SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 6, 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

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CA 14-02157

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

IN THE MATTER OF THE PETITION FOR JUDICIAL SETTLEMENT OF THE ACCOUNT OF MICHELE M. PAVLYAK, AS TRUSTEE OF THE PAVLYAK LIVING TRUST, UNDER AGREEMENT DATED JUNE 19, 1998.

MEMORANDUM AND ORDER

MICHELE M. PAVLYAK, PETITIONER-APPELLANT;

GEORGE M. PAVLYAK, OBJECTANT-RESPONDENT.

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

GEORGE M. PAVLYAK, OBJECTANT-RESPONDENT PRO SE.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered October 9, 2014. The order, inter alia, granted in part the written objections to the trust account filed with the court.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing objection Nos. 5(O) and 5(P) in part, thereby approving reimbursement to petitioner for travel expenses related to trust administration in the amount of $6,934.85, and by dismissing objection Nos. 5(K), 5(U), 5(X), 5(Y), 5(Z), 5(AA), 5(BB), and 5(DD), and as modified the order is affirmed without costs.

Memorandum: In a proceeding for the judicial settlement of the account of petitioner as trustee under an inter vivos trust, petitioner appeals from an order that, inter alia, granted certain objections following a hearing.

Initially, we reject petitioner's contention that objectant, in his capacity as a remainderman, lacked standing to challenge the administration of the trust from the date of the death of the first settlor. At that time, the trust became irrevocable under its express terms and objectant obtained a pecuniary interest in the trust under its express terms (*see generally Matter of Malasky*, 290 AD2d 631, 632). Contrary to petitioner's further contention, we conclude that Surrogate's Court did not impose an improper initial burden of proof on petitioner. It is well settled that, "[i]n a proceeding to settle a fiduciary's account, 'the party submitting the account has the burden of proving that he or she has fully accounted for all the assets of the estate, and this evidentiary burden does not change in the event the account is contested. While the party submitting

objections bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete, upon satisfaction of that showing the accounting party must prove, by a fair preponderance of the evidence, that his or her account is accurate and complete' " (*Matter of Doman*, 110 AD3d 1073, 1074, *lv denied* 23 NY3d 903; *see Matter of Schnare*, 191 AD2d 859, 860, *lv denied* 82 NY2d 653). Here, we conclude that the record establishes that the Surrogate properly applied those standards.

We agree with petitioner, however, that the Surrogate erred in concluding that petitioner failed to account for expenses incurred in updating and preparing the trust's residential real property for sale. The record unequivocally establishes that petitioner accounted for all such expenses, that petitioner incurred them in good faith, and that they subsequently resulted in a gain, not a loss, to all interested parties (*see generally Matter of Klausner*, 192 Misc 790, 793). We therefore modify the order by dismissing objection No. 5(K).

Inasmuch as the terms of the trust provided for the reimbursement of reasonable travel expenses incurred by the trustee in administering the trust, we also agree with petitioner that the Surrogate abused her discretion in disallowing all of the listed travel expenses. Upon our review of the record, we conclude that the claimed travel expenses should have been equally apportioned by petitioner between those incurred with respect to trust obligations and those related to the personal care of petitioner's mother, which is not a trust obligation, even though petitioner's mother was one of the trust settlors. In our view, the amount of $6,934.85 reflects an appropriate allowance for reasonable and necessary travel expenses incurred for trust administration purposes, and we therefore modify the order accordingly with respect to objection Nos. 5(O) and 5(P).

We likewise conclude that the Surrogate abused her discretion in disallowing fees paid for professional accounting services rendered on behalf of the trust. Surrogate's Court Procedure Act § 2309 (1) provides that, upon the settlement of an account, the Surrogate must allow all reasonable and necessary expenses actually paid by a trustee. The Uniform Rules for Surrogate's Court (22 NYCRR) § 207.40 (g), provides that "[t]he cost of producing and delivering a full accounting to persons interested in the estate shall be deemed a proper disbursement and allowed as an expense of administration." Under the circumstances presented, we conclude that professional accounting services incurred by the trust over the span of six years in the total sum of $15,059.67 were both reasonable and necessary in the administration of the trust, and we therefore further modify the order by dismissing objection No. 5(U).

With respect to the denial of petitioner's statutory commissions, SCPA 2309 (1) provides that, "[o]n the settlement of the account of any trustee the court . . . must allow to the [fiduciary] . . . a commission." Here, the record establishes that petitioner did not engage in fraud, gross neglect of duty, intentional harm to the trust, sheer indifference to the rights of others, or disloyalty, and there is no evidence that petitioner's services resulted in pecuniary loss

to the trust. We thus conclude that it was an abuse of discretion for the Surrogate to disallow petitioner her statutory commissions for her service as trustee (*see Matter of Lasdon*, 105 AD3d 499, 500, *lv denied* 22 NY3d 856), and we therefore further modify the order by dismissing objection Nos. 5(X), 5(Y), 5(Z), 5(AA), 5(BB), and 5(DD).

Entered: May 6, 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 15-00833

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

KATHLEEN P. MUELLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS J. ELLIOTT, ET AL., DEFENDANTS.

SEDGWICK CLAIMS MANAGEMENT, INTERESTED PARTY-APPELLANT.

HAMBERGER & WEISS, BUFFALO (SUSAN R. DUFFY OF COUNSEL), FOR INTERESTED PARTY-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 11, 2014. The order granted plaintiff's application for an order approving the stipulation of discontinuance of the action, nunc pro tunc.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiff was injured while working as a school bus driver when a driver lost control of his vehicle on a slippery road and struck the bus, causing plaintiff to be thrown from her seat into the bus stairwell. Plaintiff commenced this action against both the driver and the owner of the vehicle that struck the bus, but subsequently discontinued the action. Interested party Sedgwick Claims Management (Sedgwick), the workers' compensation administrator for plaintiff's employer, notified plaintiff that future workers' compensation benefits would be denied on the ground that Sedgwick did not consent to the stipulation of discontinuance. Sedgwick now appeals from an order granting plaintiff's application for judicial approval of the discontinuance, nunc pro tunc.

We agree with Sedgwick that, pursuant to Workers' Compensation Law § 29 (5), either carrier consent or judicial approval is required where, as here, a plaintiff voluntarily discontinues a third-party action (*see Matter of Duffy v Fuller Co.*, 21 AD2d 725, 726; *see generally Matter of Roach v Hastings Plastics Corp.*, 57 NY2d 293, 295-296; *Shumski v Loya*, 55 AD3d 716, 717). We further agree with Sedgwick that plaintiff failed to include an affidavit of a physician and omitted certain required information in her application seeking judicial approval (*see* Workers' Compensation Law § 29 [5] [a] - [e]), but we conclude that such omissions did not require denial of the application (*see generally Manning v Peerless Ins. Co.*, 265 AD2d 900,

901; *Merrill v Moultrie*, 166 AD2d 392, 392, *lv denied* 77 NY2d 804).

Sedgwick further contends that Supreme Court's approval of the voluntary discontinuance was not reasonable and was prejudicial to Sedgwick. It is well settled that "[a] motion for judicial approval pursuant to Workers' Compensation Law § 29 (5) is addressed to the sound discretion of the . . . [c]ourt" (*Shumski*, 55 AD3d at 717). The court must determine whether the carrier was prejudiced by the settlement or discontinuance, which depends on whether the settlement or discontinuance was "reasonable" (*Buchanan v Scoville*, 241 AD2d 965, 965; *see McNally v Workers' Compensation Bd.*, 103 AD3d 1236, 1236; *Matter of Gregory v Aetna Ins. Co.*, 231 AD2d 906, 906). On this record, however, we cannot determine whether Sedgwick was prejudiced by the discontinuation or otherwise assess the reasonableness of the discontinuation (*see McNally*, 103 AD3d at 1236; *Buchanan*, 241 AD2d at 965-966; *Matter of Dauenhauer v Continental Cas. Ins. Co.*, 217 AD2d 943, 944). We therefore reverse the order and remit to Supreme Court for a hearing on that issue (*see Buchanan*, 241 AD2d at 965; *Dauenhauer*, 217 AD2d at 944; *see also McNally*, 103 AD3d at 1236-1237).

Entered: May 6, 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 15-01289

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

TERRY SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE SZPILEWSKI AND FELICIA SZPILEWSKI,
DEFENDANTS-APPELLANTS.

RODGERS LAW FIRM, BUFFALO (MARK C. RODGERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (MICHAEL LANCER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 12, 2015. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a trap door came down onto her head as she walked upstairs from the basement of the bar where she worked. Defendants, the owners of the premises, moved for summary judgment dismissing the complaint. Supreme Court denied the motion, and we affirm. Defendants failed to meet their initial burden of establishing as a matter of law that the door did not constitute a dangerous condition in view of the absence of a latch or other mechanism to secure it in the open position (*see Daries v Haym Solomon Home for Aged*, 4 AD3d 447, 448; *see generally Bielicki v Excel Indus., Inc.*, 104 AD3d 1318, 1319; *Matter of Kania v Suchocki*, 294 AD2d 926, 927), that they lacked actual or constructive notice of the allegedly dangerous condition (*see Rachlin v Michaels Arts & Crafts*, 118 AD3d 1391, 1392-1393; *Hanley v Affronti*, 278 AD2d 868, 869; *see generally Harris v Seager*, 93 AD3d 1308, 1308-1309), or that the allegedly dangerous condition of the door was not a proximate cause of the accident (*see Mercedes v Menella*, 34 AD3d 655, 656; *Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1237; *cf. Anilus v Realties*, 206 AD2d 446, 447). "Given that defendant[s] failed to meet [their] initial burden, we do not address [their] contention that the expert affidavit submitted by plaintiff was insufficient to raise a triable issue of fact" (*Letts v Globe Metallurgical, Inc.*, 89 AD3d 1523, 1524; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Contrary to the position of the dissent, we conclude that the record does not definitively establish that the alleged accident resulted from a person intentionally closing the door. Plaintiff's theory of the case does not presuppose that the door was closed intentionally, and her testimony that the wife of one of the bar's owners closed the door on her is based on hearsay and thus insufficient to meet defendants' motion burden (*see Kramer v Oil Servs., Inc.*, 56 AD3d 730, 730; *Smilanich v Sauna Buffalo*, 267 AD2d 1049, 1049; *see generally Cox v State of New York*, 3 NY2d 693, 698). In any event, that testimony is contradicted by the testimony of the bar owner in question that he was the one who closed the door at the relevant time and that plaintiff was not on the stairs when he did so.

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. Initially, in order to prevail on a motion for summary judgment in a premises liability case, a defendant is " 'required to establish as a matter of law that [it] maintained the property in question in a reasonably safe condition and that [it] neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof' " (*Mokszki v Pratt*, 13 AD3d 709, 710; *see Richardson v Rotterdam Sq. Mall*, 289 AD2d 679, 679). I conclude that defendants met that burden on their motion for summary judgment dismissing the complaint, and that plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

Plaintiff alleges that she was injured when someone closed a trap door on her head as she was ascending a stairway from the basement in the premises. The trap door had been in the same structural condition and configuration since 1981. In support of their motion, defendants established that the trap door opening was protected on two sides with a steel tubular railing 1.5 inches in diameter that was installed approximately nine years before the accident. A third side adjoined a wall such that no foot traffic in the premises could possibly encounter the opening or the opened trap door from that direction. When the trap door, which weighed approximately 50 to 75 pounds, was opened, it leaned against the steel railing. Defendants submitted the deposition testimony of plaintiff, who was employed by the business at the premises three days per week for four years prior to the accident. Plaintiff testified that she opened and closed the trap door between five and six times each day that she worked at the premises. Moreover, plaintiff never observed or was otherwise aware of any occasion when the trap door closed on its own without deliberate human effort. On the day of the accident, plaintiff made at least three prior trips to the basement through the trap door—all without incident. Plaintiff testified that she had never had any trouble with the door and never made, heard, or received any complaints about the operation of the trap door. On her last trip to the basement, plaintiff began to ascend the stairs after retrieving some frozen food packages, and she alleges that the trap door came down and struck her in the head. When asked at her deposition if she knew how the door came down, plaintiff testified: "Lisa put it down. I was told and she apologized. She said she didn't see me going back down." Defendants also submitted the deposition testimony of Robert

Szpilewski (Robert), the owner of the business that occupied the premises, who testified that he had operated the business on the premises for 14 years and had operated the trap door "thousands of times" before the accident. Robert testified that it is "close to impossible" for a person to drop the trap door, and that it is "[not] possible to be able to put [the] door down and not see somebody coming up those stairs." Robert testified that, when closing the trap door, a person has to "stand at the top of the stairs to the left of the rail so you're facing down into the stairwell." Robert never received any complaints about the trap door prior to this incident. According to Robert, and the co-owner of the business, Steven Szpilewski, during the 14-year operation of the business, the trap door has only been closed purposefully, and there has been no prior incident where a person was struck by the trap door. Robert testified that, on the day in question, he was the person who closed the door without knowing that plaintiff was still in the basement, and that plaintiff was not at the bottom of the stairs when he did so. Although plaintiff alleges that Robert's wife, Lisa Szpilewski, closed the door, Robert confirmed that he was the person who closed the trap door before plaintiff's incident. In either case, the evidence is undisputed that the trap door was not inadvertently bumped or accidently caused to close. It was intentionally closed under either version.

In summary, defendants established that the trap door had existed in its date-of-accident condition for at least 14 years; it had been operated thousands of times before the accident without incident or complaint; it is not possible to close the door without having a clear line of sight to the stairway below; it was closed intentionally on the day of the accident and was not and could not be accidently or inadvertently bumped closed. In my view, that evidence was sufficient to satisfy defendants' initial burden on their motion for summary judgment dismissing the complaint to establish that the premises were maintained in a reasonably safe condition and that the trap door was not dangerous or defective (*see Fallon v Duffy*, 95 AD3d 1416, 1416-1417; *Lezama v 34-15 Parsons Blvd, LLC*., 16 AD3d 560, 560-561; *Hunter v Riverview Towers*, 5 AD3d 249, 249; *Aquila v Nathan's Famous*, 284 AD2d 287, 287-288; *Maldonado v Su Jong Lee*, 278 AD2d 206, 206-207).

In opposition, plaintiff submitted the affidavit of an engineer who did not visit the premises to operate and inspect the trap door and the stairway (*see Hoffman v Brown*, 109 AD3d 791, 792). Additionally, inasmuch as there is no evidence that the trap door was closed because it was accidentally "bumped," the engineer's opinion concerning the absence of a means to prevent such an accidental occurrence is irrelevant and without factual foundation. With respect to the actual situation at hand, the engineer opined that a "latch or mechanism to keep the door open would provide a moment of pause for the person closing the door to see if somebody was coming up the stairs before closing the door." Inasmuch as plaintiff's expert did not actually operate or test the trap door, his assumption that there is no "moment of pause" in its existing operation is without foundation. Plaintiff's expert also did not identify any engineering or design standards in support of his opinions and cited no building code provisions (*see Lezama*, 16 AD3d at 561; *Maldonado*, 278 AD2d at

207). More importantly, plaintiff's expert did not identify any specific "latch or mechanism" that was commercially available, feasible to install, and capable of creating the "moment of pause" he claimed was lacking (*see generally McKeon v Sears, Roebuck & Co.*, 242 AD2d 503, 503-504). Therefore, in my view, the opinions of plaintiff's engineer were "unencumbered by any trace of facts or data [and thus] should be given no probative force whatsoever" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533-534, n 2; *see also Ramirez v Sears, Roebuck & Co.*, 286 AD2d 428, 430).

Turning to the issue of constructive notice, I note that it is well established that, "[t]o 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 defendant[ ] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendants established that the trap door had been operated on a daily basis and opened and closed "thousands of times" over 14 years without injury or complaint. Thus, in my view, defendants also met their burden with respect to the lack of actual or constructive notice and shifted the burden to plaintiff to raise a triable issue of fact (*see Anderson v Justice*, 96 AD3d 1446, 1447-1448; *Fallon*, 95 AD3d at 1416-1417). For the same reasons discussed above, the affidavit of plaintiff's engineer was also woefully inadequate to raise an issue of fact with respect to notice.

Therefore, I would reverse the order, grant defendants' motion, and dismiss the complaint.

Entered: May 6, 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 15-00730

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

TYSHAWN J. WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAVALRA M. JONES, DEFENDANT-RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 9, 2014. The order, insofar as appealed from, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion in part and reinstating the complaint with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motor vehicle accident that occurred when defendant tried to turn left in front of plaintiff's oncoming vehicle. Supreme Court granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and plaintiff appeals.

To the extent that plaintiff contends that he sustained a serious injury under the permanent loss of use category, that contention is not properly before us because it is raised for the first time on appeal (*see Verkey v Hebard*, 99 AD3d 1205, 1206). In any event, we conclude that the contention is without merit inasmuch as the record establishes that plaintiff did not sustain a "total" loss of use of his cervical spine (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299; *see Constantine v Serafin*, 16 AD3d 1145, 1145-1146).

We reject plaintiff's contention that there is a triable issue of fact whether he sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories. Defendant met her burden on the motion with respect to those categories by submitting evidence that plaintiff sustained only

a temporary cervical strain, rather than any significant injury to his nervous system or spine, as a result of the accident (*see Jones v Leffel*, 125 AD3d 1451, 1452; *Parkhill v Cleary*, 305 AD2d 1088, 1089; *see generally Gaddy v Eyler*, 79 NY2d 955, 956-957). In opposition to the motion, plaintiff failed to provide a qualitative or quantitative assessment demonstrating the seriousness of his injuries and thus failed to raise a triable issue of fact as to either of those two categories (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351; *Bleier v Mulvey*, 126 AD3d 1323, 1324).

We agree with plaintiff, however, that the court erred in granting defendant's motion with respect to the claim of a serious injury under the 90/180-day category, i.e., a medically determined injury or impairment of a nonpermanent nature that prevented him from performing substantially all of his usual and customary daily activities for 90 of the 180 days after the accident (*see* Insurance Law § 5102 [d]). We therefore modify the order accordingly. Even assuming, arguendo, that defendant met her initial burden of establishing as a matter of law that plaintiff did not sustain the requisite medically determined injury (*cf. Zeigler v Ramadhan*, 5 AD3d 1080, 1081), we conclude that plaintiff raised triable issues of fact through the affirmed report of his treating physician, who described objective MRI findings that included a disc bulge and asserted that plaintiff had sustained a "chronic/recurrent acute cervical strain/sprain with cervical disc injury" that was causally related to the accident (*see Rissew v Smith*, 89 AD3d 1383, 1384; *Mancuso v Collins*, 32 AD3d 1325, 1326; *cf. Nitti v Clerrico*, 98 NY2d 345, 357). We further conclude that defendant failed 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 time period at issue (*O'Neal v Cancilla*, 294 AD2d 921, 922, quoting *Licari v Elliott*, 57 NY2d 230, 236; *see Summers v Spada*, 109 AD3d 1192, 1193; *Zeigler*, 5 AD3d at 1081; *Cummings v Riedy*, 4 AD3d 811, 813).

We cannot agree with the dissent that plaintiff's submissions failed to raise an issue of fact concerning the alleged causal relationship between the accident and his limitations during the ensuing 180 days. One of plaintiff's medical records from the period at issue states that, "[b]ased on [plaintiff's] reports and [his medical providers'] clinical findings," plaintiff was suffering from a temporary total disability and was to remain off work pending a further evaluation, and we therefore conclude that this is not a case in which contemporaneous medical records contain no reference to any limitations on the plaintiff's daily activities (*cf. Womack v Wilhelm*, 96 AD3d 1308, 1310). Moreover, plaintiff was 20 years old at the time of the accident, with no preexisting injuries, and, as noted above, the physician who treated plaintiff after the accident asserted that he had sustained a causally related cervical disc injury. In our view, when a plaintiff presents objective evidence of a medically determined injury along with evidence that a medical provider placed restrictions on his or her daily activities, and there is no apparent explanation unrelated to the accident for those restrictions (*cf. Dongelewic v Marcus*, 6 AD3d 943, 945; *Kimball v Baker*, 174 AD2d 925,

927), it cannot be said as a matter of law that causation is lacking or that the plaintiff's limitations are based solely on subjective pain (*see generally Perl v Meher*, 18 NY3d 208, 215), particularly given that the nonmoving party must be afforded the benefit of every reasonable inference on a motion for summary judgment (*see e.g. Houston v McNeilus Truck & Mfg., Inc.*, 124 AD3d 1210, 1211).

Plaintiff's further contention that the court erred in denying his cross motion for partial summary judgment on the issue of defendant's negligence is beyond the scope of his notice of appeal, which encompassed only that part of the court's order granting defendant's motion (*see Kolodziej v Savarese*, 88 AD3d 851, 852; *see generally Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1135). We decline to exercise our discretion to reach beyond the scope of the notice of appeal (*see Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc.*, 130 AD3d 1530, 1531; *cf. Mesler v PODD LLC*, 89 AD3d 1533, 1534; *see generally McSparron v McSparron*, 87 NY2d 275, 282, *rearg dismissed* 88 NY2d 816).

All concur except CARNI and DEJOSEPH, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent because we cannot agree with the majority's conclusion that Supreme Court erred in granting that part of defendant's motion for summary judgment seeking to dismiss plaintiff's claim of a serious injury under the 90/180-day category set forth in Insurance Law § 5102 (d). We would therefore affirm the order granting summary judgment dismissing the complaint.

We conclude that defendant met her initial burden on the motion of establishing as a matter of law that plaintiff did not sustain a serious injury under the 90/180-day category by submitting, inter alia, plaintiff's deposition testimony and the affirmed report of the physician who conducted an independent medical examination (IME) for defendant.

Plaintiff testified that he did not work during the first six months after the accident. He also noted that, prior to the accident, he played basketball three times per week, but within the first six months after the accident he played much less, i.e., "here and there," "probably . . . once a week." Plaintiff also testified that he continued to help his mother around the house, "but not as much as he used to." In our view, it is not dispositive that plaintiff was out of work for more than 90 days following the accident (*see Ahmed v Cannon*, 129 AD3d 645, 647; *Davis v Cottrell*, 101 AD3d 1300, 1303; *Bailey v Islam*, 99 AD3d 633, 634; *Simpson v Montag*, 81 AD3d 547, 548; *Blake v Portexit Corp.*, 69 AD3d 426, 426). In addition, even though plaintiff was unable to do certain household chores and could not play basketball as much as he used to, we conclude that those restrictions do not equate to being unable to perform substantially all of the material acts which constitute his usual and customary daily activities for 90 out of 180 days following the accident (*see Gaddy v Eyler*, 79 NY2d 955, 958; *Omar v Goodman*, 295 AD2d 413, 414). Moreover, the restrictions listed by plaintiff are simply not supported by any medical evidence in the record (*see Blake*, 69 AD3d at

426-427).

The IME physician acknowledged in his report that plaintiff was out of work for six months after the accident, but he also noted that plaintiff's medical records established that his cervical flexion and extension were full during this time period and that plaintiff was maintained on disability based only on his own subjective complaints. The IME physician opined that, although plaintiff sustained an acute cervical strain as a result of the accident, he did not sustain any type of injury that would have incapacitated him from work and/or his routine activities for a prolonged period of time. In our view, "[t]he [IME] physician described his review of [plaintiff's] medical records from the relevant [90/180-day] time period and set forth his conclusions with respect to those records" and, thus, we conclude that the IME physician's affirmed report was sufficient to satisfy defendant's initial burden (*Alcombrack v Swarts*, 49 AD3d 1170, 1172).

We further conclude that plaintiff failed to raise a triable issue of fact in opposition to that part of defendant's motion concerning the 90/180-day category of serious injury (*see generally Zuckerman v City of New York*, 59 NY2d 557, 562). Plaintiff failed to provide a link between the alleged injuries and the alleged curtailment on his activities, including work (*see Womack v Wilhelm*, 96 AD3d 1308, 1311; *Blanchard v Wilcox*, 283 AD2d 821, 824). "It was incumbent upon plaintiff to present medical evidence that [his] injuries from the automobile accident were the cause of [his] disability over the applicable period" (*Kimball v Baker*, 174 AD2d 925, 927). Even if we were to agree with the majority that the June 9, 2010 MRI findings—which were obtained 110 days after the accident—constituted the requisite objective evidence, plaintiff clearly failed to establish that his "restrictions were medically indicated and causally related to the accident" (*Calucci v Baker*, 299 AD2d 897, 898; *see Dann v Yeh*, 55 AD3d 1439, 1441). "Notably, none of the plaintiff's medical records from within the initial 180-day time period following the accident referenced any limitations on [his] usual daily activities" (*Womack*, 96 AD3d at 1311). The majority's reliance on a June 7, 2010 medical note – which came 108 days after the accident – indicating that plaintiff "will remain off work" is similarly misplaced. Even if plaintiff's physician pulled plaintiff out of work, "it cannot be determined from [the record] whether that direction was given in response to an objective medical problem or was made simply in response to plaintiff's complaints of pain" (*Kimball*, 174 AD2d at 927; *see Dongelewic v Marcus*, 6 AD3d 943, 945).

Entered: May 6, 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 12-02016

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARTH O. BENNETT, DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated March 7, 2012. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from an order summarily denying his pro se motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him, upon his plea of guilty, of four counts of robbery in the second degree (Penal Law § 160.10 [1]; [2] [b]), defendant contends that Supreme Court should have conducted a hearing on the motion pursuant to CPL 440.30 (5). We agree. In support of his motion, defendant, who is not a United States citizen, submitted an affidavit in which he asserted that his attorney advised him prior to the plea that "there is no way in the world" that he would be deported as a result of his plea because he was being sentenced to less than five years in prison. Defendant further asserted that he would not have pleaded guilty had he been properly advised of the deportation consequences of the plea. According to defendant, he was deported to Jamaica after serving his term of imprisonment.

As the Court of Appeals has held, an affirmative misstatement of the law regarding the deportation consequences of a plea may provide a basis for vacatur of the plea if it can be shown that the defendant was thereby prejudiced, i.e., there is a reasonable probability that the defendant would not otherwise have pleaded guilty (*see People v McDonald*, 1 NY3d 109, 115; *People v Argueta*, 46 AD3d 46, 50, *lv dismissed* 10 NY3d 761). Here, we conclude that defendant's sworn assertions, if true, entitle him to relief and, because it cannot be said that his assertions are incredible as a matter of law, a hearing

is required. We reject the People's contention that the court properly denied the motion because defendant failed to submit an affidavit from his former attorney corroborating his claim (*see People v Pinto*, 133 AD3d 787, 790; *People v Washington*, 128 AD3d 1397, 1399). Where, as here, defendant's "application is adverse and hostile to his trial attorney," it "is wasteful and unnecessary" to require the defendant to secure an affidavit from counsel, or to explain his failure to do so (*People v Radcliffe*, 298 AD2d 533, 534; *see Washington*, 128 AD3d at 1399). Moreover, contrary to the People's further contention, defendant's assertion that he would not have pleaded guilty if he had been properly advised regarding deportation is sufficient to raise an issue of fact whether he was prejudiced by counsel's alleged error (*see People v Ricketts-Simpson*, 130 AD3d 1149, 1151-1152; *People v Oouch*, 97 AD3d 904, 905-906).

We therefore reverse the order and remit the matter to Supreme Court for a hearing on the motion, i.e., to determine whether, as defendant has alleged, defense counsel assured him that he would not be deported as a result of his plea, and, if so, whether there is a reasonable probability that defendant would not have pleaded guilty if he had been properly advised of the deportation consequences.

Finally, we note that the People have not moved to dismiss the appeal on the ground that defendant has been deported and, although we have discretion to dismiss a permissive appeal in these circumstances (*see People v Harrison*, ___ NY3d ___, ___ [May 5, 2016]), we decline to exercise our discretion to do so.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

294

KA 15-00670

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAOUL BALDWIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated February 13, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is modified on the law and in the interest of justice by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and vacating the determination that defendant is a sexually violent offender, and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk and a sexually violent offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Pursuant to the total risk factor score in the risk assessment instrument, defendant was presumptively a level two risk, but County Court determined that an upward departure from that presumptive risk level was warranted. The evidence at the SORA hearing established that defendant, who was convicted of attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20), asked a group of children who were walking on the street to assist him in moving items from his porch to the street, and then asked if they would help him carry items from the basement to the street. The 11-year-old victim and another child followed defendant into the house. The other child ran out of the house, but defendant took the victim by the arm to the basement, where he held her in a manner that prevented her from leaving. The victim's friend returned to the house and called for the victim, at which point the victim was either released by defendant or escaped his grasp, and she left the house. Although the victim sustained scratches on her neck, she was not otherwise physically harmed. The court determined that defendant "lured . . . an 11-year-old girl[]

into the basement of his home and fortunately before she was harmed, she was able to escape. I believe that under those circumstances, an upward departure is appropriate and that a level II finding does not adequately take into account those circumstances."

We agree with defendant that the court erred in granting the People's request for an upward departure from a presumptive level two risk to a level three risk based upon its assumption that the victim would have suffered greater harm had the other child not intervened and allowed the victim to escape. While it may be reasonable to assume that defendant had sinister intentions when he lured two young children into his home, such an assumption does not constitute the requisite "clear and convincing evidence that there exist aggravating circumstances of a kind or to a degree not adequately taken into account by the risk assessment guidelines" (*People v Sczerbaniewicz*, 126 AD3d 1348, 1349). We therefore modify the order accordingly.

We cannot agree with our dissenting colleagues that an upward departure is warranted on the additional ground that the elements of the crime of attempted kidnapping in the second degree, i.e., that defendant attempted to abduct the victim (*see* Penal Law §§ 110.00, 135.20), are not adequately taken into account by the guidelines. In our view, the Legislature took the elements of the crime into account when it designated attempted kidnapping a "sex offense" despite the fact that it has no apparent sexual component (*see People v Jackson*, 46 AD3d 324, 324, *affd* 12 NY3d 60). Further, the proposed "ground[] for departure had never been raised, and the defendant was never afforded an opportunity to be heard on the issue of whether [it was a] proper ground[] for departure" (*People v Manougian*, 132 AD3d 746, 747; *see People v Segura*, 136 AD3d 496, 497; *People v Hackett*, 89 AD3d 1479, 1480). Inasmuch as the ground relied upon by the dissent was not raised at the trial court or on appeal, we conclude that relying upon that ground to depart from defendant's presumptive risk level would violate his due process rights (*see* Correction Law § 168-n [3]; *Segura*, 136 AD3d at 496-497).

Finally, although defendant failed to preserve for our review his further contention that the court erred in determining that he is a sexually violent offender (*see* Correction Law § 168-a [3]), we nevertheless review that contention in the interest of justice, and we further modify the order by vacating that determination. A " '[s]exually violent offender' means a sex offender who has been convicted of a sexually violent offense defined in [section 168-a (3)]" (§ 168-a [7] [b]), and that is not the case here. Neither the current offense of attempted kidnapping (Penal Law §§ 110.00, 135.20), nor the offense of sexual misconduct (§ 130.20), of which defendant was previously convicted, are defined as sexually violent offenses (*see* Correction Law § 168-a [3]).

All concur except NEMOYER and SCUDDER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part because, in our view, County Court properly determined that an upward departure from a presumptive level two risk was warranted under these facts. We therefore would modify

the order only by vacating the determination that defendant is a sexually violent offender, in the interest of justice and on the law.

Here, as the court properly determined, there was an aggravating circumstance that is, "as a matter of law, of a kind or to a degree not adequately taken into account by the [Sex Offender Registration Act] guidelines" (*People v Gillotti*, 23 NY3d 841, 861), i.e., that defendant attempted to abduct the victim (*see* Penal Law §§ 110.00, 135.20). The court also properly determined that the People adduced sufficient evidence to meet their burden of proving by clear and convincing evidence that the aggravating factor existed, and that the "totality of the circumstances warrants a departure to avoid an . . . under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*Gillotti*, 23 NY3d at 861).

We respectfully disagree with the majority that the risk assessment guidelines adequately take into account the attempted abduction of the victim and, in our view, *People v Jackson* (12 NY3d 60) does not compel a different result. In *Jackson*, the defendant was convicted of attempted kidnapping and challenged the requirement that he register as a sex offender pursuant to Correction Law § 168-a (1) (*see Jackson*, 12 NY3d at 64-65). The guidelines, however, are to be used by the Board of Examiners of Sex Offenders (Board) " 'to assess the risk of a repeat offense by [a] sex offender and the threat posed to the public safety' " (*Gillotti*, 23 NY3d at 852, quoting Correction Law § 168-*l* [5]). With respect to the "current offense" for which the offender is being assessed, i.e., attempted kidnapping, the guidelines require the Board to assess the risks associated with the *offender* by evaluating the following factors: the use of violence, sexual contact with the victim, the number of victims, the duration of the offensive conduct with the victim, the age of the victim, and other characteristics of the victim, such as mental disability (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7-11 [2006]). In our view, those factors do not adequately take into account the fact that defendant attempted to abduct the victim, i.e., that he attempted to restrain her and to prevent her liberation by secreting her in his basement, where she was unlikely to be found (*see* Penal Law § 135.00 [2]).

We also respectfully disagree with the majority's conclusion that the ground for departure, i.e., defendant's attempted abduction of the victim, was not raised and that defendant was not afforded an opportunity to be heard on the issue whether it was a proper ground for departure. Although the People did not frame the basis for an upward departure in precisely those terms, in our view, it is implicit in the People's argument for an upward departure that the attempted abduction of the victim was the basis for an upward departure. Indeed, in granting the application for an upward departure, the court found that defendant lured the 11-year-old victim into his house and took her by the arm into the basement and restrained her there.

Thus, in our view, the court properly providently exercised its discretion in granting the People's application for an upward departure to a level three risk (*see People v Kotler*, 123 AD3d 992,

993, *lv denied* 26 NY3d 902; *see generally People v Ellis*, 52 AD3d 1272, 1273, *lv denied* 11 NY3d 707).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

298

KA 13-02151

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY LITTLE, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 11, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, reckless endangerment in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the definite sentence imposed on count two of the indictment shall run concurrently with the determinate sentence imposed on count one of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), reckless endangerment in the second degree (§ 120.20), and resisting arrest (§ 205.30), defendant contends with respect to his burglary conviction that the evidence is legally insufficient to establish that he knowingly entered the victim's dwelling unlawfully. We reject that contention. Defendant had been evicted from the victim's residence months before the date of the alleged burglary, and the victim testified that defendant did not have permission to enter his residence on that day. Although the victim testified that defendant was welcome to come to the residence even after being evicted, it does not follow from that testimony that defendant had permission to enter the dwelling without the owner's knowledge or invitation. Moreover, defendant's actions in prying open a kitchen window to enter the residence and subsequently crawling through the residence to avoid motion sensors connected to the alarm system establish that he was not licensed or privileged to enter the residence when the victim was not there (*see People v Morrice*, 78 AD3d 1534, 1535, *lv denied* 16 NY3d 834; *see generally People v Graves*, 76 NY2d 16, 20). Viewing the evidence in light of the elements of the crime of burglary as charged

to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Resolution of credibility issues is for the jury, and the jury was entitled to disregard the minor inconsistencies in the victim's testimony (*see People v Hargett*, 11 AD3d 812, 814, *lv denied* 4 NY3d 744).

We reject defendant's further contention that the video of defendant captured by the victim's surveillance camera was improperly admitted in evidence at trial. The testimony of the victim and the police detective who viewed the video and was present while a copy was made by a technician hired by the victim established a proper foundation for admission of the video (*see People v Costello*, 128 AD3d 848, 848, *lv denied* 26 NY3d 927, *reconsideration denied* 26 NY3d 1007). Supreme Court also properly denied defendant's untimely request for a missing witness charge with respect to the technician because the technician's testimony would have been merely cumulative (*see People v Muscarella*, 132 AD3d 1288, 1289-1290, *lv denied* 26 NY3d 1147).

Defendant further contends that he was denied effective assistance of counsel because the victim was paying defendant's legal fees, and defense counsel thus had a conflict of interest. After being alerted by the court to that potential conflict of interest and being given an opportunity to engage separate counsel, however, defendant consented to continued representation by counsel, thereby waiving any claim of possible prejudice resulting from the potential conflict (*see generally People v Gomberg*, 38 NY2d 307, 315-316). In any event, in order to prevail on a claim of ineffective assistance, defendant was required to show "that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892 [internal quotation marks omitted]), and he failed to make that showing here. We reject defendant's further claims of ineffective assistance, and we conclude that the record as a whole establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention that his sentence is unduly harsh and severe. However, inasmuch as we cannot allow an illegal sentence to stand (*see e.g. People v Abuhamra*, 107 AD3d 1630, 1631, *lv denied* 22 NY3d 1038), we modify the judgment by directing that the definite sentence imposed on the reckless endangerment misdemeanor count shall run concurrently with the determinate sentence imposed on the felony burglary count (*see* Penal Law § 70.35; *People v Leabo*, 84 NY2d 952, 953; *People v Shay*, 130 AD3d 1499, 1500).

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

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

303

CA 15-01277

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

JOHN G. ULLMAN & ASSOCIATES, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BCK PARTNERS, INC., MICHAEL B. BONO, SARAH CREATH AND JAMES A. KAFFENBARGER,
DEFENDANTS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE, LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (JEANETTE N. WARREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered July 21, 2015. The order granted the motion of plaintiff for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the preliminary injunction is vacated.

Memorandum: Plaintiff, a financial services firm, commenced this action seeking to enforce restrictive covenants in an employment agreement signed by the individual defendants when they were hired by plaintiff. Approximately one month before they resigned from their employment with plaintiff, the individual defendants formed their new venture, defendant BCK Partners, Inc. (BCK Partners). After submitting their resignations, the individual defendants publicly announced that BCK Partners would establish a permanent office to provide financial services on the same street as plaintiff. Plaintiff thereafter moved for a preliminary injunction enjoining defendants from offering financial services within 50 miles of plaintiff's office, soliciting plaintiff's clients, and disclosing plaintiff's proprietary information, all allegedly pursuant to the restrictive covenants in the individual defendants' employment agreements. We conclude that Supreme Court erred in granting plaintiff's motion.

It is well settled that " '[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted' " (*Sutherland Global Servs., Inc. v Stuewe*, 73 AD3d 1473, 1474). "In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood

of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435). Here, we conclude that plaintiff failed to establish by clear and convincing evidence either a likelihood of success on the merits or irreparable injury.

With respect to plaintiff's likelihood of success on the merits, we conclude that plaintiff failed to establish that the restrictive covenants at issue were necessary to protect its legitimate business interests, or that the individual defendants provide "unique or extraordinary" services (*Riedman Corp. v Gallager*, 48 AD3d 1188, 1189; *see generally BDO Seidman v Hirshberg*, 93 NY2d 382, 389). With respect to irreparable injury, plaintiff asserted in support of the motion that it would suffer some unspecified damage to its "goodwill and reputation," and those conclusory allegations "do not establish that irreparable harm will result in the absence of injunctive relief" (*A. John Merola, M.D., P.C. v Telonis*, 127 AD2d 1007, 1007). It is also unclear from this record whether the "goodwill" relating to the clients who have transferred their business from plaintiff to defendants belongs to plaintiff or the individual defendants (*see BDO Seidman*, 93 NY2d at 393; *Reidman Corp.*, 48 AD3d at 1190; *Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806, *lv denied* 3 NY3d 612). Nor did plaintiff establish that it would not have "an adequate remedy in the form of monetary damages" and thus would suffer irreparable injury in the absence of a preliminary injunction (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 220), even if the monetary damages in this case are capable of calculation only "with some difficulty" (*SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

307

CA 15-01583

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

ALBERT R. BOWMAN, AS ADMINISTRATOR OF THE ESTATE
OF CONNIE C. BOWMAN, DECEASED,
CLAIMANT-RESPONDENT,

V ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR RESPONDENT-APPELLANT.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (KAREN SANDERS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 16, 2015. The order granted the application of claimant for leave to serve a late notice of claim.

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

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

308

CA 15-01450

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THOMAS D. AYERS, PLAINTIFF,

V MEMORANDUM AND ORDER

SNYDER CORP., DEFENDANT.
(ACTION NO. 1.)

THOMAS D. AYERS, PLAINTIFF,

V

CENTER FOR TRANSPORTATION EXCELLENCE, LLC AND
SNYDER CORP., DEFENDANTS.
(ACTION NO. 2.)

INNOVATIVE HEALTH SERVICES OF AMERICA, INC. AND
SNYDER TRANSPORTATION, LLC, DOING BUSINESS AS
FIRST CALL TRANSPORTATION, PLAINTIFFS-RESPONDENTS,

V

THOMAS D. AYERS, DEFENDANT-APPELLANT.
(ACTION NO. 3.)

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOANNA J. CHEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 6, 2015. The order denied the motion of defendant Thomas D. Ayers for summary judgment with respect to his counterclaim in action No. 3.

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

Memorandum: In action No. 3, defendant appeals from an order that denied his motion for summary judgment on his counterclaim for breach of his employment agreement with plaintiff Innovative Health Services of America, Inc. (IHSA). Plaintiffs commenced action No. 3 seeking rescission of defendant's employment agreement and asserting causes of action for breach of fiduciary duty and fraud. They alleged

that, during the negotiation of defendant's employment agreement, defendant failed to disclose certain misconduct he committed while employed as chief executive officer of plaintiff Snyder Transportation, LLC, doing business as First Call Transportation (First Call). We conclude that Supreme Court properly denied defendant's motion.

"A contract induced by fraud . . . is subject to rescission, rendering it unenforceable by the culpable party" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275), e.g., where a party deliberately conceals material information that he or she has a duty to disclose (*see Post v Xerox Corp.*, 163 AD2d 908, 909). Here, there are issues of fact whether defendant concealed material information concerning his prior misconduct at First Call when negotiating the employment agreement with IHSA. Because IHSA may thus be entitled to rescission of the agreement, defendant is not at this juncture entitled to summary judgment on his counterclaim seeking the benefits of that agreement. In light of our conclusion, we do not address defendant's remaining contention.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

313

KA 15-00111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUDOLPH YOUNG, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered December 15, 2014. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed upon his conviction of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [4]), for which he was sentenced as a persistent felony offender to an indeterminate prison term of 25 years to life. We previously affirmed the judgment of conviction on defendant's direct appeal, specifically rejecting his contention that he was improperly sentenced as a persistent felony offender (*People v Young*, 255 AD2d 907, 908, *affd* 94 NY2d 171). Contrary to defendant's current contention, we conclude that the subsequent vacatur of a separate judgment of conviction (*see Young v Conway*, 761 F Supp 2d 59, *affd* 698 F3d 69, *cert denied* ___ US ___, 134 S Ct 20) does not require vacatur of his sentence and a new persistent felony offender hearing. Neither of the felonies at issue in *Young v Conway* was used as a predicate felony to determine defendant's eligibility to be sentenced as a persistent felony offender (*see* Penal Law § 70.10 [1]; *cf. People v Dozier*, 78 NY2d 242, 248), and defendant's lengthy and serious criminal history, including a murder conviction from North Carolina, was sufficient to support Supreme Court's determination that defendant's "history and character," along with the "nature and circumstances of his criminal conduct," warranted imposition of a persistent felony offender sentence, even without consideration of the since-vacated conviction. We note that defendant

admitted to the police that he had committed between 45 and 60 burglaries during a two-month period in 1988, and he later admitted to a probation officer that he committed between 140 and 150 burglaries between July 1988 and January 1990. Moreover, the court, in denying defendant's motion, stated that it did not consider the vacated conviction in sentencing defendant as a persistent felony offender, and we perceive no basis in the record to doubt that representation. In any event, the record is clear that the court intended to sentence defendant as it did without considering any of the facts relating to the vacated conviction, and there is therefore no need to remit for resentencing (*see People v Robles*, 251 AD2d 20, 21, *lv denied* 92 NY2d 904; *People v Capers*, 177 AD2d 992, 993-994, *lv denied* 79 NY2d 944).

We reject defendant's further contention that the Grand Jury Clause of the New York State Constitution (NY Const, art I, § 6) required that he be indicted on a class A-I felony before the court could impose the sentence of imprisonment authorized for a class A-I felony. That section merely requires that, absent a waiver, a person facing a felony charge must be indicted by a grand jury. It does not require that a defendant facing the possibility of sentencing as a persistent felony offender be indicted on an A-I felony, nor does it render improper the Legislature's authorization of the imposition of an A-I felony sentence for a persistent felon. Finally, we reject defendant's contention that the persistent felony offender statutes (Penal Law § 70.10; CPL 400.20) violate the Federal Constitution. The Court of Appeals has repeatedly rejected that contention (*see People v Quinones*, 12 NY3d 116, 125-131, *cert denied* 558 US 821; *People v Rosen*, 96 NY2d 329, 334-335, *cert denied* 534 US 899) and, contrary to defendant's contention, nothing in *Alleyne v United States* (___ US ___, 133 S Ct 2151) requires a different result. Inasmuch as the factors that made him eligible for enhanced sentencing were prior convictions that were based on proof beyond a reasonable doubt, those factors were not "based on [the court's] finding by a preponderance of evidence" (*Alleyne*, ___ US at ___, 133 S Ct at 2163).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

323

CA 15-00858

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

MARY ELLEN MESI AND JOSEPH G. MESI, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MOHAMED Y. ZEID, M.D., ET AL., DEFENDANTS,
VIVIAN L. LINDFIELD, M.D., INDIVIDUALLY AND
AS AN AGENT, OFFICER AND/OR EMPLOYEE OF
WESTERN NEW YORK BREAST HEALTH, AND WESTERN
NEW YORK BREAST HEALTH, BY AND THROUGH ITS
AGENTS, OFFICERS AND/OR EMPLOYEES,
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMORE LAW FIRM, PLLC, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered February 20, 2015. The order denied the motion of defendants Vivian L. Lindfield, M.D. and Western New York Breast Health for summary judgment.

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

Memorandum: Mary Ellen Mesi (plaintiff) and her husband commenced this medical malpractice action alleging, inter alia, that Vivian L. Lindfield, M.D. (defendant) and her medical practice (collectively, defendants) were negligent in their care and treatment of plaintiff after she was diagnosed with a phyllodes tumor in her right breast. As amplified by the bill of particulars, plaintiffs allege in pertinent part that defendant was negligent in failing to order a second biopsy of the tumor to confirm that it was malignant, and in failing to advise plaintiff that the double mastectomy she later underwent was medically unnecessary to treat the tumor. Following discovery, defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion, concluding that, although defendants met their prima facie burden, plaintiffs raised issues of fact precluding summary judgment. We affirm.

Contrary to defendants' contention, plaintiff's affidavit does not directly contradict the five-page excerpt of her deposition

submitted by defendants, and thus its submission "is not merely an attempt to raise a feigned issue of fact" to defeat summary judgment (*Schwartz v Vukson*, 67 AD3d 1398, 1400; *see Indarjali v Indarjali*, 132 AD3d 1277, 1277). We further conclude that plaintiff's affidavit, combined with that of her expert, raised triable issues of fact whether defendant failed to comply with the applicable standard of care in advising plaintiff with respect to the double mastectomy defendant performed, and whether defendant's alleged failure to comply with the standard of care caused plaintiff to undergo that procedure (*see Gray v Williams*, 108 AD3d 1085, 1086-1087; *cf. Orphan v Pilnik*, 15 NY3d 907, 908-909).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

328

CA 15-01478

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

SANDRA J. CROISDALE AND LAWRENCE CROISDALE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT R. WEED AND LYOLA B. WEED,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HAGELIN KENT LLC, BUFFALO (SEAN SPENCER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered April 27, 2015. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Sandra J. Croisdale (plaintiff) and her husband commenced this negligence action seeking damages for injuries she allegedly sustained when the vehicle she was operating was struck by a vehicle owned by defendants and operated by defendant Robert R. Weed. Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), as partly evidenced by a gap in plaintiff's treatment for her left knee, which plaintiffs alleged had been injured in the accident. Supreme Court granted the motion in part, dismissing plaintiffs' claims insofar as they are based on injuries other than to plaintiff's left knee and based on the significant limitation of use, permanent loss of use and significant disfigurement categories of serious injury. The court denied the motion, however, insofar as it sought dismissal of the claim of serious injury to plaintiff's left knee under the permanent consequential limitation of use category. Defendants' appeal from that order is the subject of appeal No. 1. Defendants thereafter moved for leave to renew the motion, contending that the deposition transcript of one of plaintiff's treating physicians constituted new facts not offered on the motion that would change the court's determination, and that the deposition transcript was unavailable

before the motion was filed because plaintiffs' counsel failed to authorize defendants to obtain it. The court denied the motion for leave to renew, concluding that defendants lacked a reasonable justification for not submitting the deposition transcript in support of the summary judgment motion and, in any event, that the deposition transcript would not have changed the court's determination of the motion. Defendants' appeal from that order is the subject of appeal No. 2. We affirm in both appeals.

We conclude that, although defendants contended in support of the motion that plaintiff's left knee injuries were preexisting and the result of a degenerative condition, "they failed to submit evidence establishing as a matter of law that the injuries were entirely [preexisting] . . . and were not exacerbated by the accident in question" (*Benson v Lillie*, 72 AD3d 1619, 1620; *see Linton v Nawaz*, 62 AD3d 434, 439, *affd* 14 NY3d 821; *Schreiber v Krehbiel*, 64 AD3d 1244, 1245). In any event, even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiffs raised triable issues of fact in opposition to the motion by submitting medical evidence that the tear in plaintiff's left lateral meniscus was caused by the accident, and that any preexisting condition suffered by plaintiff was aggravated by the accident (*see Roll v Gavitt*, 77 AD3d 1412, 1413). We also conclude that plaintiffs provided a reasonable explanation for plaintiff's failure to seek medical treatment for her injuries in the six months after the accident (*see Cook v Peterson*, 137 AD3d 1594, 1597-1598; *Kellerson v Asis*, 81 AD3d 1437, 1438; *see generally Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907).

Finally, we conclude that the court properly denied defendants' motion for leave to renew. It is well settled that "[a] motion for leave to renew 'shall be based upon new facts not offered on the prior [application] that would change the prior determination' . . . , and 'shall contain reasonable justification for the failure to present such facts on the prior [application]' " (*Doe v North Tonawanda Cent. Sch. Dist.*, 91 AD3d 1283, 1284). Here, defendants did not proffer a reasonable justification for their failure to submit the subject deposition transcript in support of their summary judgment motion (*see Jones v City of Buffalo Sch. Dist.*, 94 AD3d 1479, 1479; *cf. Pratcher v Hoadley*, 306 AD2d 907, 908) and, in any event, the deposition transcript "would [not have] change[d] the prior determination" (CPLR 2221 [e] [2]; *see Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

329

CA 15-01480

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

SANDRA J. CROISDALE AND LAWRENCE CROISDALE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT R. WEED AND LYOLA B. WEED,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

HAGELIN KENT LLC, BUFFALO (SEAN SPENCER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered June 18, 2015. The order denied the motion of defendants for leave to renew their motion for summary judgment.

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

Same memorandum as in *Croisdale v Weed* ([appeal No. 1] ___ AD3d ___ [May 6, 2016]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

330

CA 15-00829

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

MICHELLE M. WALDO, PLAINTIFF-APPELLANT,

V ORDER

MINSOO KANG AND JUNGHEE PARK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 23, 2015. The order denied the motion of plaintiff to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

331

CA 15-00830

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

MICHELLE M. WALDO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MINSOO KANG AND JUNGHEE PARK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 27, 2015. The judgment granted defendants judgment against plaintiff and awarded costs to defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict on the issue of negligence is granted, and a new trial is granted on the issues of serious injury and damages.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained in a motor vehicle accident, and she now appeals from a judgment following a jury verdict finding that she was 25% liable for the accident and that she did not sustain a serious injury. We agree with plaintiff that various rulings of Supreme Court were in error and that she is therefore entitled to a directed verdict on the issue of negligence and a new trial on the issues of serious injury and damages.

We agree with plaintiff that the verdict finding her negligent is against the weight of the evidence. Indeed, we conclude that the court erred in failing to grant plaintiff's motion seeking a directed verdict on the issues whether Junghee Park (defendant) was negligent and whether such negligence was the sole proximate cause of the accident. "It is well settled that a driver who has the right-of-way is entitled to anticipate that the drivers of other vehicles will obey the traffic laws requiring them to yield" (*Heltz v Barratt*, 115 AD3d 1298, 1299, *affd* 24 NY3d 1185 [internal quotation marks omitted]). Here, the record establishes that plaintiff was proceeding within the speed limit through a green light at the time of the collision and that she was therefore entitled to assume that defendant would stop

for the red light. Moreover, defendants offered nothing other than speculation to establish that plaintiff could do anything other than slam on her brakes in the seconds prior to impact (*see id.* at 1299; *Wallace v Kuhn*, 23 AD3d 1042, 1043).

We also agree with plaintiff that the court improperly precluded a physician from testifying at trial because of the lack of an expert disclosure. "[P]reclusion [of expert testimony] for failure to comply with CPLR 3101 (d) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" and, here, defendants failed to provide any evidence of a willful or intentional failure to disclose by plaintiff or any evidence of prejudice (*Sisemore v Leffler*, 125 AD3d 1374, 1375 [internal quotation marks omitted]). Such preclusion warrants a new trial on the issues of serious injury and damages (*see Tronolone v Praxair, Inc.*, 39 AD3d 1146, 1147). We also note that, because there was no timely objection to the verdict sheet, plaintiff's contention that the court erred in precluding the jurors from awarding damages in excess of basic economic loss unless they found that she had suffered a serious injury is not preserved for our review (*see Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1683, *lv denied* 17 NY3d 710; *MacKillop v City of Syracuse*, 48 AD3d 1197, 1198).

In view of our determination, we see no need to address plaintiff's remaining contention with respect to inconsistency of the verdict.

Entered: May 6, 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 15-01113

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

LAFRAMBOISE GROUP LTD., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COMMERCIAL UNDERWRITERS INSURANCE COMPANY,
LYONS FALLS PULP & PAPER, INC., WALT WILMSHURST,
BOURDON'S INSURANCE AGENCY, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

FISCHER, BESSETTE, MULDOWNEY & HUNTER, LLP, MALONE (MATTHEW H. MCARDLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WALT WILMSHURST AND BOURDON'S INSURANCE AGENCY, INC.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MEGAN E. GRIMSLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT COMMERCIAL UNDERWRITERS INSURANCE COMPANY.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 12, 2014. The judgment, among other things, granted that part of the motion of defendant Commercial Underwriters Insurance Company seeking summary judgment dismissing plaintiff's amended complaint against it, and granted the cross motion of defendants Walt Wilmshurst and Bourdon's Insurance Agency, Inc. seeking summary judgment dismissing plaintiff's complaint against it.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the amended complaint against defendant Commercial Underwriters Insurance Company to the extent that it seeks a declaration and granting judgment in favor of that defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to indemnification or a defense from defendant Commercial Underwriters Insurance Company in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: We conclude, for reasons stated in the decision at

Supreme Court, that plaintiff is not entitled to the relief sought in the amended complaint against defendant Commercial Underwriters Insurance Company (CUIC) or the complaint against defendants Walt Wilmshurst and Bourdon's Insurance Agency, Inc. We note, however, that the court erred in dismissing the amended complaint against CUIC to the extent that it seeks declaratory relief rather than declaring the rights of the parties (*see Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047; *see also Teague v Automobile Ins. Co. of Hartford, Conn.*, 71 AD3d 1584, 1586; *Ward v County of Allegany*, 34 AD3d 1288, 1289). We therefore modify the judgment accordingly, and we grant judgment declaring that plaintiff is not entitled to indemnification or a defense from CUIC in the underlying action.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

366

KA 11-01944

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN CLARK, ALSO KNOWN AS DEVONTE HAMPTON,
DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 1, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (eight counts) and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of eight counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The conviction arose from the murder of four people in late December 2008; one victim was killed on December 23 on Skuse Street in Rochester, and three victims were killed on December 26 at a home on Bernice Street in Rochester. The 17-year-old defendant was arrested on an unrelated warrant on January 6, 2009 and was charged with the two weapon possession counts at that time. It is undisputed that the weapon that defendant possessed on January 6, 2009 was not connected to any of the murders. We agree with defendant that Supreme Court erred in denying that part of his omnibus motion seeking severance of the weapon possession counts from the murder counts because "proof of defendant's commission of the [murders] was not admissible to prove defendant's guilt of criminal possession of the [weapon] or vice versa. The incidents were unrelated in time and place and completely dissimilar in nature" (*People v Gadsden*, 139 AD2d 925, 926). We nevertheless conclude that, because the evidence of the murder counts is overwhelming, there is not a significant probability that defendant would have been acquitted of any of the murder counts if the evidence regarding the weapon possession counts had not been before the jury (*see People v Crimmins*, 36 NY2d 230, 241-242; *cf. Gadsden*, 139 AD2d at

926).

We reject defendant's contention that the court erred in refusing to suppress statements he made to the police during the 26-hour period of videotaped interrogation. It is axiomatic that the length of the interrogation period "does not, by itself, render the statement[s] involuntary" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892). Instead, we must view " 'the totality of the circumstances surrounding the interrogation' " (*People v Knapp*, 124 AD3d 36, 41). The detective ascertained defendant's date of birth, that he had completed the 10th grade and was obtaining his GED, that he could read and write, that he was not under the influence of alcohol or marijuana, and that he had never before been read his *Miranda* rights. The detective "did not restrict himself to a mere reading of the rights from a card . . . [but] [i]nstead . . . described the rights in more detail and simpler language, verifying that defendant understood [them]" (*People v Williams*, 62 NY2d 285, 288). We conclude that the court properly determined that defendant voluntarily waived his *Miranda* rights (*see People v Huff*, 133 AD3d 1223, 1224). We further conclude that his will was not overborne by coercive police tactics (*cf. People v Guilford*, 21 NY3d 206, 212; *Knapp*, 124 AD3d at 47-48). Contrary to defendant's contention, the tactics used by the police, i.e., telling defendant that they thought he was a "good kid," stating that he would feel better when he told the truth, and challenging the inconsistencies in his statement with the evidence, were not improper or unusual where, as here, there is no evidence that defendant was of subnormal intelligence or susceptible to suggestion (*cf. Knapp*, 124 AD3d at 47-48; *see generally People v Johnson*, 52 AD3d 1286, 1287, *lv denied* 11 NY3d 738). Indeed, defendant never admitted that he committed the offenses, and he changed his version of events regarding the murders at the Bernice Street home, admitting that he was present when the murders were committed by someone else, only when confronted with fingerprint evidence establishing that he was at the home. Defendant thereafter admitted that he was present at the Skuse Street murder when he implicated another person for that murder. He explained that it was that other person who also had committed the murders at the Bernice Street home, and not the three people whom he initially implicated, but whom the police established had alibis for the time those murders were committed. The record establishes that defendant was provided with food, water, cigarettes, and bathroom breaks throughout the period (*see Huff*, 133 AD3d at 1225; *People v Collins*, 106 AD3d 1544, 1545, *lv denied* 21 NY3d 1072; *cf. Guilford*, 21 NY3d at 210; *People v Anderson*, 42 NY2d 35, 40). The record further establishes that there were two breaks in the interrogation, approximately six and one-half hours and five hours long, respectively, when the police were pursuing leads and that defendant slept during those breaks (*see People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961). Moreover, we note that the length of the interrogation was in large part owing to "the nature of the crime[s] and defendant's conflicting and constantly changing stories to the police," which the police investigated and attempted to verify (*People v Steward*, 256 AD2d 1147, 1147, *lv denied* 93 NY2d 879). Although defendant made four requests to make a telephone call throughout the period, it was not until the end of the period of

interrogation that he requested to call his mother. A 17-year-old defendant is considered an adult for the purpose of criminal prosecution (*see generally People v Martin*, 39 AD3d 1213, 1213, *lv denied* 9 NY3d 878), and defendant does not contend that the police engaged in " 'deception or trickery' " to isolate him from his family, nor does the record support a conclusion that the police did so (*People v Harvey*, 70 AD3d 1454, 1455, *lv denied* 15 NY3d 570; *cf. People v Townsend*, 33 NY2d 37, 42).

Defendant failed to preserve for our review his contentions regarding circumstances surrounding the in-court identification of defendant by an 18-year-old witness, i.e., that the witness should not have been permitted to identify him and that the prosecutor and the court engaged in misconduct (*see* CPL 470.05 [2]). In any event, those contentions lack merit. The inability of a witness to make an unequivocal pretrial identification goes to the weight of the identification, not its admissibility (*see People v Parks*, 257 AD2d 636, 637, *affd* 95 NY2d 811). With respect to the allegations of misconduct, we note that, following the subject witness's identification of defendant as the person she saw with two of the victims on the night of the crimes at the home on Bernice Street, the court directed the prosecutor to speak to the witness because she had not complied with the court's repeated instructions to speak more loudly. Whether to permit contact between the prosecutor and a witness in the middle of the witness's testimony "falls within the broad discretion allowed a trial court in its management of a trial" (*People v Branch*, 83 NY2d 663, 667). We reject defendant's contention that the prosecutor's statements to the witness were improper. Contrary to defendant's contention, the court's efforts to clarify the witness's testimony did not give "any impression with respect to its own view of the 'credibility of the testimony of [the] witness or the merits of [her identification]' " (*People v Blair*, 94 AD3d 1403, 1404, *lv denied* 19 NY3d 971).

Finally, contrary to defendant's contention, he was not deprived of effective assistance of counsel based upon counsel's consent to substitute an alternate juror for a juror who, because of illness, was discharged shortly after deliberations began, rather than seeking a mistrial to which he would have been entitled (*see* CPL 270.35 [1]). It is well established that "[a]llowing a defendant to decide whether deliberations should continue . . . provides the accused with more options . . . For example, if a defendant believes that a favorable outcome is possible, he may prefer to consent to deliberations . . . But if the defendant believes that he is more likely to prevail at a retrial, the constitution ensures that this remedy is available to a defendant as well" (*People v Gajadhar*, 9 NY3d 438, 447-448). "[I]n order to prevail on a claim of ineffective assistance of counsel based on a single error or omission, a defendant must demonstrate that the error was 'so egregious and prejudicial' as to deprive defendant of a fair trial" (*People v Cummings*, 16 NY3d 784, 785, *cert denied* ___ US ___, 132 S Ct 203), and that is not the case here. Although defendant correctly contends that some of the witnesses may be unavailable to testify at a second trial, the prosecution could nevertheless use the transcript of the testimony from the first trial in its case-in-chief

in a retrial (*see* CPL 670.10 [1]). Inasmuch as there was a cogent defense that focused on the lack of credibility, and a motive to lie, of several of the prosecution witnesses, we conclude that there was a reasonable and legitimate basis for counsel's strategic decision to go forward with the deliberations with jurors who saw and heard the witnesses (*see generally People v Benevento*, 91 NY2d 708, 712-713). Finally, we reject defendant's contention that his consent to substitute a juror was not knowing, intelligent, and voluntary. The record establishes that "the court ascertained that defendant conferred with his counsel prior to signing a written consent in open court in conformance with CPL 270.35 [1]" (*People v Felton*, 279 AD2d 331, 331, *lv denied* 96 NY2d 799; *cf. People v Canales*, 121 AD3d 14, 17; *People v Teatom*, 91 AD3d 1025, 1026). To the extent that defendant's contention " 'implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record,' " it must be raised by way of a motion pursuant to CPL 440.10 (*Felton*, 279 AD2d at 331).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

369

KA 14-00473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE J. BARNES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Frederick G. Reed, A.J.), rendered February 14, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts), grand larceny in the third degree (two counts), grand larceny in the fourth degree (two counts) and criminal mischief in the third degree (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is modified on the law by reducing the conviction of grand larceny in the third degree under count two of the indictment to petit larceny, and striking the language "and family" from the orders of protection, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following retrial upon a jury verdict of, inter alia, two counts of burglary in the second degree (Penal Law § 140.25 [2]), two counts of grand larceny in the third degree (§ 155.35 [1]), and two counts of criminal mischief in the third degree (§ 145.05 [2]) and, in appeal No. 2, he appeals from the resentence imposed on that conviction.

We reject defendant's contention that County Court committed an *O'Rama* violation that constituted a mode of proceedings error (*see People v O'Rama*, 78 NY2d 276-278; *see generally* CPL 310.30). It is well settled that "not all *O'Rama* violations constitute mode of proceedings errors . . . The only errors that require reversal in the absence of preservation are those that go to the trial court's 'core responsibilities' under CPL 310.30, such as giving notice to defense counsel and the prosecutor of the contents of a jury note" (*People v Kahley*, 105 AD3d 1322, 1323). Here, we conclude that there was no *O'Rama* violation inasmuch as it is undisputed that the court provided

the jury note to counsel without the jury present, and counsel was able to respond before the jury was in the courtroom. Likewise, it was not a mode of proceedings error to fail to fully respond to the jury's note seeking testimony about surveillance prior to taking the verdict, inasmuch as the jury could have resolved that factual issue on its own without further input from the court (*see People v Albanese*, 45 AD3d 691, 692, *lv denied* 10 NY3d 761; *People v Sanders*, 227 AD2d 506, 506, *lv denied* 88 NY2d 994).

We reject defendant's further contention that the indictment should be dismissed because he was required to wear restraints and prison clothes when he testified before the grand jury. We conclude that the prosecutor's cautionary instruction to the grand jurors, which admonished them from drawing any negative inferences from the fact that defendant was in custody, was "sufficient to dispel any potential prejudice to defendant" (*People v Cotton*, 120 AD3d 1564, 1565, *lv denied* ___ NY3d ___ [Mar. 2, 2016] [internal quotation marks omitted]; *see People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995; *People v Muniz*, 93 AD3d 871, 872, *lv denied* 19 NY3d 965, *reconsideration denied* 19 NY3d 1028).

Contrary to defendant's assertion, the court did not abuse its discretion when it required that he be restrained by a stun belt during trial. "[A] stun belt may not be required unless the trial court makes findings on the record showing that the particular defendant before him needs such a restraint. A formal hearing may not be necessary, but the trial court must conduct a sufficient inquiry to satisfy itself of the facts that warrant the restraint. Where it does so, a trial court has broad discretion in deciding whether a restraint is necessary for courtroom security" (*People v Buchanan*, 13 NY3d 1, 4). On this record, we conclude that the court conducted a sufficient inquiry to satisfy itself of facts warranting use of the restraint.

Defendant's claim that the search warrant was issued without probable cause also is without merit. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423-424, citing *People v McRay*, 51 NY2d 594, 602). Further, "[p]robable cause may be supplied, in whole or part, through hearsay information . . . , [and] an informant's basis of knowledge may be verified by police investigation that corroborates the defendant's actions or that develops information consistent with detailed predictions by the informant" (*id.* at 423-424). Here, the record reflects that the information received through an informant connecting defendant to the searched premises was independently corroborated by the investigator and was sufficient to support a reasonable belief that evidence of a crime could be found at the premises. The court also properly denied defendant's motion for a *Franks/Alfinito* hearing (*see Franks v Delaware*, 438 US 154; *People v Alfinito*, 16 NY2d 181) because defendant failed to make " 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the warrant

affidavit, and . . . [that such] statement [was] necessary to the finding of probable cause' " (*People v Binion*, 100 AD3d 1514, 1514-1515, *lv denied* 21 NY3d 911).

Defendant contends that he was deprived of a fair trial by various instances of alleged prosecutorial misconduct. Defendant failed to object to most of those instances, however, and thus failed to preserve his contention for our review with respect to them (*see People v Torres*, 125 AD3d 1481, 1484, *lv denied* 25 NY3d 1172). In any event, we conclude that the alleged instances of misconduct, both preserved and unpreserved, " 'were not so pervasive or egregious as to deprive defendant of a fair trial' " (*id.*; *see People v Weaver*, 118 AD3d 1270, 1270, *lv denied* 24 NY3d 965; *cf. People Griffin*, 125 AD3d 1509, 1511-1512).

We agree with defendant, however, that the evidence is not legally sufficient to support the conviction with respect to grand larceny in the third degree under count two of the indictment because there is insufficient evidence that the value of the property stolen was $3,000 or more (*see* Penal Law § 155.35 [1]; *see also People v Morgan*, 111 AD3d 1254, 1257; *People v Geroyianis*, 96 AD3d 1641, 1644-1645, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102). Nevertheless, the evidence is legally sufficient to establish that defendant committed the lesser included offense of petit larceny (§ 155.25), and we therefore modify the judgment accordingly and modify the resentence by vacating the resentence imposed under count two of the indictment, and we remit the matter to County Court for sentencing on that count (*see Geroyianis*, 96 AD3d at 1645).

Contrary to defendant's assertion, the evidence is legally sufficient to support the conviction with respect to criminal mischief in the third degree under count five of the indictment inasmuch as replacement cost is a legally sufficient basis to establish the requisite value of the property (*see* Penal Law § 155.20 [1]).

Finally, defendant contends, and the People concede, that the orders of protection are overly broad and should be modified. We agree, and we therefore modify the judgment by removing from the orders of protection the words "and family."

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

370

KA 14-01807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE J. BARNES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 9, 2014. Defendant was resentenced upon his conviction of burglary in the second degree (two counts), grand larceny in the third degree (two counts), grand larceny in the fourth degree (two counts), and criminal mischief in the third degree (two counts).

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by vacating the resentence imposed for grand larceny in the third degree under count two of the indictment, and as modified the resentence is affirmed, and the matter is remitted to Ontario County Court for sentencing on the conviction of petit larceny under count two of the indictment.

Same memorandum as in *People v Barnes* ([appeal No. 1] ___ AD3d ___ [May 6, 2016]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

371

KA 13-01191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALPHEAUS DAILEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 18, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Defendant contends that he was deprived of effective assistance of counsel inasmuch as Supreme Court forced him either to accept or to reject an existing plea offer after defendant complained that his attorney was not adequately representing him, but before the court assigned him new counsel. That contention does not survive the guilty plea because there is no indication in the record that the alleged ineffective assistance affected the plea that defendant later accepted (*see People v Petgen*, 55 NY2d 529, 534-535, *rearg denied* 57 NY2d 674; *People v Granger*, 96 AD3d 1669, 1670, *lv denied* 19 NY3d 1102). The sentence is not unduly harsh or severe.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

372

CA 14-00556

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

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NUSHAWN WILLIAMS, ALSO KNOWN AS SHYTEEK JOHNSON,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CLIFFORD CHANCE US LLP, NEW YORK CITY (EVELYN KACHAJE OF COUNSEL), AND MAYO SCHREIBER, JR., DEPUTY DIRECTOR, THE CENTER FOR HIV LAW AND POLICY, FOR THE AMERICAN ACADEMY OF HIV MEDICINE, DR. JEFFREY BIRNBAUM/HEALTH EDUCATION ALTERNATIVES FOR TEENS, DR. ALWYN COHALL/PROJECT STAY, THE CENTER FOR HIV LAW AND POLICY, THE NATIONAL ALLIANCE OF STATE AND TERRITORIAL AIDS DIRECTORS, DR. NEAL RZEPKOWSKI, AND THE TREATMENT ACTION GROUP, AMICI CURIAE.

Appeal from an order of the Supreme Court, Chautauqua County (John L. Michalski, A.J.), entered March 3, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that respondent be committed to a secure treatment facility designated by the Office of Mental Health.

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

Memorandum: In appeal No. 1, respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law § 10.07 (f). In appeal No. 2, he appeals from an order denying his motion pursuant to CPLR 5015 (a) seeking to vacate the order in appeal No. 1. Respondent was convicted in Chautauqua County in 1999 of two counts of rape in the second degree (Penal Law § 130.30) and one count of reckless endangerment in the first degree (§ 120.25) and, in Bronx County, of one count of reckless endangerment in the first degree (*id.*). The reckless endangerment convictions stem from respondent's respective pleas of guilty that he had unprotected sexual relations knowing that he was HIV-positive and that he did not inform his sexual partners that he

was HIV-positive.

We address first respondent's contentions in appeal No. 1. As we did in a prior appeal in this case (*Matter of State of New York v Williams*, 92 AD3d 1274, 1275-1276), we reject respondent's contention that he was not a detained sex offender when petitioner filed the petition for civil management. Contrary to respondent's contention, the determination in *People v Williams* (24 NY3d 1129, 1132) does not compel a different result.

We reject respondent's further contention that Supreme Court erred in denying his motion to change the venue from Chautauqua County to Bronx County on the ground that he could not receive a fair trial in Chautauqua County because of the notoriety associated with his criminal prosecution in 1999. As we explained in a prior appeal, "[c]onclusory statements unsupported by facts are insufficient to warrant a change of venue . . . [, and] respondent failed to make any factual or evidentiary showing that he would be unable to obtain a fair trial in Chautauqua County or that a transfer was necessary for the convenience of the parties or witnesses" (*Matter of State of New York v Williams*, 92 AD3d 1271, 1271-1272).

Contrary to respondent's contention, we conclude that, viewing the evidence in the light most favorable to the petitioner (*see Matter of State of New York v John S.*, 23 NY3d 326, 348-349, *rearg denied* 24 NY3d 933), the evidence is legally sufficient to support the verdict that he has a mental abnormality that predisposes him to the commission of conduct constituting a sex offense and that results in him having serious difficulty controlling that conduct (*see* Mental Hygiene Law § 10.03 [i]). Petitioner's two experts and respondent's expert agreed on the diagnosis of respondent with antisocial personality disorder (ASPD). Petitioner's experts also diagnosed respondent with psychopathy, which they described as a condition wherein respondent has the traits of ASPD to an extreme degree. Respondent's expert testified that, although he did a psychopathy assessment, and his score was the same as one of petitioner's experts and higher than the other, he did not diagnose respondent with psychopathy because it is not a diagnosis contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Petitioner's experts each diagnosed respondent with sexual preoccupation which, although not sufficient by itself to satisfy the criteria for mental abnormality (*see Matter of State of New York v Kenneth W.*, 131 AD3d 872, 873), may nevertheless be part of a " 'detailed psychological portrait' " that can be used to establish mental abnormality (*Matter of State of New York v Richard TT.*, 132 AD3d 72, 78, *appeal dismissed* 26 NY3d 994). Finally, each of petitioner's experts provided an additional diagnosis that the other did not: one expert diagnosed respondent with polysubstance abuse, and the other expert diagnosed him with sexual sadism. The latter expert had considered the diagnosis of sexual sadism when he prepared his report two years prior to the trial, but did not actually make the diagnosis until he reviewed the trial testimony of a victim regarding respondent's violent and degrading treatment of her during an attempted rape when she was 13 years old. The evidence also

established that, in 1996, after he was advised that he was HIV-positive, respondent, using charm and/or force, engaged in sexual relations with 42 females, both adult women as well as girls under the age of 14 years old, 13 of whom contracted the virus. Two inmates and two correction officers testified that, inter alia, respondent stated that he intended to continue that behavior upon his release, specifically referencing underage girls. Furthermore, respondent failed to complete sex offender treatment and had a poor prison disciplinary record prior to 2006.

Even assuming, arguendo, that the diagnosis of sexual sadism is not supported by legally sufficient evidence, as respondent contends, we nevertheless conclude that the diagnoses of ASPD, psychopathy, sexual preoccupation, and polysubstance abuse, together with respondent's failure to complete sex offender treatment, his poor prison disciplinary record, his pattern of sexual misconduct, both with respect to the use of force and targeting underage girls, and his stated intention to commit further sex offenses create a " 'detailed psychological portrait' " of respondent that is legally sufficient to support the verdict (*Richard TT.*, 132 AD3d at 78*; see John S.*, 23 NY3d at 348-349; *Matter of Wright v State of New York*, 134 AD3d 1483, 1485-1486; *cf. Matter of State of New York v Donald DD.*, 24 NY3d 174, 190-191). Indeed, we conclude that respondent is not simply a "dangerous but typical recidivist convicted in an ordinary criminal case" (*Wright*, 134 AD3d at 1487 [internal quotation marks omitted]; *see Donald DD.*, 24 NY3d at 189).

We reject respondent's contention that the court abused its discretion in denying his motions seeking a mistrial based upon the testimony of a witness regarding respondent's violent attempted rape of her when she was 13 years old. Respondent alleged in his first motion that he was prejudiced by the undue surprise of the testimony of that witness. We reject that contention inasmuch as the name of the witness appeared on the witness list and, although petitioner had not provided an offer of proof with respect to the witness pursuant to the court's determination of respondent's motion in limine, respondent did not object to the testimony until the court called a recess. Thus, we conclude that the testimony of the witness did not constitute unfair surprise warranting a mistrial (*cf. People v Shaulov*, 25 NY3d 30, 35-36; *Hannon v Dunkirk Motor Inn*, 167 AD2d 834, 834-835). We conclude that the court did not abuse its discretion in denying respondent's subsequent motion seeking a mistrial on the ground that his defense was discredited because respondent's counsel stated in his opening statement that there would be no evidence that respondent used force when engaging in sexual activity. The expert's report supporting the petition referenced respondent's use of force with respect to other women, and thus respondent did not rely on assurances from petitioner that there would be no evidence that respondent had used such force (*cf. Shaulov*, 25 NY3d at 35-36).

We reject respondent's contention that he was denied a fair trial by the improper admission of hearsay evidence through the testimony of one of the petitioner's experts. We note initially that, although respondent made a motion in limine seeking to prohibit any testimony

based on hearsay evidence, the court determined that it would have to make determinations as such testimony was sought to be admitted, and respondent failed to object to the testimony at trial (*see generally Matter of State of New York v Nervina*, 120 AD3d 941, 942, *lv granted* 24 NY3d 1065). The expert testified that, in determining respondent's diagnoses, he considered a presentence investigation, which included information that respondent was charged with a felony offense when he was 17 or 18 years old, and he also considered materials from a police investigation, which included information regarding one of the women whom respondent allegedly forced to have sex. We conclude that the evidence based on hearsay met the minimum requirements of reliability and relevance (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109). We also reject respondent's contention that he was denied a fair trial by misconduct during summation by petitioner's counsel. Respondent failed to object to the majority of the alleged instances of misconduct, and thus failed to preserve for our review his contention with respect to those instances (*see Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474, *lv denied* 17 NY3d 702). Although we agree with respondent that the attorney made some inappropriate remarks, we conclude that "none of those remarks was 'so egregious or prejudicial as to deny respondent his right to a fair trial' " (*id.*).

Contrary to respondent's contention, we conclude that he was not denied meaningful representation, as assessed by the standards that are applicable to counsel in criminal proceedings (*see Matter of State of New York v Campany*, 77 AD3d 92, 98-99, *lv denied* 15 NY3d 713). Respondent contends that there was no strategic or legitimate explanation for his counsel to challenge the validity of respondent's HIV-positive diagnosis or to present evidence regarding the limited risk of transmission of that virus by respondent to others based upon the medical advances since respondent's conviction in 1999. We reject that contention and conclude that respondent's attorney may have decided, legitimately, to avail himself of those approaches in light of the report of one of petitioner's experts, submitted in support of the petition, who referenced respondent's condition as a "highly infectious disease." The record establishes that respondent's attorney provided zealous representation both before and during the trial, and we therefore conclude that he received the meaningful representation to which he was entitled (*see Matter of State of New York v Carter*, 100 AD3d 1438, 1439; *Campany*, 77 AD3d at 99-100).

We reject the contention of respondent in appeal No. 2 that the court erred in denying his motion pursuant to CPLR 5015 (a) seeking to vacate the order determining that he is a dangerous sex offender requiring confinement. Contrary to respondent's contention, the decision of the Court of Appeals in *Donald DD*. (24 NY3d 174) does not compel the conclusion that he does not have a mental abnormality as defined by Mental Hygiene Law § 10.03 (i).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

376

CA 15-01528

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

IN THE MATTER OF DANIEL F. KENEFICK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS STICHT, SUPERINTENDENT, GOWANDA
CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI,
ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

DANIEL F. KENEFICK, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 4, 2015 in a proceeding pursuant to CPLR article 78. The judgment set aside respondents' determination denying petitioner's release to parole and granted petitioner a de novo parole hearing before a different panel.

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

Memorandum: In this proceeding pursuant to CPLR article 78, respondents appeal from a judgment that set aside their determination denying petitioner's release to parole, and granted petitioner a de novo parole hearing before a different panel. We reverse the judgment and dismiss the petition.

"It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board [of Parole] complied with the statutory requirements enumerated in Executive Law § 259-i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838, 839; *see generally Matter of King v New York State Div. of Parole*, 83 NY2d 788, 790-791). The Board is "not required to give equal weight to each of the statutory factors" but, rather, may "place[] greater emphasis on the severity of the crimes than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815; *see Matter of Huntley v Evans*, 77 AD3d 945, 947). Where parole

is denied, the inmate must be informed in writing of "the factors and reasons for such denial of parole" (§ 259-i [2] [a] [i]). "Judicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety' " *(Matter of Silmon v Travis*, 95 NY2d 470, 476; *see Matter of Johnson v Dennison*, 48 AD3d 1082, 1083; *Matter of Gaston v Berbary*, 16 AD3d 1158, 1159).

Here, we conclude upon our review of the record that the Board considered the required statutory factors and adequately set forth its reasons for denying petitioner's application for release (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778, *rearg denied* 11 NY3d 885; *Matter of Patterson v Evans*, 106 AD3d 1456, 1457, *lv denied* 22 NY3d 912). We further conclude that the Board's determination does not exhibit " 'irrationality bordering on impropriety' " (*Silmon*, 95 NY2d at 476).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

377

CA 15-01378

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

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NUSHAWN WILLIAMS, ALSO KNOWN AS SHYTEEK JOHNSON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John L. Michalski, A.J.), entered July 30, 2015. The order denied the motion of respondent to vacate an order entered March 3, 2014.

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

Same memorandum as in *Matter of State of New York v Williams* ([appeal No. 1] ___ AD3d ___ [May 6, 2016]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

387

KA 13-02206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GILBERTO LOPEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 January 30, 2013. The judgment convicted defendant, after a nonjury trial, 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 case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The conviction arose from the observations of a police officer conducting surveillance of a gas station parking lot after reports of drug sales occurring at that location were received. Shortly after defendant arrived at the gas station as a passenger in one vehicle (first vehicle), defendant exited the first vehicle and entered a second vehicle for about 30 seconds, and then defendant returned to the first vehicle. When both vehicles left the parking lot, the officer contacted another police officer, who stopped the first vehicle a short distance away and found heroin inside the vehicle.

Meanwhile, the officer conducting surveillance at the gas station followed the other vehicle to a nearby motel, where he saw the driver exit the vehicle and enter a motel room. The driver thereafter left his motel room and was approached by the police. The driver admitted that he had purchased heroin from defendant at the gas station, and he consented to a search of the motel room, where the police recovered heroin that had been purchased from defendant.

Defendant was initially indicted on one count of criminal possession of a controlled substance in the third degree upon allegations that he possessed heroin at the time of the traffic stop. That indictment was dismissed after County Court determined that the traffic stop was unlawful and granted defendant's motion to suppress the evidence recovered during the stop. Based upon the statements of the driver of the other vehicle and the evidence recovered at the motel, defendant was subsequently indicted with the instant charges upon allegations that he possessed heroin and sold it to the driver of the other vehicle while they were at the gas station.

Defendant contends that the court should have suppressed the evidence recovered at the motel as the fruit of the illegal traffic stop. We reject that contention and conclude that the court properly refused to suppress the evidence without holding a hearing (*see generally People v Pucci*, 37 AD3d 1068, 1068, *lv denied* 8 NY3d 949). There was no causal connection between the unlawful traffic stop and the evidence recovered at the motel inasmuch as the police activity at the motel was based upon the officer's observations at the gas station and not upon information obtained as a result of the unlawful stop of the vehicle in which defendant was a passenger (*see People v Cooley*, 48 AD3d 1091, 1091, *lv denied* 10 NY3d 861; *People v Washington*, 37 AD3d 1131, 1132, *lv denied* 8 NY3d 992; *People v Sommerville*, 6 AD3d 1232, 1232, *lv denied* 3 NY3d 648). Defendant further contends that the court erred in refusing to suppress the identification of the police officer who observed defendant at the gas station and then later viewed defendant at the scene of the unlawful traffic stop because the identification was the fruit of the unlawful stop. We conclude that defendant failed to preserve that contention for our review because he did not move to suppress the identification testimony on that ground (*see generally People v Crouch*, 70 AD3d 1369, 1370, *lv denied* 15 NY3d 773). In any event, we conclude that any error in the court's refusal to suppress the identification is harmless beyond a reasonable doubt. The evidence of guilt is overwhelming, and there is no reasonable possibility that the error contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237).

Finally, we agree with defendant that the court did not rule on his motion to dismiss the indictment based on the People's alleged violation of CPL 190.75 (3) in failing to seek leave to represent the matter to a second grand jury. "CPL 470.15 precludes the Appellate Division from reviewing an issue that was either decided in appellant's favor or was not decided by the trial court" (*People v Ingram*, 18 NY3d 948, 949; *see People v Chattley*, 89 AD3d 1557, 1558). We therefore hold the case, reserve decision, and remit the matter to County Court to rule on defendant's motion.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

390

KA 14-00817

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY D. PAUL, ALSO KNOWN AS JEFFREY D. LIPSON,
DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 27, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property 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 criminal possession of stolen property in the fourth degree (Penal Law § 165.45). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Harris*, 125 AD3d 1506, 1506, *lv denied* 26 NY3d 929), we nevertheless conclude that none of defendant's contentions on appeal requires reversal or modification. Defendant failed to preserve for our review his challenge to the amount of restitution imposed "inasmuch as he did not object to that amount at sentencing . . . , and in any event he affirmatively waived his right to a restitution hearing" (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104). In addition, "[b]y failing to request a hearing on the issue whether he had the ability to pay the amount of restitution ordered by County Court, defendant failed to preserve for our review his further contention that the court failed to consider his ability to pay the restitution" (*People v Dillon*, 90 AD3d 1468, 1468-1469, *lv denied* 19 NY3d 1025; *see People v Pugliese*, 113 AD3d 1112, 1112, *lv denied* 23 NY3d 1066). Moreover, although we agree with defendant that his release to parole supervision does not render his challenge to the severity of his sentence moot inasmuch as he remains under the control of the Parole Board until his sentence has terminated (*see People v Sebring*, 111 AD3d 1346, 1347, *lv denied* 22 NY3d 1159), we nevertheless conclude

that his challenge is without merit.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

398

CAF 15-00012

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

IN THE MATTER OF TERRY R. GREEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN M. GREEN, SR., RESPONDENT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR RESPONDENT-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA ANDERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered December 2, 2014. The order, among other things, awarded custody of the subject child to petitioner.

It is hereby ORDERED that said appeal insofar as it concerns visitation is unanimously dismissed, the order is reversed on the law without costs and the petition is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from a December 2014 order granting custody of the subject child to petitioner stepmother, with supervised visitation to the father. The order was entered following a trial, upon a finding of extraordinary circumstances. We were informed at oral argument of this appeal that an order was subsequently entered upon agreement of the parties regarding custody and visitation of the child, and the stepmother and the Attorney for the Child assert that the father's appeal has thereby been rendered moot in its entirety. We reject that contention. The father contends, inter alia, that Family Court erred in finding the existence of extraordinary circumstances to warrant consideration of the best interests of the child. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). "[O]nce the preferred status of the birth parent under *Bennett* . . . has been lost by a judicial determination of extraordinary circumstances," that

issue cannot be revisited in a subsequent proceeding seeking to modify custody (*Matter of Guinta v Doxtator*, 20 AD3d 47, 51) and, "thus, such a finding may have 'enduring consequences' for the parties" (*Van Dyke v Cole*, 121 AD3d 1584, 1585, quoting *Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 578). We therefore conclude that the father's challenge to the court's determination with respect to extraordinary circumstances is not moot (*see id.*).

We conclude that the court erred in determining that the stepmother met her burden of establishing the existence of extraordinary circumstances to warrant consideration of the best interests of the child (*cf. Gary G.*, 248 AD2d at 981-982). We therefore reverse the order and dismiss the petition.

The father's appeal insofar as it pertains to visitation must be dismissed as moot (*see Van Dyke*, 121 AD3d at 1586).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

406

CA 15-01482

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

CARL HASSELBACK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

2055 WALDEN AVENUE, INC., AND RONALD BENDERSON AND DAVID BALDAUF, AS TRUSTEES UNDER A TRUST AGREEMENT DATED SEPTEMBER 22, 1993, KNOWN AS THE RANDALL BENDERSON 1993-1 TRUST, INTERVENORS-DEFENDANTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR INTERVENORS-DEFENDANTS-APPELLANTS.

THE MCGORRY LAW FIRM, LLP, BUFFALO (MICHAEL P.J. MCGORRY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 1, 2015. The judgment, among other things, granted plaintiff's motion for summary judgment and denied intervenors-defendants' motion for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, the motion of the intervenors-defendants is granted and partial judgment is granted in favor of the intervenors-defendants as follows:

> It is ADJUDGED AND DECLARED that the intervenors-defendants are entitled to make improvements to the leased parcel provided that such improvements do not unreasonably interfere with plaintiff's use of the burdened parcel for ingress and egress to and from plaintiff's property.

Memorandum: Plaintiff commenced a special proceeding, which has since been converted into an action, against the owner of an 18-acre parcel of property (larger parcel) upon which was situated a 2.4 acre parcel burdened by an easement in favor of plaintiff (burdened parcel). Plaintiff sought to enjoin the owner from erecting any "barriers, fencing, walls or the like within the easement area." Supreme Court thereafter granted a motion by the intervenors-defendants (hereafter, Benderson), to intervene as party defendants. Benderson leases 4.6 acres of the larger parcel (leased parcel), and the burdened parcel is situated within that leased parcel. Once

Benderson entered the action, plaintiff discontinued its action against the owner of the larger parcel. In its amended answer, Benderson asserted two counterclaims seeking, inter alia, a declaration "whether [its] proposed development . . . infringes upon [plaintiff's] claimed rights" in the burdened parcel.

Plaintiff moved for summary judgment "permanently enjoining and restraining [Benderson] from erecting or causing to be erected any barriers, fencing, walls or the like" on the burdened parcel as well as "prohibiting and permanently enjoining [Benderson] from blocking Plaintiff's access or use in any way" of the burdened parcel. Plaintiff contended that any type of structure built on the burdened parcel would prevent his customers from accessing his property.

Benderson moved for partial summary judgment declaring that Benderson is permitted, inter alia, "to make improvements to the [leased parcel], so long as the improvements do not unreasonably interfere with [p]laintiff's use of the [burdened parcel] for ingress and egress" to and from plaintiff's property. Of particular note, Benderson specifically stated that it was "not seeking summary judgment declaring that its particular proposed use [was] allowable under the easement." Instead, Benderson conceded that "the fact-sensitive inquiry of whether Benderson's plan . . . unreasonably interfere[d] with [p]laintiff's right of ingress and egress must await trial."

At oral argument of the motions, the parties stipulated that the deed containing the easement language was "unambiguous" and that its interpretation was "a matter of law to be determined by the court." The parties also specified that neither plaintiff nor Benderson had moved for summary judgment on the issue whether Benderson's proposed development would unreasonably interfere with plaintiff's rights under the easement.

In its order, the court concluded that the unambiguous language of the easement permitted improvements on the easement parcel. The court further concluded that Benderson's proposed improvements would "unduly impair [p]laintiff's right of passage over the [b]urdened [p]arcel." In the first decretal paragraph, however, the court ordered that it was granting plaintiff's motion "in its entirety" and declared that Benderson did not "possess the right to construct the [p]roposed [i]mprovement on the [b]urdened [p]arcel, because it would unduly impair [p]laintiff's right of passage over it."

As a preliminary matter, we agree with Benderson that the court erred in rendering any decision on the reasonableness of the proposed improvement. It is well settled that, "[u]nless public policy is violated, the parties are free to chart their own procedural course, and may fashion the basis upon which a particular controversy will be resolved . . . Thus, [p]arties may by stipulation shape the facts to be determined at trial and . . . circumscribe the relevant issues for the court" (*Loretto-Utica Props. Corp. v Douglas Co.*, 226 AD2d 1058, 1059 [internal quotation marks omitted]; *see Mitchell v New York Hosp.*, 61 NY2d 208, 214). Due to the limited scope of the respective

motions, the court erred in rendering any decision on the reasonableness of the proposed improvement. In any event, the record establishes that there are triable issues of fact whether the proposed development unduly impairs plaintiff's right of ingress and egress over the burdened parcel.

Plaintiff contends, in response to Benderson's appeal, that the court erred in determining that the language of the easement permitted any improvements on the burdened parcel. Contrary to Benderson's contention, plaintiff is permitted to address that issue. Here, despite the language in the body of its decision and order, the court "ordered" that plaintiff's motion for summary judgment was granted "in its entirety." As a result, plaintiff was not aggrieved by the order and could not appeal (*see* CPLR 5511). Pursuant to CPLR 5501 (a) (1), a respondent on appeal may "obtain review of a determination incorrectly rendered below where, otherwise, he [or she] might suffer a reversal of the final judgment or order upon some other ground. Hence, the successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his [or her] favor" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). We thus address the merits of plaintiff's contention.

On the merits, however, we reject plaintiff's contention. Due to the stipulation of the parties that the language of the easement was unambiguous, we are constrained to review only the language contained within the four corners of the instrument (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). Although the deed containing the easement excepted and reserved an easement "across and over the *entire* [burdened parcel] for the purpose of free ingress and egress" (emphasis added), subject to two conditions not relevant here, the deed also contained a restriction precluding the erection of any structure or the operation of any business on the burdened parcel that sold or dispensed liquid vehicle fuel. " 'Under the standard canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other' " (*Mastrocovo v Capizzi*, 87 AD3d 1296, 1298), the fact that the deed specifically prohibited the erection of one particular type of structure and the operation of one particular type of business compels us to conclude that the erection of other types of structures and the operation of other types of businesses are not so precluded. If the parties to the deed had intended to preclude the erection of all structures and the operation of all businesses, then the reference to those structures or businesses that sold or dispensed liquid vehicle fuel "would have been unnecessary" (*Realtime Data, LLC v Melone*, 104 AD3d 748, 751; *see generally Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302).

Plaintiff contends that the restriction applied to the entirety of the larger parcel, but that contention is not supported by the language of the deed containing the easement. Rather, plaintiff's

contention is based on extrinsic evidence. It is well settled that "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc.*, 77 NY2d at 162*; see Alt v Laga*, 207 AD2d 971, 971).

We thus conclude that the intent of the easement was to provide plaintiff "only a right of ingress and egress, [and as a result], it [was] the right of passage, and not any right in a physical passageway itself, that [was] granted to the easement holder" (*Lewis v Young*, 92 NY2d 443, 449). Benderson, as the leaseholder of the parcel burdened by an express easement of ingress and egress may therefore "narrow it, cover it over, gate it or fence it off, so long as the [plaintiff's] right of passage is not impaired" (*id.*). The issue whether Benderson's proposed development will impair plaintiff's right of passage must be determined at trial.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

408

CA 15-01088

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

VLADIMIR A. SUPRUNCHIK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SALVATORE VITI, A-1 AUTO PARTS, INC. AND S. VITI REALTY CORP., DEFENDANTS-RESPONDENTS.

DAVID G. GOLDBAS, UTICA, FOR PLAINTIFF-APPELLANT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 8, 2015. The judgment, among other things, awarded plaintiff the sum of $27,000 on his wrongful eviction cause of action and awarded defendant S. Viti Realty Corp. the sum of $12,000 on its counterclaim against plaintiff for lost rent.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking from the fifth decretal paragraph the phrase "Defendant, Salvatore Viti, personally" and substituting therefor the word "defendants" and by striking from the sixth decretal paragraph the phrase "months of August, September, October, and November 2008 for a total of $12,000.00 (Twelve Thousand Dollars)" and substituting therefor the phrase "month of August 2008 for a total of $3,000," and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendant Salvatore Viti (Viti) and Viti's corporations, defendants A-1 Auto Parts, Inc. and S. Viti Realty Corp. (Realty) (collectively, corporate defendants), alleging causes of action for, inter alia, breach of contract and wrongful eviction. According to plaintiff, defendants repudiated a written asset purchase agreement and then unlawfully ousted him from the leased property on which he operated a junkyard business. Following a bench trial, Supreme Court granted judgment in favor of plaintiff only on the cause of action for wrongful eviction, and plaintiff contends on appeal that the court erred in dismissing the cause of action for breach of contract. We reject that contention. The decision of a court following a nonjury trial should not be disturbed on appeal "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially [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]). Viewing the evidence in the light most favorable to sustain the judgment (*see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286), we conclude that there is a fair interpretation of the evidence supporting the court's determination that plaintiff was not ready, willing and able to fulfill his contractual obligations at closing (*see generally Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 531-532; *3801 Review Realty LLC v Review Realty Co. LLC*, 111 AD3d 509, 509-510). Thus, contrary to plaintiff's contention, he is not entitled to recover damages for breach of contract (*see Pesa*, 18 NY3d at 532).

We reject plaintiff's further contention that the court erred in failing to award him lost profits and other actual damages arising from the wrongful eviction. "The measure of compensatory damages for wrongful eviction is the value of the unexpired term of the lease over and above the rent the lessee must pay under its terms . . . , together with any actual damages flowing directly from the wrongful eviction" (*Long Is. Airports Limousine Serv. Corp. v Northwest Airlines*, 124 AD2d 711, 712; *see North Main St. Bagel Corp. v Duncan*, 37 AD3d 785, 786; *Matter of Marina Bay Club v Cannizzaro*, 105 AD2d 1114, 1114). "Although loss of profits may be an element of recovery in a wrongful eviction action . . . , the loss must be ascertainable with a reasonable degree of certainty and may not be based on conjecture" (*Long Is. Airports Limousine Serv. Corp.*, 124 AD2d at 713; *see North Main St. Bagel Corp.*, 37 AD3d at 786). Here, plaintiff's claims with respect to lost profits are speculative and insufficient to establish such damages with the requisite degree of reasonable certainty (*see Long Is. Airports Limousine Serv. Corp.*, 124 AD2d at 713), and plaintiff failed to prove any other actual damages allegedly flowing from the wrongful eviction.

We agree with plaintiff, however, that the court erred in finding that Viti, the corporate defendants' sole shareholder, director and officer, was not acting on behalf of the corporate defendants when he unlawfully ousted plaintiff from the property (*see* 14 NY Jur 2d, Business Relationships § 497; *see generally O'Donnell v K-Mart Corp.*, 100 AD2d 488, 491). We thus conclude that the award of wrongful eviction damages for the value of the leasehold, which was appropriately trebled in this case pursuant to RPAPL 853 (*see e.g. Moran v Orth*, 36 AD3d 771, 773), should also have been entered against the corporate defendants. We therefore modify the judgment accordingly. Inasmuch as the corporate defendants are liable for the wrongful eviction, we further agree with plaintiff that the court erred in awarding Realty unpaid rent on its counterclaim against plaintiff for those months during which it had wrongfully evicted plaintiff. We therefore further modify the judgment accordingly.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

410

KA 12-00898

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLAND D. BROOKS, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARLAND D. BROOKS, DEFENDANT-APPELLANT PRO SE.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered March 19, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree, robbery in the third degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and robbery in the first degree (§ 160.15 [2]). The record establishes that defendant and his girlfriend were social visitors to the victim's home when an altercation broke out between defendant and the victim. During the altercation, defendant inflicted two stab wounds to the victim's chest that ultimately caused his death. The People also presented evidence that defendant reached into the victim's pocket and took his wallet as defendant and his girlfriend left the scene after the stabbing. Defendant raised the defense of justification at trial, and he testified on his own behalf that the victim initiated the altercation by charging at him with a knife.

We reject defendant's contention that County Court erred in directing that he be restrained with a stun belt during trial. A trial court has "broad discretion" in deciding whether a restraint is necessary for security reasons as long as it conducts a sufficient inquiry into the relevant facts and "makes findings on the record showing that the particular defendant before [it] needs such a restraint" (*People v Buchanan*, 13 NY3d 1, 4). We conclude that the

court acted within its discretion in ordering the use of a stun belt here based on defendant's criminal history and his alleged assault of a guard while in jail awaiting trial (*see People v Harvey*, 100 AD3d 1451, 1451, *lv denied* 21 NY3d 943; *People v Freeman*, 184 AD2d 864, 864-865, *lv denied* 80 NY2d 903; *see generally Buchanan*, 13 NY3d at 4). We reject defendant's further contention that he was denied a fair trial by his girlfriend's testimony, on direct examination by the prosecutor, that defendant had "just gotten out of jail" shortly before the crimes were committed. The court struck that testimony in response to defendant's objection and gave curative instructions that were sufficient to alleviate any prejudice (*see People v Santiago*, 52 NY2d 865, 866; *People v Dewitt*, 126 AD3d 579, 579).

Defendant failed to preserve for our review his contention that the verdict is repugnant inasmuch as he did not object to the verdict on that ground before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987; *People v Spears*, 125 AD3d 1400, 1401, *lv denied* 25 NY3d 1172). In any event, we conclude that the verdict is not repugnant because defendant's acquittal of felony murder and robbery in the first degree pursuant to Penal Law § 160.15 (1) was not "conclusive as to a necessary element" of any of the crimes of which he was convicted (*People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039; *see People v Lamont*, 113 AD3d 1069, 1072, *affd* 25 NY3d 315). Where "there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant" (*People v Muhammad*, 17 NY3d 532, 540), and it is theoretically possible for a person to commit intentional murder and robbery in the first degree pursuant to section 160.15 (2), but not felony murder or robbery in the first degree pursuant to section 160.15 (1). For instance, a person could intentionally inflict fatal injuries on his or her victim without contemporaneous intent to commit a robbery, and then forcibly steal property from the dying victim while armed with a deadly weapon—a scenario that is consistent with the evidence and jury charge in this case.

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Carbonaro*, 134 AD3d 1543, 1544). In any event, we conclude that the evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant's actions were not justified (*see People v Folger*, 292 AD2d 841, 842, *lv denied* 98 NY2d 675), and that he forcibly stole property from the victim while the victim was still alive (*see generally People v Gerena*, 49 AD3d 1204, 1206, *lv denied* 10 NY3d 958). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The challenges defendant raises on appeal to his girlfriend's credibility were matters for the jury to determine, and we see no reason to disturb its verdict (*see People v Carson*, 122 AD3d 1391, 1393, *lv denied* 25 NY3d 1161).

Defendant failed to object to any of the prosecutor's allegedly improper summation comments, and thus failed to preserve for our review his contention that those comments deprived him of a fair trial (*see* CPL 470.05 [2]; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the claims of ineffective assistance of counsel in defendant's main brief are without merit. Defense counsel was not ineffective in failing to object to the verdict as repugnant inasmuch as the objection would have been meritless (*see Lamont*, 113 AD3d at 1072; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702), and counsel was not at fault for defendant's testimony that opened the door to otherwise precluded questioning about a prior robbery conviction. Counsel "should not have had to anticipate" that defendant would misrepresent his criminal history in response to a question whether he was cooperative with the police when giving a DNA sample in connection with the instant crimes (*People v Long*, 307 AD2d 647, 648; *see People v Lloyd*, 199 AD2d 573, 574, *lv denied* 83 NY2d 807).

Defendant further contends that the People violated their *Brady* obligation by failing to accurately disclose the terms of his girlfriend's cooperation agreement. The agreement disclosed to the defense and testified to by defendant's girlfriend at trial provided that she would plead guilty to robbery in the first degree and receive a 10-year sentence of imprisonment. Defendant's girlfriend entered her plea after defendant's trial, and her plea transcript, which is attached to defendant's brief, shows that she pleaded guilty to attempted robbery in the first degree with the understanding that her sentence of imprisonment would be "no more than" 10 years. She later received a 7½-year sentence of imprisonment. Even assuming that the transcripts of his girlfriend's plea and sentencing are properly before us, we conclude that defendant has not established that there was a *Brady* violation. Those transcripts are not inconsistent with the People's position that the agreement disclosed to the defense was the one in place at the time of trial, and that the People simply decided to give defendant's girlfriend a more favorable plea deal after the trial ended (*see People v Patchen*, 46 AD3d 1112, 1114, *lv denied* 10 NY3d 814), in which case there was no item of evidence that should have been disclosed and was not (*see generally People v Newkirk*, 133 AD3d 1364, 1365, *lv denied* 26 NY3d 1148; *People v Jenkins*, 84 AD3d 1403, 1406, *lv denied* 19 NY3d 1026). To the extent that defendant contends that the People did not fully disclose the terms of his girlfriend's cooperation agreement, or that she was aware at the time of trial that she could improve her plea deal through her testimony, those contentions involve matters outside the record and thus must be raised by a motion pursuant to CPL article 440 (*see People v Jefferson*, 125 AD3d 1463, 1464-1465, *lv denied* 25 NY3d 990). The sentence is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that the court erred in failing to instruct the jury to consider his girlfriend's crack cocaine intoxication at the time of the events

underlying this case in evaluating her credibility. That contention is not preserved for our review because defendant never requested such an instruction (*see generally People v Lipton*, 54 NY2d 340, 351), and we conclude in any event that the proposition in question was adequately conveyed to the jury by the court's general instruction on witness credibility (*see People v Dunston*, 100 AD3d 769, 770, *lv denied* 20 NY3d 1098). As a result, we reject defendant's related pro se contention that he was deprived of effective assistance of counsel by his attorney's failure to request a jury instruction concerning his girlfriend's intoxication (*see generally People v Tyler*, 43 AD3d 633, 634-635, *lv denied* 9 NY3d 1010).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

411

KA 13-02225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY D. FINEOUT, DEFENDANT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Jefferson County Court (Kim H. Martusewicz, J.), dated December 5, 2013. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his CPL article 440 motion to vacate the 2011 judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of marihuana in the second degree (§ 221.25), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). The charges against defendant stemmed from an investigation of various individuals associated with a certain apartment in Watertown (*People v Fineout*, 96 AD3d 1601, *lv denied* 19 NY3d 1025). Defendant contends that, despite finding that the People committed *Brady* violations by failing to disclose that a witness had been offered consideration to induce his testimony against defendant, failing to correct that witness's testimony to the contrary, and compounding the error by emphasizing the misinformation on summation, County Court erred in denying his motion on the ground that such errors were harmless. We reject that contention.

Even assuming, arguendo, that the court's procedural ground for denial of the motion pursuant to CPL 440.10 (3) (a) was unwarranted because defendant was not afforded an adequate opportunity to develop a factual record for appellate review on direct appeal (*see generally People v Wagstaffe*, 120 AD3d 1361, 1363, *lv denied* 25 NY3d 1173), we conclude that, in addressing the merits (*see* CPL 440.30 [2]), the

court properly determined that the *Brady* violations constituted harmless error inasmuch as there is no reasonable possibility that they might have contributed to the verdict (*see People v Pressley*, 91 NY2d 825, 827; *People v Rivera*, 70 AD3d 1484, 1484, *lv denied* 15 NY3d 756). Here, there was overwhelming evidence that defendant, who was discovered sleeping on the couch in the subject apartment, had constructive possession of the drugs and paraphernalia, i.e., that he exercised dominion and control over the area in which the contraband was found (*see generally People v Farmer*, 136 AD3d 1410, 1411). Indeed, there was evidence that defendant resided at the apartment, had a significant role in facilitating drug activity for one of the individuals under investigation, conducted drug transactions out of the apartment and was arranging a sale on his cell phone just prior to his arrest, and was entrusted to remain alone in the apartment containing large amounts of various drugs, packing materials, and other equipment, much of which was in plain view, as well as a significant amount of money (*see People v Bundy*, 90 NY2d 918, 920*; People v Doleo*, 261 AD2d 194, 195, *lv denied* 93 NY2d 1017; *People v Bernard*, 237 AD2d 210, 210, *lv denied* 90 NY2d 855; *see also People v McLeod*, 281 AD2d 746, 747, *lv denied* 96 NY2d 921). Inasmuch as the overwhelming evidence of defendant's guilt was established by the testimony of other witnesses, the verdict did not turn solely or even predominately on the testimony of the subject witness (*see People v Johnson*, 107 AD3d 1161, 1166, *lv denied* 21 NY3d 1075; *People v Phillips*, 55 AD3d 1145, 1149, *lv denied* 11 NY3d 899; *People v Tutt*, 305 AD2d 987, 987, *lv denied* 100 NY2d 588). As the court properly observed, a significant portion of the subject witness's testimony was cumulative and, inasmuch as the relevant issue was defendant's constructive possession rather than whether he had personally brought the drugs into the apartment at some earlier time, we reject defendant's contention that the witness's testimony was critical to the verdict because he was the only individual to "directly link" defendant to the drugs.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

412

KA 14-00659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRACY L. BROOKS, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered November 13, 2013. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of restitution to $49,959.98, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant challenges only the amount of restitution that she was directed to pay following a hearing conducted pursuant to Penal Law § 60.27 (2) and CPL 400.30. Defendant, who admitted to stealing from the parent-teacher organization of which she had been treasurer, was ordered to pay restitution in the amount of $52,437.48, minus an immediate credit for $25,112 paid at sentencing, plus a 10% restitution surcharge apparently computed on the unpaid amount of restitution.

County Court did not err in refusing to give defendant credit for sums she deposited in the victim's bank account. Defendant made no attempt to demonstrate that the money she deposited in the bank was not already the victim's money. The court did not err in crediting the forensic accountant's opinion, which was based on an estimate of anticipated sales derived from invoices related to the victim's fundraising endeavors, that defendant's embezzlement included a fundraising "shortfall" of $17,569. In addition, the court did not err in refusing to grant defendant any credit for checks allegedly signed by her husband, or in refusing to credit defendant for $1,632.30 paid to vendors, i.e., transactions for which the forensic accountant could not find any authorization or backup documentation

concerning what was purchased and why. "The People met their burden of establishing the amount of restitution by a preponderance of the evidence through [the testimony and documentation presented by them], which the court found to be credible (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222; *People v Wilson*, 108 AD3d 1011, 1013-1014)" (*People v Perez*, 130 AD3d 1496, 1497). The court explicitly chose not to credit the testimony and documentation of defendant. "[W]e perceive no basis in the record for us to substitute our credibility determinations for those of the court, which had 'the advantage of observing the witnesses and [was] in a better position to judge veracity than an appellate court' (*People v Dolan*, 155 AD2d 867, 868, *lv denied* 75 NY2d 812)" (*Perez*, 130 AD3d at 1497).

Contrary to defendant's contention, the court did not err in imposing a collection surcharge of 10% of the amount of restitution (*see People v Robinson*, 112 AD3d 1349, 1350, *lv denied* 23 NY3d 1042; *see also* Penal Law § 60.27 [8]). We conclude, however, that the restitution award cannot be sustained insofar as the court awarded the victim $10,000 as opposed to $7,522.50 for the forensic accountant's fee. The testimony at the restitution hearing established that the total bill from the accounting firm as of the date of hearing was $7,500, plus a $22.50 finance charge. Although the forensic accountant testified that such bill did not include his fee for testifying, the record contains no quantification of that additional part of the fee, and thus there is no record basis for the $10,000 figure awarded by the court. We conclude that the restitution award must be reduced by $2,477.50, and we modify the judgment accordingly. We note that the dollar amount of the 10% restitution surcharge must be reduced accordingly, by $247.75.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

413

KA 09-01473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID ALLIGOOD, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered May 8, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in or near school grounds, 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.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he was deprived of effective assistance of counsel because his trial attorney waived his right to a *Wade* hearing that County Court had ordered with respect to the photo array identification of him by an undercover police officer. As a preliminary matter, we note that it is not clear from the record whether the court granted defendant a *Wade* hearing; the court merely stated that, because defense counsel was not yet in a position to concede that the identification of defendant was confirmatory, as the People had argued, "we will have an identification hearing." It is therefore possible that the court intended merely to conduct a *Rodriguez* hearing to determine whether the identification was confirmatory (*see People v Rodriguez*, 79 NY2d 445, 449-450; *People v Green*, 70 AD3d 1392, 1392). Moreover, there is no evidence in the record that defense counsel "waived" defendant's right to a suppression hearing. Although a suppression hearing was not held, the record is silent with respect to the reason why. Thus, defendant's contention is based on matters outside the record and must be raised, if at all, by way of a motion pursuant to CPL article 440 (*see People v Washington*, 128 AD3d 1397, 1399; *People v Kreutter*, 121 AD3d 1534, 1535, *lv denied* 25 NY3d 990; *People v Brown*, 120 AD3d 1545,

1546, *lv denied* 24 NY3d 1082). In any event, we note that it cannot be said on this record that defendant had a " 'colorable' " claim that the identification evidence should have been suppressed (*People v Garcia*, 75 NY2d 973, 974; *see People v Rivera*, 71 NY2d 705, 709; *People v Carver*, 124 AD3d 1276, 1279).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

417

KA 12-02303

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH TUCKER, III, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 12, 2012. The judgment convicted defendant, after a nonjury trial, of robbery in the second degree (six counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a nonjury verdict of six counts of robbery in the second degree (Penal Law §§ 20.00, 160.10 [1]; [2] [b]). In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction.

With respect to appeal No. 1, we reject defendant's contention that the testimony of his accomplices was not sufficiently corroborated and thus that the conviction is not supported by legally sufficient evidence. We conclude that the testimony of the victims tended to connect defendant with the crime and harmonized with the narrative provided by the accomplices in such a way that Supreme Court could have been reasonably satisfied that the accomplices were telling the truth (*see People v Reome*, 15 NY3d 188, 191-192; *People v Highsmith*, 124 AD3d 1363, 1364, *lv denied* 25 NY3d 1202; *People v Rimmen*, 17 AD3d 1078, 1079, *lv denied* 5 NY3d 768). Moreover, the in-court identifications of defendant by two of the victims, although equivocal, were "sufficient to satisfy the minimal requirements of the accomplice corroboration statute" (*People v Jones*, 85 NY2d 823, 825; *see* CPL 60.22 [1]; *People v Billingsley*, 128 AD3d 1520, 1520-1521, *lv denied* ___ NY3d ___ [Mar. 16, 2016]).

We agree with defendant, however, that he is entitled to a new trial because the court violated his right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding a conflict of interest with defense counsel. Prior to commencement of a scheduled suppression hearing, defense counsel informed the court that, based on recent discussions, defendant wanted to request new counsel, and that there had been a breakdown in communication between defense counsel and defendant regarding the issues that they needed to address. Defendant subsequently confirmed that he was requesting new assigned counsel and informed the court that he had filed a grievance against defense counsel resulting in a conflict of interest. "[A]lthough there is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel, [a] court [is] required to make an inquiry to determine whether defense counsel [can] continue to represent defendant in light of the grievance" (*People v McCullough*, 83 AD3d 1438, 1440, *lv denied* 17 NY3d 798; *see People v Smith*, 25 AD3d 573, 575, *lv denied* 6 NY3d 853; *see also People v Brown*, 305 AD2d 422, 423). Moreover, "where potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry" (*People v Porto*, 16 NY3d 93, 101; *see People v Sides*, 75 NY2d 822, 824-825). We thus conclude on this record that the court was obligated to make a minimal inquiry (*see Sides*, 75 NY2d at 825; *McCullough*, 83 AD3d at 1440; *Smith*, 25 AD3d at 575-576).

The court failed to fulfill that obligation. Instead, upon defense counsel's representation that defendant wanted new assigned counsel and that there had been a breakdown in communication, the court told defendant that he could retain any attorney he wanted and asked him whether he could afford to do so (*see Sides*, 75 NY2d at 824). Defendant then stated that he had filed a grievance against defense counsel and, as he began to explain that defense counsel was not properly handling his case, the court cut defendant off, expressed its opinion that defense counsel had provided him with competent representation, and indicated that it would not allow defendant to "change lawyers on the day of a hearing just because [he was] not comfortable with it." The record thus demonstrates that the court, without conducting any inquiry, failed to provide defendant with an opportunity to explain his complaints (*see People v Beard*, 100 AD3d 1508, 1512; *People v Branham*, 59 AD3d 244, 245). Indeed, the court "erred by failing to ask even a single question about the nature of the disagreement or its potential for resolution" (*Sides*, 75 NY2d at 825). "[H]ad the court conducted that inquiry, it might well have determined that, despite the defendant's allegedly having filed a grievance, the grievance was merely a delaying tactic or that the defense counsel was, despite the grievance, fully capable of providing the defendant with effective representation" (*Smith*, 25 AD3d at 575-576). The court could not, however, summarily dismiss the request (*see Sides*, 75 NY2d at 825; *Beard*, 100 AD3d at 1512).

In light of our determination, we dismiss appeal No. 2 as academic (*see People v Wilson*, 5 NY3d 778, 779 n; *People v Oxley*, 64 AD3d 1078, 1084, *lv denied* 13 NY3d 941), and there is no need to

address defendant’s remaining contentions.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

418

KA 14-01890

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH TUCKER, III, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated October 1, 2014. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of robbery in the second degree (six counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Tucker* ([appeal No. 1] ___ AD3d ___ [May 6, 2016]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

421

CAF 14-01822

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

IN THE MATTER OF TYLER M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TRACI C., RESPONDENT,
AND SCOTT M., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

JEFFREY C. MANNILLO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent Scott M. neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, determined that he neglected the subject child. We agree with the father that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). At the fact-finding hearing, "only competent, material and relevant evidence may be admitted" (§ 1046 [b] [iii]). Here, however, the evidence admitted in support of the petition consisted primarily of the caseworker's testimony regarding the mother's out-of-court statements, as well as portions of a police report containing the mother's statements to the police. The mother's out-of-court statements constituted hearsay, and "were not admissible against the father in the absence of a showing that they came within a statutory or common-law exception to the hearsay rule" (*Matter of Nicholas C. [Erika H.—Robert C.]*, 105 AD3d 1402, 1402; *see Matter of Imani B.*, 27 AD3d 645, 646). Petitioner failed to make such showing (*see Nicholas C.*, 105 AD3d at 1403). Inasmuch as "[t]he nonhearsay evidence in the record is insufficient to establish that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired as a consequence of the father's conduct," the petition must be dismissed (*id.*; *see* Family Ct Act § 1012 [f] [i]; *Matter of Imani*

O. [Marcus O.], 91 AD3d 466, 468).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

422

CAF 14-00906

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

IN THE MATTER OF THOMAS B. AND DAGAN B.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CALLA B., RESPONDENT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

TIFFANY M. SORGEN, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered April 17, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children under the care and custody of petitioner pending the next permanency hearing.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Ontario County, for a new dispositional hearing in accordance with the following memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, inter alia, continued the placement of her two children in the care and custody of petitioner Ontario County Department of Social Services (DSS). The mother's appeal also brings up for review an order of fact-finding determining that she neglected the subject children (*see* CPLR 5501 [a] [1]; *Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258).

Contrary to the mother's contention, we conclude that the order of disposition was properly entered upon her default based on her failure to appear on the date scheduled for the dispositional hearing. On that date, the mother's retained attorney appeared in Family Court, notwithstanding that the mother had directed that attorney to "remove [him]self fro[m] the case and have the court reassign counsel," and he objected to the entry of a default order on the basis that the mother "should continue to have input through an attorney." The court then assigned a new attorney for the mother, and that attorney declined to be heard on DSS's application for a default order. Under those

circumstances, where neither attorney was both willing and authorized to proceed with the hearing in the mother's absence, we conclude that the court properly determined that the mother's failure to appear constituted a default (*see Matter of Aaron C. [Grace C.]*, 105 AD3d 548, 548-549; *Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1181-1182; *cf. Bradley M.M.*, 98 AD3d at 1258). The mother's appeal is therefore "limited to matters which were the subject of contest" in the proceedings below (*Matter of Yu F. [Fen W.]*, 122 AD3d 761, 762), including issues involving the fact-finding hearing, at which the mother was present, and rulings made by the court prior to the dispositional hearing (*see James v Powell*, 19 NY2d 249, 256 n 3, *rearg denied* 19 NY2d 862; *Matter of Lucinda A. [Luba A.]*, 120 AD3d 492, 493, *lv denied* 25 NY3d 962, *rearg denied* 25 NY3d 1195; *see generally Paul v Cooper* [appeal No. 2], 100 AD3d 1550, 1551, *lv denied* 21 NY3d 855).

We conclude that DSS established by a preponderance of the evidence that the children were neglected as a result of the mother's mental illness (*see Yu F.*, 122 AD3d at 762; *see generally* Family Court Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368-369). The evidence at the hearing established that the mother engaged in " 'bizarre and paranoid behavior' " toward the older child that placed his physical, mental, or emotional condition in imminent danger of becoming impaired, and that such behavior took place in the presence of the younger child at times and thereby exposed him to a similar danger (*Matter of Christy S. v Phonesavanh S.*, 108 AD3d 1207, 1208; *see Matter of Senator NN.*, 11 AD3d 771, 772; *Matter of Nicole Q.*, 242 AD2d 915, 916; *see generally Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680, *lv denied* 18 NY3d 810). Contrary to the mother's contention, a finding of neglect based on mental illness need not be supported by a particular diagnosis or by medical evidence (*see Matter of Caress S.*, 250 AD2d 490, 490; *Matter of Zariyasta S.*, 158 AD2d 45, 48).

We agree with the mother, however, that the court should have allowed her to appear by telephone pursuant to Domestic Relations Law § 75-j at the dispositional hearing. That issue was contested below and is thus reviewable despite the mother's subsequent default (*see Matter of Krische v Sloan*, 100 AD3d 758, 758). The record establishes that the mother moved to Florida, with financial assistance from DSS, during the period between the fact-finding hearing and the dispositional hearing. She requested permission to make future appearances by telephone, and the court denied the request, citing "the facts and circumstances of the case" and its preference that the mother be present "as any party of the proceeding should be present." While section 75-j does not require courts to allow testimony by telephone or electronic means in all cases (*see Matter of Barnes v McKown*, 74 AD3d 1914, 1914, *lv denied* 15 NY3d 708, *cert denied* 562 US 1234), we conclude that the ruling here, in which the court failed to consider the impact of the mother's limited financial resources on her ability to travel to New York, was an abuse of discretion (*see DeJac v DeJac*, 17 AD3d 1066, 1067-1068; *cf. Krische*, 100 AD3d at 759; *see generally Matter of Eileen R. [Carmine S.]*, 79 AD3d 1482, 1485-1486). We therefore modify the order by vacating the disposition, and we

remit the matter to Family Court for a new dispositional hearing (*see generally Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1573). Because the older child is now over 18 years old and can no longer be considered a neglected child, a new dispositional hearing need be held only with respect to the younger child (*see Matter of Daniel W.*, 37 AD3d 842, 843; *Matter of John S.*, 175 AD2d 207, 208-209; *see generally* Family Ct Act § 1012 [f]; *Matter of Helen L.O. v Mark L.O.*, 37 AD3d 1190, 1190-1191, *lv denied* 8 NY3d 812).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

423

CA 15-01526

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

BRENDA C. BROWN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH A. HALL, MICHAEL HALL AND CANINE & COMPANY, INC., DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ANDREW D. DRILLING OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM C. BERNHARDI LAW OFFICES, PLLC, BUFFALO (JOSEPH NICASTRO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 10, 2015. The order denied the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries she sustained when she was attacked by a dog on the premises of her employer, defendant Canine & Company, Inc., which is owned by defendants Deborah A. Hall and Michael Hall. Plaintiff is uncertain whether the dog is owned by the corporate defendant or the individual defendants but, according to the individual defendants, the dog is owned by the corporate defendant. Defendants moved to dismiss the amended complaint or, in the alternative, for summary judgment, on the ground that workers' compensation benefits were plaintiff's exclusive remedy. Supreme Court denied the motion, and defendants appeal.

We conclude that the court erred in entertaining the motion. It is well settled that "primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by" the Board (*Botwinick v Ogden*, 59 NY2d 909, 911; *see O'Rourke v Long*, 41 NY2d 219, 227-228; *Davis v Erie County Dept. of Social Servs.*, 133 AD3d 1373, 1374). Here, whether plaintiff was injured within the scope of her employment and whether the individual defendants acted within the course of their employment in having the dog on the premises are matters that " 'must in the first instance be determined by the [B]oard' " (*O'Rourke*, 41

NY2d at 228; *see Ferguson v Davis Auto World*, 207 AD2d 991, 991; *Ralph v Oliver*, 186 AD2d 977, 977). Thus, the court "should not have entertained [defendants'] motion at this juncture, and the case should have been referred to the Board for a determination . . . whether . . . plaintiff[] [has] a valid cause of action for damages or whether [she] is limited to benefits under the Workers' Compensation Law" (*Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 114 AD3d 905, 906-907). We therefore reverse the order and remit the matter to Supreme Court to determine the motion after final resolution of a prompt application to the Board to determine plaintiff's rights, if any, to workers' compensation benefits (*see Davis*, 133 AD3d at 1374).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

424

CA 15-01553

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

DIANE M. GLADSTONE AND FRANCIS GLADSTONE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THOMAS FALLON, DEFENDANT-RESPONDENT.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered December 4, 2014. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs appeal from an order granting defendant's motion for summary judgment dismissing the complaint, which seeks to recover damages for personal injuries allegedly sustained by Diane M. Gladstone (plaintiff) as a result of defendant's allegedly negligently shaking her hand. We conclude that Supreme Court properly granted the motion. Defendant met his burden on the motion by demonstrating that it was not foreseeable that plaintiff might be injured as a result of the handshake (*see generally Di Ponzio v Riordan*, 89 NY2d 578, 583-586), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated" (*Di Ponzio*, 89 NY2d at 583). "It is [required only] that the care be commensurate with the risk and danger" (*Nussbaum v Lacopo*, 27 NY2d 311, 319). Here, "plaintiff failed to show that the act of this [defendant] as to [her] had possibilities of danger so many and apparent as to entitle [her] to be protected against the doing of it . . . Against this kind of unlikely misfortune, the law does not confer protection" (*id.*). We thus conclude that defendant cannot be held liable for his alleged negligence in shaking

hands with plaintiff (*see generally Johnson v Vetter*, 1991 WL 348415, *1-3 [Ct of Common Pleas of Pa 1991]).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

426

CA 15-00871

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

IN THE MATTER OF ANN MEYER AND 1262 CULVER AVENUE REALTY, LLC, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF UTICA, STEWART'S SHOPS CORP., CARLTON J. BURTH AND JAMES STASAITIS, RESPONDENTS-RESPONDENTS.

WOODS OVIATT GILMAN, LLP, ROCHESTER (REUBEN ORTENBERG OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WILLIAM M. BORRILL, CORPORATE COUNSEL, UTICA (KATHRYN HARTNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF CITY OF UTICA.

MILLER, MANNIX, SCHACHNER & HAFNER, LLC, GLENS FALLS (LEAH EVERHART OF COUNSEL), FOR RESPONDENT-RESPONDENT STEWART'S SHOPS CORP.

Appeal from a judgment of the Supreme Court, Oneida County (David A. Murad, J.), entered May 12, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition in its entirety.

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

Memorandum: In this CPLR article 78 proceeding, petitioners appeal from a judgment dismissing their petition seeking, inter alia, to annul the determination granting the application of respondent Stewart's Shops Corp. (Stewart's) for a use variance to construct a "vehicle service station with an accessory retail establishment" on the subject property. We affirm.

We reject petitioners' contention that the determination to grant the use variance lacks a rational basis and is not supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). Stewart's established that "applicable zoning regulations and restrictions have caused unnecessary hardship," i.e., that it could not realize a reasonable return with respect to the property, that the hardship was unique, that the variance would not alter the essential character of the neighborhood, and that the hardship was not self-created (General City Law § 81-b [3] [b] [i] - [iv]).

We further conclude that respondent Zoning Board of Appeals of City of Utica (ZBA) complied with the requirements of the State Environmental Quality Review Act (ECL art 8) in issuing a negative declaration. Contrary to petitioners' contention, we conclude that the ZBA properly "identified the relevant areas of environmental concern . . . [and] took a 'hard look' at them" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). Petitioners' contention that there was no reasoned elaboration underlying the ZBA's determination is not preserved for our review inasmuch as petitioners failed to raise that issue in their petition (*see generally Matter of Blue Lawn v County of Westchester*, 293 AD2d 532, 534, *lv denied* 98 NY2d 607). In any event, we conclude that the contention is without merit (*see id.*; *cf. Matter of Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571).

We have considered petitioners' remaining contention and conclude that it is without merit.

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court

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

428

CA 15-01458

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

MICHAEL JABCZYNSKI AND BRENDA JABCZYNSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ADVANCED DRYING AND RESTORATION,
DEFENDANT-APPELLANT,
AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT.

MCCABE, COLLINS, MCGEOUGH, FOWLER, LEVINE & NOGAN, LLP, BUFFALO (TAMARA HARBOLD OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER D. CLARK, FREDONIA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered November 19, 2014. The order granted plaintiffs' motion to set aside the jury verdict, directed judgment as a matter of law that a contract existed between plaintiff Michael Jabczynski and defendant Advanced Drying and Restoration, and granted plaintiffs a new trial on the issues of breach of contract, proximate cause and damages.

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

Memorandum: In this breach of contract action, Advanced Drying and Restoration (defendant) appeals from an order granting plaintiffs' motion to set aside the jury verdict, directing judgment as a matter of law on the issue that a contract existed between defendant and plaintiff Michael Jabczynski, and ordering a new trial on the issues of breach, proximate cause, and damages. We affirm.

"[W]hile the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455 [internal quotation marks omitted]). Moreover, " '[i]t is well settled that a motion to set aside a verdict as contrary to the weight of the evidence invokes the court's discretion' . . . , and 'that discretion is at its broadest [where, as here,] it appears that the unsuccessful litigant's evidentiary position was particularly strong compared to that of the victor' " (*Pellegrino v Youll*, 37 AD3d 1064, 1064; *see* CPLR 4404 [a]).

Contrary to defendant's contention, Supreme Court did not abuse its discretion in setting aside the verdict inasmuch as the evidence adduced at trial, including the signed agreement between the parties, established as a matter of law the existence of an enforceable contract (*see generally Resetarits Constr. Corp.*, 118 AD3d at 1455).

Entered: May 6, 2016

Frances E. Cafarell
Clerk of the Court