary circumstances and thus lacked standing to contest the mother's custody petition.

It is well settled that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness *or other like extraordinary circumstances*" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976] [emphasis added]; *see* Domestic Relations Law § 72 [2] [a]). "If extraordinary circumstances are established such that the nonparent has standing to seek custody, the court must make an award of custody based on the best interest of the child" (*Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]).

Consistent with *Bennett*, the legislature amended Domestic Relations Law § 72 (2) (a) to provide that "[a]n extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance" for grandparents who seek custody of grandchildren for whom they have provided care (*see* L 2003, ch 657, § 2). The statute defines " 'extended disruption of custody' " to "include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months" (Domestic Relations Law § 72 [2] [b]).

As the Court of Appeals has made clear, however, an extended disruption of custody as defined in Domestic Relations Law § 72 (2) (a) is merely "a specific example of extraordinary circumstances" (*Suarez*, 26 NY3d at 446) and the statute was "not intended to overrule

existing case law relating to third parties obtaining standing in custody cases" (*id.* at 447). That is to say, the grounds for nonparent standing set forth in *Bennett* apply to grandparents who cannot establish extraordinary circumstances arising from an extended disruption of custody.

"The extraordinary circumstances analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Brown v Comer*, 136 AD3d 1173, 1174 [3d Dept 2016] [internal quotation marks omitted]; *see Matter of Byler v Byler*, 207 AD3d 1072, 1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]).

Here, the court determined that there was "no extended disruption of custody" because the mother had joint legal custody of the child since entry of the prior order and maintained consistent contact with him as well as secondary placement. The court further determined that there was no "abandonment or prolonged separation," and, thus, no extraordinary circumstances. As noted, however, those are not the only grounds upon which nonparents may establish standing to seek custody. In our view, the grandparents established the existence of "other like extraordinary circumstances" so as to afford them standing (*Bennett*, 40 NY2d at 544).

It is undisputed that the child, who was eight years old at the time of the hearing, had lived with the grandparents for his entire life in the only home he has ever known; the child expressed a strong desire to continue residing with his grandparents and the AFC adheres to that position on appeal; the mother and the father both suffered from severe substance abuse problems for years and were unable to care for the child on their own; the mother failed to contact the child for a period of 18 months before resuming visitation in January 2018; the child's half-sister also resided with the grandparents and the child developed a sibling relationship with her; and "the grand[parents] ha[ve] taken care of the child for most of his life and provided him with stability" (*Matter of DellaPiana v DellaPiana*, 161 AD3d 1228, 1231 [3d Dept 2018]). Additionally, according to the AFC, the child had "developed a strong emotional bond with the grand[parents]" (*Matter of Lewis v Speaker*, 143 AD3d 822, 824 [2d Dept 2016]; *see Matter of Sharlow v Hughes*, 213 AD3d 1200, 1201 [4th Dept 2023]; *Matter of Hilkert v Parsons-O'Dell*, 187 AD3d 1675, 1676 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]).

Under the circumstances, we conclude that, "even if the prolonged separation alone is entitled to little significance here, the combination of that factor along with others present on this record sufficiently establish the existence of extraordinary circumstances" (*Byler*, 207 AD3d at 1074), and that the court's contrary determination is not supported by a sound and substantial basis in the record.

We therefore reverse the amended order, and we remit the matter

to Family Court for a new hearing to determine whether the modifications of the prior order sought by the mother are in the best interests of the child, at which new facts may be considered in light of events that have transpired during the pendency of this appeal (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *Matter of Matthew DD. v Amanda EE.*, 187 AD3d 1382, 1384 [3d Dept 2020]; *Matter of Lopez v Reyes*, 154 AD3d 756, 757 [2d Dept 2017]).

All concur except CURRAN and OGDEN, JJ., who dissent in appeal No. 2 and vote to affirm in the following memorandum: We disagree with the majority that extraordinary circumstances exist on this record, and we therefore respectfully dissent in appeal No. 2. Despite the limitations on our review, the majority is weighing the evidence and arriving at a different result from the trial court. We, however, are unwilling to disturb Family Court's determination and would affirm the amended order in appeal No. 2.

As an initial matter, contrary to the contention of respondents Kristine Worthington (grandmother) and Donald Worthington (collectively, grandparents) and respondent Andrew Worthington (father), we agree with the majority that petitioner mother established a change in circumstances since the entry of the prior order.

We disagree with the majority, however, that the court erred in determining that the grandparents failed to establish extraordinary circumstances. " '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]). In evaluating whether there are extraordinary circumstances, we "[a]fford[ ] great deference to the determination of the hearing court with its superior ability to evaluate the credibility of the testifying witnesses" (*Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; *see Matter of Cross v Caswell*, 113 AD3d 1107, 1107 [4th Dept 2014]), and we should not disturb that determination "unless it lacks a sound and substantial basis in the record or is contrary to the weight of the credible evidence" (*Matter of Pieri v Rider*, 195 AD2d 1013, 1013 [4th Dept 1993]; *see Matter of Papineau v Sanford*, 189 AD3d 2147, 2147 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021]; *Matter of Radley v Radley*, 107 AD3d 1578, 1579 [4th Dept 2013], *lv denied* 22 NY3d 852 [2013]).

The mother's separation from the child was the result of substance abuse issues, but the mother testified at the hearing that her final use of illegal substances was over five years before the hearing began. Furthermore, we believe that the record supports the conclusion that there have been no prolonged periods of separation

between the mother and child inasmuch as the mother has been actively exercising the visitation set forth in the prior order, with the exception of the period of her final relapse into drug use which occurred more than two years prior to her filing of the instant petition (*see Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1318-1319 [4th Dept 2007]). It is evident that " 'the separation between the [mother] and child is not in any way attributable to a *lack of interest or concern for the parental role*,' " and therefore " 'deserves little significance' " (*Matter of Byler v Byler*, 207 AD3d 1072, 1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022] [emphasis added]; *see Matter of Male Infant L.*, 61 NY2d 420, 429 [1984]). Consequently, contrary to the contentions of the grandparents, the father, and the attorney for the child, inasmuch as the grandparents failed to establish the existence of extraordinary circumstances, there is no need to conduct an analysis of the best interests of the child (*see Orlowski*, 147 AD3d at 1446).

Finally, we also conclude that there is no need to disturb the court's order with respect to the father's and the grandparents' access to the child. The amended order in appeal No. 2 did not alter the father's access to the child, and, with respect to the grandparents' access, the amended order provides that the grandmother would have access to the child "as the parties may agree," and the record indicates that the mother and the grandparents had previously been able to amicably agree to an access schedule.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

541

CA 22-00787

PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF UPSTATE UNIVERSITY HOSPITAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON L., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JOSEPH M. BETAR OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 26, 2022. The order, inter alia, granted the petition to compel respondent to undergo medical treatment over his objection.

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

Memorandum: Respondent, an individual who was struggling with homelessness and had a cast in place to treat a tibia fracture, was admitted to petitioner, a hospital, with a serious bacterial infection around the cast. After the cast was removed, respondent cooperated with antibiotic treatment of the infection. Respondent, however, required wound dressing, with which he cooperated only intermittently. Respondent was also diagnosed with bedbug and lice infestations that would require treatment. Although respondent consented to oral medication for the infestations, that treatment was unsuccessful, and respondent then refused the topical and shampoo treatments needed to remedy the infestation conditions. Respondent was referred for a psychiatric evaluation, which did not indicate a clear psychiatric diagnosis, and respondent remained in the medical unit. However, inasmuch as respondent denied the existence of his underlying medical conditions and did not understand the need for treatment, physicians determined that respondent lacked capacity to make treatment decisions regarding his wound care and infestations (*see* Public Health Law § 2994-c). Petitioner then located a surrogate decisionmaker, respondent's grandfather, who agreed that the proposed treatment was in respondent's best interests (*see* § 2994-d).

Petitioner, by order to show cause and verified petition, brought this proceeding pursuant to Public Health Law § 2994-r for an order

finding that respondent lacked decision-making capacity and compelling respondent to undergo medical treatment over his objection. Mental Hygiene Legal Service (MHLS), in anticipation of petitioner's application, submitted a letter to Supreme Court advising that MHLS lacked jurisdiction to represent respondent in such a proceeding. MHLS asserted that its statutory jurisdiction did not extend to representation of patients in portions of a hospital that were not being operated for purposes of providing services to the mentally disabled. After considering the petition and MHLS's letter, the court signed the order to show cause, which directed a hearing and also appointed MHLS to represent respondent.

Following the hearing, during which petitioner withdrew its request for an order requiring that respondent undergo wound dressing changes because respondent's leg had healed in the interim, the court issued an order that, inter alia, ordered that respondent, over his objection and upon the consent of his surrogate decisionmaker, receive specified treatment for his bedbug and lice infestations. The Attorney General, who represents petitioner on appeal, advises us that, subsequent to the order, respondent received the bedbug and lice treatment, then required additional care after he experienced seizure disorder symptoms, and was ultimately discharged to the care of his grandfather. Respondent does not dispute in his brief on appeal that the treatment administered pursuant to the order has been completed. Respondent, still represented by MHLS, appeals from the order directing the administration of treatment over his objection.

MHLS, ostensibly on behalf of respondent on appeal, contends that the court, in the order to show cause, erred in appointing MHLS because it is an agency of limited jurisdiction and, insofar as respondent was never a patient in a mental hygiene facility under the applicable statutes and instead remained in the medical unit of the hospital, the appointment was not authorized by law. We agree with petitioner, however, that the nonfinal order appointing MHLS to represent respondent is not properly before us on this appeal.

A nonfinal order "may be reviewed on appeal from a final paper only if, pursuant to CPLR 5501 (a) (1), the nonfinal order 'necessarily affects' the final judgment" (*Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025 [2022], *rearg denied* 38 NY3d 1170 [2022]). The Court of Appeals has acknowledged that "[i]t is difficult to distill a rule of general applicability regarding the 'necessarily affects' requirement" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-42 [2012]), and that no attempt has been made to provide such a generally applicable definition (*see Bonczar*, 38 NY3d at 1025; *Oakes v Patel*, 20 NY3d 633, 644 [2013]). Nonetheless, the Court of Appeals has provided guidance in its case law, which helps resolve the issue presented here.

"[T]o determine whether a nonfinal order 'necessarily affects' the final judgment, in cases where the prior order 'str[uck] at the foundation on which the final judgment was predicated[,]' [the Court of Appeals] ha[s] inquired whether 'reversal would inescapably have led to a vacatur of the judgment' " (*Bonczar*, 38 NY3d at 1025, quoting

Matter of Aho, 39 NY2d 241, 248 [1976]). Here, however, as petitioner correctly contends, "[t]his is not such a case" because the pre-hearing appointment of MHLS, as opposed to an order allowing private representation or appointment of counsel under any other applicable statute, does not strike at the foundation on which the post-hearing merits ruling was based such that reversal of the nonfinal appointment order would necessarily lead to vacatur of the final order (*Bonczar*, 38 NY3d at 1026).

"In other cases, [the Court of Appeals] ha[s] asked whether the nonfinal order 'necessarily removed [a] legal issue from the case' so that 'there was no further opportunity during the litigation to raise the question decided by the prior non-final order' " (*id.*, quoting *Siegmund Strauss, Inc.*, 20 NY3d at 43). As petitioner again correctly contends, the nonfinal order appointing MHLS here "did not remove any issues from the case" (*id.*); instead, the nonfinal order simply afforded respondent representation to assist him in opposing petitioner's petition seeking to compel the receipt of medical treatment over his objection.

As the Court of Appeals has further explained, the "necessarily affects" rule embodied in CPLR 5501 (a) (1) is to allow appellate review of a prior nonfinal order where "[t]he correctness of a final judgment may turn on the correctness of an intermediate non-final order[ ]" (*Siegmund Strauss, Inc.*, 20 NY3d at 41). That is not the case here, however, because nothing about the correctness of the appointment order would necessarily affect the correctness of the final order following the hearing on the merits that was indisputably conducted by a court of appropriate jurisdiction and venue (*cf. Aho*, 39 NY2d at 248).

With respect to the only issue properly before us on appeal, respondent contends that petitioner failed to meet its burden on the petition and, although the disputed treatment has already been administered, his challenge should be reviewed because the exception to the mootness doctrine applies. We agree with petitioner, however, that the appeal should be dismissed as moot.

Inasmuch as it is undisputed that respondent received the ordered medical treatment and is no longer a patient at the hospital, and thus no longer subject to the order, the appeal has been rendered moot (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see also Matter of McCulloch v Melvin H.*, 156 AD3d 1480, 1481 [4th Dept 2017], *appeal dismissed* 31 NY3d 927 [2018], *lv denied* 32 NY3d 902 [2018]; *Matter of Russell v Tripp*, 144 AD3d 1593, 1594 [4th Dept 2016]; *Matter of Bosco [Quinton F.]*, 100 AD3d 1525, 1526 [4th Dept 2012]). Contrary to respondent's contention, this case does not fall within the exception to the mootness doctrine (*see McCulloch*, 156 AD3d at 1481; *Russell*, 144 AD3d at 1594; *Bosco*, 100 AD3d at 1526*; McGrath*, 245 AD2d at 1082; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Here, the issues raised by respondent challenging the evidence at the hearing and the relief granted in the final order "ha[ve] no application outside this particular proceeding" (*McGrath*,

245 AD2d at 1082). Indeed, "[i]t would be wholly speculative to assume that the exact facts at issue will be repeated in another case and will result in a similar order" (*id.*). Moreover, the issues here do not typically evade judicial review inasmuch as patients facing medical treatment over their objection are entitled to a hearing, and the issues are not substantial and novel (*see id.*).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00916

PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND OGDEN, JJ.

DEBRA A. DEMARCO AND PETER DEMARCO,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

DOMINICK A. SEVERANCE AND ASHLEY M. SEVERANCE,
RESPONDENTS-RESPONDENTS.

HOGANWILLIG PLLC, AMHERST (DANIEL S. GVERTZ OF COUNSEL), FOR PETITIONERS-APPELLANTS.

SERCU & SERCU, LLP, PITTSFORD (MARILEE G. SERCU OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 19, 2021. The order granted respondents' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petitions are reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioners commenced this proceeding with separate petitions pursuant to Domestic Relations Law § 72 seeking visitation with respondents' children, i.e., petitioners' grandchildren. The petitions were consolidated to a single proceeding and, after a hearing on the petitions began, Supreme Court sua sponte terminated the hearing before petitioners had completed the presentation of their case and informed the parties that it would entertain written submissions on the issue whether petitioners could maintain their petitions in light of the ostensibly undisputed evidence of acrimony between the parties and respondents' strenuous objection to visitation. Respondents then moved for summary judgment dismissing the petitions. The court granted the motion, first by presuming that petitioners had standing and then by reasoning that visitation with petitioners was not in the children's best interests. Petitioners appeal.

We agree with petitioners that, under the circumstances of this case, the court erred in granting respondents' motion and in terminating the hearing before petitioners had completed the presentation of their case (*see Matter of Placidi v Sleiertin*, 61 AD3d 1340, 1341 [4th Dept 2009]). "[E]ven where . . . a grandparent has established standing to seek visitation, 'a grandparent must then

establish that visitation is in the best interests of the grandchild . . . Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent' " (*Matter of Honeyford v Luke*, 186 AD3d 1049, 1051 [4th Dept 2020]; *see Matter of E.S. v P.D.*, 8 NY3d 150, 157-158 [2007]; *Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]). Visitation and "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' " (*S.L. v J.R.*, 27 NY3d 558, 563 [2016], quoting *Obey v Degling*, 37 NY2d 768, 770 [1975]), "[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of the child['s] best interests" (*Burns v Grandjean*, 210 AD3d 1467, 1471 [4th Dept 2022] [internal quotation marks omitted]). Upon our review of the record, we conclude that, "[a]bsent a[full] evidentiary hearing, . . . the court here lacked sufficient evidence . . . to enable it to undertake a comprehensive independent review of the [children]'s best interests" (*id.* at 1471-1472 [internal quotation marks omitted]; *see Placidi*, 61 AD3d at 1341). We therefore reverse the order, deny the motion, reinstate the petitions, and remit the matter to Supreme Court for a full evidentiary hearing on the petitions.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01904

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

STEVEN PRIMOSCH AND JEANNE PRIMOSCH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PEROXYCHEM, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CARL W. MORGAN, P.C., HAMBURG (CARL W. MORGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered January 7, 2022. The order granted the motion of plaintiffs for summary judgment on liability pursuant to Labor Law § 200 and denied the cross-motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that said appeal from the order insofar as it denied those parts of defendant's cross-motion seeking summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims is unanimously dismissed without costs and the order is modified on the law by denying plaintiffs' motion.

Memorandum: Plaintiffs commenced this action asserting claims pursuant to Labor Law §§ 200, 240 (1), and 241 (6) for injuries that Steven Primosch (plaintiff) allegedly sustained when he received an electric shock while performing work on a vacuum circuit breaker (VCB) at defendant's substation. The electrical power to the VCBs was ordinarily cut off for the purposes of the work plaintiff was performing, but at the time of the accident, VCB #6, on which plaintiff was working, had not been de-energized.

In appeal No. 1, defendant appeals from an order that granted plaintiffs' motion for summary judgment on the issue of defendant's liability under Labor Law § 200 and denied defendant's cross-motion for summary judgment dismissing the complaint. Following entry of the order in appeal No. 1, defendant moved for, inter alia, leave to reargue its cross-motion insofar as it sought summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims, and plaintiffs cross-moved for leave to reargue with respect to those claims, seeking a determination that plaintiff was performing the protected activity

of cleaning. Supreme Court granted leave to reargue and, in appeal No. 2, defendant appeals from an order that, upon reargument, adhered to the prior determination denying those parts of defendant's cross-motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims and, after searching the record, determined that plaintiffs were entitled to summary judgment on their Labor Law § 240 (1) claim.

As a preliminary matter, we dismiss the appeal from the order in appeal No. 1 insofar as it denied those parts of defendant's cross-motion seeking summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims (*see Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1431-1432 [4th Dept 2015]; *Loafin' Tree Rest., Inc. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). The contentions relating to that part of the order in appeal No. 1 are appropriately the subject of the order in appeal No. 2.

In appeal No. 1, we agree with defendant that the court erred in granting plaintiffs' motion for summary judgment on their Labor Law § 200 claim. We reject defendant's further contention, however, that the court erred in denying defendant's cross-motion insofar as it sought summary judgment dismissing that claim. We conclude that the parties' submissions demonstrate that there is a question of fact whether plaintiff's conduct was an intervening superseding cause of his injuries. The record is clear that defendant failed to de-energize VCB #6, but the record further establishes that electricians are supposed to test the wires for high voltage and attach grounds for protection and that plaintiff would have been expected to do so. Under the circumstances of this case, a question of fact exists whether plaintiff's conduct constitutes an unforeseeable, superseding act "sufficient to break the causal chain, thus absolving defendant of any claimed liability" (*Haughton v T & J Elec. Corp.*, 309 AD2d 1007, 1009 [3d Dept 2003], *lv denied* 1 NY3d 508 [2004]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]; *Neumire v Kraft Foods*, 291 AD2d 784, 785 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]; *Pomeroy v Buccina*, 289 AD2d 944, 945 [4th Dept 2001]). We therefore modify the order in appeal No. 1 by denying plaintiffs' motion for summary judgment on their Labor Law § 200 claim.

In appeal No. 2, we agree with defendant that, upon reargument, the court erred in denying defendant's cross-motion insofar as it sought summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims. With respect to the Labor Law § 240 (1) claim, defendant met its initial burden on the cross-motion of establishing that plaintiff was not engaged in "cleaning" the VCBs for the purposes of Labor Law § 240 (1) based on the factors set forth in *Soto v J. Crew, Inc.* (21 NY3d 562, 568 [2013]). In particular, defendant's submissions demonstrated that the work was "the *type* of job" that was performed routinely and recurrently "with relative frequency as part of the ordinary maintenance and care of a commercial property" (*Healy v EST Downtown, LLC*, 38 NY3d 998, 1000 [2022]), and plaintiffs' original motion referred to the work accordingly as "certain inspection, testing and maintenance service work." Moreover, the risk

inherent in the work resulted not from gravity but from the high voltage of the VCBs and, therefore, the work did not implicate the "core purpose of Labor Law § 240 (1)" (*Soto*, 21 NY3d at 568). Thus, we conclude that defendant established that, rather than cleaning, plaintiff was engaged in "routine maintenance in a non-construction, non-renovation context" to which section 240 (1) does not apply (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), and we conclude that plaintiffs failed to raise a triable issue of fact in opposition. We further conclude that defendant met its initial burden of demonstrating that plaintiff's work was not within the coverage of Labor Law § 241 (6), which is limited to work performed in the context of construction, demolition, or excavation (*see Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Deangelis v Franklin Plaza Apts., Inc.*, 189 AD3d 772, 773 [2d Dept 2020]), and we conclude that plaintiffs failed to raise a triable issue of fact in opposition. We therefore reverse the order insofar as appealed from in appeal No. 2, grant defendant's cross-motion in part, and dismiss plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01298

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

STEVEN PRIMOSCH AND JEANNE PRIMOSCH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PEROXYCHEM, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CARL W. MORGAN, P.C., HAMBURG (CARL W. MORGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered June 3, 2022. The order, insofar as appealed from, upon reargument, adhered to a prior determination denying those parts of the cross-motion of defendant for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims and granted plaintiffs summary judgment on their Labor Law § 240 (1) claim.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, defendant's cross-motion is granted in part, and plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims are dismissed.

Same memorandum as in *Primosch v Peroxychem, LLC* ([appeal No. 1] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

All concur except WHALEN, P.J., and OGDEN, J., who dissent in appeal No. 2 and vote to affirm in the following memorandum: We respectfully dissent in appeal No. 2 because we disagree with the majority's conclusion that Steven Primosch (plaintiff) was not engaged in "cleaning" within the meaning of Labor Law § 240 (1). The Court of Appeals has stated that "an activity cannot be characterized as 'cleaning' under [that] statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction,

renovation, painting, alteration or repair project" (*Soto v J. Crew, Inc.*, 21 NY3d 562, 568 [2013]). Whether the activity is "cleaning" is an issue for the court to decide, and "[t]he presence or absence of any one [factor] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*id.* at 568-569).

Here, the record shows that plaintiff was assisting in "inspection, testing and maintenance service work" for electrical substation equipment, including several vacuum circuit breakers (VCB), which required him to, inter alia, clean the equipment using shop-vacs, scratch pads, and spray cleaners. This service typically took place during a designated annual shutdown of the substation, although each VCB was serviced only once every three years, and certain other equipment was serviced only once every five years. Based on that evidence, we disagree with the majority's conclusion that the activity occurred with "relative frequency" (*Healy v EST Downtown, LLC*, 38 NY3d 998, 1000 [2022]) within the meaning of the first factor inasmuch as an activity that occurs annually—or less often—is not conducted on a "daily, weekly or other relatively-frequent and recurring basis" (*Soto*, 21 NY3d at 568).

The majority does not address the second and third factors, both of which also weigh in plaintiffs' favor. With respect to the second factor, although some of the supplies used by plaintiff were typical household or commercial cleaning equipment, plaintiff also used specialized testing equipment, wore protective clothing, and was a journeyman electrician trained to work in a high voltage environment. With respect to the third factor, plaintiffs established that the VCBs were eight or nine feet tall and that the work required plaintiff to climb to either the third or fourth rung of an 8- or 10-foot ladder, a height that has been found to present an elevation-related risk that Labor Law § 240 (1) was intended to address (*see Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560-561 [1993]).

The fourth factor also supports a finding that plaintiff was engaged in a covered cleaning activity based on the environment in which the work was being performed. The Court of Appeals has made clear that it is "[in]consistent with the spirit of the [Labor Law] statute to isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Plaintiff was a highly skilled electrician performing specialized cleaning tasks in a dangerous, high-voltage environment in the course of his employment with a specialized contractor engaged under a contract to carry out that high-risk, specialized activity. We conclude that, "viewed in totality," the considerations surrounding the incident here "militate in favor" of a determination that this case involves a covered activity (*Soto*, 21 NY3d at 569) inasmuch as plaintiff's activity was not comparable to that of a "bookstore employee who climbs a ladder to dust off a bookshelf" or a "maintenance worker who climbs to a height to clean a light fixture" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 526 [2012]).

The majority concludes that "the risk inherent in the work resulted not from gravity but from the high voltage of the VCBs." While there can be no doubt that the electrical shock was one proximate cause of plaintiff's injury, plaintiff was also injured by being thrown off his ladder and landing on the ground, and recovery under Labor Law § 240 (1) is not foreclosed merely because an elevation-related risk was not the only proximate cause of a worker's injury (*see generally Gordon*, 82 NY2d at 562). We would therefore affirm the order in appeal No. 2 insofar as it granted summary judgment in plaintiffs' favor on the Labor Law § 240 (1) claim.

With respect to plaintiffs' Labor Law § 241 (6) claim, the Court of Appeals has stated that section 241 (6) protects workers "from industrial accidents specifically in connection with construction, demolition or excavation work" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]). "[T]he courts have generally held that the scope of Labor Law § 241 (6) is governed by 12 NYCRR 23-1.4 (b) (13) which defines construction work expansively" (*Vernieri v Empire Realty Co.*, 219 AD2d 593, 595 [2d Dept 1995]). We cannot conclude that "[t]he work performed by plaintiff at the time of his injury constituted routine maintenance in a non-construction, non-renovation context" (*Bieber v A & B Wholesale*, 291 AD2d 936, 936 [4th Dept 2002] [internal quotation marks omitted]). We would therefore also affirm the order in appeal No. 2 insofar as it denied that part of defendant's cross-motion for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00788

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

ISKALO ELECTRIC TOWER LLC, AND DOWNTOWN CBD INVESTORS LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STANTEC CONSULTING SERVICES, INC., DEFENDANT-RESPONDENT-APPELLANT.

THE GARAS LAW FIRM, LLP, WILLIAMSVILLE (JOHN C. GARAS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HARTER, SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 11, 2022. The order granted in part and denied in part plaintiffs' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion in its entirety and reinstating defendant's eleventh counterclaim and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, limited liability companies managed by nonparty Iskalo Development Corp., commenced this action seeking damages for defendant's alleged breach of two commercial leases. One lease (Electric Tower lease) was executed between plaintiff Iskalo Electric Tower LLC (Iskalo) and defendant for commercial space in a certain building (Electric Tower building), and the other lease (East Huron Street lease) was executed by plaintiff Downtown CBD Investors LLC (CBD) and defendant to provide for warehouse and parking space near the Electric Tower building (East Huron Street premises). It was imperative to defendant to obtain parking space near the Electric Tower building and, as a result, the two leases contained provisions tying them together and allegedly permitting defendant to terminate both leases should certain contingencies relating to the parking area not occur.

Following a series of motions and appeals (*Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 174 AD3d 1420 [4th Dept 2019] [*Iskalo III*]; *Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 113 AD3d 1105 [4th Dept 2014] [*Iskalo II*]; *Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 79 AD3d 1605 [4th Dept 2010]

[*Iskalo I*]), Supreme Court granted defendant leave to file an amended answer asserting a counterclaim for reformation of the East Huron Street lease (10th counterclaim) as well as a counterclaim for breach of the Electric Tower lease regarding, inter alia, build-out costs (11th counterclaim).

Plaintiffs thereafter moved for summary judgment dismissing the 10th counterclaim and partially dismissing the 11th counterclaim. The court granted that part of the motion with respect to the 11th counterclaim, awarding plaintiffs summary judgment dismissing the 11th counterclaim insofar as it challenged Iskalo's attempt to recover build-out costs that had been the subject of prior discussions between the parties. The court found that defendant had waived its right to challenge those particular costs due to its failure to insist on compliance with certain provisions of the Electric Tower lease and its failure to invoke the notice and cure provisions contained in section 30.17 of that lease. Plaintiffs appeal, and defendant cross-appeals. Although we conclude that the court properly denied that part of plaintiffs' motion with respect to the 10th counterclaim, we agree with defendant that the court erred in granting that part of the motion with respect to the 11th counterclaim, and we modify the order accordingly.

Plaintiffs contend on their appeal that the law of the case doctrine bars defendant's 10th counterclaim and that the court thus erred in denying their motion insofar as it sought summary judgment dismissing the 10th counterclaim. We reject that contention inasmuch as the issue whether the East Huron Street lease should be reformed was not "necessarily resolved on the merits in a prior decision" (*Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 184 AD3d 1085, 1086 [4th Dept 2020], *lv dismissed* 36 NY3d 1081 [2021] [internal quotation marks omitted]; *see Pettit v County of Lewis*, 145 AD3d 1650, 1651 [4th Dept 2016]). "The law of the case doctrine . . . precludes relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [3d Dept 2007]; *see Matter of Murtaugh v New York State Dept. of Envtl. Conservation* [appeal No. 2], 134 AD3d 1392, 1394 [4th Dept 2015]). It also bars claims that " 'could have been raised on a prior appeal' " (*Juhasz v Juhasz*, 101 AD3d 1690, 1690 [4th Dept 2012]; *see Murtaugh*, 134 AD3d at 1394). Here, however, defendant has yet to be given a full and fair opportunity to address the issue of reformation, and we affirmatively declined to address that issue on the merits in *Iskalo I* (79 AD3d at 1608).

Moreover, the law of the case doctrine is not implicated because "the court did not alter a ruling by another court of coordinate jurisdiction but rather its own ruling" (*Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]; *see Commercial Tenant Servs., Inc. v Northern Leasing Sys., Inc.*, 131 AD3d 895, 896-897 [1st Dept 2015]). Regardless, "this Court is not bound by the doctrine of law of the case, and may make its own determinations" (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017] [internal quotation marks

omitted]; *see Smalley v Harley-Davidson Motor Co. Group LLC*, 134 AD3d 1490, 1492 [4th Dept 2015]; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]).

Contrary to plaintiffs' further contentions, the court properly denied that part of their motion with respect to the 10th counterclaim, seeking reformation of section 3.1 (f) of the East Huron Street lease. That section as written provides, in pertinent part, that "[n]otwithstanding anything to the contrary contained herein, to the extent that [CBD] is not able to cause Delivery of Possession [of the East Huron Street premises] to occur by December 1, 2005, [CBD] will provide notice to [defendant] on or before noon, October 31, 2005, so that [defendant] may extend the lease for its existing warehouse/parking facility to accommodate the delay in Delivery of Possession. In the event [that CBD] does not deliver such notice **and** Delivery of Possession does not occur by December 1, 2005, [CBD] shall, for a period of up to three months after December 1, 2005, use its best efforts to locate or construct alternative leased premises within 500 feet of [the Electric Tower building]. During such three-month period, [CBD] shall reimburse [defendant] for the rent differential between its existing location and the rent that would have otherwise been payable under the terms of this Lease had Delivery of Possession occurred on December 1, 2005 . . . If at the end of such three-month period, [CBD] is unable to secure such alternative space, [defendant] shall have the right, for a period of thirty (30) days thereafter, to elect to terminate this Lease and to terminate the [Electric Tower] lease" (emphasis added).

We previously determined that CBD gave defendant the requisite notice (*see Iskalo I*, 79 AD3d at 1607). It is undisputed, however, that CBD did not deliver possession of the East Huron Street premises and did not locate or construct an alternative leased premises within 500 feet of the Electric Tower building. Defendant contends that the second sentence of section 3 (f) should be reformed by replacing the word "and" with the word "or." That sentence would then provide: "In the event [that CBD] does not deliver such notice [or] Delivery of Possession does not occur by December 1, 2005, [CBD] shall, for a period of up to three months after December 1, 2005, use its best efforts to locate or construct alternative leased premises within 500 feet of [the Electric Tower building]." Contrary to plaintiffs' contentions, there are triable issues of fact whether the East Huron Street lease should be reformed.

"Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). The party seeking reformation bears the burden of establishing by clear and convincing evidence either that there was a mutual mistake or that there was a unilateral mistake procured by fraud (*see Judge v Travelers Ins. Co.*, 262 AD2d 983, 983 [4th Dept 1999]; *see generally Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Here, however, we are concerned with

plaintiffs' motion for summary judgment and, as a result, plaintiffs bore the burden of establishing as a matter of law that there was no merit to defendant's counterclaim for reformation (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiffs failed to meet their burden.

"Because the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, generally neither the parol evidence rule nor the Statute of Frauds applies to bar proof, in the form of parol or extrinsic evidence, of the claimed agreement" (*Chimart Assoc.*, 66 NY2d at 573). Plaintiffs' own evidence raises triable issues of fact whether the East Huron Street lease should be reformed. To begin with, the East Huron Street lease, as written, is illogical inasmuch as it does not make sense for the parties to require a failure of notice *and* a failure of delivery as a prerequisite to defendant's right to terminate the leases. It is clear from the record that defendant's goal was to find one centralized location for all of its operations. Thus, its primary concern in entering the East Huron Street lease was to find a place, close to the Electric Tower building, to park its expensive and specialized vehicles. That was *the* nonnegotiable aspect of its dealings with plaintiffs. In that regard, delivery was required to fulfill defendant's goal in entering the leases, whereas notice was needed only to allow defendant to extend its then-existing lease for storage of its vehicles.

CBD failed to deliver either the East Huron Street premises or any alternative parking within a 500-foot area of the Electric Tower building. In light of defendant's purpose for entering the leases, it makes no sense for the termination clause to be obviated by CBD's mere *notice* that it could not provide a parking area. Indeed, the idea that defendant could not terminate the leases in response to CBD's failure to provide a parking area would be contrary to the entire purpose of section 3.1 (f) of the East Huron Street lease. Moreover, the parties' conduct subsequent to that notice demonstrates an understanding between the parties that the termination clause had been triggered. When the three-month grace period mentioned in section 3.1 (f) was nearing a close, plaintiffs' own attorney conceded in a letter that CBD had only two options: to proceed with an expensive build out of the East Huron Street premises, thereby worsening its position, in the hope that defendant "will not exercise its termination right" or to "wait out the thirty day termination period." Although plaintiffs' attorney later stated that he wrote that letter without having reviewed the East Huron Street lease and that his suggestion that defendant had a right of termination was thus made in error, such inconsistent statements create an issue of credibility that warrants denial of summary judgment (*see Hale v Meadowood Farms of Cazenovia, LLC*, 104 AD3d 1330, 1332 [4th Dept 2013]; *Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514, 1514 [4th Dept 2008]). As defendant correctly states, " '[t]he best evidence of the intent of parties to a contract is their conduct after the contract is formed' " (*T.L.C. W., LLC v Fashion Outlets of Niagara, LLC*, 60 AD3d 1422, 1424 [4th Dept 2009]; *see Ames v County of Monroe*, 162 AD3d 1724, 1727 [4th Dept 2018]). Both plaintiffs' attorney and defendant's attorney operated under the

belief that defendant had properly invoked the termination provision, and they acted accordingly (*see e.g. Orangetown Home Improvements, LLC v Kiernan*, 84 AD3d 902, 903-904 [2d Dept 2011]; *Benderson Dev. Co. v Schwab Bros. Trucking*, 64 AD2d 447, 457-458 [4th Dept 1978]). Inasmuch as plaintiffs failed to meet their initial burden of establishing as a matter of law that there was no mutual mistake warranting reformation, the burden never shifted to defendant to raise a triable issue of fact and the court properly denied that part of plaintiffs' motion with respect to the 10th counterclaim (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We reject plaintiffs' assertion that defendant improperly invoked the termination clause based only on CBD's failure to deliver the East Huron Street premises. In correspondence to plaintiffs, defendant noted that CBD had failed to deliver the East Huron Street premises "or a reasonably acceptable alternate space." Moreover, in its termination letter defendant stated without limitation that termination was based on "Article 3, paragraph f." Inasmuch as that section required either delivery of the East Huron Street premises or location of a suitable alternative, we conclude that defendant did not attempt to terminate the leases based only on CBD's failure to deliver the East Huron Street premises without regard to whether CBD might deliver alternate space.

We also reject plaintiffs' assertion that section 3.1 (f) was intended to apply only if CBD failed to "close" on the East Huron Street premises rather than failing to "deliver" the parking space required by defendant. Although there were references in some emails regarding CBD's potential inability to "close" on the East Huron Street premises, other emails discussed the consequences should CBD fail "to deliver the [East] Huron Street building." Even plaintiffs' principal admitted in his deposition that the purpose of section 3.1 (f) was to provide defendant protection in case CBD "fail[ed] to deliver" suitable parking space.

On its cross-appeal, defendant contends that the court erred in granting that part of plaintiffs' motion seeking summary judgment dismissing defendant's 11th counterclaim insofar as it challenges Iskalo's right to recover certain build-out costs related to the Electric Tower building. We agree. In their motion, plaintiffs contended that defendant waived its right to challenge those build-out costs because it was aware of those additional costs at a time when it could have invoked the notice-and-cure provisions of section 30.17 of the Electric Tower lease. The court agreed. It is undisputed that defendant was presented with a certain figure related to build-out costs that exceeded the amount allowed in the Electric Tower lease and that defendant thereafter made additional requests for work. It is also undisputed that those costs and additions were known to defendant before it signed the East Huron Street lease. The Electric Tower lease provided that all work in building out the Electric Tower lease space had to be approved by defendant, but defendant contended that the cost overruns were related to items for which it never gave approval. Although section 30.17 of the Electric Tower lease provided defendant with the right to notify Iskalo of an alleged default—here,

Iskalo's failure to obtain defendant's approval for cost overruns—and to seek cure of that default, defendant did not exercise its right to do so.

We agree with defendant that its failure to enforce the notice-and-cure provision of the Electric Tower lease did not establish as a matter of law that defendant was waiving its right to challenge Iskalo's ability to recover the additional build-out costs. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]; *see Preferred Mut. Ins. Co. v Donnelly*, 111 AD3d 1242, 1246 [4th Dept 2013], *affd* 22 NY3d 1169 [2014]). Waiver may be established "by such actions or *failures to act* as demonstrate an intent to relinquish such right" (*Lannon v Lannon*, 124 AD2d 1051, 1052 [4th Dept 1986] [emphasis added]; *see Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978]; *Bolis v Fitzpatrick* [appeal No. 2], 35 AD3d 1153, 1155 [4th Dept 2006]). Inasmuch as a waiver of contractual rights should not be lightly presumed, there must be evidence of " 'a clear manifestation of intent' to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 448 [1984]). Generally, "the existence of an intent to forgo such a right is a question of fact" (*Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104).

Plaintiffs' own submissions raise triable issues of fact whether defendant's failure to act, i.e., its failure to terminate the Electric Tower lease over a relatively minor default by Iskalo, should be deemed a waiver of its right to contest build-out costs that it did not approve, as required by the Electric Tower lease. Given that the waiver of contractual rights is not lightly presumed, we conclude that the court erred in granting that part of plaintiffs' motion with respect to defendant's 11th counterclaim.

As a final matter, we note that we do not address those contentions raised by the parties for the first time in their reply briefs as those contentions are not properly before us (*see Brooks v City of Buffalo*, 209 AD3d 1270, 1272 [4th Dept 2022]; *Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1605 [4th Dept 2018]). In addition, we note that defendant's reiteration in its reply brief of arguments it made in opposition to plaintiffs' appeal amounts to an improper sur-reply (*see generally Scarpati v Kim*, 124 AD3d 866, 868 [2d Dept 2015]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

561

CA 22-01396

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

HAUSRATH LANDSCAPE MAINTENANCE, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARAVAN FACILITIES MANAGEMENT, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 16, 2022. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross-motion of plaintiff for summary judgment.

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

Same memorandum as in *Hausrath Landscape Maintenance, Inc. v Caravan Facilities Mgt., LLC* ([appeal No. 2] — AD3d — [Aug. 11, 2023] [4th Dept 2023]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

562

CA 22-01407

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

HAUSRATH LANDSCAPE MAINTENANCE, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARAVAN FACILITIES MANAGEMENT, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered June 29, 2022. The order adhered to an order granting the motion of defendant for summary judgment dismissing the complaint and denying the cross-motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion, reinstating the complaint, and granting the cross-motion insofar as it sought damages under the contract accruing prior to October 28, 2018, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for breach of contract arising from a contract with defendant pursuant to which plaintiff agreed to perform snow removal services. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment on the complaint. In appeal No. 1, plaintiff appeals from an order granting defendant's motion and denying plaintiff's cross-motion. Plaintiff then moved for leave to reargue its cross-motion and its opposition to defendant's motion. In appeal No. 2, plaintiff appeals from an order granting leave to reargue and, upon reargument, adhering to the prior determination.

Initially, we note that the appeal from the order in appeal No. 1 must be dismissed because the order in appeal No. 2 superseded the order in appeal No. 1 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

On the merits, we agree with plaintiff that Supreme Court erred

in determining that defendant established its entitlement to judgment as a matter of law dismissing the complaint. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). In order to terminate the agreement for convenience, the plain language of the agreement required defendant to send "notice for the same to [plaintiff] by registered mail, return receipt requested, at any time, with minimum 30 days prior written notice." The termination for convenience provision also stated that "[s]uch termination for convenience shall not give rise to any . . . damages of any kind whatsoever." It is undisputed that plaintiff received actual notice of defendant's intent to terminate the agreement via email on September 28, 2018 and that the notice stated that termination would be effective October 1, 2018.

The termination for convenience provision would not have given rise to damages if it had been effected with proper notice (*see generally Wilsey v 7203 Rawson Rd., LLC*, 204 AD3d 1497, 1499 [4th Dept 2022]). Defendant, however, failed to provide the requisite 30 days' prior written notice of termination and instead provided 2 days' prior written notice. We conclude that defendant provided notice of termination as of September 28, 2018 even though that notice was not sent by registered mail with return receipt requested (*see Yarmy v Conte*, 128 AD2d 611, 611 [2d Dept 1987]). As a result, the effective date of termination was October 28, 2018, not October 1, 2018 (*see G. B. Kent & Sons v Helena Rubinstein, Inc.*, 47 NY2d 561, 564-565 [1979]), and plaintiff is entitled to damages under the agreement accruing prior to the effective date (*see Guasteferro v Family Health Network of Cent. N.Y.*, 203 AD2d 905, 905 [4th Dept 1994]). We further conclude that the court erred in granting the motion and properly denied the cross-motion with respect to consequential damages inasmuch as there are triable issues of fact whether plaintiff is entitled to such damages (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore modify the order in appeal No. 2 by denying defendant's motion, reinstating the complaint, and granting plaintiff's cross-motion insofar as it sought payment of damages under the contract that accrued prior to termination on October 28, 2018.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

564

CA 22-01764

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, OGDEN, AND GREENWOOD, JJ.

GARY J. LAVINE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RITA M. GLAVIN, DEFENDANT-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

GARY J. LAVINE, PLAINTIFF-RESPONDENT-APPELLANT PRO SE.

Appeal and cross-appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered November 4, 2022. The order denied the motion of plaintiff to dismiss defendant's counterclaim and denied the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant insofar as it sought to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (g) and dismissing the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this defamation action seeking damages for statements made by defendant in a letter to the New York State Inspector General (Inspector General) about defendant's concerns that plaintiff, as a member of the New York State Joint Commission on Public Ethics, and others were disclosing confidential information to the media. Defendant answered the complaint and asserted a counterclaim seeking to recover damages under the anti-strategic lawsuits against public participation statutes (*see* Civil Rights Law §§ 70-a, 76-a). Plaintiff moved to dismiss defendant's counterclaim, and defendant moved, inter alia, to dismiss plaintiff's complaint. Defendant appeals and plaintiff cross-appeals from an order that denied both motions.

We agree with defendant on her appeal that Supreme Court should have granted her motion insofar as it sought dismissal of the complaint pursuant to CPLR 3211 (a) (7) and (g), and we therefore modify the order accordingly. There is no dispute that defendant established on her motion that the action involves "public petition and participation" (CPLR 3211 [g]; *see* Civil Rights Law § 76-a [1] [a] [2]), and we conclude that plaintiff, in opposition to the motion, failed to demonstrate that the action has a substantial basis in law

inasmuch as defendant's statements in question constitute nonactionable expressions of opinion (*see* CPLR 3211 [g]; *see generally Davis v Boeheim*, 24 NY3d 262, 269-270 [2014]). "In order for the challenged statements to be susceptible of a defamatory connotation, they must come within the well established categories of actionable communications" (*Davis*, 24 NY3d at 268). Because "falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action' " (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993], quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992], *rearg denied* 81 NY2d 759 [1992], *cert denied* 508 US 910 [1993]). "Whether a particular statement constitutes an opinion or an objective fact is a question of law" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]).

Here, defendant's letter constitutes "a statement of opinion . . . accompanied by a recitation of the facts upon which it is based" (*Davis*, 24 NY3d at 269 [internal quotation marks omitted]). Defendant made allegations, using phrases such as "appear to be" and "[t]o the extent that there is evidence," while setting forth the facts upon which such allegations were based. The purpose of the letter was to implore the Inspector General to commence an investigation. In reviewing the full context of the communication, including its tone and purpose, we conclude that defendant "set out the basis for [her] personal opinion, leaving it to the [Inspector General] to evaluate it for [herself]" (*Brian v Richardson*, 87 NY2d 46, 53-54 [1995]).

We have reviewed plaintiff's contentions on his cross-appeal and conclude that they lack merit.

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court

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

576

CA 22-01150

PRESENT: SMITH, J.P., CURRAN, BANNISTER, MONTOUR, AND OGDEN, JJ.

AMBER WELL DRILLING, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT DIEGELMAN, DEFENDANT-RESPONDENT.

THE CROSSMORE LAW OFFICE, ITHACA (EDWARD Y. CROSSMORE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL G. PUTTER, ROME, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered May 16, 2022. The order awarded defendant money damages in the amount of $1,456.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the award of damages to defendant to $1,426 and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking the unpaid balance for its services in connection with the parties' contract providing for the installation of a new well and pump system on defendant's property. Defendant answered and asserted a counterclaim alleging that the well was actually installed on his neighbors' property and that, as a result, defendant was required to purchase the parcel containing the well from his neighbors. The counterclaim thus sought reimbursement for the money expended by defendant for the purchase of that parcel.

The evidence presented at the bench trial in this case established that, although defendant provided plaintiff with a survey of his property, the parties never met to discuss the exact location where the well would be installed, nor did the contract specify the exact location where the well would be installed. Defendant made two payments to plaintiff for its services, but after purchasing the parcel containing the well from his neighbors, declined to make full payment to plaintiff. Following the bench trial, Supreme Court awarded defendant $1,456.00, which the court determined was the difference between the cost to defendant of buying the land where the well was installed, i.e., $6,975.00, and the amount due to plaintiff under the contract, i.e., $5,549.00. Plaintiff appeals.

Contrary to plaintiff's contentions, we conclude that the court

properly determined that plaintiff breached the contract. The contract required that plaintiff install a new well on defendant's property, and defendant provided plaintiff with a survey for that purpose. Plaintiff thus breached the contract when it failed to place the well on defendant's property. Furthermore, the court properly awarded defendant damages on his counterclaim representing the difference between the cost to defendant of buying the land where the well was installed and the amount due to plaintiff under the contract. "Damages awarded in a breach of contract action should place a [party] in the same position as it would have been if the agreement had not been violated" (*R & I Elecs. v Neuman*, 66 AD2d 836, 837 [2d Dept 1978]). We conclude, however, that the court made a mathematical error in calculating the damages, and we therefore modify the order by reducing the award of damages to defendant to $1,426.00 (*see generally Spano v Kline*, 50 AD3d 1499, 1500 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008], *lv denied* 12 NY3d 704 [2009]).

Entered: August 11, 2023

Ann Dillon Flynn
Clerk of the Court