SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 18, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1285

CA 15-00782

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND WHALEN, JJ.

TONYA TIEDE, PLAINTIFF-RESPONDENT,

V ORDER

FRONTIER SKYDIVERS, INC.,
ET AL., DEFENDANTS,
AND DAYSTAR TRADING & VENTURES, LLC,
DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 20, 2014. The order, insofar as appealed from, denied the motion of defendant Daystar Trading & Ventures, LLC, for summary judgment dismissing the second amended complaint against it.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on January 14, 2016,

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1297

KA 14-00125

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYSHAWN S. PARKER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 3, 2014. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree, attempted assault in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the third degree (two counts) and strangulation in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of kidnapping in the second degree (Penal Law § 135.20), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and two counts each of assault in the second degree (§ 120.05 [2]), strangulation in the second degree (§ 121.12), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant was sentenced to an aggregate determinate term of incarceration of 15 years, with five years of postrelease supervision. Defendant contends that his sentence is unduly harsh and severe. Contrary to the People's contention, in exercising our power to review the severity of a sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; [6] [b]), we need not determine "that there is some demonstrated need to impose a different view of discretion than that of the sentencing Judge." Rather, it is well settled that we have "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 780, 783; *see People v Lopez*, 6 NY3d 248, 260 n 5; *People v Suitte*, 90 AD2d 80, 85-86). Nevertheless, under the circumstances presented, we conclude that defendant's sentence is not unduly harsh or severe.

Defendant further contends that the $300 mandatory surcharge and $25 crime victim assistance fee imposed pursuant to Penal Law § 60.35 (1) are excessive when considered in conjunction with the $2,093 ordered in restitution. Because the mandatory surcharge and crime victim assistance fee are not part of defendant's sentence (*see People v Guerrero*, 12 NY3d 45, 48) and, inasmuch as defendant did not object to the imposition of the surcharge and fee at sentencing, defendant's contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, defendant's contention is without merit because he has "offered 'no credible and verifiable information establishing that the surcharge [and fee] would work an unreasonable hardship on [him] over and above the ordinary hardship suffered by other indigent inmates' " (*People v Kistner*, 291 AD2d 856, 856; *see People v Abdus-Samad*, 274 AD2d 666, 667, *lv denied* 95 NY2d 862).

Finally, defendant contends that County Court erred in assessing a 10% collection surcharge pursuant to Penal Law § 60.27 (8), because the People failed to file an affidavit from an official enumerated in CPL 420.10 (8). Although defendant's contention is unpreserved for our review (*see People v Kirkland*, 105 AD3d 1337, 1338, *lv denied* 21 NY3d 1043), we note that the People concede that they did not submit the requisite affidavit. We exercise our power to review the issue as a matter of discretion in the interest of justice, and we modify the judgment by reducing the surcharge from 10% of the value of the ordered restitution to 5% (*see People v Underwood*, 128 AD3d 1385, 1386-1387, *lv denied* 25 NY3d 1209).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1387

CA 15-01010

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND DEJOSEPH, JJ.

RALPH ANGELO DENARDO AND TRACEY DENARDO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

LILLIAN AARON, WILLOW PARK, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANT.

GOLDBERG SEGALLA, LLP, SYRACUSE (DAVID E. LEACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (ROBIN C. ZIMPEL-FONTAINE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT NORTH EASTERN HVAC/R CORP.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered February 4, 2015. The order denied the motion of defendants Lillian Aaron and Willow Park, Inc., for a change of venue and denied the cross motion of plaintiffs for leave to serve a second amended summons and complaint.

Now, upon the stipulation discontinuing appeal signed by the attorneys for the parties on December 23 and 29, 2015, and January 11, 2016, and filed in the Ulster County Clerk’s Office on January 20, 2016,

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1406

CA 15-00558

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF CANANDAIGUA NATIONAL BANK & TRUST COMPANY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARK R. BROWN, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW, CITY OF CANANDAIGUA, RESPONDENTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (DUNCAN W. O'DWYER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (John J. Ark, J.), entered January 6, 2015 in proceedings pursuant to RPTL article 7. The judgment, among other things, determined that the assessments of properties owned by petitioner are erroneous by reason of overvaluation.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner commenced these proceedings pursuant to RPTL article 7, seeking to challenge the tax assessments on three contiguous parcels of real property that contain several adjacent or adjoining buildings and a parking lot. The buildings were constructed at different times, and several were extensively remodeled, during a period of more than 100 years preceding the assessments at issue. Petitioner used the majority of the space in all of the buildings for its offices and a bank branch, but leased some of the space to other entities for retail and office use. For reasons that are not clear from the record, petitioner challenged the assessment for the 2010 through 2012 tax years on two of the subject parcels, but challenged the assessment for the third parcel, at 56 South Main Street, only for the 2010 and 2012 tax years. The matter proceeded to trial, where both petitioner and respondents submitted expert appraisals of the subject properties. Petitioner's expert primarily relied upon the income capitalization method of appraisal, using estimates for the rental values of the properties because the buildings are primarily owner-occupied, although he also used sales of comparable properties as a check on his results. In his appraisal, petitioner's expert valued the subject properties at an

aggregate of $1,255,000 for 2010, $1,197,000 for 2011, and $1,182,000 for 2012. At the close of petitioner's case, respondents moved to dismiss the petitions on the ground that petitioner failed to submit substantial evidence establishing a prima facie case of overvaluation. Supreme Court denied the motion.

In his appraisal, respondents' expert valued the subject properties at an aggregate of $3,522,000, $3,522,000, and $3,622,000, for each of the three applicable tax years, respectively, primarily using a sales comparison method based on sales of several properties scattered throughout various counties, with upward and downward adjustments based on the expert's evaluation of, inter alia, square footage, use, and location. Respondents' expert also calculated a value for the properties using the income capitalization method, as a check on his valuation, although he used different assumptions than petitioner's expert concerning, among other things, the rental income that would be generated by the properties, the expenses of the properties, the value of the basement areas of the properties, and the square footage of the interior spaces.

The court concluded, quoting *Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes* (92 NY2d 192, 196), that petitioner submitted a " 'detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser,' " and that the appraisal was sufficient to meet petitioner's initial burden of rebutting the presumption of validity that attaches to respondents' valuation of the properties (*see generally Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188). The court further concluded, however, that the variances in the experts' opinions were "more a result of advocacy than objectivity, thereby compromising their credibility," and that neither expert's appraisal was completely acceptable owing to the unique nature of the joined parcels. The court also noted "[t]he inherent difficulty" of using the income capitalization method to evaluate an owner-occupied building because of the "speculative nature of both the income and expenses" used in the valuation, and the speculative nature of the comparison with purportedly comparable leases. Consequently, the court determined a value for the properties by applying the sales comparison method to several properties that both experts deemed comparable, with adjustments for, inter alia, use and square footage of the various areas within the subject parcels. After determining a value per square foot for the properties, the court applied that value to arrive at a final value for the parcels of $2,320,000 for the subject tax years. The court then calculated the total overvaluation of the subject parcels to be $3,390,000 for the three tax years combined, and awarded judgment in favor of petitioner by, inter alia, directing that the overpayment be refunded with 9% interest. We now reverse.

Contrary to respondents' contention, the court properly denied their motion to dismiss the petitions at the close of petitioner's evidence, and properly declined to strike petitioner's appraisal. Respondents are correct that, "[i]n an RPTL article 7 proceeding, a rebuttable presumption of validity attaches to the valuation of

property made by the taxing authority . . . Thus, a petitioner challenging the accuracy of a tax valuation has the initial burden to rebut the presumption by introducing substantial evidence that the property was overvalued" (*Matter of Roth v City of Syracuse*, 21 NY3d 411, 417). It is also well settled, however, that "[s]ubstantial evidence is a minimal threshold standard that simply 'requires that [a] petitioner demonstrate the existence of a valid and credible dispute regarding valuation' " (*Matter of Adirondack Mtn. Reserve v Board of Assessors of the Town of N. Hudson*, 106 AD3d 1232, 1234, quoting *FMC Corp.*, 92 NY2d at 188). Furthermore, "[t]he fact that some aspects of [the expert]'s valuation methodology may be subject to question goes to the weight to be accorded the appraisal and not to 'the threshold issue of whether petitioner produced substantial evidence to rebut the presumption of validity' " (*Matter of OCG L.P. v Board of Assessment Review of the Town of Owego*, 79 AD3d 1224, 1226; *see FMC Corp.*, 92 NY2d at 187-188).

Here, the court properly concluded that petitioner met "this burden through submission of 'a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser' " (*Matter of Gran Dev., LLC v Town of Davenport Bd. of Assessors*, 124 AD3d 1042, 1044, quoting *Niagara Mohawk Power Corp.*, 92 NY2d at 196). Contrary to respondents' contention, petitioner's expert "articulated a plausible reason for his failure to use the type of comparables adopted by" respondents' expert and "put forth a persuasive case for [his own] . . . valuation[]" (*Matter of Rite Aid of N.Y. No. 4928 v Assessor of Town of Colonie*, 58 AD3d 963, 966; *see Matter of Rite Aid Corp. v Haywood*, 130 AD3d 1510, 1517, *lv denied* 26 NY3d 915; *Matter of Myron Hunt/Shaker Loudon Assoc. v Board of Assessment Review for Town of Colonie*, 6 AD3d 953, 954-955).

Contrary to respondents' further contention, the court's refusal to completely follow either appraisal was an acceptable exercise of its discretion inasmuch as, " 'in an assessment review, the court is granted great discretion in evaluating the appraisals presented by each party' " (*Matter of Sun Plaza Enters. Corp. v Tax Commn. of City of N.Y.*, 304 AD2d 763, 766, *lv dismissed* 3 NY3d 689). Consequently, after petitioner's "initial burden was met, the presumption disappeared, and the court properly considered the entire record in order to arrive at a fair and realistic value for the subject propert[ies]" (*Matter of Jay Dee Tomfor Transp. v Board of Assessors*, 288 AD2d 475, 475; *see generally Gran Dev., LLC*, 124 AD3d at 1044; *Stone Mtn. Prime LLC v UICC Holding LLC*, 122 AD3d 1114, 1115, *lv denied* 24 NY3d 917). Based upon our review of the record, and affording great deference to the court's credibility determinations (*see Gran Dev., LLC*, 124 AD3d at 1046), we conclude that the court relied upon comparable sales that were " 'sufficiently similar to serve as a guide to the market value of the [subject] complex, notwithstanding differences between these comparables and the [subject] propert[ies]' . . . , [and then the court used] 'sound theory and objective data' . . . to adjust evidence of sales of comparable properties in order to more accurately reflect the market value of the subject propert[ies]" (*FMC Corp.*, 92 NY2d at 189). Thus,

we conclude that the court used an appropriate method in an attempt to ascertain the market value of the subject properties.

Although we reject respondents' challenge to the method that the court used to arrive at a fair and reasonable value for the subject parcels, we conclude that the court erred in its calculations. The court concluded that the value of the subject properties remained the same for each tax year, a conclusion with which we agree, but the court reduced the valuation for the 56 South Main Street parcel for all three tax years despite petitioner's failure to challenge the assessment on that parcel for one of the applicable years. In addition, we are unable to ascertain which tax years are covered by the judgment, inasmuch as the court reduced the assessments for the 2009 through 2011 tax years, but the petitions sought reductions on two parcels for the 2010 through 2012 tax years, and the 56 South Main Street parcel for only the 2010 and 2012 tax years. The judgment is also internally inconsistent with respect to the valuation of the 72 South Main Street parcel, inasmuch as the "Conclusions of Law" section of the judgment indicates that the parcel should be valued at $1,605,100, but the decretal paragraph values the parcel at $1,905,100. Furthermore, the court erred in its calculation of the amount of taxes that were overpaid.

We also agree with respondents that the court erred in assessing interest at a rate of 9%. As petitioner correctly concedes, the governing statute unequivocally states that, when a court orders a taxing authority to pay interest in an action pursuant to RPTL article 7, the "rate of interest shall be the overpayment rate set by the commissioner of taxation and finance pursuant to subsection (j) of section six hundred ninety-seven of the tax law and such interest rate shall not be greater than nine percent per annum" (RPTL 726 [2]). Section 697 of the Tax Law sets that rate at "the sum of (i) the federal short-term rate as provided under paragraph three of this subsection, plus (ii) two percentage points" (§ 697 [j] [2] [A]). The parties correctly agree that the rate is 3% for 2010 and 2% for 2011 and 2012, which are the tax years challenged in the respective petitions.

Consequently, we remit the matter to Supreme Court to state the parcel, tax year, and valuation date to which each part of its judgment applies, to recalculate the assessment for each tax year with respect to each challenged parcel, to recalculate the amount of overpayment for each challenged parcel and tax year, to recalculate the total amount of overvaluation, and to award interest for each parcel and tax year pursuant to RPTL 726 (2) and Tax Law § 697 (j) (2) (A).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

2

TP 15-01078

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF LUCIANO SPATARO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

THOMAS J. EOANNOU, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Shirley Troutman, J.], filed June 16, 2015) to review a determination of the New York State Board of Parole. The determination rescinded petitioner's parole release date.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner, an inmate serving an aggregate sentence of 25 years to life for various convictions including murder in the second degree (*People v Spataro*, 202 AD2d 1005, *lv denied* 84 NY2d 833), commenced this CPLR article 78 proceeding seeking to annul the determination of the New York State Board of Parole (Board) that, after a hearing, rescinded a prior determination granting him an open release date. We confirm.

A parole board may, "[i]n its discretion, . . . revoke or modify any of its decisions or determinations" (9 NYCRR 8000.4), and a parole release date may be rescinded when, among other things, there is "significant information which existed . . . prior to the rendition of the parole release decision, where such information was not known by the board" (9 NYCRR 8002.5 [b] [2] [i]; *see Matter of Ortiz v New York State Bd. of Parole*, 239 AD2d 52, 55, *lv denied* 92 NY2d 811). In rescinding an inmate's parole release date, a majority of the board must be "satisfied that substantial evidence was presented at the hearing to form a basis for rescinding the grant of release" (9 NYCRR 8002.5 [d] [1]; *see Ortiz*, 239 AD2d at 55).

Contrary to petitioner's contention, we conclude that the decision of the Court of Appeals in *Matter of Costello v New York*

State Bd. of Parole (23 NY3d 1002, 1004, *revg* 101 AD3d 1512) does not require annulment of the Board's rescission determination here. In *Costello*, the Court held that the Board improperly rescinded the petitioner's parole release "under the particular circumstances of this case," and emphasized that its resolution in *Costello* "should not be interpreted as minimizing . . . the importance of victim impact statements in parole board hearings" (23 NY3d at 1004).

Here, in addition to various unrelated crimes, petitioner was convicted of murder in the second degree after he conspired with the victim's wife to collect on the victim's life insurance policy and then shot the victim in his driveway when he returned from dinner with his wife. The statements from the family members of that victim submitted in conjunction with the rescission procedure detailed their grief and the continuing ramifications of the murder on the health and well-being of the family, and also provided information concerning the brutality and consequences of petitioner's crime by describing the pain and suffering experienced by the victim before he died. The Board was aware that the victim was not killed instantly when petitioner shot him with a handgun at close range, and that he received medical care at two hospitals for several weeks before succumbing to severe bronchial pneumonia that was induced by the gunshot wound to his neck. Nonetheless, the subsequent statements of the family members provided detailed eyewitness accounts of the victim's suffering during his hospitalization, including his unsuccessful attempts to communicate despite the fact that he had been partially paralyzed and his vocal cords had been "destroyed" as a result of the shooting. We thus conclude that, even if some of the other information submitted was already known to the Board, the abovementioned victim impact statements provided "significant information" not previously known by the Board, and the statements constitute substantial evidence to support the determination rescinding petitioner's parole release date (9 NYCRR 8002.5 [b] [2] [i]; *see* 9 NYCRR 8002.5 [d] [1]; *Matter of Rizo v New York State Bd. of Parole*, 251 AD2d 997, 997-998, *lv denied* 92 NY2d 811; *Ortiz*, 239 AD2d at 56).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 13-01960

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS J. BOAZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 28, 2013. The judgment convicted defendant, after a nonjury trial, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of burglary in the second degree (Penal Law § 140.25 [2]). According to the evidence that the People presented at trial, defendant and an accomplice broke into a residence, stole various items, and fled when they discovered that one of the residents was in the home.

We reject defendant's contention that the evidence is legally insufficient to support the conviction because the testimony of his accomplice was not sufficiently corroborated. The accomplice's testimony was amply corroborated by, inter alia, the testimony of disinterested witnesses, defendant's own statement to the police, and physical evidence, as well as the testimony of a jailhouse informant (*see generally* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 192-193; *People v Lipford*, 129 AD3d 1528, 1529). Viewing the evidence in light of the elements of the crime in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, we reject defendant's contention that he was deprived of effective assistance of counsel (*see People v Rivera*, 71 NY2d 705, 709; *People v Kurkowski*, 117 AD3d 1442, 1443-1444; *People v Hughes*, 148 AD2d 1002, 1002, *lv denied* 74 NY2d 741, *reconsideration*

denied 74 NY2d 848).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00499

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

IN THE MATTER OF WILLIAM E. HAMILTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY ALLEY, JAMES FROIO, AND BOARD OF EDUCATION
OF JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (DENNIS G. O'HARA OF COUNSEL), FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (LARRY P. MALFITANO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 17, 2014 in a proceeding pursuant to CPLR article 75. The order denied the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the amended petition in part and dismissing so much of amended charge No. 7 as alleged misconduct prior to February 15, 2009, and by dismissing amended charge No. 8, and as modified the order is affirmed without costs.

Memorandum: Petitioner, a tenured administrator employed by Jordan-Elbridge Central School District, commenced this proceeding pursuant to Education Law § 3020-a (5) and CPLR 7511 challenging his termination following a disciplinary hearing and seeking reinstatement to his former position. We note at the outset that we agree with petitioner that Supreme Court erred in determining that this special proceeding was not timely commenced (*see* Education Law § 3020-a [5] [a]; CPLR 304 [a]), and that his supporting papers and amended petition were not timely served (*see* CPLR 402, 403 [b]; 3025 [a]). We further note, however, that the court in any event addressed the merits of the amended petition.

We reject petitioner's contention that the court failed to apply the correct standard of review. We conclude that the court properly identified and applied the "additional layer of judicial scrutiny" applicable to a compulsory arbitration proceeding, and it recognized and appropriately decided the matter on the basis that the arbitrator's decision had evidentiary support and was not arbitrary and capricious (*City Sch. Dist. of the City of N.Y. v McGraham*, 17

NY3d 917, 919).

We agree with petitioner, however, that there was no rational basis for the Hearing Officer to apply the crime exception with respect to amended charges Nos. 7 and 8, and we therefore modify the order accordingly (*see* Education Law § 3020-a [1]; *see also Matter of Aronsky v Board of Educ., Community Sch. Dist. No. 22 of City of N.Y.*, 75 NY2d 997, 1000; *Matter of Hegarty v Board of Educ. of City of N.Y.*, 5 AD3d 771, 772-773). We reject petitioner's contention that the Hearing Officer imposed an inappropriate penalty. "In light of the litany of specifications proven against [petitioner], the penalty of dismissal does not shock the conscience" (*Krinsky v New York City Dept. of Educ.*, 28 AD3d 353, 353, *lv denied* 7 NY3d 718; *see Matter of Mazur [Genesee Val. BOCES]*, 34 AD3d 1240, 1240).

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00687

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

IN THE MATTER OF PITTSFORD CANALSIDE PROPERTIES, LLC, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF PITTSFORD, BOARD OF TRUSTEES OF VILLAGE OF PITTSFORD, LINDA LANPHEAR AND FRANK GALUSHA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF BOARD OF TRUSTEES OF VILLAGE OF PITTSFORD, FRIENDS OF PITTSFORD VILLAGE, INC., RESPONDENTS-APPELLANTS, VILLAGE OF PITTSFORD PLANNING BOARD, ET AL., RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENTS-APPELLANTS VILLAGE OF PITTSFORD, BOARD OF TRUSTEES OF VILLAGE OF PITTSFORD, LINDA LANPHEAR AND FRANK GALUSHA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF BOARD OF TRUSTEES OF VILLAGE OF PITTSFORD.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR RESPONDENT-APPELLANT FRIENDS OF PITTSFORD VILLAGE, INC.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (John J. Ark, J.), entered October 29, 2014 in a CPLR article 78 proceeding. The judgment, among other things, annulled the resolution adopted by respondent Board of Trustees of Village of Pittsford on May 1, 2014, rescinding the negative declaration made pursuant to the State Environmental Quality Review Act.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first, seventh and eighth decretal paragraphs, dismissing in its entirety the first cause of action in the amended verified petition, granting the second and third counterclaims, and granting judgment in favor of respondents as follows:

> It is ADJUDGED and DECLARED that Frank Galusha does not have a conflict of interest with respect to matters concerning the Project and that he may fully participate in

all deliberations and in rendering determinations with respect to the Project, and it is further

ADJUDGED and DECLARED that Village of Pittsford Mayor Robert Corby does not have a conflict of interest with respect to matters concerning the Project and that he may fully participate in all deliberations and in rendering determinations with respect to the Project,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioner is the owner and developer of Westport Crossing (hereafter, Project), a proposed mixed-use development in respondent Village of Pittsford (Village). Respondent Board of Trustees of Village of Pittsford (Board) acted as lead agency for the purpose of conducting an environmental review of the Project pursuant to the State Environmental Quality Review Act (SEQRA). Following its three-year review of the Project, the Board issued a negative declaration based upon its determination that the Project would not have a significant adverse environmental impact. The Board thereafter adopted a resolution issuing the requisite special permits for the Project and determining that "[t]he proposed development will be compatible, in terms of scale, massing, orientation, and architectural design, with the visual character of the Village."

On March 11, 2014, following approval by respondent Village of Pittsford Planning Board (Planning Board) of the preliminary site plan for the Project, the Board adopted two resolutions determining that there had been "substantive changes" to certain aspects of the Project that would have a "potential significant adverse impact" that was not considered in the original SEQRA review. On May 1, 2014, the Board passed a resolution rescinding the negative declaration and issuing a positive declaration. Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, a judgment "reversing, annulling and vacating and/or setting aside" the March 11, 2014 resolutions, and the May 1, 2014 resolution and positive declaration, and reinstating the negative declaration. Petitioner alleged in the first cause of action in its amended verified petition that respondents Linda Lanphear and Frank Galusha, members of the Board who voted in favor of the challenged resolutions, had demonstrated bias against the Project, which constituted conflicts of interest disqualifying them from participating in deliberations or determinations with respect to the Project. In their first counterclaim, the Village, the Board, Lanphear and Galusha (hereafter, respondents) sought a judgment declaring that Lanphear does not have a conflict of interest with respect to matters concerning the Project and that she may fully participate in all deliberations and determinations with respect to the Project. In their second and third counterclaims, respondents respectively sought identical declarations covering Galusha and Village of Pittsford Mayor Robert Corby, who is also a member of the Board.

Supreme Court dismissed the first cause of action insofar as it sought judgment annulling the resolutions at issue based upon

Lanphear's alleged conflict of interest and granted the declaratory relief sought in the first counterclaim concerning Lanphear. Petitioner did not cross-appeal from that part of the judgment. The court granted the remainder of the relief sought in the first cause of action, annulling the resolutions at issue based upon Galusha's alleged conflict of interest. The court denied the relief sought in the second and third counterclaims, declaring that Galusha had a conflict of interest with respect to the Project and that he may not participate in deliberations and determinations concerning the Project, and that Mayor Corby had a conflict of interest with respect to any additional SEQRA review of the Project and that he may not participate in deliberations or determinations with respect to such SEQRA review.

We agree with the contention of respondents that the court erred in determining that Galusha had a conflict of interest that disqualified him from participating in deliberations or determinations concerning the Project and that Mayor Corby had a conflict of interest that disqualified him from participating in deliberations or determinations concerning SEQRA review of the Project, and we therefore modify the judgment accordingly. "Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances" (*Matter of Parker v Town of Gardiner Planning Bd.*, 184 AD2d 937, 938, *lv denied* 80 NY2d 761). Here, both Galusha and Mayor Corby had expressed opposition to the Project before and after their elections, and prior to voting on the challenged resolutions. They were not disqualified from participating in the deliberations or voting on those resolutions, however, inasmuch as their "alleged bias involved only expressions of personal opinion" that did not constitute a basis for finding a conflict of interest (*Matter of Laird v Town of Montezuma*, 191 AD2d 986, 987). Indeed, we agree with respondents that the expression of opinion by Galusha and Mayor Corby on matters of public concern "is to be encouraged, not penalized" (*Matter of Byer v Town of Poestenkill*, 232 AD2d 851, 853; *see Webster Assocs. v Town of Webster*, 59 NY2d 220, 227).

We further conclude, however, that the court properly annulled the challenged resolutions on the ground alleged in the second cause of action in the amended verified petition, i.e., that the Board lacked authority to rescind its negative declaration under the circumstances of this case. Here, the Board was authorized to rescind its negative declaration "prior to its decision to undertake, fund, or approve an action," and the Board made its decision to approve the action, i.e., the Project, when it issued the requisite special permits (*see Matter of United Water New Rochelle v Planning Bd. of Town of Eastchester*, 2 AD3d 627, 628, *lv denied* 2 NY3d 703; *see also* 6 NYCRR 617.7 [f] [1]). Finally, we reject the contention of respondents that this Court's decision in *Matter of Allegany Wind LLC v Planning Bd. of Town of Allegany* (115 AD3d 1268) supports the conclusion that the Board had authority to rescind its negative declaration. That issue was neither raised nor addressed in *Allegany Wind*.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-00726

PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. SLACK, ALSO KNOWN AS JOHN SLACK, ALSO KNOWN AS JONATHAN J. SLACK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 9, 2014. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction to petit larceny and vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Genesee County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he moved for a trial order of dismissal on a ground different from that raised on appeal (*see People v Gray*, 86 NY2d 10, 19). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we agree with defendant that there is insufficient evidence that the value of the stolen property exceeded $3,000. The value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (Penal Law § 155.20 [1]). It is well settled that "a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404). Furthermore, "[c]onclusory statements and rough estimates of value are not sufficient" to establish the value of the property (*People v Loomis*, 56 AD3d 1046, 1047; *see People v Walker*, 119 AD3d 1402, 1402-1403; *People v Pallagi*, 91 AD3d 1266, 1269). "Although a 'victim is competent to supply evidence of original cost' . . . ,

'evidence of the original purchase price, without more, will not satisfy the People's burden' " (*People v Geroyianis*, 96 AD3d 1641, 1644, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102).

Here, the victim testified that several specific items were taken, but the only evidence of the value of those items was the victim's testimony regarding the purchase price of some of them, and her hearsay testimony regarding a purported expert's appraisal of some of the property, which was based solely on her description of certain jewelry to the purported expert. Based on the evidence of value in the record, we cannot conclude "that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold" of $3,000 (*People v Sheehy*, 274 AD2d 844, 845, *lv denied* 95 NY2d 938; *cf. People v Pepson*, 61 AD3d 1399, 1400, *lv denied* 12 NY3d 919). We therefore conclude that the evidence is legally insufficient to establish that the value of the property taken exceeded $3,000 (*see People v Echlin*, 188 AD2d 1042, 1042, *lv denied* 81 NY2d 885; *see also People v Quigley*, 70 AD3d 1411, 1412). The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of petit larceny (*see* Penal Law § 155.25), " 'which requires no proof of value' " (*Quigley,* 70 AD3d at 1412). We therefore modify the judgment by reducing the conviction to that crime and by vacating the sentence, and we remit the matter to County Court for sentencing on the conviction of petit larceny (*see* CPL 470.15 [2] [a]).

Defendant's contention that the court erred in imposing restitution without conducting a hearing is moot, inasmuch as we have vacated the sentence. We note, however, that we agree with defendant that "the record 'does not contain sufficient evidence to establish the amount [of restitution to be imposed]' " (*People v Lawson* [appeal No. 7], 124 AD3d 1249, 1250). Therefore, in view of the fact that we are remitting for sentencing, we further direct that, if the court determines upon remittal that the sentence should include restitution, the court must conduct a hearing to ascertain the amount of restitution, if any, to be imposed.

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to challenge a prospective juror for cause or to exercise a peremptory challenge with respect to that prospective juror. We reject that contention. It is well settled that " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709), and here, defendant "failed to show the absence of a strategic explanation" for defense counsel's decision not to challenge that prospective juror (*People v Irvin*, 111 AD3d 1294, 1296, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930 [internal quotation marks omitted]; *see People v Boykins*, 134 AD3d 1542, 1542).

The record is insufficient to enable us to review defendant's contention that the court failed to respond appropriately to a jury communication (*see generally People v Kinchen*, 60 NY2d 772, 773-774),

and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL article 440. Finally, defendant's contentions regarding the severity of the sentence are moot in light of our determination.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01891

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. BARNES, DEFENDANT-APPELLANT.

GANGULY BROTHERS, PLLC, ROCHESTER (ANJAN K. GANGULY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 14, 2014. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [ii]), defendant contends that the evidence is legally insufficient to establish that he was operating the vehicle at the time of the accident. We reject that contention. " 'It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Annis*, 126 AD3d 1525, 1525-1526; *see People v Bleakley*, 69 NY2d 490, 495). Here, we conclude that " 'there is ample evidence in the record from which [Supreme Court] could have reasonably concluded that defendant was indeed driving at the time of the accident' " (*Annis*, 126 AD3d at 1526). When a police officer arrived on the scene, he observed that a vehicle had struck a support pillar for an interstate highway. The officer concluded that the accident had happened shortly before his arrival because, among other things, the vehicle's engine was still warm. There were footprints in the snow leading away from the driver's side only, the only airbag that had deployed was on the driver's side, and the backseat contained two

children's car seats that appeared to leave no room for an adult to sit. Defendant was subsequently located at a gas station and, although he denied to the police that he had been the driver, the gas station was in close proximity to the accident scene, defendant exhibited signs of alcohol consumption and intoxication, and defendant admitted that he had been in the vehicle (*see id.*). Contrary to defendant's further contention, we conclude that, to the extent that the People's proof included inadmissible hearsay, any error in admitting such proof in evidence is harmless. "In this nonjury case, the court is presumed to have considered only competent evidence in reaching the verdict . . . , and there is no basis in this record to conclude that the court did otherwise" (*People v Clinkscales*, 277 AD2d 930, 931, *lv denied* 96 NY2d 733). Finally, we conclude that, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-00338

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEANDELL KING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN B. HANNAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (John H. Crandall, A.J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the seventh degree and dismissing count two of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). We reject defendant's contention that County Court erred in summarily denying that part of his omnibus motion seeking to suppress heroin found on his person by the police following a stop of the vehicle he was operating. It is undisputed that the stop of defendant's vehicle was lawful because the arresting officer observed him fail to obey a stop sign while talking on his cell phone. It is also undisputed that, when questioned by the officer, defendant stated that his driver's license was suspended. The officer then directed defendant to exit the vehicle and placed him under arrest. During a search incident to the arrest, the officer found twenty packets of heroin in the inside flap of defendant's long underwear, near his waistband, along with $330 in cash. In moving for suppression of the heroin, defendant "submitted only defense counsel's affirmation containing conclusory statements, and he therefore failed to raise factual issues sufficient to require a hearing" (*People v Caldwell*, 78 AD3d 1562, 1563, *lv denied* 16 NY3d 796*; see* CPL 710.60 [3] [b]; *People v Mendoza*,

82 NY2d 415, 426).

We reject defendant's related contention that the court erred in denying at trial his motion to renew that part of the omnibus motion seeking suppression of the heroin. Defendant's application to renew was based upon the arresting officer's testimony at trial, which, according to defendant, established that he was subjected to an unlawful roadside "strip search." Defendant was not strip-searched, however; the officer merely patted down defendant's waistband during a lawful search incident to the arrest and discovered the heroin in the top fold of his underwear. Defendant's reliance on *People v Smith* (134 AD3d 1453) is misplaced inasmuch as the officer in that case "pulled open the front of defendant's underwear" and "looked at his genital area" (*id.* at 1454). Here, in contrast, defendant's underwear was not pulled open, and his genitals were not exposed. In any event, as the People point out, defendant was provided early in the case with police reports that specify the exact location where the heroin was found and the manner in which it was found, and the officer's trial testimony was consistent with his reports. There was thus no basis for the court to revisit its suppression ruling in light of the officer's trial testimony.

Defendant further contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence with respect to the charge of criminal possession of a controlled substance in the third degree because the People failed to prove that he intended to sell the heroin, which is an element of that crime. We reject that contention. As noted, defendant possessed twenty packets of heroin, which, according to the People's expert witness, was more than that commonly possessed by heroin users. The expert further testified that users of heroin do not typically have "hundreds of dollars" in cash in their possession, as defendant did at the time of his arrest. Moreover, defendant did not possess any instruments that he could have used to consume the heroin, such as straws, needles, or spoons.

Under the circumstances, and viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury," i.e., that defendant intended to sell the narcotics he undisputedly possessed (*People v Bleakley*, 69 NY2d 490, 495; *see People v Bedell*, 114 AD3d 1153, 1153-1154, *lv denied* 23 NY3d 1059). Viewing the elements of the crime of criminal possession of a controlled substance in the third degree as charged to the jury, we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Alverson*, 79 AD3d 1787, 1788). As the People correctly concede, however, the count of the indictment charging defendant with criminal possession of a controlled substance in the seventh degree must be dismissed because it is an inclusory concurrent count of criminal possession of a controlled substance in the third degree (*see* CPL 300.40 [3] [b]; *People v Coleman*, 2 AD3d 1045, 1047; *People v Delgado*, 285 AD2d 654, 655, *lv denied* 97 NY2d 680), and we therefore modify the judgment

accordingly.

We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-02044

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

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

V MEMORANDUM AND ORDER

THOMAS W. MURTAUGH, JR.,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

TRACY L. PUGLIESE, CLINTON, FOR PETITIONER-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered October 16, 2014 in a proceeding pursuant to Family Court Act article 8. The order dismissed the family offense petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Herkimer County, for compliance with 22 NYCRR 202.44.

Memorandum: In appeal No. 1, petitioner-respondent mother appeals from an order that dismissed her family offense petition brought pursuant to Family Court Act article 8 against respondent-petitioner father. In appeal Nos. 2, 3, and 4, the mother appeals from orders that, among other things, denied her petitions brought pursuant to Family Court Act article 6 seeking custody of the subject children, and granted the father's petitions to modify a prior order by directing that the mother's visitation be supervised.

We first address appeal Nos. 2, 3, and 4, which concern custody and visitation. The mother failed to preserve for our review her contention that the Judicial Hearing Officer (JHO) erred in admitting in evidence medical records concerning her mental health. Contrary to the mother's further contention, the father established a sufficient change in circumstances to warrant inquiry into whether the prior order should be modified, and the JHO's determination that it was in the children's best interests to impose supervised visitation is supported by a sound and substantial basis in the record. The hearing evidence established, among other things, that the mother's mental

health issues resulted in several incidents of erratic behavior that negatively affected the children and jeopardized their well-being, and that the mother failed to adequately address those issues (*see Matter of Procopio v Procopio*, 132 AD3d 1243, 1244, *lv denied* 26 NY3d 915; *Matter of Westfall v Westfall*, 28 AD3d 1229, 1230, *lv denied* 7 NY3d 706).

We reject the mother's contention that the JHO abused his discretion in denying her motion for recusal. " 'Where, as here, there is no allegation that recusal is statutorily required . . . , the matter of recusal is addressed to the discretion and personal conscience of the [JHO] whose recusal is sought' " (*Matter of Herald v Herald*, 305 AD2d 1080, 1081; *see Silber v Silber*, 84 AD3d 931, 932). The mother's "allegations of bias are too speculative to warrant the conclusion that the [JHO] abused [his] discretion in refusing to recuse [himself] here" (*Matter of Jason A.C. v Lisa A.C.*, 30 AD3d 1110, 1111 [internal quotation marks omitted]; *see Matter of Owens v Garner*, 63 AD3d 1585, 1586).

With respect to appeal No. 1, however, we agree with the mother that Family Court erred in adopting the JHO's report to dismiss the family offense petition without providing the parties with notice of the filing of the report and affording them an opportunity to object to it (*see* 22 NYCRR 202.44 [a]; *Matter of Witzigman v Witzigman*, 132 AD3d 1426, 1427; *Matter of Wilder v Wilder*, 55 AD3d 1341, 1341). "The record establishes that the [JHO] was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the [JHO] for a final determination on [her] petition" (*Witzigman*, 132 AD3d at 1427). We therefore reverse the order in appeal No. 1, reinstate the petition, and remit the matter to Family Court for compliance with 22 NYCRR 202.44 (*see id.*).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-02197

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

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

V MEMORANDUM AND ORDER

THOMAS W. MURTAUGH, JR.,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TRACY L. PUGLIESE, CLINTON, FOR PETITIONER-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered November 19, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of an order of visitation.

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

Same memorandum as in *Matter of Gibson v Murtaugh* ([appeal No. 1] ___ AD3d ___ [Mar. 18, 2016]).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

77

CAF 14-02198

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF THOMAS W. MURTAUGH, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROSE M. GIBSON, RESPONDENT-APPELLANT.

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

V

THOMAS W. MURTAUGH, JR., RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered November 19, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted Thomas W. Murtaugh, Jr. sole custody of the parties' children.

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

Same memorandum as in *Matter of Gibson v Murtaugh* ([appeal No. 1] ___ AD3d ___ [Mar. 18, 2016]).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-02199

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

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

V MEMORANDUM AND ORDER

THOMAS W. MURTAUGH, JR.,
RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

TRACY L. PUGLIESE, CLINTON, FOR PETITIONER-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered November 19, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of an order of visitation.

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

Same memorandum as in *Matter of Gibson v Murtaugh* ([appeal No. 1] ___ AD3d ___ [Mar. 18, 2016]).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

79

CA 15-01093

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF DENNIS T. BROWN, HOLDER OF 25% OF ALL OUTSTANDING SHARES OF LOGISTIC DYNAMICS, INC., PETITIONER-APPELLANT,

V ORDER

BRIAN MAOUAD, JAD MAOUAD AND NADY MAOUAD, RESPONDENTS-RESPONDENTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (PATRICIA GILLEN OF COUNSEL), FOR PETITIONER-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOHN G. SCHMIDT, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 26, 2014. The order, among other things, dismissed the petition.

Now, upon the stipulation of dismissal and discontinuance signed by the attorneys for the parties on January 15 and 25, 2016, and filed in the Erie County Clerk's Office on February 8, 2016,

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00615

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

ANTHONY JOSEPH ALATI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DIVIN BUILDERS, INC., DEFENDANT-APPELLANT,
MICHAEL FRIERY, DOING BUSINESS AS VIPER SIDING,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRENNA BOYCE, PLLC, ROCHESTER (WILLIAM P. SMITH, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (CARRIE GALLAGHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 20, 2015. The order granted plaintiff's motion for partial summary judgment and denied the cross motion of defendant Divin Builders, Inc. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross motion of defendant Divin Builders, Inc. for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) causes of action against it except insofar as the section 241 (6) cause of action is based on the alleged violation of 12 NYCRR 23-1.21 (b) (1) and (3) (iv), and dismissing the complaint against it to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this common-law negligence and Labor Law action seeking damages for injuries he sustained when he fell from a ladder while installing a light fixture in the foyer of a residence being built by Divin Builders, Inc. (defendant). At the time of the accident, plaintiff was leaning over the top of his A-Frame ladder to receive a screw or drill bit he had dropped, which had been retrieved and was being handed to plaintiff by another contractor, defendant Michael Friery, doing business as Viper Siding (Friery). Plaintiff alleges that Friery improperly stepped on the support "rungs" on the back of the ladder, and that the ladder collapsed. According to Friery, however, the ladder "exploded" when

plaintiff leaned over the top of the ladder. In any event, the ladder broke into pieces, causing plaintiff to fall to the ground and sustain injuries.

In the complaint, plaintiff asserts causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Following discovery, plaintiff moved for partial summary judgment against defendant on the issue of liability pursuant to section 240 (1) and, insofar as relevant to this appeal, defendant cross-moved for summary judgment dismissing the complaint against it. Supreme Court granted the motion and denied the cross motion.

We reject defendant's contention that the court erred in granting the motion for partial summary judgment and denying that part of the cross motion for summary judgment seeking dismissal of the section 240 (1) cause of action. We conclude that plaintiff met his initial burden of establishing entitlement to judgment as a matter of law. Whatever the exact cause of the ladder's collapse, the fact that the ladder failed and plaintiff fell to the ground demonstrates that it " 'was not so placed . . . as to give proper protection to him' " (*Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582). The burden then shifted to defendant to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562), and we conclude that it failed to do so. Even if the accident occurred as described by plaintiff, defendant "failed to raise a triable issue of fact . . . whether [Friery's] act of stepping on the back of . . . plaintiff's ladder just before it broke was . . . 'of such an extraordinary nature or so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve [it] of liability' " (*Losito v Manlyn Dev. Group, Inc.*, 85 AD3d 983, 984). Moreover, even assuming, arguendo, that plaintiff was aware that there was scaffolding belonging to another contractor in the garage at the work site, there is no evidence in the record that plaintiff was aware that he was supposed to use the scaffolding and yet chose not to do so (*see Gallagher v New York Post*, 14 NY3d 83, 88), or that a scaffold would have been an appropriate safety device for the work being done by plaintiff when he sustained his injury.

We further conclude that the affidavit of Vincent Falbo, one of defendant's owners, so contradicts his deposition testimony that its submission "constitutes an attempt to raise feigned issues of fact where none truly exists" (*Dermody v Tilton*, 85 AD3d 1682, 1683). Because Falbo admitted that defendant had no employees, and the record supports plaintiff's assertion that he was an independent contractor, we reject defendant's further contention that this action is barred by Workers' Compensation Law § 11.

We agree with defendant, however, that the court erred in denying its cross motion for summary judgment insofar as it seeks dismissal of the common-law negligence and Labor Law § 200 causes of action against defendant, and we therefore modify the order accordingly. The record is clear that defendant exercised no supervisory control over the injury-producing work, and that the accident arose from plaintiff's methods and manner of work (*see Lombardi v Stout*, 80 NY2d 290, 295;

Gillis v Brown, 133 AD3d 1374, 1376). We further agree with defendant that the court should have granted summary judgment dismissing the Labor Law § 241 (6) cause of action against it except insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (b) (1) and (3) (iv), and we therefore further modify the order accordingly. Those regulations are both sufficiently specific to support a violation of section 241 (6) and applicable to the facts of this case (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654; *Soodin v Fragakis*, 91 AD3d 535, 536). Subsection (b) (4) of that regulation, which plaintiff also asserts as a basis for a violation of section 241 (6), is inapplicable to the facts of this case, and plaintiff has abandoned his reliance on all other regulations recited in his bill of particulars.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

111.1

CA 13-01529

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

SHIKEMA WILLIAMS, ADMINISTRATRIX OF THE ESTATES OF FREDERICK VELEZ AND CHRISTINE COX, DECEASED, FREDERICK HALL, AND SHAMIA HALL, BY HER MOTHER AND NATURAL GUARDIAN, SABRINA HALL, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

BENNO & ASSOCIATES P.C., NEW YORK CITY (AMEER BENNO OF COUNSEL), AND JEFFREY A. ROTHMAN, FOR CLAIMANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Glen T. Bruening, J.), entered November 7, 2012. The order, inter alia, denied in part the motion of claimants for leave to file a late claim.

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

Memorandum: Claimants appeal from an order denying those parts of their motion for permission to file a late claim against defendant with respect to claims for damages under theories of constitutional tort and negligent training, arising from the stabbing death of decedent Frederick Velez, an inmate in a correctional facility. We affirm. "The Court of Claims has broad discretion in determining whether to grant or deny an application for permission to file a late . . . claim and its decision will not be disturbed absent a clear abuse of that discretion" (*Matter of Martinez v State of New York*, 62 AD3d 1225, 1226; *see Collins v State of New York*, 69 AD3d 46, 48). Here, the court did not abuse its discretion in denying that part of the motion with respect to the proposed constitutional tort theory (*see generally Martinez v City of Schenectady*, 97 NY2d 78, 83). To the contrary, "recognition of the claimant[s'] State constitutional claims was neither necessary nor appropriate to ensure the full realization of [their] rights, because the alleged wrongs could have been redressed by . . . timely interposed common-law tort claims" (*Lyles v State of New York*, 2 AD3d 694, 695, *affd* 3 NY3d 396; *see Peterec v State of New York*, 124 AD3d 858, 859; *Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1150).

We also reject claimants' contention that the court abused its discretion in denying that part of the motion with respect to the proposed negligent training theory. A claim that defendant, as an employer, was "negligent in failing 'to properly interview, hire, train, supervise, and monitor' its employees . . . 'does not lie where, as here, the employee is acting within the scope of his or her employment, thereby rendering the employer liable for damages caused by the employee's negligence under the [alternative] theory of respondeat superior' " (*Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143; *see Brown v State of New York*, 45 AD3d 15, 26-27, *lv denied* 9 NY3d 815; *see generally Leftenant v City of New York*, 70 AD3d 596, 597).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

128

CAF 14-01588

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

IN THE MATTER OF KELLY A. LANGDON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. LANGDON, RESPONDENT-APPELLANT.

IN THE MATTER OF DANIEL J. LANGDON,
PETITIONER-APPELLANT,

V

KELLY A. LANGDON, RESPONDENT-RESPONDENT.

IN THE MATTER OF DANIEL J. LANGDON,
PETITIONER-APPELLANT,

V

KELLY A. LANGDON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Wyoming County (Terrence M. Parker, A.J.), entered July 17, 2014 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, dismissed respondent-petitioner Daniel J. Langdon's family offense petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the family offense petition and violation petition of respondent-petitioner and as modified the order is affirmed without costs and the matter is remitted to Family Court, Wyoming County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent-petitioner father appeals from an order of fact-finding and disposition in proceedings pursuant to articles 6 and 8 of the Family Court Act that, inter alia, dismissed his family offense petition and denied, without making any findings of fact, his violation petition. In appeal No. 2, the father appeals from an order of protection issued pursuant to article 8 of the Family Court Act, directing the father to refrain from, inter alia, harassing petitioner-respondent mother, his

former wife.

With respect to appeal No. 1, the father contends that Family Court erred in dismissing his family offense petition on the ground that "he offered no proof in support of his family offense petition." We agree. We conclude that the record establishes that the father testified to conduct by the mother that could support a determination that she committed a family offense. Although the record is sufficient for this Court to make its own findings of fact (*see generally Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705), we decline to do so. Given the conflicting versions of the same events offered by the parties at the hearing, we consider the credibility of the parties as witnesses to be crucial to the resolution of the father's family offense petition (*see Matter of Streat v Streat*, 117 AD3d 837, 838*; see generally Matter of Oakes v Oakes*, 115 AD3d 956, 956-957). Indeed, "[e]ffective appellate review . . . requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" (*Giordano v Giordano*, 93 AD2d 310, 312). We likewise agree with the father's further contention in appeal No. 1 that the court failed to make any findings of fact with respect to his violation petition. Although the order stated that "any and all remaining issues are hereby denied," the court failed "to set forth those facts essential to its decision" (*Matter of Graci v Graci*, 187 AD2d 970, 971). We therefore modify the order in appeal No. 1 by reinstating the father's family offense petition and violation petition and we remit the matter to Family Court to make the requisite factual findings on those petitions and, if the court deems it appropriate upon making such findings, a new determination on each petition (*see generally Matter of Wagner v Wagner*, 222 AD2d 1039, 1040).

The father contends in appeal No. 2 that the court erred in determining that he committed a family offense. Initially, we note that the order of protection appealed from in appeal No. 2 has expired, and we therefore ordinarily would dismiss the appeal as moot (*see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284-1285, *lv denied* 10 NY3d 705). However, inasmuch as the father challenges only the court's finding that he committed a family offense and, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,' " we conclude that "the appeal from so much of the order . . . as made that adjudication is not academic" (*Matter of Hunt v Hunt*, 51 AD3d 924, 925). We note that the court failed to specify the particular family offense under Family Court Act § 812 (1) that the father allegedly committed. Nonetheless, remittal is not necessary because the record is sufficient for this Court to conduct an independent review of the evidence (*see Matter of Elizabeth X. v Irving Y.*, 132 AD3d 1100, 1101; *Matter of Stewart v Lassiter*, 103 AD3d 734, 734). Upon such review, we conclude that the evidence is not legally sufficient to support a finding by a fair preponderance of the evidence that the father committed any of the enumerated family offenses upon which an order of protection may be predicated (*see Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113; *Matter of Ebony J. v Clarence D.*, 46 AD3d 309, 309; *see also* Family Ct Act § 812 [1]). We therefore reverse the order in

appeal No. 2 and dismiss the petition (*see generally Matter of Woodruff v Rogers*, 50 AD3d 1571, 1571-1572, *lv denied* 10 NY3d 717).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

129

CAF 14-01589

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

IN THE MATTER OF KELLY A. LANGDON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. LANGDON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Wyoming County (Terrence M. Parker, A.J.), entered July 17, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to refrain from harassing petitioner.

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

Same memorandum as in *Matter of Langdon v Langdon* ([appeal No. 1] ___ AD3d ___ [Mar. 18, 2016]).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

132

CA 15-00508

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF DWAYNE HALL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT,
AND CARDINAL HEALTH, RESPONDENT-RESPONDENT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ROBERT C. WHITAKER, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

JACKSON LEWIS P.C., NEW YORK CITY (CLEMENTE J. PARENTE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 22, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that respondent Cardinal Health, a company in the health care industry, discriminated against petitioner. Supreme Court dismissed the petition. We affirm.

In August 2012, petitioner completed and submitted an online job application for a position with Cardinal Health. Cardinal Health made petitioner a verbal offer of employment, which he immediately accepted. One week later, Cardinal Health rescinded the employment offer. Petitioner filed a complaint with SDHR alleging that Cardinal Health had unlawfully discriminated against him by revoking its job offer based upon his prior criminal conviction. SDHR dismissed the complaint without a hearing.

"Where, as here, a determination of no probable cause is rendered [by SDHR] without holding a hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis" (*Matter of Mambretti v New York State Div. of Human Rights*, 129

AD3d 1696, 1696-1697, *lv denied* 26 NY3d 909 [internal quotation marks omitted]). We note initially that, contrary to petitioner's contention, the conflicting evidence before SDHR did not create a material issue of fact that warranted a formal hearing (*see Matter of Hone v New York State Div. of Human Rights*, 223 AD2d 761, 762; *Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725).

We reject defendant's contention that SDHR deemed his certificate of relief irrelevant. It is well established that a "certificate [of relief] does not establish a prima facie entitlement to . . . employment, but only establishes, if not rebutted, that the applicant has been rehabilitated—just one of the eight factors [to be considered under Correction Law § 753]" (*Matter of Arocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 365). Here, Cardinal Health was "not obligated to rebut the presumption of rehabilitation" and was justified in evaluating said presumption in the context of the other factors (*id*. at 366). We conclude that SDHR was entitled to take those matters into consideration when evaluating how much weight to give to the certificate of relief in making its determination of no probable cause.

Finally, " '[u]pon our review of the record, we conclude that [SDHR] properly investigated petitioner's complaint . . . and provided petitioner with a full and fair opportunity to present evidence on his behalf and to rebut the evidence presented by [Cardinal Health],' and we further conclude that [SDHR's] determination is supported by a rational basis and is not arbitrary or capricious" (*Matter of Witkowich v New York State Div. of Human Rights*, 56 AD3d 1170, 1170, *lv denied* 12 NY3d 702).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

138

TP 14-02248

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF JOSE MEDINA, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

JOSE MEDINA, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered April 7, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including inmate rule 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assaulting a staff member]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [possessing a weapon]). Contrary to petitioner's contention, the misbehavior report, together with the Unusual Incident Report, the Use of Force Report, the testimony of several correction officers who observed the incident, and the photograph of the ice pick that was recovered, "constitutes substantial evidence supporting the determination that petitioner violated [the] inmate rule[s]" at issue (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648). Petitioner's denials of the reported misbehavior raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966).

We reject petitioner's further contentions that the search was not authorized, and that it was conducted in violation of certain administrative regulations and without probable cause. To the contrary, the record establishes that the search was, in fact, authorized by a correction sergeant, and petitioner has not demonstrated that he has been prejudiced by any technical defect with

respect to the manner in which it was conducted (*see Matter of Roman v Selsky*, 270 AD2d 519, 519-520; *see also Matter of Motzer v Goord*, 273 AD2d 559, 559-560). Moreover, the record reflects that the correction officer who searched petitioner had probable cause for the search, including his own observations (*see Matter of Cole v Goord*, 47 AD3d 1147, 1147).

Contrary to petitioner's further contention, even assuming, arguendo, that there was a violation of 7 NYCRR 251-4.2 based on the allegedly inadequate assistance provided by petitioner's employee assistant, we conclude that the Hearing Officer remedied any alleged defect in that assistance by adjourning the proceeding to permit the assistant to take the actions petitioner deemed necessary (*see generally Matter of Melendez v Berbary*, 89 AD3d 1524, 1525, *lv denied* 19 NY3d 804; *Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1092-1093). Petitioner failed to preserve for our review his contention that he was denied the right to call witnesses based on the Hearing Officer's refusal to permit him to call a certain inmate witness (*see Matter of Duamutef v Johnson*, 266 AD2d 823, 825, *lv denied* 94 NY2d 759). Although petitioner preserved that contention for our review with respect to other witnesses, including other correction officers who allegedly were at the scene, we conclude that his right to call witnesses was not violated because "[t]he additional testimony requested by petitioner would have been either redundant or immaterial" (*Matter of Sanchez v Irvin*, 186 AD2d 996, 996, *lv denied* 81 NY2d 702; *see Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289). The record does not support petitioner's further contention that the Hearing Officer "was biased or that the determination flowed from the alleged bias" (*Matter of Rodriguez v Herbert*, 270 AD2d 889, 890; *see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502).

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

139

TP 15-01048

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF COREY MOBLEY, PETITIONER,

V ORDER

SUPERINTENDENT SHEAHAN, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

COREY MOBLEY, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered June 15, 2015) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

144

KA 11-00096

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN ROCKWELL, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered December 16, 2010. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of aggravated driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [2-a] [a]), defendant contends that he was coerced into pleading guilty by County Court, including the court's statement that, if he did not plead guilty at his first appearance with counsel, he would forfeit a prior plea offer that did not include incarceration in a state prison. Defendant did not move to withdraw his plea or to vacate the judgment, and he thus failed to preserve that contention for our review (*see People v Boyd*, 101 AD3d 1683, 1683; *see generally People v Ali*, 96 NY2d 840, 841).

Defendant also failed to preserve for our review his contention that he was not able to understand the plea proceedings due to his hearing impairment, and, in any event, that contention is belied by the plea proceedings, in which defendant responded appropriately to all of the court's questions (*see generally People v Ribeiro*, 245 AD2d 804, 804, *lv denied* 91 NY2d 976; *People v Robinson*, 156 AD2d 598, 598).

Defendant further contends that he was denied effective assistance of counsel because defense counsel sought an adjournment to allow her to discuss the earlier plea offer with defendant, thereby

depriving him of a plea offer that was subsequently withdrawn. Even assuming, arguendo, that defendant's contention survives his guilty plea (*cf. People v Abdulla*, 98 AD3d 1253, 1254, *lv denied* 20 NY3d 985), we conclude that it lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Finally, although defendant failed to preserve for our review his contention that the court erred in imposing a fine (*see* CPL 470.05 [2]), we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As the People correctly concede, the court erred in imposing the fine without affording defendant an opportunity to withdraw the plea because the fine was not mentioned at the time of the plea (*see People v Barber*, 31 AD3d 1145, 1146). "Because defendant was denied the benefit of his plea bargain, we modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the sentence promised . . . or to afford defendant the opportunity to withdraw his plea" (*People v Lafferty*, 60 AD3d 1318, 1319).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

145

KA 12-01039

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NANCY JAMES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 13, 2012. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [2]). The charges stem from defendant's conduct during a New Year's Eve party when several people began fighting. The People alleged that defendant cut one victim on the forehead with a piece of broken glass and then fatally stabbed a second victim. Defendant contends that Supreme Court erred in denying her request to charge the defense of justification on the assault count with respect to both ordinary and deadly physical force, requiring reversal of the assault count and the factually related manslaughter count. We agree with defendant that the court committed reversible error in refusing to charge the defense of justification with respect to deadly physical force under Penal Law § 35.15 (2) (a).

"A trial court must charge the factfinder on the defense of justification 'whenever there is evidence to support it' . . . Viewing the record in the light most favorable to the defendant, a court must determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified. If such evidence is in the record, the court must provide an instruction on the defense" (*People v Petty*, 7 NY3d 277, 284; *see People v Cox*, 92 NY2d 1002, 1004; *People v Gentile*, 23 AD3d 1075, 1075, *lv denied* 6 NY3d 813). Where deadly physical force is used, the evidence must

establish that the defendant reasonably believed that the other person was using or about to use deadly physical force (*see* Penal Law § 35.15 [2] [a]; *People v Goetz*, 68 NY2d 96, 106).

We agree with the court that defendant used deadly physical force and not ordinary physical force when she used a piece of broken glass to slash the first victim's forehead (*see People v Mason*, 132 AD3d 777, 777; *see also People v Saenz*, 27 AD3d 379, 380, *lv denied* 7 NY3d 762). We therefore reject defendant's contention that the court erred in failing to charge the jury on justification using nondeadly physical force for the assault count. We agree with defendant, however, that the court erred in denying her request to charge the jury on justification using deadly physical force in defense of a third party for the assault count. There was a reasonable view of the evidence, viewed in the light most favorable to defendant, that the first victim was using deadly physical force by striking defendant's brother in the head with a champagne bottle when defendant assaulted her (*see generally People v Ponder*, 34 AD3d 1314, 1315; *People v Liggins*, 2 AD3d 1325, 1326-1327). We further agree with defendant that the error in failing to give the justification charge on the assault count requires reversal of the manslaughter count as well. Although the court instructed the jury on justification for that count, there was a "significant factual relationship" between the two counts (*People v McDaniel*, 81 NY2d 10, 20), particularly on the issue whether defendant was the initial aggressor (*see* Penal Law § 35.15 [1] [b]). We therefore reverse the judgment and grant a new trial on both counts.

In view of our determination, we need not review defendant's remaining contentions. Nevertheless, because we are granting a new trial, we note in the interest of judicial economy that the court erred in allowing the People to impeach one of their witnesses with her grand jury testimony. The witness's testimony that she did not see defendant stab the second victim did not affirmatively damage the People's case (*see People v Ayala*, 121 AD3d 1124, 1125, *lv denied* 25 NY3d 987; *People v Rios*, 166 AD2d 616, 617, *lv denied* 77 NY2d 842; *People v Garrett*, 147 AD2d 905, 905-906, *lv denied* 74 NY2d 664).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 15-00153

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF MINDY S. GIRARD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM R. NEVILLE, RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered March 18, 2014. The order, among other things, adjudged that respondent had willfully failed to obey a court order and placed respondent on probation for a period of three years.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following memorandum: Respondent appeals from an order confirming the determination of the Support Magistrate that he willfully violated an order of child support and sentencing him to three years of probation. Although the Support Magistrate properly advised respondent that he had the right to counsel (*see* Family Ct Act § 262 [a] [vi]), we agree with respondent that the Support Magistrate failed to make a " 'searching inquiry' " to ensure that his waiver of the right to counsel was a knowing, voluntary and intelligent choice, and thus that he was denied his right to counsel (*Matter of Storelli v Storelli*, 101 AD3d 1787, 1788; *see Matter of Commissioner of Genesee County Dept. of Social Servs. v Jones*, 87 AD3d 1275, 1275-1276). We therefore reverse the order and remit the matter to Family Court for a new hearing. To the extent that our decision in *Matter of Huard v Lugo* (81 AD3d 1265, 1266, *lv denied* 16 NY3d 710) requires preservation of a contention that the Support Magistrate erred in allowing the respondent to proceed pro se at a fact-finding hearing, that decision is no longer to be followed. In light of our determination, we do not review respondent's remaining contentions.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-01530

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF TRINITY E.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CHRISTIE J.C., RESPONDENT,
AND ROBERT E., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MERIDETH SMITH, COUNTY ATTORNEY, ROCHESTER (CAROL EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered July 7, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Robert E. had neglected the subject child.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent father appeals from an order finding that he neglected his daughter. We reject the father's contention that Family Court erred in basing its finding of neglect on matters not contained in the petition, i.e., on the subject child's failure to thrive while in the father's care. The record establishes that the court based its finding of neglect on the allegations in the petition, and only noted in a footnote that the child had failed to thrive.

We also reject the father's contention that the court's finding of neglect is not supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Pursuant to Family Court Act § 1012 (f) (i) (B), "there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' . . . In order for danger to be 'imminent,' it must be 'near or impending, not merely possible' . . . Further, there must be a 'causal connection between the basis for the neglect petition and the circumstances that allegedly produce the . . . imminent danger of impairment' " (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9). Here, the court properly concluded that the subject child was in imminent danger of physical,

emotional or mental impairment based on the father's long-standing history of mental illness and his failure to obtain treatment for it (*see Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680, *lv denied* 18 NY3d 810; *cf. Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1445), and his failure to seek treatment for substance abuse issues (*see Matter of Alim Lishen Laquan R.*, 63 AD3d 947, 947-948). The court also found that the father had permitted the child to be cared for by respondent mother, whom the father knew to be an unsuitable caregiver (*see Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324; *Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612, *lv denied* 15 NY3d 705). Finally, "[t]he exposure of the child to domestic violence between the parents may form the basis for a finding of neglect" (*Matter of Michael G.*, 300 AD2d 1144, 1144), and thus we reject the father's contention that the court erred in relying upon an incident of domestic violence committed by the father as an additional ground for its finding of neglect (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 375).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01244

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

PUTRELO CONSTRUCTION COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF MARCY, DEFENDANT-RESPONDENT.

TOWN OF MARCY, THIRD-PARTY PLAINTIFF,

V

BONACCI ARCHITECTS, PLLC, SUCCESSOR IN
INTEREST TO FULIGNI-FRAGOLA ARCHITECTS, PLLC,
THIRD-PARTY DEFENDANT-RESPONDENT.

SHEATS & BAILEY, PLLC, BREWERTON (DIANA PLUE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELT EVANS, LLP, CLINTON (ANTHONY G. HALLAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered September 29, 2014. The order denied the motion of plaintiff for leave to amend the ad damnum clause in its complaint, granted the cross motion of defendant to limit proof of damages at trial, and granted the cross motion of third-party defendant to dismiss the first cause of action of plaintiff to the extent that plaintiff seeks to recover $33,323.31 for change orders ## 7, 11, 12, 13 and 17.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's motion, and by denying those parts of the cross motions seeking to dismiss the first cause of action to the extent it seeks payment for change orders #12 and #17 and reinstating the complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for breach of contract in connection with its construction of a new town hall for defendant-third-party plaintiff (hereafter, defendant). Defendant commenced a third-party action against third-party

defendant, the successor in interest to the architect who contracted with defendant. On a prior appeal, we affirmed an order granting the motion of third-party defendant for partial summary judgment dismissing the second cause of action, which sought delay damages (*Putrelo Constr. Co. v Town of Marcy*, 105 AD3d 1406). Plaintiff now appeals from an order denying its motion for leave to amend the ad damnum clause, granting defendant's cross motion to limit the proof of damages at trial, and granting third-party defendant's cross motion for summary judgment dismissing the first cause of action in part.

We agree with plaintiff that Supreme Court abused its discretion in denying its motion to amend the ad damnum clause from $77,585.50 to $111,331.13, and we therefore modify the order by granting the motion. It is axiomatic that " '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*Holst v Liberatore*, 105 AD3d 1374, 1374; *see* CPLR 3025 [b]; *Meyer v University Neurology*, 133 AD3d 1307, 1309; *McGrath v Town of Irondequoit*, 120 AD3d 968, 969). Plaintiff failed to include an amended pleading with its motion, as required by CPLR 3025 (b). Under the circumstances of this case, however, we conclude that the error was merely a technical defect that the court should have disregarded (*see generally* CPLR 2001), inasmuch as "the limited proposed amendment[was] clearly described in the moving papers" and did not prejudice defendant or third-party defendant (*Medina v City of New York*, 134 AD3d 433, 433; *cf. Barone v Concert Serv. Specialists, Inc.*, 127 AD3d 1119, 1120).

We further conclude that defendant and third-party defendant failed to show that they would be prejudiced by the amendment. "[I]n the absence of prejudice . . . , a motion to amend the *ad damnum* clause, whether made before or after the trial, should generally be granted" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801). We reject the contention of defendant and third-party defendant that the amendment was "palpably insufficient or patently devoid of merit" (*Corwise v Lefrak Org.*, 93 AD3d 754, 754). Defendant and third-party defendant rely upon documents submitted by them in opposition to the motion, but " '[a] court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face' " (*Holst*, 105 AD3d at 1374-1375; *see Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836). Finally, while the delay in moving to amend was extensive and plaintiff provided no excuse for it, " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959), which, as we previously concluded, defendant and third-party defendant did not show.

With respect to defendant's cross motion, defendant contends that it merely sought an evidentiary ruling and thus that no appeal lies from the order granting the cross motion. We reject that contention, and instead conclude that defendant's cross motion was the functional equivalent of a motion for partial summary judgment (*see Dischiavi v Calli*, 125 AD3d 1435, 1436; *Charter Sch. for Applied Tech. v Board of*

Educ. for City Sch. Dist. of City of Buffalo, 105 AD3d 1460, 1464). In addition, with respect to the cross motions by defendant and third-party defendant, "[a]lthough successive summary judgment motions generally are disfavored absent newly discovered evidence or other sufficient cause . . . , neither Supreme Court nor this Court is precluded from addressing the merits of such a motion" (*Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702; *see Sexstone v Amato*, 8 AD3d 1116, 1116-1117, *lv denied* 3 NY3d 609). The court appropriately exercised its discretion in considering the merits of the cross motions (*see generally Rose v Horton Med. Ctr.*, 29 AD3d 977, 978).

Third-party defendant's cross motion sought to dismiss the first cause of action to the extent plaintiff sought to recover $33,323.31 for change orders ## 7, 11, 12, 13, and 17 because plaintiff failed to file a notice of claim within the time limitations of Town Law § 65 (3). Defendant's cross motion was the functional equivalent of a partial summary judgment motion seeking that same relief. Town Law § 65 (3) requires a written verified claim to be filed "within six months after the cause of action shall have accrued" (*id.*). As we explained in the prior appeal, the contract between plaintiff and defendant provided for a date of accrual as to " 'acts or failures to act occurring prior to the relevant date of Substantial Completion' " to be no later than the date of substantial completion (*Putrelo Constr. Co.*, 105 AD3d at 1407). Defendant and third-party defendant established that third-party defendant rejected payment for work plaintiff had performed or proposed for change orders ## 7, 11, and 13 prior to the date of substantial completion, and therefore those claims accrued no later than the date of substantial completion. Inasmuch as the notice of claim was not filed within six months of that date, it was untimely, and the court properly granted the cross motions insofar as they sought dismissal of the first cause of action with respect to those change orders. We further conclude, however, that the court erred in granting those parts of the cross motions seeking to dismiss the first cause of action to the extent it seeks to recover payment for change orders #12 and #17, and we therefore further modify the order accordingly. Defendant and third-party defendant did not submit any evidence that payment for those change orders was rejected prior to the date of substantial completion.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01299

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

CURTIS COOK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALYSSA S. PETERSON AND THOMAS M. MIKE,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT ALYSSA S. PETERSON.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS M. MIKE.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered December 9, 2014. The order granted defendants' cross motions for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the cross motions are denied, the complaint and cross claims are reinstated and the matter is remitted to Supreme Court, Steuben County, for further proceedings on the motion filed by defendant Thomas M. Mike.

Memorandum: In June 2009, plaintiff was a passenger in a vehicle operated by defendant Alyssa S. Peterson. The vehicle was struck by a vehicle operated by defendant Thomas M. Mike, who was proceeding straight through an intersection when Peterson turned left in front of him. Plaintiff went directly to the hospital from the scene of the accident, complaining of pain in his head, neck, lower back and right shoulder. In the two weeks following the accident, plaintiff treated with an orthopedist for right shoulder pain and "occipital type headaches." The orthopedist diagnosed plaintiff with a "[c]ervical strain sprain and occipital headaches- posttraumatic," "[b]ilateral paracervical strains- post[]traumatic," and right shoulder tendonitis. Plaintiff was prescribed various medications, and the orthopedist "recommend[ed] postural improvements which [plaintiff could] do in a self managed fashion and [the] specific exercise was reviewed/demonstrated in the office" on July 8, 2009. Plaintiff did not see any physician again for complaints related to the accident until September 2010, when he sought treatment for back pain. It was

not until March 2011 that plaintiff presented to his primary care physician for complaints of debilitating headaches. From that point forward, plaintiff was diagnosed with occipital neuralgia, underwent numerous occipital nerve block injections and ultimately, in July 2013, underwent surgery to have a permanent occipital nerve stimulator implanted, resulting in five scars measuring 2.5 to 3 inches each along the line of plaintiff's spine.

Plaintiff commenced this action in April 2012, i.e., before the stimulator surgery, alleging that he had sustained serious physical injuries in the motor vehicle accident and that he had sustained an economic loss greater than the basic economic loss. In his initial bill of particulars, plaintiff alleged serious injuries under the categories of "permanent loss of use and/or permanent consequential limitations of use and/or significant limitation of use of his neck and hip," and he further alleged that he sustained a serious injury under the 90/180-day category (*see generally* Insurance Law § 5102 [d]).

On February 17, 2014, Mike moved for summary judgment dismissing the complaint and any cross claims against him on the ground that Peterson's negligence was the sole proximate cause of the accident. On May 19, 2014, Peterson cross-moved for summary judgment dismissing the complaint against her on the ground that plaintiff did not sustain a qualifying serious injury. On June 3, 2014, Mike cross-moved for summary judgment dismissing the complaint and cross claims based on plaintiff's failure to meet the serious injury threshold, joining in Peterson's cross motion and incorporating all of the arguments and exhibits she submitted in support of her cross motion.

By amended verified bills of particulars dated May 30, 2014, i.e., before Mike's cross motion for summary judgment, plaintiff claimed that he had sustained a serious injury under the significant disfigurement category. He based that new claim on the scars that resulted from his stimulator surgery. Plaintiff opposed the motion and cross motions, but in his opposing papers he expressly withdrew his claim under the permanent loss of use category of serious injury.

Supreme Court granted the cross motions, awarding defendants summary judgment dismissing the complaint, and implicitly the cross claims, on the ground that plaintiff did not sustain a serious injury. The court found that defendants met their initial burden of establishing that plaintiff did not sustain a serious injury and that, even though there were conflicting medical opinions on the issue of serious injury, the gaps in plaintiff's treatment interrupted the chain of causation. Based on its determination, the court found that there was no reason to rule on Mike's motion, in which he asserted that Peterson's negligence was the sole proximate cause of the accident. We now reverse.

With respect to the category of permanent consequential limitation of use, defendants met their initial burden on the cross motions by submitting, inter alia, the report of a medical expert concluding that the only injuries sustained by plaintiff in the

accident were "[c]ervical and lumbar sprain/strain[s]," which would have "resolve[d] in weeks to months, but not years after the accident." We conclude, however, that plaintiff raised triable issues of fact by submitting the report of a medical expert who opined that plaintiff's occipital neuralgia was causally related to the accident and limited plaintiff "from being functional or basically doing anything." Plaintiff's expert contended that the permanent stimulator required to alleviate the pain caused from the occipital neuralgia resulted in a permanent consequential limitation of use of plaintiff's musculoskeletal system and limited all of plaintiff's activities. Those conflicting expert opinions create triable issues of fact requiring a trial (*see DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126; *Pagels v P.V.S. Chems.*, 266 AD2d 819, 819). Indeed, "[i]t is well established that 'conflicting expert opinions may not be resolved on a motion for summary judgment' " (*Corbett v County of Onondaga*, 291 AD2d 886, 887).

Although Mike correctly contends that many of the medical reports and records submitted by plaintiff in opposition to the cross motions were unsworn and uncertified, we may consider those reports and records that were "submitted by defendants . . . or were referenced in the reports of physicians who examined plaintiff on their behalf, and [defendants] submitted the reports of [those physicians]" (*Feggins v Fagard*, 52 AD3d 1221, 1223; *see Siemucha v Garrison*, 111 AD3d 1398, 1399). To the extent that plaintiff submitted unsworn and uncertified medical reports and records that were not submitted by defendants or relied upon by their expert, we may nevertheless rely on the medical opinions of plaintiff's experts because "the various medical opinions relying on those . . . reports [and records] are sworn and thus competent evidence" (*Brown v Dunlap*, 4 NY3d 566, 577 n 5*; see Harris v Carella*, 42 AD3d 915, 916). We further agree with plaintiff that the court erred in discounting entirely the opinion of plaintiff's treating physician due to perceived errors in his report. "The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441). In any event, regardless of the opinion of plaintiff's treating physician, plaintiff also submitted an expert affirmation from another medical professional that raises triable issues of fact.

We reject defendants' contention that the gaps in plaintiff's treatment are fatal to his claims (*see generally Pommells v Perez*, 4 NY3d 566, 574). With respect to the 14-month gap in treatment following the July 2009 medical appointments, medical records submitted by defendants in support of their cross motions provided the unrebutted explanation that plaintiff's treating orthopedist had provided plaintiff with medication and an exercise regimen that was to be performed "in a self managed fashion." In opposition to the cross motions, plaintiff contended that he experienced only mild relief from that course of treatment and, as a result, "sought a second opinion." We thus conclude that plaintiff provided a reasonable explanation for the gap in treatment that is substantiated by the record, which is sufficient to defeat defendants' cross motions (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906; *Kellerson v Asis*, 81

AD3d 1437, 1438; *cf. Smyth v McDonald*, 101 AD3d 1789, 1790-1791; *Thompson v Abbasi*, 15 AD3d 95, 99). With respect to two other alleged gaps in treatment, we conclude that "the record fails to establish that plaintiff in fact ceased all therapeutic treatment" during those purported gaps inasmuch as plaintiff was still under the care of physicians who had provided nerve block injections, he had received referrals for other physicians and he was exploring alternative treatments to combat the pain caused by the occipital neuralgia (*Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481, 1483; *see Seecoomar v Ly*, 43 AD3d 900, 902).

With respect to the significant limitation of use category, we conclude that defendants failed to meet their initial burden with respect to that category (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). Defendants' own submissions established that plaintiff sustained, at the very least, "[c]ervical and lumbar sprain[s]/strain[s]," which resulted in a "moderately limited" range of motion. "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Downie v McDonough*, 117 AD3d 1401, 1403, *lv denied* 24 NY3d 906 [internal quotation marks omitted]; *see Vasquez v Almanzar*, 107 AD3d 538, 539-540). Here, defendants failed to establish as a matter of law that the limitations sustained by plaintiff from the cervical and lumbar sprains and strains were not significant (*see Clark v Aquino*, 113 AD3d 1076, 1077-1078; *Feggins*, 52 AD3d at 1223-1224; *Brown v Motor Veh. Acc. Indem. Corp.*, 33 AD3d 832, 832). In any event, as with the permanent consequential limitation of use category, we agree with plaintiff that he raised triable issues of fact whether the occipital neuralgia was caused by the accident and, if so, whether that injury caused a significant limitation of use of plaintiff's musculoskeletal system.

We further agree with plaintiff that defendants did not meet their burden of establishing that plaintiff did not sustain a serious injury under the 90/180-day category. Inasmuch as we have held that a " 'whiplash injury to [plaintiff's] cervical spine and [a] lumbosacral sprain/strain' " can constitute a qualifying injury under the 90/180-day category (*Bowen v Dunn*, 306 AD2d 929, 929; *see Zeigler v Ramadhan*, 5 AD3d 1080, 1081; *cf. Heatter v Dmowski*, 115 AD3d 1325, 1326), defendants were required to "establish as a matter of law that plaintiff was not curtailed from performing [his] usual activities to a great extent rather than some slight curtailment" during the relevant time period (*Winslow v Callaghan*, 306 AD2d 853, 854 [internal quotation marks omitted]). Defendants failed to do so (*see Crewe v Pisanova*, 124 AD3d 1264, 1265-1266; *Suazo v Brown*, 88 AD3d 602, 602; *Winslow*, 306 AD2d at 853-854), and thus the burden never shifted to plaintiff to raise an issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

With respect to the final category of serious injury, i.e., significant disfigurement, Peterson contends that plaintiff improperly attempted to rely on that category of serious injury in opposing the

cross motions because it was first recited in the amended verified bills of particulars that postdated Peterson's cross motion. Peterson's contention is not properly before us inasmuch as it is raised for the first time on appeal and is an issue that "could have been obviated or cured by factual showings or legal countersteps in the trial court" (*Smith v Besanceney*, 61 AD3d 1336, 1336 [internal quotation marks omitted]). In any event, even if we were to agree with Peterson that the significant disfigurement category of serious injury should not have been addressed by the motion court, that category of serious injury was properly asserted in the amended verified bills of particulars (*see* CPLR 3042 [b]), and thus would have "remained intact" following the decision on the previously asserted categories of serious injury (*O'Brien v Bainbridge*, 89 AD3d 1511, 1511-1512).

On the merits, to the extent that there is an issue of fact whether the occipital neuralgia was caused by the accident, there is likewise an issue of fact whether the scarring sustained by plaintiff as a result of the surgery necessitated by the occipital neuralgia was caused by the accident (*see Schader v Woyciesjes*, 55 AD3d 1292, 1293; *Chmiel v Figueroa*, 53 AD3d 1092, 1093; *see generally Baez v Rahamatali*, 6 NY3d 868, 869; *Kilmer v Strek*, 35 AD3d 1282, 1283).

Finally, we agree with plaintiff that the claim for economic loss in excess of basic economic loss should be reinstated. We note that the court did not expressly address this claim in granting the cross motions for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, and it is well settled, however, that a plaintiff may recover for economic loss in excess of basic economic loss "without proof of serious injury" (*Colvin v Slawoniewski*, 15 AD3d 900, 900; *see Barnes v Kociszewski*, 4 AD3d 824, 825; *see generally Montgomery v Daniels*, 38 NY2d 41, 47-48). Here, "plaintiff[] made a sufficient showing that [he] sustained economic loss in excess of basic economic loss to warrant submission of the issue to the jury" (*Barnes*, 4 AD3d at 825).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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TP 15-01243

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ARTHEA RUSSO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
CITY OF JAMESTOWN POLICE DEPARTMENT, RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MARILYN BALCACER OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MARK A. MOLDENHAUER OF COUNSEL), FOR RESPONDENT CITY OF JAMESTOWN POLICE DEPARTMENT.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Chautauqua County [Paul B. Wojtaszek, J.], entered April 14, 2015) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of petitioner for gender discrimination and retaliation.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing her complaint alleging unlawful discrimination and retaliation. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, is limited to the issue whether it is supported by substantial evidence (*see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331; *Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). "Courts may not weigh the evidence or reject [SDHR's] determination where the evidence is conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by [SDHR] is found, the judicial function is exhausted" (*Granelle*, 70 NY2d at 106; *see Rainer N. Mittl, Ophthalmologist, P.C.*, 100 NY2d at 331; *Matter of City of Niagara Falls v New York State Div. of Human Rights*, 94 AD3d 1442, 1443-1444).

Contrary to petitioner's contention, there is substantial evidence to support the determination that she was not discriminated against based on her gender. "To establish a prima facie case of employment discrimination, petitioner was required to demonstrate that she was a member of a protected class, that she was qualified for her position, that she was terminated from employment or suffered another adverse employment action, and that the termination or other adverse action 'occurred under circumstances giving rise to an inference of discriminatory motive' " (*Matter of Lyons v New York State Div. of Human Rights*, 79 AD3d 1826, 1827, *lv denied* 17 NY3d 707, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306). "The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision' " (*Forrest*, 3 NY3d at 305). "In order to nevertheless succeed on her claim, [petitioner] must prove that the legitimate reasons proffered by the [employer] were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" (*id.*).

While we agree with SDHR's determination that most of the employment actions at issue were not adverse because they did not constitute "materially adverse change[s] in the terms and conditions of employment" (*id.* at 306; *see Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315), we conclude that the three-day suspension imposed on petitioner is an adverse employment action (*see Lovejoy-Wilson v NOCO Motor Fuel, Inc.*, 263 F3d 208, 223; *see generally Forrest*, 3 NY3d at 306). Even assuming, arguendo, that the imposition of the adverse employment action occurred under circumstances giving rise to an inference of discrimination, we nevertheless conclude that petitioner's employer, respondent City of Jamestown Police Department (City), presented a legitimate, independent and nondiscriminatory reason to support its employment decision (*see Forrest*, 3 NY3d at 305). There is substantial evidence in the record to establish that petitioner, in her role as a court security supervisor, subjected one or more persons to heightened security measures on a regular basis either for personal reasons or for no legitimate reason, and that she caused her male subordinate to do the same. Moreover, there is substantial evidence to establish that petitioner engaged in excessive use of her personal cell phone and excessive socializing while on duty. Contrary to petitioner's contention, she was not similarly situated to the male subordinate, and she could not establish disparate treatment based on the fact that the male subordinate was not suspended for his role in subjecting certain people to heightened security measures (*see Tucker v Battery Park City Parks Corp.*, 227 AD2d 318, 318-319).

Contrary to petitioner's further contention, there is substantial evidence to support SDHR's determination that she was not subjected to retaliation. "In order to make out a claim for unlawful retaliation under state or federal law, a [petitioner] must show that '(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment

action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action' " (*Calhoun v County of Herkimer*, 114 AD3d 1304, 1306, quoting *Forrest*, 3 NY3d at 313). Once that showing is made, "the burden then shifts to [the employer] to present legitimate, independent and nondiscriminatory reasons to support [its] actions. Then, if [the employer] meet[s] this burden, [petitioner] has the obligation to show that the reasons put forth by [the employer] were merely a pretext" (*Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104).

Even assuming, arguendo, that petitioner met her initial burden, we nevertheless conclude that the City presented a legitimate, independent and nondiscriminatory reason for issuing a counseling memorandum on sexual harassment based on evidence that petitioner had been sharing sexually explicit material that she had on her cell phone (*see generally Matter of Pace Univ. v New York City Commn. on Human Rights*, 85 NY2d 125, 129). Petitioner failed to establish that the reason for the memorandum was pretextual (*see generally id.*).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

159

CA 15-00767

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND SCUDDER, JJ.

ROGER D. FELLER AND SHERRI FELLER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EARTH LEASING, LLC, ALLIANCE CONTRACTING, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

TRONOLONE & SURGALLA, P.C., BUFFALO (ELEANOR B. FERRY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 8, 2015. The order granted the motion of defendants Earth Leasing, LLC and Alliance Contracting, LLC to dismiss plaintiffs' complaint against them.

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

Memorandum: Plaintiffs commenced this action in August 2010 to recover damages for injuries sustained by Roger D. Feller (plaintiff) when a piece of rebar was propelled into the back of his head as he operated an excavator at a demolition site in July 2006. Defendants-respondents (defendants) moved to dismiss the action against them as time-barred, and plaintiffs contended in opposition to the motion that the statute of limitations had been tolled pursuant to CPLR 208 based on plaintiff's insanity, i.e., that his injuries had left him "unable to protect [his] legal rights because of an [overall] inability to function in society" for a period that would have rendered the action timely (*McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548). After a hearing on the issue of insanity, Supreme Court granted defendants' motion, and plaintiffs appeal. We affirm.

Even assuming, arguendo, that CPLR 4213 "applies to a hearing before the court for the resolution of factual issues incident to the disposition of a motion challenging [the timeliness of an action], as distinguished from a trial on the merits" (*Slotnick v Campanile*, 38 NY2d 986, 987; *see generally Matter of Thompson v Unczur*, 55 AD2d 818, 818, *lv denied* 42 NY2d 806), and thus that the court erred in failing to "state the facts it deem[ed] essential" in its decision (CPLR 4213

[b]), we nonetheless conclude that "the record is sufficient to enable us to make the requisite findings" (*Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339). Based on our review of the record, we conclude that the court properly determined that plaintiff's mental condition did not render him unable to function in society (*see generally McCarthy*, 55 NY2d at 548; *Brown v Rochester Gen. Hosp.*, 292 AD2d 855, 855-856, *lv denied* 98 NY2d 607).

At the hearing, a neurosurgeon who treated plaintiff on four postaccident occasions in 2006 testified for defendants that plaintiff was able to engage in a normal physician-patient relationship, and that there was "never any doubt in [his] mind that [plaintiff] was competent to make his own decisions at that time." Defendants also submitted the deposition testimony of two attorneys who performed legal work for plaintiff in 2007, wherein they testified that plaintiff was capable of making legal decisions. In addition, the neuropsychologist who testified for plaintiffs at the hearing conceded that plaintiff was lucid during their interactions, and that plaintiff "could answer anybody's questions." Affording due deference to the court's resolution of credibility issues (*see Lynch v Carlozzi*, 129 AD3d 1240, 1243; *see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we conclude that its determination is "well supported in the record" (*Juman v Louise Wise Servs.*, 3 AD3d 309, 310; *see Thompson v Metropolitan Transp. Auth.*, 112 AD3d 912, 913-914; *Rodriguez v Mount Sinai Hosp.*, 96 AD3d 534, 535).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

160

CA 15-01288

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), dated March 23, 2015. The order, among other things, determined that defendants are liable for breach of contract and ordered that judgment be entered in plaintiff's favor against defendants, jointly and severally.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

161

CA 15-01314

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 6, 2015. The judgment awarded plaintiff money damages as against defendants, jointly and severally.

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

Memorandum: Plaintiff commenced this action seeking damages for defendants' alleged breach of a waste hauling agreement (Agreement). Following a nonjury trial, Supreme Court awarded plaintiff $755,125.58 in lost profits and $4,884.44 as late payment penalties and interest. Defendants appeal, and we now affirm.

Contrary to defendants' contention, the court's determination that defendants breached the Agreement is supported by a fair interpretation of the evidence and should not be disturbed where, as here, "the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495, *rearg denied* 81 NY2d 835 [internal quotation marks omitted]). The testimony and evidence at trial supports the court's conclusion that defendants unequivocally and finally repudiated the Agreement when defendant Kenneth Loughry ordered plaintiff to remove all of his equipment from defendants' property and refused plaintiff's subsequent request to resume his duties under the Agreement (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463; *Howard v BioWorks, Inc.*, 83 AD3d 1588, 1588-1589; *cf. Children of Am. [Cortlandt Manor], LLC v Pike Plaza Assoc., LLC*, 113 AD3d 583, 584). Such action constitutes an unequivocal and " ' "overt communication of intention" not to perform' agreed-upon obligations"

(*Howard*, 83 AD3d at 1588-1589, quoting *Tenavision, Inc. v Neuman*, 45 NY2d 145, 150).

We also reject defendants' contention that defendants Matthew W. Loughry and Kenneth Loughry (Loughry defendants) cannot be held individually liable. Viewing the evidence in the light most favorable to sustain the judgment (*see Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we conclude that there is " 'clear and explicit evidence' " that the Loughry defendants signed the Agreement in their individual capacity rather than as agents of defendant Center Point Transfer Station, Inc. (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67, quoting *Mencher v Weiss*, 306 NY 1, 4; *see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4). First, the signature line for Matthew Loughry to sign as "President" of the corporation was left blank, but the signature line for each Loughry defendant to sign as a "Supplier" under the Agreement was executed (*cf. Matter of Jevremov [Crisci]*, 129 AD2d 174, 176-177). Second, after the confrontation between plaintiff and Kenneth Loughry, defendants' attorney mailed a letter to plaintiff enclosing a check to pay the entire balance due "pursuant to the contract . . . between [plaintiff] and Matthew Loughry and Kenneth Loughry." Finally, Kenneth Loughry testified at trial that he never had any intention to bind the corporation when he signed the Agreement. Although the Loughry defendants testified at trial that they did not intend to be bound by the Agreement, their subjective intent "is not material" to the analysis (*Pimpinello v Swift & Co.*, 253 NY 159, 162).

Based on the testimonial and documentary evidence submitted at trial, we conclude that the court's award of lost profits is supported by a fair interpretation of the evidence (*see City of Syracuse Indus. Dev. Agency*, 20 AD3d at 170). Contrary to defendants' contention, the lost profits sought in this action are general, not consequential, damages inasmuch as plaintiff "seeks only to recover money that the breaching party agreed to pay under the contract" (*Tractebel Energy Mktg., Inc. v AEP Power Mktg., Inc.*, 487 F3d 89, 109; *see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805; *American List Corp. v U.S. News & World Report*, 75 NY2d 38, 42-43), and plaintiff established that the damages he claimed were the difference between the payments specified in the contract and the cost of plaintiff's performance of that contract (*see Tractebel Energy Mktg., Inc.*, 487 F3d at 109-110; *see generally R & I Elecs. v Neuman*, 66 AD2d 836, 837).

While we agree with defendants that there is a measure of uncertainty with respect to plaintiff's claims of lost profits, it is well settled that, "when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his [or her] contract should not be permitted entirely to escape liability because the amount of the damages which he [or she] has caused is uncertain" (*Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205, 209; *see R & I Elecs.*, 66 AD2d at 837-838). Here, plaintiff

presented an "adequate basis for computing th[at] amount" (*Plant Planners v Pollock*, 60 NY2d 779, 780-781), inasmuch as plaintiff had personal and actual knowledge of the costs of the business (*see Wathne Imports, Ltd. v PRL USA, Inc.*, 125 AD3d 434, 434; *S.J. Kula, Inc. v Carrier*, 107 AD3d 1541, 1542-1543; *cf. R & I Elecs.*, 66 AD2d at 838). Contrary to defendants' contention, plaintiff's business was not a new business from which there was no basis to estimate lost profit (*see Wolf St. Supermarkets v McPartland*, 108 AD2d 25, 33, *appeal dismissed* 65 NY2d 785, *lv dismissed* 68 NY2d 833; *cf. Manniello v Dea*, 92 AD2d 426, 429). We have reviewed defendants' remaining contentions concerning possible events that could have affected plaintiff's profit, and we conclude that those speculative contentions are not supported by the proof at trial and do not warrant any modification to the court's award of damages.

We reject defendants' contentions that plaintiff waived his right to seek an award for late payment penalties and interest and that the amount awarded is not supported by the record. Waiver is "the voluntary and intentional relinquishment of a contract right" (*Stassa v Stassa*, 123 AD3d 804, 805, *lv dismissed* 25 NY3d 960; *see Team Mktg. USA Corp. v Power Pact, LLC*, 41 AD3d 939, 941-942), and it " 'cannot be inferred from mere silence' " (*Stassa*, 123 AD3d at 806). There is no dispute that plaintiff did not assess late fees or interest during the first few months of the contractual relationship and did not act to enforce payment of the late fees and interest until the complaint was filed. Plaintiff did, however, begin adding late payment penalties and notices about late payments within months after the contractual relationship began. Inasmuch as "waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual [provision]" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.,* 7 NY3d 96, 104), we conclude that plaintiff's inaction or silence in the face of defendants' failure to pay the late payment penalties and interest cannot constitute a waiver. There was simply no " 'affirmative conduct or . . . failure to act so as to evince an intent not to claim' " those contractually-derived payments (*id.*; *see EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617-618).

Finally, defendants contend that the court failed to explain how it calculated the amount of late payment penalties and interest awarded, i.e., $4,884.44, and that, without such an explanation, the calculation of damages is flawed. We reject that contention. In his complaint, plaintiff sought only $4,884.44, which represented the late payment penalties and interest for the bills that were still outstanding at the time the action was commenced. Although plaintiff presented proof at trial that defendants owed more than $30,000 in late payment penalties, it is well settled that "a party cannot recover more in a monetary judgment than is requested in his [or her] demand for relief" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 20, *rearg denied* 55 NY2d 801). "In the absence of a motion to amend the ad damnum clause, damages [were] limited to the amount sought in the complaint" (*17 E. 80th Realty Corp. v 68th Assoc.*, 173 AD2d 245, 249; *see Bank of Richmondville v Terra Nova Ins. Co.*, 263

AD2d 786, 788). We thus conclude that the award of damages, as limited by the relief sought in the complaint, is supported by the record.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01266

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

LAURA SALVANIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (JAMES S. WOLFORD OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 30, 2015. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell while trying to stand up from a chair at defendant's Strong Memorial Hospital (hospital). At the time of the incident, plaintiff was visiting a patient and was asked by an X ray technician to leave the room temporarily. Supreme Court denied in part defendant's motion for summary judgment seeking dismissal of the complaint, and we affirm. In support of its motion, defendant submitted the deposition testimony of plaintiff, who testified that "a faulty chair" caused her to fall. When asked what was faulty about the chair, plaintiff mentioned both a loose armrest on the chair and the fact that a footrest of the chair came out when she began to stand up. Defendant also submitted the deposition testimony of witnesses who observed defects in the armrest and the footrest a day or two after plaintiff's fall.

Defendant contends that plaintiff could only speculate that she fell because of a loose armrest on the chair, rather than that she fell when she merely tripped over the footrest, and that plaintiff may not rely on any allegedly defective footrest in support of her negligence cause of action because defendant did not have notice that plaintiff would be relying on such a theory, but instead had notice only of a loose armrest. We reject that contention. "It is well settled that [a] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for

negligence for the first time in opposition to the motion" (*Flynn v Haddad*, 109 AD3d 1209, 1210 [internal quotation marks omitted]; *see Cannon v Amarante*, 19 AD3d 1144, 1145). Here, however, plaintiff was not relying on a new theory of liability for her negligence cause of action (*see Gilfus v CSX Transp., Inc.*, 79 AD3d 1671, 1672-1673). In her complaint, plaintiff alleged that defendant was negligent in "permitting a dangerous and defective condition within said premises, namely an unsafe guest chair." Plaintiff alleged in her second supplemental bill of particulars that the chair "was in a state of disrepair." Although plaintiff specifically mentioned in the second supplemental bill of particulars that the accident occurred when she fell "as a result of an insecure and wobbly arm on the chair," the allegations in the complaint and second supplemental bill of particulars that the chair was defective were sufficient to encompass her theory that the chair's footrest was defective (*see Avery v Rockwell Intl. Corp.*, 204 AD2d 1044, 1044; *cf. Flynn*, 109 AD3d at 1209-1210). In any event, even assuming, arguendo, that the defective footrest was a new theory of liability, we conclude that there was no surprise to defendant arising from plaintiff's reliance on that theory (*see DiFabio v Jordan*, 113 AD3d 1109, 1110-1111). Defendant was well aware through the deposition testimony that the witnesses noticed a problem with the footrest, and defendant's attorney questioned them extensively about it. Contrary to defendant's contention, we conclude that defendant did not establish as a matter of law that the cause of plaintiff's fall was speculative (*see Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1488).

Defendant also contended in support of its motion that it did not have constructive notice of the allegedly defective chair. We reject that contention. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Defendant failed to establish as a matter of law that it did not have constructive notice of the allegedly defective chair prior to plaintiff's fall. The affidavit of defendant's employee did not establish the reasonableness of defendant's inspection practices such that defendant was entitled to judgment as a matter of law (*see Catalano v Tanner*, 23 NY3d 976, 977). The employee was not a member of the department responsible for cleaning the patient rooms and, moreover, he stated in conclusory fashion that workers clean the rooms and inspect the chairs, and they were instructed to make a report if they noticed a problem with a chair. Defendant therefore failed to establish that it regularly inspected the chairs and actually did so just prior to the accident. Even if there was a general policy of inspecting chairs every time a room was cleaned, "defendant failed to submit evidence establishing that the general policy was followed on the day of plaintiff's accident" (*Johnson v Panera, LLC*, 59 AD3d 1118, 1118).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

166

CA 15-00968

PRESENT: WHALEN, P.J., LINDLEY, TROUTMAN, AND SCUDDER, JJ.

PIRRO & SONS, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS J. PIRRO, JR. FUNERAL HOME AND THOMAS J. PIRRO, JR., DEFENDANTS-RESPONDENTS.

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

BARCLAY DAMON, LLP, SYRACUSE (MICHAEL A. OROPALLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 25, 2014. The order granted defendants' motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the special proceeding is converted to an action, the motion is denied and the petition is reinstated as a complaint.

Memorandum: Pirro & Sons, Inc. commenced this "proceeding" seeking a preliminary and permanent injunction, alleging that Thomas J. Pirro, Jr. Funeral Home and Thomas J. Pirro, Jr. violated the terms of a settlement agreement in a prior action, which was thereafter discontinued, by using language in an advertisement in a church news bulletin that indicated an affiliation with Pirro & Sons, Inc. We note at the outset that Pirro & Sons, Inc. correctly concedes that it improperly commenced a proceeding rather than an action, and we exercise our discretion under CPLR 103 (c) to convert this matter to an action for breach of contract (*see e.g. Nichols v BDS Landscape Design*, 79 AD3d 1690, 1691). We thus deem the petition to be a complaint, and we note that Pirro & Sons, Inc. is properly denominated as a plaintiff, while Thomas J. Pirro, Jr. Funeral Home and Thomas J. Pirro, Jr. are properly denominated as defendants.

We conclude that Supreme Court erred in granting defendants' motion to dismiss the complaint pursuant to CPLR 3211. In deciding a motion pursuant to CPLR 3211, we must afford plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). We conclude that plaintiff alleged a cognizable claim for breach of contract for which it seeks a permanent

injunction (*see generally Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216-217).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

167

KA 14-01320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD M. DELAVALLE, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 10, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), we reject defendant's contention that the waiver of the right to appeal is not valid (*see generally People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's further contention, the sentence is not illegal, and the valid waiver of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see generally id.* at 255-256).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

168

KA 14-00323

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOANNE AGLIATA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered February 3, 2014. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third 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.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

173

KA 14-00730

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDYN T. BRADLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MEGHAN E. LEYDECKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 25, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant's sole contention is that Supreme Court erred in refusing to suppress physical evidence seized from him and his statements to the police on the ground that the initial approach by a police officer was unlawful. We reject that contention. It is well established that, in evaluating police conduct, we "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858, citing *People v De Bour*, 40 NY2d 210, 215). "The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223; *see People v McIntosh*, 96 NY2d 521, 525; *People v Hollman*, 79 NY2d 181, 184). Here, the testimony at the suppression hearing established that the officer and his partner were on routine patrol in Buffalo when the officer observed known members of two different gangs congregating outside a residence on Davidson Avenue. According to the officer, one of the gang members was in a neighborhood occupied by the other gang, the neighborhoods in which each gang operated were not particularly close, and the officer had never seen members of those gangs interacting before. The officer testified that this unusual situation raised his suspicion because he was unsure whether the gang members were "starting anything, or what

was going on" outside the residence. When the officer exited his patrol vehicle and approached the residence to request information, he observed defendant—who was unknown to the officer at that time and had been sitting on the porch—turn away, ring the doorbell, and begin to pull a handgun out of his pocket. The officer eventually seized the handgun, and defendant was arrested. Contrary to defendant's contention, we conclude that the officer's testimony establishes that he "[did] not act on whim or caprice and [had] an articulable reason not necessarily related to criminality for making the approach" (*Hollman*, 79 NY2d at 190; *see generally De Bour*, 40 NY2d at 213).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

177

CAF 15-01062

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

IN THE MATTER OF GAMALIEL DOMINGUEZ,
PETITIONER-RESPONDENT,

V ORDER

CLARA MONTALBANO, RESPONDENT-APPELLANT.

IN THE MATTER OF CLARA MONTALBANO,
PETITIONER-APPELLANT,

V

GAMALIEL DOMINGUEZ, RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

GAMALIEL DOMINGUEZ, PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered August 29, 2014 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied and dismissed Carla Montalbano's written objections to an order of the Support Magistrate.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

178

CAF 14-01937

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

IN THE MATTER OF NICHOLE M. HIRSCHMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK R. MCFADDEN, RESPONDENT-RESPONDENT.

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

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 1, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that dismissed her petition seeking permission to relocate with the parties' child to Florida. We affirm. Based on our review of the evidence at the fact-finding hearing, we conclude that Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and we further conclude that the court's determination has " 'a sound and substantial basis in the record' " (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434, *lv denied* 25 NY3d 910). The court properly determined that the mother "failed to establish that the child's life would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*id.*). Indeed, although the mother asserted financial reasons for the proposed relocation, she failed to present any proof of her purported job offer and, moreover, she failed to establish that any employment she was offered in Florida would be anything more than temporary (*see id.*; *Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339). In addition, while the mother testified that the child could receive a superior education upon relocation, "she failed to offer any proof from which [the court] reasonably could conclude that the [Florida] school system was a significant improvement over the school system in [New York]" (*Matter of Batchelder v BonHotel*, 106 AD3d 1395, 1397; *see Matter of Guiffrida v Adams*, 277 AD2d 948, 948). In addition, compared to the support the mother and the child receive by residing with the maternal

grandmother in New York, we conclude that the mother failed to establish that she and the child would receive similar support in Florida, where the nearest family member would be over an hour away (*see Matter of Anne S. v Peter S.*, 92 AD3d 483, 484; *Matter of Webb v Aaron*, 79 AD3d 1761, 1761-1762). Finally, the court considered the fact that respondent father had failed to fully avail himself of his visitation rights, but the court nevertheless properly concluded that the mother lacked a feasible plan for preserving the relationship between the father and the child inasmuch as her proposed visitation arrangement upon relocation was unlikely to materialize given her uncertain employment and the lack of financial resources necessary to facilitate the child's transportation to New York (*see generally Tropea*, 87 NY2d at 740-741; *Matter of Kirshy-Stallworth v Chapman*, 90 AD3d 1189, 1191-1192).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

183

CA 15-00500

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

RUSSELL BAKER, PLAINTIFF-APPELLANT,

V ORDER

LOFINK MOTOR CO., INC., DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ROBERT P. DWYER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ROBERT P. CAHALAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered November 24, 2014. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

186

CA 15-00048

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

FAYE M. EATON, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFFS,

V ORDER

SYLVIA HUNGERFORD, INDIVIDUALLY AND AS SPECIAL EDUCATION TEACHER OF WAYNE CENTRAL SCHOOL DISTRICT, WAYNE CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION OF WAYNE CENTRAL SCHOOL DISTRICT, FRANK ROBUSTO, INDIVIDUALLY AND AS PRESIDENT OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, JOYCE LYKE, INDIVIDUALLY AND AS VICE PRESIDENT OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, JOHN TRIOU, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, RICHARD JOHNSON, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, JEFF SCHULTZ, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, SCOTT GRISWOLD, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, MARK WYSE, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, SUSAN NEWMAN, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, TOM NICHOLSON, INDIVIDUALLY AND AS MEMBER OF WAYNE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, ROBERT ARMOCIDA, INDIVIDUALLY AND AS WAYNE CENTRAL SCHOOL DISTRICT MIDDLE SCHOOL PRINCIPAL, MICHAEL HAVENS, INDIVIDUALLY AND AS WAYNE CENTRAL SCHOOL DISTRICT SUPERINTENDENT, AND MARK CALLAHAN, INDIVIDUALLY AND AS WAYNE CENTRAL SCHOOL DISTRICT DIRECTOR OF HUMAN RESOURCES, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF EMMELYN LOGAN-BALDWIN, ROCHESTER (EMMELYN LOGAN-BALDWIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 11, 2014. The order granted defendants'

motion for summary judgment dismissing plaintiffs' complaint.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

189

CA 15-00553

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

WILLIAM W. CUVA, PLAINTIFF-RESPONDENT,

V ORDER

ADESA NEW YORK, LLC, ROBERT E. PADDEN AND
CREDIT ACCEPTANCE CORPORATION,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PERLA & PERLA, LLP, BUFFALO (JEFFREY A. PERLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 2, 2014. The order denied the motion of defendants for partial summary judgment dismissing plaintiff's claim for punitive damages.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on September 11 and 15, 2015, and filed in the Onondaga County Clerk's Office on October 20, 2015,

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

194

KA 14-00256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 2, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses his challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

195

KA 14-00515

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JONATHAN E. STANTON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J), entered January 6, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

196

KA 14-00808

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM R. PALMER, DEFENDANT-APPELLANT.

WILLIAM R. PALMER, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER PARKER HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 20, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that reversal of the judgment and vacatur of the plea are required because County Court failed to advise him, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing. We agree (*see People v Turner*, 24 NY3d 254, 259; *People v Catu*, 4 NY3d 242, 245; *People v Corsaro*, 128 AD3d 1538, 1538). In light of our determination, we do not address defendant's remaining contentions.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

198

KA 13-01463

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY BOYD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 26, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, burglary in the first degree, burglary in the second degree, criminal possession of a weapon in the second degree (two counts) and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and burglary in the first degree (§ 140.30 [4]) in connection with a home invasion during which four men were engaged in a standoff with police for approximately six hours. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and he therefore failed to preserve for our review his contention that his plea to the indictment was not knowing and voluntary (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). In any event, we conclude that defendant's contention is without merit (*see id.*).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

200

KA 14-01665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE R. SCOTT, JR., DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

WILLIE R. SCOTT, JR., DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Although defendant waived his right to appeal, County Court permitted defendant to reserve the right to challenge on appeal the court's disqualification of defense counsel and, thus, we conclude that the waiver of the right to appeal does not encompass that challenge (*see generally People v Sudlik*, 129 AD3d 1548, 1549). We nevertheless reject the contention of defendant in his main and pro se supplemental briefs that the court abused its discretion in granting the People's motion to disqualify defense counsel based on his prior representation of the victim's mother, a potential prosecution witness (*see People v Watson*, ___ NY3d ___, ___ [Feb. 11, 2016]; *People v Carncross*, 14 NY3d 319, 326-330). Finally, we conclude that defendant's waiver of the right to appeal encompasses his contention in his pro se supplemental brief that he was denied due process of law based on the People's alleged discovery violation (*see People v Vanvleet*, 126 AD3d 1359, 1360, *lv denied* 26 NY3d 1012).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

203

CAF 14-01288

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

IN THE MATTER OF AUSTIN JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHERRY PRICHARD, RESPONDENT-RESPONDENT.

IN THE MATTER OF SHERRY PRICHARD,
PETITIONER-RESPONDENT,

V

AUSTIN JOHNSON, RESPONDENT-APPELLANT.

IN THE MATTER OF SHERRY PRICHARD,
PETITIONER-RESPONDENT,

V

AUSTIN JOHNSON, RESPONDENT-APPELLANT.

PAUL M. DEEP, UTICA, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered June 27, 2014 in proceedings pursuant to Family Court Act article 6 and article 8. The order, among other things, directed that Sherry Prichard shall continue to have sole legal and physical custody of the subject child.

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

Memorandum: We affirm for the reasons stated in the decision at Family Court. We add only that we reject the contention of petitioner-respondent father that the Court Attorney Referee did not have jurisdiction to hear and determine the matter. The parties and their attorneys signed a stipulation in 2012 setting forth that a judicial hearing officer or court attorney referee would hear and determine the custody matter and "all future modifications/violation proceedings concerning this action," and thus the Referee did not err in denying the father's oral request that the matter be heard by a

Family Court judge (*see Matter of Johnson v Streich-McConnell*, 66 AD3d 1526, 1527).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

205

CA 15-00353

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

IN THE MATTER OF EMMANUEL PATTERSON,
PETITIONER-APPELLANT,

V ORDER

MICHAEL GRAZIANO, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE, RESPONDENTS-RESPONDENTS.

EMMANUEL PATTERSON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered October 21, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

206

CA 15-00502

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND SCUDDER, JJ.

PAULA GIBBS, PLAINTIFF-APPELLANT,

V ORDER

STATE FARM FIRE AND CASUALTY CO.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 4, 2014. The order, insofar as appealed from, granted in part the motion of defendant to set aside a verdict and ordered a new trial on damages to the dwelling and additional living expenses unless plaintiff stipulates to damages of $43,000 and $11,669.60, respectively.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

207

CA 15-01017

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND SCUDDER, JJ.

PAULA GIBBS, PLAINTIFF-APPELLANT,

V ORDER

STATE FARM FIRE AND CASUALTY CO.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 23, 2015. The judgment, insofar as appealed from, ordered a new trial on damages to the dwelling and additional living expenses unless plaintiff stipulates to damages of $43,000 and $11,669.60, respectively.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

217

CA 14-01690

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

REGINALD MCFADDEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, MARCUS MASTROCCO, DEPUTY SOLICITOR GENERAL, AND ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, DEFENDANTS-RESPONDENTS.

REGINALD MCFADDEN, PLAINTIFF-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 22, 2014. The order, among other things, granted defendants' cross motion to dismiss the complaint.

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

Memorandum: Plaintiff appeals from an order that denied his motion seeking a default judgment on his complaint seeking declaratory relief (*see* CPLR 3215 [a]), and granted defendants' cross motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the complaint for failure to state a cause of action. Contrary to plaintiff's contention, Supreme Court did not exceed its authority or otherwise err in denying his motion for a default judgment inasmuch as plaintiff failed to establish that he effected service of the summons and complaint on defendants pursuant to CPLR 312-a (a) through (d), as required by CPLR 3215 (f) (*see Klein v Educational Loan Servicing, LLC*, 71 AD3d 957, 958). In any event, " '[a] default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[] establish a right to a declaration' and, here, plaintiff[] did not establish [his] entitlement to the declaration sought" (*Dole Food Co., Inc. v Lincoln Gen. Ins. Co.*, 66 AD3d 1493, 1494).

We reject plaintiff's further contention that the court erred in granting defendants' cross motion to dismiss the complaint for failure to state a cause of action. It is well established that, "[i]n assessing a motion under CPLR 3211 (a) (7), . . . 'the criterion is

whether the proponent of the pleading has a cause of action, not whether he has stated one' " (*Leon v Martinez*, 84 NY2d 83, 88). "Although the pleading is to be afforded a liberal construction on a motion to dismiss pursuant to CPLR 3211 . . . , the allegations in a complaint cannot be vague and conclusory . . . , and '[b]are legal conclusions' will not suffice" (*Rios v Tiny Giants Daycare, Inc.*, 135 AD3d 845, ___; *see Williams v Maddi*, 306 AD2d 852, 852-853, *lv denied* 100 NY2d 516, *cert denied* 541 US 960). We conclude that the allegations contained in the complaint are vague and conclusory and do not allege a justiciable controversy, i.e., "a substantial legal controversy between the parties that may be resolved by a declaration of the parties' legal rights" (*Rice v Cayuga-Onondaga Healthcare Plan*, 190 AD2d 330, 333), or any other valid cause of action for which relief may be granted.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

218

KA 14-01135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. NICOMETO, ALSO KNOWN AS MICHAEL NICOMETO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 21, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant " 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976), and that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's further contention, it is well settled that a "waiver of the right to appeal [is] not rendered invalid based on the court's failure to require [the] defendant to articulate the waiver in his [or her] own words" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the bargained-for sentence (*see Lopez*, 6 NY3d at 255; *see also People v Vincent*, 114 AD3d 1171, 1171, *lv denied* 23 NY3d 969; *People v Williams*, 49 AD3d 1280, 1280; *see generally People v Lococo*, 92 NY2d 825, 827).

Defendant further contends that the court erred in issuing an order of protection in favor of his former wife as a condition of the sentence. Inasmuch as the "order[] of protection was first disclosed

at sentencing after defendant executed a waiver of appeal at the plea proceedings, [defendant's contention] survives the appeal waiver" (*People v Gardner*, 129 AD3d 1386, 1387; *see also People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21 NY3d 1015; *People v Smith*, 83 AD3d 1213, 1214). Nevertheless, we conclude that the contention is without merit (*see generally People v Victor*, 20 AD3d 927, 928, *lv denied* 5 NY3d 833, *reconsideration denied* 5 NY3d 885).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

220

KA 14-00998

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAWN MCINTOSH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 1, 2013. The judgment convicted defendant, upon his plea of guilty, of use of a child in a sexual performance (four counts), sexual abuse in the first degree (two counts), possessing a sexual performance by a child (four counts), and endangering the welfare of a child (two counts).

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

221

KA 14-00957

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEQUAN BAILEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 21, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and robbery in the second degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of five counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]) and one count of robbery in the first degree (§ 160.15 [4]). We conclude that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Knox*, 133 AD3d 1257, 1257; *see generally People v Sanders*, 25 NY3d 337, 340-341). Contrary to defendant's contention, his waiver of the right to appeal "was not rendered invalid based on [Supreme Court]'s failure to require defendant to articulate [it] in his own words" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815). The waiver encompasses defendant's challenges to the court's refusal to suppress identification testimony (*see Sanders*, 25 NY3d at 342; *People v Kemp*, 94 NY2d 831, 833), the court's exercise of discretion in denying his request for youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024), and the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

228

CAF 14-00248

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

IN THE MATTER OF JAMIE BAYLEY,
PETITIONER-RESPONDENT,

V ORDER

PHILLIP BAYLEY, RESPONDENT-APPELLANT.

EVELYNE O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

CHRISTOPHER J. BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the petition to modify a visitation order.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

232

CA 14-02091

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

IN THE MATTER OF MIKE HAWLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered October 17, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of the determination, following a tier III disciplinary hearing, finding that he violated inmate rule 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). Supreme Court dismissed the petition, and we affirm. Although a directive of the Department of Corrections and Community Supervision provides that an inmate removed from his or her cell for a search has the right to observe the search absent a determination that he or she presents a safety or security risk (*see Matter of Johnson v Fischer*, 109 AD3d 1070, 1071), that directive is inapplicable here because petitioner was being examined in the prison hospital when his cell was searched, and he was therefore not "removed from his cell for the purpose of conducting the search" (*Matter of Williams v Goord*, 270 AD2d 744, 745; *see Matter of Horton v Annucci*, 133 AD3d 1002, 1003; *Matter of Nieves v Goord*, 262 AD2d 1042, 1042). Contrary to petitioner's contention, the Hearing Officer properly denied his request to call a lieutenant as a witness because the lieutenant's testimony " 'would have been either redundant or immaterial' " (*Matter of Jackson v Annucci*, 122 AD3d 1288, 1288; *see* 7 NYCRR 254.5 [a]; *Matter of Mullady v Bezio*, 87 AD3d 765, 766). Petitioner's further contention that it was improper for the hearing officer to address two misbehavior reports at one hearing is not preserved for our review because he did not raise it at

the hearing (*see Matter of Freeman v Selsky*, 270 AD2d 547, 547; *see generally Matter of Allah v Fischer*, 118 AD3d 1507, 1507). In any event, "no law or regulation prohibits the review of two misbehavior reports in one disciplinary hearing" (*Freeman*, 270 AD2d at 547; *see Matter of Baker v Fischer*, 96 AD3d 1334, 1334), and petitioner's claim of prejudice is not supported by the record (*see generally Matter of Bramble v Mead*, 242 AD2d 858, 859, *lv denied* 91 NY2d 803).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

237

CA 15-01317

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

IN THE MATTER OF UNIVEST I CORP., DERIVATIVELY
ON BEHALF OF 470 PEARL STREET, LLC,
PETITIONER-RESPONDENT,

V ORDER

SKYDECK CORPORATION, DOING BUSINESS AS PAY2PARK,
RESPONDENT-RESPONDENT,
BUFFALO DEVELOPMENT CORPORATION,
RESPONDENT-APPELLANT,
AND 470 PEARL STREET, LLC, RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW D. MILLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 1, 2014 in a proceeding pursuant to RPAPL article 7. The order, among other things, denied the motion of respondent Buffalo Development Corporation to dismiss the petition, and granted the petition in part.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 4 and 5, 2016, and filed in the Erie County Clerk’s Office on February 8, 2016,

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

238

CA 15-00753

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

DIANE SPARKS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LARRY FELS, JR., SCHWAN'S HOME SERVICE, INC., AND SCHWAN'S FOOD SERVICE, INC., DEFENDANTS-RESPONDENTS.

CAMPBELL & SHELTON, LLP, EDEN, MAGAVERN MAGAVERN GRIMM, LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 26, 2015. The order, insofar as appealed from, granted in part defendants' motion for summary judgment and dismissed plaintiff's claim for punitive damages.

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

Memorandum: In this action arising out of a motor vehicle accident, plaintiff appeals from that part of an order granting defendants' motion for summary judgment seeking dismissal of plaintiff's claim for punitive damages. "Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness (*Fernandez v Suffolk County Water Auth.*, 276 AD2d 466, 467 [2000]; *Lee v Health Force*, 268 AD2d 564 [2000]; *Rey v Park View Nursing Home*, 262 AD2d 624, 627 [1999])" (*Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 585). In other words, "[p]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives" (*Pascazi v Pelton*, 210 AD2d 910 [internal quotation marks omitted]; *see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489). Here, we conclude that the record does not evince circumstances warranting an award of punitive damages (*see Cushing v Seemann*, 247 AD2d 891, 893; *see generally Green v Passenger Bus Corp.* [appeal No. 2], 61 AD3d 1377, 1378; *Buckholz*, 38 AD3d at

585).

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

243

KA 14-00809

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEREMY J. HAYNES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 9, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

245

KA 14-01077

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTONY ASARI HO, ALSO KNOWN AS ANTHONY ASARI-HO,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 1, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

249

CAF 14-01925

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF SHYANA C. BROUGHTON,
PETITIONER-RESPONDENT,

V ORDER

LARRY P. LIVINGSTON, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 18, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted the amended petition of petitioner seeking modification of a prior court order of custody and access.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

250

CAF 14-01941

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF LARRY P. LIVINGSTON,
PETITIONER-APPELLANT,

V ORDER

SHYANA C. BROUGHTON, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

AUDREY ROSE HERMAN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 18, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

271

CAF 15-00563

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

IN THE MATTER OF RICK A.U.,
PETITIONER-APPELLANT,

V ORDER

REBECCA K. AND JAMES K., JR.,
RESPONDENTS-RESPONDENTS.

IN THE MATTER OF RICK A.U.,
PETITIONER-APPELLANT,

V

JAMES K., JR., RESPONDENT-RESPONDENT.

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

LISA A. SADINSKY, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

MICHELLE M. SCUDERI, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered June 2, 2014 in a proceeding pursuant to Family Court Act article 5. The order dismissed the petitions.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

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

276

CA 15-01297

PRESENT: WHALEN, P.J., CARNI, DEJOSEPH, AND TROUTMAN, JJ.

BARBARA HAUG, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

TOPS MARKETS, LLC, DEFENDANT-RESPONDENT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 26, 2014. The order granted in part defendant's motion for summary judgment.

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

Entered: March 18, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1518/91) KA 04-00648. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BARRY ARKIM, ALSO KNOWN AS ED MASON, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1713/04) KA 02-00981. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN FULTON, JR., ALSO KNOWN AS SHAIK S., ALSO KNOWN AS SHAIKH S. ABDMUQTADIR, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (712/08) KA 06-00530. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER M. DIAZ, DEFENDANT-APPELLANT. -- Writ of error coram mobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (117/10) KA 05-01420. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES C. HYMES, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (372/11) KA 08-00122. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER WESTER, DEFENDANT-APPELLANT. -- Writ of error coram mobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (28/12) KA 10-00080. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN L. ALLEN, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1200/12) KA 09-01058. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GREGORY HARVEY, DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (233/14) KA 11-01121. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL BRADFORD, JR., DEFENDANT-APPELLANT. -- Writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (568/15) CA 14-01849. -- NANCY BURKHART, AS ADMINISTRATOR OF THE ESTATE OF BRIAN BURKHART, DECEASED, PLAINTIFF-RESPONDENT, V PEOPLE, INC., ELISA SMITH, KATELYNNE COLEMAN, AMY MAZURKIEWICZ, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Reargument or leave to appeal to the Court of Appeals

denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (936/15) CA 14-01767. -- PHILLIP WOLFE, PLAINTIFF-RESPONDENT, V WAYNE-DALTON CORP., ET AL., DEFENDANTS, JOANNE LESKA AND ROBERT TARSON, JR., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (965.1/15) CA 15-00538. -- IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF MYRON WRIGHT, CONSECUTIVE NO. 16906 FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW § 10.09, PETITIONER-RESPONDENT, V STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-APPELLANTS. -- Leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1144/15) CA 15-00464. -- MARCUS QUIROS, PLAINTIFF-RESPONDENT, V FIVE STAR IMPROVEMENTS, INC., DEFENDANT-APPELLANT. -- Reargument denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1340/15) CA 15-00297. -- MARY DELUCA, INDIVIDUALLY, AND AS CLASS REPRESENTATIVE, ET AL., PLAINTIFFS-RESPONDENTS, V TONAWANDA COKE CORPORATION, ESTATE OF J.D. CRANE, DECEASED, MARK KAMHOLZ, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1341/15) CA 15-00298. -- MARY DELUCA, INDIVIDUALLY, AND AS CLASS REPRESENTATIVE, ET AL., PLAINTIFFS-RESPONDENTS, V TONAWANDA COKE CORPORATION, ESTATE OF J.D. CRANE, DECEASED, MARK KAMHOLZ, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1360/15) CA 15-00790. -- MARY PINTER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ERIN PINTER, DECEASED, PLAINTIFF-RESPONDENT, V TOWN OF JAVA, TOWN OF JAVA HIGHWAY DEPARTMENT, DEFENDANTS-APPELLANTS, WYOMING COUNTY AND WYOMING COUNTY HIGHWAY DEPARTMENT, DEFENDANTS-RESPONDENTS. -- Leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1381/15) CA 15-00145. -- ZRAJ OLEAN, LLC AND ZAMIAS SERVICES, INC., PLAINTIFFS-APPELLANTS, V ERIE INSURANCE COMPANY OF NEW YORK, RAYMOND WANGELIN, DOING BUSINESS AS ADAMS SEPTIC & SOUTHERN SUMMIT, AND NANCY J. WANGELIN, AS ADMINISTRATRIX OF THE ESTATE OF RAYMOND L. WANGELIN, DECEASED, DEFENDANTS-RESPONDENTS. -- Reargument and leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 18, 2016.)

MOTION NO. (1409/15) CA 15-01024. -- WELLS FARGO BANK, N.A., PLAINTIFF-APPELLANT, V LUKE BUFFENMYER, DEFENDANT-RESPONDENT, AND HOME HEADQUARTERS, INC., DEFENDANT. -- Reargument and leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 18, 2016.)