SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 17, 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

280

CA 15-00195

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

DARLENE M. LOHNAS, PLAINTIFF-RESPONDENT,

V ORDER

FRANK A. LUZI, JR., M.D. AND NORTHTOWNS ORTHOPEDICS, P.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, ROCHESTER (TAMSIN J. HAGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 14, 2014. The order denied defendants' motion for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

281

CA 15-00398

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

DARLENE M. LOHNAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK A. LUZI, JR., M.D. AND NORTHTOWNS ORTHOPEDICS, P.C., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

THE TARANTINO LAW FIRM, LLP, ROCHESTER (TAMSIN J. HAGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered February 4, 2015. The order granted defendants' motion for leave to reargue and, upon reargument, denied defendants' motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion for partial summary judgment in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, asserts that defendants are equitably estopped from asserting as a defense the statute of limitations for medical malpractice, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action on September 30, 2008, seeking damages for injuries allegedly sustained as the result of the negligent care and treatment by Frank A. Luzi, Jr., M.D. (defendant) throughout the course of the parties' seven-year doctor-patient relationship. Defendants moved for partial summary judgment dismissing as time-barred the claims arising out of defendant's treatment of plaintiff's shoulder prior to March 30, 2006, contending that the doctrines of continuous treatment and equitable estoppel are not applicable to the facts herein. Supreme Court denied the motion, determining that there are triable issues of fact "whether the statute of limitations might have been tolled by [plaintiff's] continuous course of treatment with defendant" and "whether the equitable estoppel doctrine applies to toll the statute of limitations."

The court properly determined that there are issues of fact with respect to the continuous treatment doctrine. Defendants met their

initial burden of establishing that more than 2½ years elapsed between the dates of the alleged malpractice underlying the claims prior to March 30, 2006 and the commencement of the action (*see Simons v Bassett Health Care*, 73 AD3d 1252, 1254). Plaintiff, however, submitted proof raising triable issues of fact. Although the record contains evidence of a gap in treatment that exceeds the 2½-year period of limitations, we conclude that there are issues of fact whether plaintiff and defendant "reasonably intend[ed] [plaintiff's] uninterrupted reliance upon [defendant's] observation, directions, concern, and responsibility for overseeing [plaintiff's] progress" (*Shumway v DeLaus*, 152 AD2d 951, 951, *lv dismissed* 75 NY2d 946; *see Devadas v Niksarli*, 120 AD3d 1000, 1005-1006; *Gomez v Katz*, 61 AD3d 108, 116-117; *Neureuther v Calabrese*, 195 AD2d 1035, 1036; *Edmonds v Getchonis*, 150 AD2d 879, 881).

We respectfully disagree with our dissenting colleague's view that "because the parties only contemplated treatment after September 5, 2003 on an 'as needed basis,' the continuous treatment doctrine does not apply." The determination whether continuous treatment exists "must focus on the patient" (*Rizk v Cohen*, 73 NY2d 98, 104) and, "[i]n determining whether plaintiff[] raised an issue of fact concerning the applicability of the continuous treatment doctrine, [her] version of the facts must be accepted as true" (*Scribner v Harvey*, 245 AD2d 1120, 1121). Based on plaintiff's version of the facts, there is support in the record for a finding that plaintiff "intended uninterrupted reliance" upon defendant's observation, directions, concern, and responsibility for overseeing her progress. Notably, during approximately 7 years of treatment with defendant, plaintiff underwent two surgeries, saw no other physician regarding her shoulder, and returned to him for further treatment, i.e., a potential third surgery, but was told that he did not treat or operate on shoulders anymore. Defendant referred plaintiff to another physician in his practice, and plaintiff went to that appointment, but was told that the second physician would not treat her. Furthermore, the fact that plaintiff left the September 5, 2003 appointment with a direction to see defendant "as needed" is not dispositive inasmuch as defendant conceded that "[o]bviously [plaintiff's] problem is long standing and chronic. She most likely will need further surgery in the future due to her young age and need for revision shoulder replacement vs fusions." While plaintiff's subsequent visit to defendant on April 28, 2006 "might not have been scheduled at the conclusion of the visit on [September 5, 2003], we recognize that, as a practical matter, it is not always possible to know at the conclusion of one visit with a physician whether a further visit with the physician may become indicated for the same condition within a reasonable time thereafter" (*Gomez*, 61 AD3d at 114; *see Edmonds*, 150 AD2d at 881). Although plaintiff certainly admitted to being discouraged with defendant after the September 5, 2003 visit, we cannot conclude that such discouragement renders the continuous treatment doctrine inapplicable as a matter of law (*see Edmonds*, 150 AD2d at 880-881).

We further conclude, however, that the court erred in determining that plaintiff raised triable issues of fact whether defendants are

equitably estopped from asserting a statute of limitations defense. Plaintiff failed to submit any proof that she "was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 449; *see Calderaro v Lehman*, 178 AD2d 396, 397). "Thus, it cannot be said that defendants 'improperly lull[ed] . . . plaintiff into failing to bring h[er] claim' " (*Ashe v Niagara Frontier Transp. Auth.*, 294 AD2d 842, 843). We therefore modify the order accordingly.

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part. I agree with my colleagues that defendants are entitled to summary judgment dismissing plaintiff's claim that defendants are equitably estopped from asserting a statute of limitations defense. However, I respectfully disagree with the conclusion that plaintiff raised issues of fact in response to defendants' prima facie entitlement to partial summary judgment with respect to plaintiff's assertion of a toll under the continuous treatment doctrine.

Following an office appointment with Frank A. Luzi, Jr., M.D. (defendant) on April 2, 2002, which concluded with defendant to "see [plaintiff] back on an as needed basis" with no scheduled follow-up appointment, plaintiff returned to defendant on September 5, 2003 to be seen as a result of being "pushed against the wall by one of her children." This was a patient-initiated appointment. At the conclusion of this appointment, defendant diagnosed plaintiff with a "left shoulder strain and a contusion . . . with no obvious evidence of loosening or fracture." Defendant "recommended continued exercises on her own and [plaintiff] was given samples of anti-inflammatory medication." Again, defendant noted that he would "see [plaintiff] on an as needed basis." Plaintiff did not see defendant again until April 28, 2006, which again was a patient-initiated appointment.

The undisputed facts further establish that between September 5, 2003 and April 28, 2006, a gap of more than 2½ years (*see* CPLR 214-a), plaintiff had no scheduled return appointments, sought no patient-initiated appointments, received no treatment of any kind from defendant, and no medications were prescribed or renewed by defendant on plaintiff's behalf. Plaintiff testified at her examination before trial that the reason for such a long time between these appointments was that she "had gotten discouraged with [defendant]. It was kind of learn to live with it, you're going to have problems, kind of deal with it type of thing. It was like why keep going back to him, he's going to keep telling me the same thing."

In my view, because the parties only contemplated treatment after September 5, 2003 on an "as needed basis," the continuous treatment doctrine does not apply (*see Williams-Gardner v Almeyda*, 50 AD3d 286, 286-287, *lv denied* 11 NY3d 708). No further treatment was "explicitly anticipated" after the September 5, 2003 appointment (*Richardson v Orentreich*, 64 NY2d 896, 898).

Moreover, inasmuch as plaintiff admitted that the more than 2½-

year gap in treatment was because she was discouraged with defendant and she did not expect any actual treatment if she returned, it cannot be said that there existed the "trust and confidence" that ordinarily marks the physician-patient relationship and "puts the patient at a disadvantage questioning the doctor's skill because to sue while undergoing treatment necessarily interrupts the course of treatment" (*Massie v Crawford*, 78 NY2d 516, 519, *rearg denied* 79 NY2d 978). Here, there simply was no course of treatment to interrupt during the more than 2½-year hiatus between appointments. "A patient is not entitled to the benefit of the toll in the absence of continuing efforts by a doctor to treat a particular condition because the policy reasons underlying the continuous treatment doctrine do not justify the patient's delay in bringing suit in such circumstances" (*id.* at 519). Here, plaintiff's testimony at her examination before trial established that for over 2½ years she neither believed nor expected that defendant was making, or would make, any continuing efforts to treat her shoulder problems. In my view, under these circumstances, the policy reasons underlying the continuous treatment doctrine are simply not implicated.

Therefore, I would modify the order by granting defendants' motion for partial summary judgment in its entirety, and dismissing the allegations in the complaint with respect to any medical malpractice occurring prior to March 30, 2006.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

380

CA 15-01490

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

STEPHEN SARACH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M&T BANK CORPORATION, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DIANE M. PERRI ROBERTS OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 28, 2015. The order granted plaintiff's motion to strike defendant's answer and affirmative defenses.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the sanctions imposed and reinstating the answer and affirmative defenses, and plaintiff is granted an adverse inference charge as a sanction under CPLR 3126, and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiff commenced this action on March 1, 2012, for injuries he allegedly sustained when he slipped and fell on ice on March 23, 2009, as he was walking into defendant's bank in Buffalo, New York. On August 10, 2010, prior to the commencement of the action, plaintiff sought an order pursuant to CPLR 3102 (c) for pre-action disclosure and preservation of evidence. Defendant opposed plaintiff's request for any pre-action disclosure, but represented to Supreme Court that it had voluntarily undertaken preservation of certain evidence, including accident reports, photographs, and surveillance videotapes, and ultimately "consent[ed] to an order of preservation." On October 29, 2010, the court granted plaintiff's application and ordered defendant to preserve, inter alia, all "photographs [and] video tapes, including but not limited to security and surveillance video related to the subject accident." During discovery after the action was commenced, plaintiff requested, inter alia, surveillance films related to the subject accident, and defendant responded that those materials had not been preserved. Thereafter, on July 30, 2014, plaintiff brought a motion pursuant to CPLR 3126 to strike defendant's answer on the ground that defendant had violated the court's 2010 order of preservation. The court granted plaintiff's motion and struck defendant's answer and affirmative defenses. Defendant appeals.

Initially, we agree with plaintiff that a sanction was warranted inasmuch as defendant "wilfully fail[ed] to disclose information" that the court had ordered to be preserved (CPLR 3126). Nevertheless, we conclude that the court abused its discretion in striking defendant's answer and affirmative defenses. It is well established that "a less drastic sanction than dismissal of the responsible party's pleading may be imposed where[, as here,] the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense" (*Marro v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 294 AD2d 341, 342). Indeed, we note that the record does not demonstrate that the plaintiff has been " 'prejudicially bereft' " of the means of prosecuting his action (*Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598, 599). Thus, we conclude that an appropriate sanction is that an adverse inference charge be given at trial with respect to the unavailable surveillance footage (*see Mahiques v County of Niagara*, 137 AD3d 1649, 1653; *Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 656; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 254-255), and we therefore modify the order accordingly.

Our dissenting colleague agrees that a "remedy is necessary," but disagrees with the sanction we have imposed, our analysis in reaching that sanction, and ultimately our directive to the court on how to effectuate the sanction. In our view, our resolution of this case requires us simply to determine whether defendant violated an order and whether such violation requires a sanction pursuant to CPLR 3126. The dissent refers to the "minimal prejudice suffered by plaintiff in not having been able to inspect the surveillance video in question." That reference overlooks the undisputed fact that plaintiff sought an order pursuant to CPLR 3102 (c) for pre-action disclosure, and counsel for defendant not only volunteered to preserve certain items, including surveillance video related to the subject accident, but "consent[ed] to an order of preservation." Naturally, the court then granted the relief requested by plaintiff, and defendant never challenged the resulting order. Under those circumstances, we are unable to conclude that defendant's failure to comply with the order was anything but wilful. As for our dissenting colleague's concern with respect to the form of the adverse inference charge, we anticipate that the court will follow the Pattern Jury Instructions.

All concur except CURRAN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent from the majority's conclusion that "defendant 'wilfully fail[ed] to disclose information' that the court had ordered to be preserved (CPLR 3126)." I also disagree with the sanction imposed. Nevertheless, I agree that a remedy is necessary to cure the minimal prejudice suffered by plaintiff in not having been able to inspect the surveillance video in question. For the reasons set forth below, I would modify Supreme Court's order, vacate the sanction imposed, reinstate the answer, and preclude defendant from introducing evidence at trial in its direct case regarding the contents of the surveillance video. I also would remit for a hearing pursuant to Part 130 of the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR 130 *et seq*.) to determine whether defendant's counsel engaged in "[f]rivolous conduct" (22 NYCRR § 130-1.1 [c]) warranting an award of costs or

sanctions based on his affidavit stating that defendant had "already voluntarily taken steps to preserve (the surveillance video) without any loss of evidence."

Plaintiff alleges that he slipped and fell on ice on March 23, 2009, as he was walking into defendant's main branch in downtown Buffalo, New York. Plaintiff asserts that the ice was created by defendant because it was negligently operating its outside fountain in freezing temperatures, and plaintiff slipped on an ice patch next to the fountain.

As noted by the majority, on October 29, 2010, the court granted plaintiff's application to preserve, inter alia, "video tapes" and "security and surveillance video related to the subject accident" (hereafter, preservation order). It was in response to this application that defendant's counsel made the representation assuring that evidence had been voluntarily preserved.

The action was commenced on March 1, 2012, and document discovery began in 2012 and 2013. On June 4, 2014, defendant's counsel sent a letter to plaintiff's counsel indicating that the only surveillance videos and photographs that had been kept pursuant to defendant's normal retention policies were two photographs taken by the security officer on the date of the accident, a still photograph from the surveillance video on the date of the accident, and four still photographs from the surveillance video on March 27, 2009, when plaintiff returned to the bank seeking reimbursement for his medical expenses. Defendant indicated that its normal policy is to overwrite the surveillance video tapes after 90 days. Thus, defendant claims that, within 90 days after the accident, the surveillance videos were overwritten and reused.

Plaintiff brought the subject motion to strike defendant's answer on July 30, 2014, based solely on the violation of the preservation order. In opposition to the motion, defendant provided an affidavit from an assistant vice-president whose duties include inspection of records maintained by defendant relating to bodily injury claims and litigation. The assistant vice-president averred that she conducted a diligent search of defendant's records and confirmed that all of the videos and photographs in the possession of defendant at the time of the preservation order had been produced for plaintiff. Additionally, she averred that the surveillance video from the date of the accident was overwritten pursuant to defendant's normal business practice approximately 14 months before the preservation order was issued. Plaintiff did not contest any of these sworn statements from the assistant vice-president.

The majority's conclusion that defendant "wilfully" failed to disclose the surveillance video was not even argued in plaintiff's spoliation motion. Rather, the motion was premised on the other basis for a penalty under CPLR 3126, i.e., the violation of a court order. Irrespective of whether the majority's sanction is based on a "willful failure to disclose" or contumacious behavior in violating a court order, the imposition of a penalty pursuant to CPLR 3126 is unfounded

here because defendant, pursuant to its normal business policy, recorded over the surveillance video more than a year before the preservation order was entered.

I respectfully submit that the majority has overlooked our precedent applying CPLR 3126. The prerequisites for a penalty pursuant to that statute are a party: (1) refusing to "obey an order for disclosure"; or (2) "wilfully fail[ing] to disclose information" (CPLR 3126). When faced with a motion alleging "willful, contumacious or bad faith conduct," our Court analyzes it according to a burden-shifting structure: the movant must establish that such conduct occurred, "thereby shifting the burden to [the adversary] to offer a reasonable excuse" (*Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513; *see Cason v Smith*, 120 AD3d 1554, 1555, *lv dismissed* 25 NY3d 1057; *Hann v Black*, 96 AD3d 1503, 1504-1505; *Household Fin. Realty Corp. of N.Y. v Robinson*, 68 AD3d 1724, 1724; *Hill v Oberoi*, 13 AD3d 1095, 1096). When the movant seeks to strike the adversary's pleading, as occurred here, our Court requires that there be a "clear showing" (*Fox v Eastman Kodak Co.*, 275 AD2d 921, 921) of willful, contumacious, or bad faith conduct, or that such conduct be "conclusively shown" (*McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1311).

The majority has overlooked our precedent here in two ways. First, it has not considered whether defendant's purported willful failure to disclose information that the court ordered be preserved, i.e., contumacious behavior, was "conclusively shown" or established by a "clear showing," or by "clear and convincing evidence," as would be necessary for contempt (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29), or to exercise the court's inherent power to preserve the integrity of the judicial system (*see CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318). Second, the majority has failed to mention the excuse offered by defendant, i.e., that the surveillance video from the date of the accident was overwritten pursuant to normal business practices within 90 days after plaintiff's alleged fall and that defendant was therefore unable to comply with the preservation order or plaintiff's demand to produce.

Our Court has excused the alleged spoliation of evidence when the evidence was destroyed "in good faith before litigation was pending, pursuant to . . . normal business practices" (*Raymond v State of New York*, 294 AD2d 854, 855; *see Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 1070). Additionally, "a party cannot be compelled to disclose that which is not in his or her possession" (*Saferstein v Stark*, 171 AD2d 856, 857). Our Court also has accepted that an "inability to comply" with a court order may be a "valid defense" to an application for contempt (*Matter of Andrew B.*, 128 AD3d 1513, 1515).

The majority is rightfully concerned about the perceived misrepresentation in the affidavit from defendant's counsel seeming to ensure that the surveillance video had been preserved. However, I respectfully submit that these concerns should not cause us to overlook our precedent and the fundamental facts, which should compel us to conclude here that the evidence was destroyed pursuant to normal

business practices and that the evidence was not contumaciously or wilfully destroyed. Thus, a penalty under CPLR 3126 is not warranted.

More fundamentally, the majority fails to address the three-prong analysis for spoliation motions adopted by the Court of Appeals in *Pegasus Aviation I, Inc. v Varig Logistica S.A.* (26 NY3d 543, 547). The first prong is whether "the party having control over the evidence possessed an obligation to preserve it *at the time of its destruction*" (*id.*) (emphasis added). The majority's analysis is devoid of this required finding. Instead, the majority apparently assumes that the surveillance video still existed as of the time the preservation order was obtained and after litigation commenced. The record, however, offers no support for this assumption and is quite clearly to the contrary. Rather, the record demonstrates that the surveillance video was overwritten within 90 days of plaintiff's fall, and plaintiff has not disputed this fact.

While I disagree with the majority's analysis under CPLR 3126, and fault the majority for not adhering to *Pegasus*, I nevertheless conclude that defendant had a duty to preserve the surveillance video within 90 days of plaintiff's fall. In my view, defendant was on "notice of an impending lawsuit" at the time the surveillance video was overwritten (*MetLife Auto & Home v Joe Basil Chevrolet*, 1 NY3d 478, 484). Moreover, the video is "matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). Although defendant indicates that the surveillance video from the date of the accident was inspected and that it did not show plaintiff's fall, plaintiff should not be required to accept that representation without an opportunity to inspect the video (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 251). Thus, I agree with the majority that a remedy for the missing evidence is appropriate. However, for the reasons discussed below, an adverse inference charge should not be given when, as here, the sole basis for the imposition of a penalty is negligent conduct. Instead, in my view, the more appropriate remedy is "to restore balance to the litigation" by precluding defendant from introducing at trial evidence of the video's content as part of its direct case (*Ortega v City of New York*, 9 NY3d 69, 76).

While the Court of Appeals has indicated that an adverse inference charge, among other remedies, may be an appropriate sanction or penalty for spoliation (*see Pegasus*, 26 NY3d at 554; *Ortega*, 9 NY3d at 76), it has not held that all such remedies are suited to all forms of spoliation, i.e., negligent, grossly negligent, and willful. Upon a finding that the destruction of evidence was solely the result of negligence—such as through normal business practices—thereby fulfilling the second prong of the *Pegasus* analysis, i.e., a " 'culpable state of mind' " (26 NY3d at 547), I submit that an adverse inference charge is inappropriate because it would be inconsistent with its traditional use as an evidentiary inference that the missing evidence was unfavorable to the spoliator or that destruction of the evidence showed consciousness of a weak case.

New York law has long recognized that "[a] party's failure to produce evidence[,] which the party controls and would be naturally

expected to introduce, raises the logical inference that the withheld evidence would prove unfavorable. *Armory v Delamirie*, 1 Strange (KB) 505, 93 Eng Rep 644 (non-production of a chattel)" (Jerome Prince, Richardson on Evidence § 3-139 [Farrell 11th ed 1995]). Further, "[t]he intentional destruction or mutilation of relevant evidence may give rise to the inference that the matter destroyed and mutilated is unfavorable to the spoliator . . . The mutilation or destruction is not alone sufficient to serve as a basis for this inference; the act must have been intentional, and the matter mutilated or destroyed must be shown to be relevant to the issues on the trial . . . Fabrication or deliberate mutilation of evidence or other fraud on the part of a party is a circumstance that may properly be considered by the jury as indicating a weak case" (*id.* § 3-141).

When evidence has been negligently destroyed, there is no factual basis upon which to instruct the jury to infer weakness of the spoliator's case or that the evidence was unfavorable. The federal courts recently grappled with this issue in connection with "electronically stored information" (ESI) and, with respect to ESI, they have rejected an adverse inference charge premised on negligent conduct (*see* Federal Rules of Civil Procedure, rule 37 [e] [2]; *see also* Federal Rules of Civil Procedure, Advisory Committee Notes, 2015 Amendment, Subdivision [e] [2] ["Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction"]).

In reaching this conclusion, the federal courts resolved a dispute among the Circuit Courts of Appeal electing to adopt the reasoning of courts rejecting negligence as a basis for an adverse inference charge (*see e.g. Aramburu v The Boeing Company*, 112 F3d 1398, 1407; *Vick v Texas Empl. Commn.*, 514 F2d 734, 737), and to reject the reasoning of those courts accepting it (*see e.g. Residential Funding Corp. v DeGeorge Fin. Corp.*, 306 F3d 99, 108). This rejection of *Residential Funding* may have significant ramifications for New York law because that case, as followed in *Zubulake v UBS Warburg LLC* (220 FRD 212, 220), is the basis for our appellate courts accepting negligence as a form of a " 'culpable state of mind' " authorizing spoliation sanctions (*Pegasus*, 26 NY3d at 547; *see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482). Nevertheless, *Pegasus* is controlling on this issue, and mere negligence is apparently a culpable state of mind in New York for the purpose of imposing spoliation sanctions.

One of the reasons the federal courts limited the availability of an adverse inference charge in the recent amendments to the Federal Rules of Civil Procedure, rule 37 (e), was to address business concerns about over-preservation of ESI (*see* Alexander Nourse Gross, Note, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37 (E) Protect Producing Parties?*, 2015 Colum Bus L Rev 705, 723-724, 754, 763). The majority's failure to appreciate such concerns, not only in this case, but also in our precedent seemingly employing an adverse inference charge as the compromise remedy of choice (*see Mahiques v County of Niagara*, 137 AD3d 1649, 1653; *Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445; *Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 1288; *Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1087), is another reason for my dissent.

Additionally, even though the majority sua sponte imposes an adverse inference charge as a sanction without a request by either party, it blithely leaves it to the trial court to figure out what the required charge should say and how it will impact the proof at trial. The majority elects not to refer to either PJI 1:77 or PJI 1:77.1 (1A NY PJI 1:77 at 130; 1A NY PJI 1:77.1, at 132-133 [2016]), or to some other charge it considers to be more "tailored" to the facts here (*Pegasus*, 26 NY3d at 554). However, even a casual citation to PJI 1:77 or PJI 1:77.1, without more, would be insufficient. PJI 1:77 is a "failure to produce" charge and leaves it to the jury to determine whether: (1) the evidence existed; (2) there was a reasonable explanation for it not being produced in court; and (3) the evidence would have been important or significant to the jury in its deliberations. PJI 1:77 is the traditional evidentiary inference permitting the jury to infer the unfavorability of the missing evidence.

PJI 1:77.1 pertains to the "destruction or spoliation of evidence" and leaves it to the jury to determine whether: (1) the alleged spoliator destroyed, altered, or caused the disappearance of the evidence; and (2) there was a reasonable explanation for the claimed destruction, alteration, or disappearance of the evidence. As the comment states, the charges should be modified to remove from the jury those issues that have been resolved by stipulation or by a judicial finding (*see* 1A NY PJI3d 1:77 at 132 [2016]).

PJI 1:77.1 is obviously the type of charge imposed as a sanction. As the majority imposes the charge as a penalty under CPLR 3126, it would appear that it is requiring the trial court to use PJI 1:77.1.

By penalizing defendant with an adverse inference charge based on "willful" conduct, the majority has necessarily determined that the missing surveillance video was relevant, i.e., it would have been important to the jury in its deliberations (*see Pegasus*, 26 NY3d at 547 ["(w)here the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed"]). However, as noted above, there is no support for this conclusion in the record and, in fact, the record is to the contrary. The only evidence in the record as to the importance of the video, or

lack thereof, is the representation from defendant's counsel that the video was reviewed and that it did not capture plaintiff's fall. Thus, the majority speculates as to the actual content of the video and imposes that speculation on the jury.

The majority also fails to address whether defendant will be permitted to present evidence as to the circumstances of the video's destruction and as to the video's contents to the extent it supports the reason for permitting its destruction pursuant to normal business practices, i.e., a reasonable explanation. The majority thereby overlooks the embedded best evidence rule objection this testimony may evoke (*see e.g. People v Cyrus*, 48 AD3d 150, 159, *lv denied* 10 NY3d 763) and, if sustained, the prejudice to defendant in being unable to support its alleged reasonable explanation for the video's destruction.

Lastly, requiring the trial court to deliver an undefined "adverse inference charge" will undoubtedly require the parties to conduct a "trial within a trial" addressing the spoliation issue. This will prolong the trial process and subject the jury to a tangential issue.

In the absence of clear direction from our Court, I foresee confusion and randomness at the trial court level leading to further grounds for appeal. For all of these reasons, I dissent from the majority's decision and would instead modify the order and remit the matter as described above.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

403

CA 15-01564

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

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE COMPLAINT OF HOUSING OPPORTUNITIES MADE EQUAL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY FOLINO AND CARMELINE FOLINO, DEFENDANTS-APPELLANTS.

ANTHONY FOLINO, DEFENDANT-APPELLANT PRO SE.

CARMELINE FOLINO, DEFENDANT-APPELLANT PRO SE.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (ERIN SOBKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 14, 2014. The order denied the pre-answer motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff, New York State Division of Human Rights (SDHR), on the complaint of Housing Opportunities Made Equal, Inc. (HOME), commenced this action seeking damages for defendants' alleged discriminatory housing practices (*see* Executive Law § 296 *et seq*.). We agree with defendants that Supreme Court erred in denying their pre-answer motion to dismiss the complaint as time-barred pursuant to CPLR 214 (2). The last discriminatory act set forth in the complaint occurred on November 8, 2010, and thus the cause of action accrued and the three-year statute of limitations for the Human Rights Law began to run on that date (*see Henderson v Town of Van Buren*, 15 AD3d 980, 981, *lv denied* 4 NY3d 710). However, on April 1, 2011, HOME filed an administrative complaint with the United States Department of Housing and Urban Development, which then forwarded the matter to SDHR pursuant to a worksharing agreement (*see* 29 CFR 1626.10 [a]; *see also Tewksbury v Ottaway Newspapers*, 192 F3d 322, 327). The statute of limitations was tolled upon the filing of the administrative complaint and during its pendency, until the administrative proceeding was terminated (*see* Executive Law § 297 [9]; CPLR 204 [a]; *Penman v Pan Am. World Airways*, 69 NY2d 989, 990-991; *Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd.*, 61 NY2d 542, 549).

On July 15, 2011, following a probable cause determination by SDHR, defendants submitted a notice of their election to terminate the administrative proceeding and instead "to have an action commenced in the civil court" by SDHR (Executive Law § 297 [9]). That election lifted the administrative proceeding toll (*see Pan Am. World Airways*, 61 NY2d at 549). Inasmuch as 143 days elapsed after the cause of action accrued and before the tolling period commenced, SDHR had two years and 222 days within which to commence the action after the tolling period ended, i.e., until February 22, 2014. Because SDHR commenced this action on July 3, 2014, it is untimely (*see Henderson*, 15 AD3d at 981).

In light of our determination, we do not consider defendants' remaining contentions.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

404

CA 15-00506

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

JASON PEARSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEREMY WALLACE, ROBINSON CONCRETE, INC.,
DEFENDANTS,
LECESSE CONSTRUCTION SERVICES, LLC, AND
GENEVA GENERAL HOSPITAL, DEFENDANTS-RESPONDENTS.

JEREMY WALLACE, ET AL., THIRD-PARTY PLAINTIFFS,

V

CATENARY CONSTRUCTION CORPORATION, THIRD-PARTY
DEFENDANT-RESPONDENT,

LECESSE CONSTRUCTION SERVICES, LLC, THIRD-PARTY
PLAINTIFF,

V

CATENARY CONSTRUCTION CORPORATION
AND ROYAL ENVIRONMENTAL, INC., THIRD-PARTY
DEFENDANTS-RESPONDENTS.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT ROYAL ENVIRONMENTAL, INC.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (AMANDA BURNS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (PETER BALOUSKAS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT CATENARY CONSTRUCTION CORPORATION.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered December 24, 2014. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on liability under Labor Law § 240 (1) against defendant-third-party plaintiff LeCesse Construction Services, LLC and

defendant Geneva General Hospital.

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

Memorandum: Defendant-third-party plaintiff LeCesse Construction Services, LLC (LeCesse), the general contractor for a construction project on premises owned by defendant Geneva General Hospital (Geneva), subcontracted demolition work to plaintiff's employer, third-party defendant Royal Environmental, Inc., and subcontracted excavation and concrete work to third-party defendant Catenary Construction Corporation. Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when the ladder on which he was working was allegedly struck by the chute of a concrete truck, causing plaintiff to fall. Plaintiff appeals from an order denying his motion for partial summary judgment on liability under Labor Law § 240 (1) against LeCesse and Geneva (defendants).

We agree with plaintiff that he met his initial burden on the motion by submitting evidence establishing that defendants violated Labor Law § 240 (1) " 'by failing to ensure the proper placement of the ladder' . . . , and that such violation was a proximate cause of plaintiff's injuries" (*Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554; *see Woods v Design Ctr., LLC*, 42 AD3d 876, 877). In opposition to the motion, however, defendants and third-party defendants raised an issue of fact by submitting evidence that, contrary to plaintiff's account of the accident, the ladder did not move upon contact with the chute, and plaintiff was not knocked off the ladder by such contact (*see D'Antonio v Manhattan Contr. Corp.*, 93 AD3d 443, 444). " 'The two different versions of the accident . . . create questions of fact as to the adequacy of the protective device and as to [plaintiff's] credibility,' thereby precluding summary judgment" (*Militello v Landsman Dev. Corp.*, 133 AD3d 1378, 1379). Defendants and third-party defendants also raised a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). In particular, they submitted evidence that plaintiff was directed to refrain from working in the area during the scheduled concrete pour and that, upon plaintiff's initial refusal to cease working there, LeCesse's superintendent removed the ladder from that area and also had plaintiff leave the area. Plaintiff nonetheless intentionally disregarded the directives, returned to the area, set up the ladder, and continued working there when other workers were attempting to begin the pour (*see Georgia v Urbanski*, 84 AD3d 1569, 1569-1570; *see also Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759; *Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939-940).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

432

CA 15-00412

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

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAW OFFICE OF CHRISTOPHER J. CASSAR, P.C., AND CHRISTOPHER J. CASSAR, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

THE LAW OFFICES OF CHRISTOPHER J. CASSAR, P.C., HUNTINGTON (CHRISTOPHER J. CASSAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 9, 2014. The order denied the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion seeking dismissal of the second and third causes of action and as modified the order is affirmed without costs.

Memorandum: This dispute between law firms over attorney's fees arises from legal services provided to a client in a personal injury action against an allegedly negligent motorist. Over two years after she had retained plaintiff as counsel and nearly four months after plaintiff had commenced the personal injury action on her behalf in Supreme Court, Suffolk County, the client discharged plaintiff and retained defendants. Following substitution of counsel, plaintiff sent a letter to defendants asserting a charging lien pursuant to Judiciary Law § 475 to secure its interest in attorney's fees. With defendants as counsel, the client subsequently commenced a legal malpractice action against plaintiff in Suffolk County alleging that plaintiff negligently failed to file a workers' compensation claim for the client. Thereafter, defendants secured a settlement in the client's personal injury action. Defendants then sought an order within that action directing that a portion of the settlement funds be held in escrow while the validity of the charging lien was resolved and that the remainder of the settlement funds be released to the client. Two days later, plaintiff commenced the instant action against defendants in Supreme Court, Erie County, i.e., the county in which plaintiff's principal place of business is located, alleging in the first cause of action that it is entitled to attorney's fees

related to the settlement on a quantum meruit basis, and further alleging in the second and third causes of action that defendants engaged in frivolous and fraudulent conduct in commencing the legal malpractice action. On the same day, but after the instant action was commenced in Erie County, Supreme Court, Suffolk County, issued an order directing plaintiff to show cause why the order sought by defendants should not be granted. In appeal No.1, defendants appeal from an order denying their motion to dismiss the complaint in the instant action pursuant to CPLR 3211 and, in appeal No. 2, defendants appeal from an order denying their motion to transfer venue to Suffolk County.

We agree with defendants in appeal No. 1 that the court erred in failing to grant the motion to dismiss with respect to the second and third causes of action for failure to state a cause of action pursuant to CPLR 3211 (a) (7). We therefore modify the order in appeal No. 1 accordingly. To the extent that such is asserted in those causes of action, we note that New York does not recognize a separate cause of action to impose sanctions for frivolous conduct pursuant to 22 NYCRR 130–1.1 (*see Young v Crosby*, 87 AD3d 1308, 1309). To the extent that the second and third causes of action assert a cause of action for fraud, we conclude that plaintiff failed to allege the essential elements of such a cause of action (*see Robertson v Wells*, 95 AD3d 862, 864).

Defendants' contention in appeal No. 1 that the court should have dismissed the first cause of action for failure to state a cause of action is not properly before us because they did not seek dismissal of that cause of action on that ground in their motion (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We reject defendants' further contention in appeal No. 1 that the court abused its discretion in denying their motion to dismiss the first cause of action pursuant to CPLR 3211 (a) (4). That provision "vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (*Whitney v Whitney*, 57 NY2d 731, 732). "While complete identity of parties is not a necessity for dismissal under CPLR 3211 (a) (4) . . . , there must at least be a 'substantial' identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action' " (*Proietto v Donohue*, 189 AD2d 807, 807-808; *see Forget v Raymer*, 65 AD2d 953, 954). Here, in the underlying personal injury action, the parties are the client and the motorist. The parties in the instant action, however, are plaintiff and defendants. There are thus no common parties to either action nor the requisite substantial identity of parties (*see Winters v Dowdall*, 63 AD3d 650, 651; *Credit-Based Asset Servicing & Securitization v Grimmer*, 299 AD2d 887, 887; *Blank v Schafrann*, 167 AD2d 745, 746; *see generally Proietto*, 189 AD2d at 808). Further, although we agree with the dissent that defendants were not required to commence a separate action to determine and enforce a charging lien pursuant to Judiciary Law § 475 (*see Westfall v County of Erie*, 281 AD2d 979, 980), we conclude that it does not follow that the court abused its broad discretion in refusing to dismiss the action properly commenced by plaintiff in Erie County

before similar relief was sought within a pending action between different parties in Suffolk County (*see generally Whitney*, 57 NY2d at 732; *Forget*, 65 AD2d at 954).

Defendants contend in appeal No. 2 that the court improperly denied their motion to transfer venue from Erie County to Suffolk County (*see* CPLR 510 [3]). We reject that contention. "A motion for a change of venue is addressed to the sound discretion of the court, and absent a clear abuse the court's determination will not be disturbed on appeal" (*McLaughlin v City of Buffalo*, 259 AD2d 1014, 1014). We conclude that the court did not abuse its discretion in denying the motion inasmuch as defendants failed to meet their burden of proving that "the convenience of material witnesses and the ends of justice [would] be promoted by the change" (CPLR 510 [3]; *see Rochester Drug Coop., Inc. v Marcott Pharmacy N. Corp.*, 15 AD3d 899, 899; *Zinker v Zinker*, 185 AD2d 698, 698).

Finally, contrary to defendants' further contention in both appeals, the court did not improvidently exercise its discretion in denying those parts of their motions seeking attorney's fees and costs (*see generally* 22 NYCRR 130-1.1 [a]).

All concur except DeJoseph, J., who dissents in part and votes to reverse in accordance with the following memorandum: I respectfully dissent in part. I agree with my colleagues in appeal No. 1 that Supreme Court erred in failing to grant defendants' motion to dismiss with respect to the second and third causes of action. I also agree in appeal No. 2 that the court properly denied defendants' motion to transfer venue. I respectfully disagree, however, with the majority's conclusion in appeal No. 1 that the court did not abuse its discretion in denying defendants' motion to dismiss the first cause of action pursuant to CPLR 3211 (a) (4). I would therefore reverse the order in appeal No. 1, grant defendants' motion in its entirety, and dismiss the complaint.

As a preliminary matter, I question how the majority concluded that the court did not abuse its discretion. The court provided no written or oral basis for its decision; it simply denied the motion. I find it nearly impossible to determine whether the court did or did not abuse its discretion when it failed to provide any reasoning for denying the motion. This is even more troubling in light of the letter submitted to the court by counsel for defendants, in which counsel noted, inter alia, that the court had "fail[ed] to state the legal basis for the . . . decision" and, because of a scheduling hearing in Suffolk County on the issue of attorney's fees, asked the court for clarification. By all accounts in the record before us, the court never responded. In my view, trial courts have an obligation to the litigants to provide a basis for their decisions. Failing to do so is unacceptable and continues to frustrate appellate review (*see generally McMillian v Burden*, 136 AD3d 1342, 1343).

Moving now to the merits, during oral argument of this appeal, both parties agreed that: (1) the relief—attorney's fees—sought in Suffolk County was the same as that sought in Erie County; and (2) it

affected the same two parties, i.e., plaintiff and defendants. It was plaintiff's primary contention that there was simply no other "action" pending in Suffolk County in order to trigger CPLR 3211 (a) (4). Interestingly, the majority does not address whether the relief sought in both venues is substantially the same. Instead, the majority concludes that "[t]here are . . . no common parties to either action nor the requisite substantial identity of parties." I disagree. Although the captions of the two actions do not match, there is an action pending in Suffolk County concerning the same relief that affects the same two parties, i.e., not the underlying personal injury action itself, but the proceeding brought within that action by defendants. There is no dispute that within the underlying personal injury action, defendants, by way of order to show cause and supporting petition, sought a resolution of the issue concerning the attorney's fees between plaintiff and defendants. On that same day, plaintiff commenced an action in Erie County also seeking, inter alia, a resolution of the issue concerning the attorney's fees. As conceded by the majority, the "defendants were not required to commence a separate action to determine and enforce a charging lien pursuant to Judiciary Law § 475." As I see it, defendants have been faulted for following common and accepted procedure inasmuch as defendants' attorney's fees application in Suffolk County clearly constitutes another action pending between the same parties for the same relief (*see* CPLR 3211 [a] [4]).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

433

CA 15-00413

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

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAW OFFICE OF CHRISTOPHER J. CASSAR, P.C., AND CHRISTOPHER J. CASSAR, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

THE LAW OFFICES OF CHRISTOPHER J. CASSAR, P.C., HUNTINGTON (CHRISTOPHER J. CASSAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 9, 2014. The order denied the motion of defendants for a change of venue.

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

Same memorandum as in *Cellino & Barnes, P.C. v Law Office of Christopher J. Cassar, P.C.* ([appeal No. 1] ___ AD3d ___ [June 17, 2016]).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

461

KA 12-01741

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIANNA M. MASSEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (M. William Boller, A.J.), rendered June 11, 2012. The judgment convicted defendant, upon a nonjury verdict, of assault in the first degree.

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

Memorandum: Defendant was convicted following a nonjury trial of assault in the first degree (Penal Law § 120.10 [1]) for cutting another woman in the face and arm with a razor blade during a physical altercation. Defendant contends that the evidence of her intent to commit the crime is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. Defendant failed to preserve for our review her contention concerning the legal sufficiency of the evidence by failing to renew her motion for a trial order of dismissal after presenting evidence (*see People v Goley*, 113 AD3d 1083, 1083; *People v Heary*, 104 AD3d 1208, 1209, *lv denied* 21 NY3d 943, *reconsideration denied* 21 NY3d 1016). In any event, we conclude that the verdict is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495), and, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). With respect to the element of intent, defendant admitted in her testimony that she caused the victim's injuries by slashing at her with a razor blade, and she " 'may be presumed to intend the natural and probable consequences of [her] actions' " (*People v Boley*, 126 AD3d 1389, 1390, *lv denied* 25 NY3d 1159; *see People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660).

We reject defendant's contention that County Court erred in discrediting her justification defense. There was no evidence that

the victim was armed or was attempting to use deadly physical force against defendant when defendant used the razor blade. Additionally, the testimony of the victim and other witnesses suggested that defendant had the opportunity to retreat, and failed to do so, making a justification defense inapplicable under the circumstances herein (*see* Penal Law § 35.15 [2] [a]; *People v Robinson*, 1 AD3d 1022, 1023, *lv denied* 1 NY3d 633). Although defendant provided contradictory testimony, based upon our independent review of the evidence pursuant to CPL 470.15 (5) and giving "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Robinson*, 1 AD3d at 1023 [internal quotation marks omitted]), we conclude that the court's rejection of the justification defense was not contrary to the weight of the evidence. The sentence is not unduly harsh or severe.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

462

KA 15-01785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. JOHNSON, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 15, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of rape in the first degree (Penal Law § 130.35 [4]), defendant contends that his sentence is unduly harsh and severe. We conclude that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). During the plea colloquy, County Court made clear to defendant that the right to appeal was separate and distinct from the other rights that are automatically forfeited upon a plea of guilty (*see People v Rausch*, 126 AD3d 1535, 1535, *lv denied* 26 NY3d 1149; *cf. People v VanHooser* [appeal No. 2], 126 AD3d 1531, 1532), and the court further explained that the waiver precluded defendant from challenging either the conviction or the severity of his sentence (*cf. People v Maracle*, 19 NY3d 925, 928). In any event, based on our review of the record, we perceive no basis upon which to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

466

KA 11-01115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASZELL TAYLOR, DEFENDANT-APPELLANT.

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered September 14, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second 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 assault in the second degree (Penal Law § 120.05 [2]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that County Court's *Sandoval* ruling denied him his right to a fair trial. "By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve that contention for our review" (*People v Poole*, 79 AD3d 1685, 1685, *lv denied* 16 NY3d 862). In any event, the court's *Sandoval* ruling does not constitute an abuse of discretion (*see People v Smalls*, 16 AD3d 1154, 1155, *lv denied* 5 NY3d 769). Contrary to defendant's contention, the court properly permitted his prior drug convictions to be used for impeachment purposes inasmuch as the jury could have considered them as a manifestation of defendant's willingness to place his own interests above that of the community (*see generally People v Newland*, 83 AD3d 1202, 1203-1204, *lv denied* 17 NY3d 798). Moreover, the fact that the convictions were 15 or more years old does not require preclusion of those convictions for impeachment purposes (*see People v Fotiou*, 39 AD3d 877, 878, *lv denied* 9 NY3d 843).

We reject defendant's further contention that the court erred in instructing the jury on the use of deadly physical force rather than the use of ordinary physical force (*see People v Davis*, 118 AD2d 206, 209, *lv denied* 68 NY2d 768). Defendant's use of a pocket knife to inflict injury on the victim clearly constituted the use of deadly

physical force (*see id.*). Contrary to defendant's further contention, the court correctly instructed the jury on the issue whether the altercation with the victim occurred in defendant's dwelling (*see People v Berk*, 88 NY2d 257, 267, *cert denied* 519 US 859).

We reject defendant's contention that he was deprived of a fair trial as a result of the court's instruction to the jury on consciousness of guilt. We conclude that there was "a sufficient factual predicate to support a jury instruction on the concept of flight as evidence of consciousness of guilt" (*People v Cartledge*, 50 AD3d 1555, 1556, *lv denied* 10 NY3d 957 [internal quotation marks omitted]), and we note that the instruction given by the court was consistent with the instruction set forth in the Pattern Criminal Jury Instructions (*see People v Muscarella*, 132 AD3d 1288, 1289, *lv denied* 26 NY3d 1147).

Finally, there is no merit to defendant's contention that he was entitled to have the jury instructed on the issue of justification with respect to the criminal possession of a weapon count (*see People v Pons*, 68 NY2d 264, 267).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

469

KA 14-01510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS BROWN, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 (Joseph E. Fahey, J.), rendered April 14, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree (three counts), sexual abuse in the second degree (three counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, three counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). The charges stemmed from defendant's sexual abuse of his daughter. 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). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Contrary to defendant's contention, the trial testimony of the victim "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982), and we see no basis for disturbing the jury's credibility determinations in this case.

Defendant further contends that testimony on the People's direct case regarding certain answers he provided during a police interview constituted improper evidence of selective silence. We reject that contention inasmuch as the testimony established that defendant did not remain silent in response to police questioning (*cf. People v Williams*, 25 NY3d 185, 193; *People v Capers*, 94 AD3d 1475, 1476, *lv*

denied 19 NY3d 971). Defendant's contention that the People improperly bolstered the victim's testimony by introducing evidence of her delayed disclosures of defendant's actions is not preserved for our review inasmuch as defendant did not object to that evidence at trial (*see* CPL 470.05 [2]; *People v Comerford*, 70 AD3d 1305, 1306), and 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 reject defendant's further contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant's attorney provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, defendant contends that the People failed to comply with the requirements of CPL 400.15 in sentencing him as a second violent felony offender and thus, that the sentence is illegal. We conclude that defendant's contention, which is actually a challenge to the adequacy of the procedures that County Court used in sentencing him rather than to the legality of the sentence, is not preserved for our review (*see People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931; *cf. People v Samms*, 95 NY2d 52, 58). In any event, the record establishes that, prior to sentencing, both defendant and defense counsel received and signed a copy of the second felony offender statement and, at sentencing, the court asked defendant whether there was "[a]nything . . . you want to say before I pronounce sentence." We therefore conclude that "there was substantial compliance with CPL 400.15 in this case . . . inasmuch as both defendant and defense counsel 'received adequate notice and an opportunity to be heard with respect to the prior conviction' " (*People v Myers*, 52 AD3d 1229, 1230; *see People v Hall*, 82 AD3d 1619, 1620, *lv denied* 16 NY3d 895).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

472

CA 15-01213

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

LATOYA PEOPLES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M&T BANK, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

DAVID M. GIGLIO & ASSOCIATES, LLC, UTICA (BRIDGET M. TALERICO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 20, 2015. The order granted the motion of defendant M&T Bank for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained as a result of her alleged exposure to lead paint through March 1993 in premises on which defendant M&T Bank (defendant) held a mortgage. Defendant moved for summary judgment dismissing the complaint against it because it did not become owner of the premises where the exposure allegedly occurred until April 1993, after the period of alleged exposure, and because it owed no duty to plaintiff as an out-of-possession mortgagee during the period of exposure. Supreme Court granted the motion, and we now affirm.

It is clear from the record that defendant did not become the owner of the premises until the foreclosure sale on April 5, 1993, which, as plaintiff correctly concedes, occurred after the period in which she was allegedly exposed to lead paint on the premises (*see Forbes v Aaron*, 81 AD3d 876, 877). Thus, defendant is not liable for plaintiff's alleged injuries (*see Suero-Sosa v Cardona*, 112 AD3d 706, 707; *Pollard v Credit Suisse First Boston Mtge. Capital, LLC*, 66 AD3d 862, 863, *lv denied* 14 NY3d 708; *Greenpoint Bank v John*, 256 AD2d 548, 548). We reject plaintiff's contention that the Referee appointed by the court in the foreclosure action was an agent of defendant, and that the authority and actions or inactions of the Referee may therefore be attributed to defendant. It is well settled that a receiver "is an officer of the court and not an agent of the mortgagee or the owner" (*Bank of Am., N.A. v Oneonta, L.P.*, 97 AD3d 1023, 1026

[internal quotation marks omitted]; *see Matter of Kane [Freedman —Tenenbaum]*, 75 NY2d 511, 515; *Matter of Schwartzberg v Whalen*, 96 AD2d 974, 975).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

475

CA 15-01159

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

BRENDA M. BOROSZKO AND ROBERT R. BOROSZKO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GERALD J. ZYLINSKI, PRAXAIR DISTRIBUTION, INC.,
MICHAEL A. PECA AND KRISTEN L. PECA,
DEFENDANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GERALD J. ZYLINSKI AND PRAXAIR DISTRIBUTION, INC.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MICHAEL A. PECA AND KRISTEN L. PECA.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 1, 2015. The order granted the motion and cross motion of defendants for summary judgment, denied the cross motion of plaintiffs for partial summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Brenda M. Boroszko (plaintiff) in two separate motor vehicle accidents. In January 2009, plaintiff was involved in an accident when defendant Gerald J. Zylinski, who was operating a vehicle owned by his employer, defendant Praxair Distribution, Inc. (collectively, Praxair defendants), exited a parking lot onto the street and collided with the passenger side of plaintiff's vehicle. In January 2011, plaintiff was involved in another accident when she was rear-ended while stopped at a red light by a vehicle operated by defendant Michael A. Peca and owned by defendant Kristen L. Peca (collectively, Peca defendants). As relevant on appeal, plaintiffs alleged that, as a result of the accidents, plaintiff "sustained[,] aggravated[,] and/or exacerbated" injuries to her cervical and lumbar spine under the permanent loss of use, permanent consequential limitation of use, and significant limitation of use categories of serious injury as defined in Insurance

Law § 5102 (d). The Peca defendants moved for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a serious injury within the meaning of those categories, and the Praxair defendants cross-moved for the same relief. Plaintiffs opposed defendants' motions, and cross-moved for partial summary judgment on the issue of the Praxair defendants' negligence. Supreme Court granted the Peca defendants' motion and the Praxair defendants' cross motion, and denied plaintiffs' cross motion. We affirm.

We note at the outset that plaintiffs limit their appeal to the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102 (d), and therefore they have abandoned the other remaining category of serious injury alleged in their bills of particulars, i.e., permanent loss of use (*see Fanti v McLaren*, 110 AD3d 1493, 1494). Further, plaintiffs concede that plaintiff suffered no serious injury to her cervical or lumbar spine following the first accident in January 2009. They contend that plaintiff's lumbar spine injury did not exist until the second accident in January 2011 and that her cervical spine injury qualified as serious under the statute only upon aggravation or exacerbation as a result of the second accident in January 2011.

Plaintiffs contend that the Peca defendants failed to meet their initial burden of establishing that plaintiff did not have any serious injury following the second accident that arose from aggravation or exacerbation of her preexisting injuries and/or conditions. We reject that contention. In support of their motion, the Peca defendants submitted hospital records from the date of the second accident, which established that, although plaintiff reported neck and back pain and was ultimately diagnosed with a sprain in those areas, her physical examination demonstrated "[n]o true pain along her cervical spine," her cervical spine X rays showed no fracture, she was given pain medication, and she was discharged. Moreover, while plaintiff's radiology report showed no visible pathologic prevertebral soft tissue swelling, it did show "moderate multilevel degenerative disc disease with moderate degenerative changes throughout the cervical spine." In addition to various other medical records, the Peca defendants also submitted an affirmed report of a physician who reviewed plaintiff's records and conducted a physical examination of her, as well as an affirmed report of a radiologist who reviewed plaintiff's MRI records. The physician and the radiologist opined that plaintiff's complaints following the second accident were the same as those prior to that accident, that plaintiff's MRIs and X rays—which showed degenerative changes—were unchanged after the second accident, and that there was no evidence of posttraumatic injuries to plaintiff's cervical or lumbar spine following the second accident (*see Garcia v Feigelson*, 130 AD3d 498, 499; *Heatter v Dmowski*, 115 AD3d 1325, 1326; *Pina v Pruyn*, 63 AD3d 1639, 1639; *Faso v Fallato*, 39 AD3d 1234, 1234). Although plaintiffs correctly note that the physician documented limited range of motion in plaintiff's cervical spine upon his examination of her, the Peca defendants' submissions also included a December 2010 chiropractic record that the physician reviewed. That chiropractic record showed that plaintiff had essentially the same

levels of decreased range of motion just weeks before the January 2011 accident, and thus established that there was no aggravation or exacerbation of plaintiff's condition as a result of the second accident. To the extent that plaintiffs rely on a September 2000 record showing that plaintiff had full range of motion, such reliance is misplaced given the length of time between the prior record and the January 2011 accident, the evidence of various other accidents and injuries suffered by plaintiff during the intervening time period, and the more recent testing showing nearly identical range of motion deficits just before the second accident (*see Yakubov v CG Trans Corp.*, 30 AD3d 509, 510). The Peca defendants thus established that plaintiff did not suffer aggravation or exacerbation of any preexisting injury or condition, and that she did not have any serious injury following the second accident (*see Faso*, 39 AD3d at 1234).

Contrary to plaintiffs' further contention, we conclude that their submissions in opposition to the motion failed to raise a triable issue of fact. Although plaintiff's orthopedist, who first examined plaintiff 10 months after the second accident and provided an affirmation on her behalf, opined that plaintiff had measurable limitations in her range of motion, he failed to refute the opinion of the Peca defendants' examining physician that plaintiff had not sustained any additional limitation causally related to the January 2011 accident by, for example, "comparing plaintiff's pre- and post-accident range of motion restrictions" (*Overhoff v Perfetto*, 92 AD3d 1255, 1256, *lv denied* 19 NY3d 804). To the extent that the orthopedist's opinion that the two accidents activated, aggravated, and/or exacerbated certain preexisting conditions is responsive to the Peca defendants' prima facie showing of entitlement to summary judgment, we conclude that the orthopedist "failed to provide any basis for determining the extent of any exacerbation of plaintiff's prior injuries" (*Brand v Evangelista*, 103 AD3d 539, 540). Although the orthopedist reviewed an April 2009 MRI, he failed to explain how the January 2011 accident aggravated the alleged injuries sustained in the January 2009 accident, and thus failed to raise a triable issue of fact whether such injuries qualified as serious under the statute (*see Brand*, 103 AD3d at 540; *Nowak v Breen*, 55 AD3d 1186, 1188-1189).

Inasmuch as the parties' submissions establish, as a matter of law, that plaintiff did not suffer any serious injury following the January 2011 accident resulting from aggravation or exacerbation of her preexisting injuries and/or conditions, plaintiffs' theory of liability against the Praxair defendants, i.e., that the January 2009 accident contributed to plaintiff's purported serious injuries following the second accident, necessarily fails. We therefore agree with the Praxair defendants that the court properly granted their cross motion for summary judgment dismissing the complaint against them. Finally, in light of our determination, we do not address plaintiffs' contention that they are entitled to partial summary judgment on the issue of the Praxair defendants' negligence.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

478

CA 15-01209

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

CIERRA DANDY, ALSO KNOWN AS CIERRA PEOPLES,
PLAINTIFF-APPELLANT,

V ORDER

M&T BANK, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

DAVID M. GIGLIO & ASSOCIATES, LLC, UTICA (BRIDGET M. TALERICO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 20, 2015. The order granted the motion of defendant M&T Bank for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Peoples v M&T Bank*, ___ AD3d ___ [June 17, 2016]).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

494

CA 15-01334

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

IN THE MATTER OF LISA NAPIERALA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN
RIGHTS, ET AL., RESPONDENTS,
AND ERIE COMMUNITY COLLEGE,
RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 10, 2014 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition to annul a determination of respondent New York State Division of Human Rights.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is dismissed, and the determination of respondent New York State Division of Human Rights is reinstated.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that Erie Community College (respondent) retaliated against petitioner. We conclude that Supreme Court erred in granting the petition.

Petitioner, a security officer for respondent, alleged that respondent had retaliated against her "by subjecting her to adverse employment actions after she complained of discrimination." Specifically, petitioner alleged that respondent "knowingly assigned" her to guard duty in its athletic center at a time when the gymnasium floor was being polyurethaned. The fumes were so strong that petitioner became ill near the end of her shift and left a voice message with her supervisor advising him that she needed to leave her shift early. Subsequently, petitioner was asked to report to the Human Resources Department to discuss why she went home sick without

first obtaining her supervisor's permission. Petitioner was questioned, but no disciplinary action was taken. Petitioner also alleged in her petition that respondent retaliated against her when it allegedly "lost" her "On-the-Job-Training" certificate, which led to the lapse of her security license and resulted in her suspension without pay.

Where, as here, SDHR "renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis" (*Matter of Gordon v New York State Div. of Human Rights*, 126 AD3d 697, 698). SDHR "has broad discretion to determine the method to be employed in investigating complaints . . . , and its determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims" (*Matter of Cornelius v New York State Div. of Human Rights*, 286 AD2d 329, 329-330; *see generally Matter of Ramirez v New York State Div. of Human Rights*, 4 NY3d 789, 790).

In our view, SDHR's determination is not arbitrary or capricious, and it has a rational basis. The record establishes that petitioner "had a full and fair opportunity to present her case and that [SDHR's] investigation was neither abbreviated nor one-sided" (*Kim v New York State Div. of Human Rights*, 107 AD3d 434, 434, *lv denied* 21 NY3d 866; *see Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881, *lv denied* 22 NY3d 851). "Probable cause exists only when, after giving full credence to the [petitioner's] version of the events, there is some evidence of unlawful discrimination" (*Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725). Here, crediting petitioner's assertion that respondent intentionally assigned her to its athletic center knowing that the gym floor was being polyurethaned, we conclude that there is no evidence of unlawful discrimination, e.g., petitioner was not forced to stay at the athletic center against her will, nor was she disciplined for leaving work early. The Human Rights Law (Executive Law § 296 *et seq*.) and title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) "are textually similar and ultimately employ the same standards of recovery," and thus "federal case law in this area . . . proves helpful to the resolution of this appeal" (*Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 26). As the United States Court of Appeals for the Second Circuit has written, title VII "does not protect an employee from 'all retaliation,' but only 'retaliation that produces an injury or harm' " (*Tepperwien v Entergy Nuclear Operations, Inc.*, 663 F3d 556, 569 [2d Cir]; *see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-314), and here there was no injury or harm.

With respect to the issue of the security license lapse, we note that it does not appear from the record that respondent ever was in possession of petitioner's training certificate. In any event, the record establishes that respondent provided petitioner with an opportunity to rectify the situation, and petitioner was suspended without pay only when she failed to do so, consistent with

respondent's treatment of other security officers with lapsed licenses.

Finally, we agree with respondent that there was no need for a hearing "because the record does not demonstrate the existence of unresolved questions that required further scrutiny" (*Matter of Orosz v New York State Div. of Human Rights*, 88 AD3d 798, 799). "[A]s long as the investigation is sufficient and the [petitioner is] afforded a full opportunity to present his [or her] claims, '[i]t is within the discretion of [SDHR] to decide the method or methods to be employed in investigating a claim' " (*Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 112). Here, SDHR contacted both petitioner and respondent and requested specified answers and documents related to petitioner's allegations, and "the conflicting evidence before SDHR did not create a material issue of fact that warranted a formal hearing" (*Matter of Hall v New York State Div. of Human Rights*, 137 AD3d 1583, 1584).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

496

CA 15-01767

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

SCOTT SCHAFFER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LORRAINE JASKOWIAK AND LEONARD J. JASKOWIAK (DECEASED), DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (ANDREW L. BOUGHRUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (DAVID M. HEHR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 14, 2015. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that said appeal insofar as it concerns defendant Leonard J. Jaskowiak (Deceased) is unanimously dismissed, that part of the order concerning that defendant is vacated and the complaint against that defendant is dismissed, and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of exposure to lead paint as a child while living in an apartment owned by Lorraine Jaskowiak (defendant) and Leonard J. Jaskowiak (decedent), who died in 1992. "Since '[a] party may not commence a legal action or proceeding against a dead person' . . . , the action [against decedent] was a nullity from its inception" (*Krysa v Estate of Qyra*, 136 AD3d 760, 760). "Under these circumstances, the order appealed from, insofar as it purports to affect [decedent], was a nullity and this Court has no jurisdiction to hear and determine that purported appeal" (*Jordan v City of New York*, 23 AD3d 436, 437). We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

508

KA 15-00422

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMMESOA M. WILLIAMS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 10, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon her conviction of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and imposing a determinate term of imprisonment, followed by a period of postrelease supervision. Defendant failed to preserve for our review her contention that her admission to the probation violations was not voluntary inasmuch as she failed "to move to withdraw [her] admission . . . or to vacate the judgment revoking the sentence of probation on that ground" (*People v Rodriguez*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 809; *see People v Carlisle*, 120 AD3d 1607, 1607, *lv denied* 24 NY3d 1082; *see generally People v Lopez*, 71 NY2d 662, 665-666). This case does not fall within the narrow exception to the preservation doctrine (*see Lopez*, 71 NY2d at 666), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention, in light of her numerous admitted violations, we conclude that the court did not abuse its discretion in revoking the sentence of probation and imposing a term of imprisonment followed by a period of postrelease supervision (*see e.g. People v White*, 75 AD3d 1003, 1003-1004, *lv denied* 15 NY3d 956). Although we agree with defendant that her waiver of the right to appeal encompasses the sentence of probation but does not encompass

her challenge to the sentence imposed following her violations of probation (*see People v Johnson*, 77 AD3d 1441, 1442, *lv denied* 15 NY3d 953; *People v Dexter*, 71 AD3d 1504, 1504-1505, *lv denied* 14 NY3d 887), we nevertheless reject her contention that the sentence is unduly harsh and severe. We perceive no basis upon which to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *see generally People v Handley*, 134 AD3d 1509, 1510).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

509

KA 13-01462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORTNEY J. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 29, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]). The charge arose from an incident during which defendant and an accomplice stole property at gunpoint from a store clerk. Although we agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the negotiated sentence "inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentence" (*People v Doblinger*, 117 AD3d 1484, 1485; *see People v Maracle*, 19 NY3d 925, 928), we conclude that the sentence is not unduly harsh or severe.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

512

KA 15-01365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. REGATUSO, II, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 13, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the seventh degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fine imposed for criminal possession of a controlled substance in the third degree under count 2 of the indictment and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, seven counts each of criminal sale of a controlled substance in the third degree (§ 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). County Court sentenced defendant as a second felony offender to concurrent determinate terms of incarceration, to be followed by a period of postrelease supervision, and imposed fines aggregating $25,500.

We reject defendant's contention that the certificates of conviction are at variance with the court's pronouncement of the sentence. The sentencing minutes reflect that the court imposed fines for certain offenses, and those fines were then aggregated and correctly recorded in the certificates of conviction. We reject

defendant's further contention that a court may not aggregate fines when it imposes concurrent terms of incarceration (*see e.g. People v Petell*, 128 AD3d 1283, 1283; *People v Miller*, 57 AD3d 1009, 1009-1010). We agree with defendant, however, that the fines are illegal to the extent the court imposed a fine on both a conviction for criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree that arose from a single act (*see* Penal Law § 80.15; *People v Wiley*, 67 AD3d 1370, 1372, *lv denied* 14 NY3d 845; *People v Atwood*, 2 AD3d 1331, 1332, *lv denied* 3 NY3d 636). We therefore modify the judgment in appeal No. 1 by vacating the fine imposed on count 2 of the indictment, and modify the judgment in appeal No. 2 by vacating the fines imposed on counts 3, 5, 7, 9, 11, 13, and 15 of the indictment.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

513

KA 15-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. REGATUSO, II, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 13, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (seven counts), criminal possession of a controlled substance in the third degree (seven counts) and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fines imposed for criminal possession of a controlled substance in the third degree under counts 3, 5, 7, 9, 11, 13, and 15 of the indictment and as modified the judgment is affirmed.

Same memorandum as in *People v Regatuso* ([appeal No. 1] ___ AD3d ___ [June 17, 2016]).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

515

KA 13-01689

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELFIN ELLIOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered September 5, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that County Court erred in denying those parts of his omnibus motion seeking to suppress physical evidence, including a handgun, and statements he made to the police following his arrest. We agree.

The evidence at the suppression hearing showed that, on the day before defendant’s arrest, two police officers recovered marihuana from a field near 17 Maria Street in the City of Rochester. The officers returned to that area the next day along with a police sergeant, and they observed a group of five or six men, who dispersed upon their approach. The sergeant saw defendant “quickly grab near his waistband area” and enter the front passenger seat of a nearby sport utility vehicle, where the sergeant saw defendant bend over, “as if [defendant] was putting something underneath the seat.” The sergeant left his patrol car and approached defendant with his service weapon drawn, demanding to see defendant’s hands. The sergeant asked

defendant what he had put under his seat, and defendant responded that he had placed a quantity of marihuana under the seat. Defendant was ordered out of the car and arrested after the sergeant found marihuana under the front passenger seat. Upon a subsequent pat-down search of defendant's person, a loaded handgun was recovered from his waistband.

The People concede that the sergeant's encounter with defendant constituted a level three forcible detention under *People v De Bour* (40 NY2d 210, 223), and thus required "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" (*People v Moore*, 6 NY3d 496, 499). "[A]ctions that are at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality" (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844 [internal quotation marks omitted]; *see People v Mobley*, 120 AD3d 916, 918).

We agree with defendant that the arresting sergeant lacked the requisite reasonable suspicion. There is no evidence in the record that the sergeant was informed of the recovery of marihuana in the area the day before defendant's arrest, and defendant's actions in merely "grabbing" at his waistline and bending down to the floor of the vehicle, without more, were insufficient to provide the sergeant with the requisite suspicion that defendant committed a crime, and to justify defendant's gunpoint detention (*see Mobley*, 120 AD3d at 918; *People v Cady*, 103 AD3d 1155, 1156; *Riddick*, 70 AD3d at 1422-1423; *People v Guzman*, 153 AD2d 320, 323). Inasmuch as the forcible detention of defendant was unlawful, the handgun and other physical evidence seized by the police, and the statements made by defendant to the police following the unlawful seizure, should have been suppressed. As a result, defendant's guilty plea must be vacated and the indictment dismissed, and we remit the matter to County Court for proceedings pursuant to CPL 470.45 (*see Mobley*, 120 AD3d at 918-919).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

521

CAF 15-00017

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

IN THE MATTER OF JOSEPH CLARK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TARA HAWKINS, RESPONDENT-APPELLANT.

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

NOEMI FERNANDEZ, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered December 16, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' child to petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order awarding sole custody of the parties' child to petitioner father. The mother failed to preserve for our review her contention that Family Court erred in admitting in evidence at the custody hearing an audio recording of a telephone conversation between the parties that the father had secretly recorded. Although the mother's counsel initially objected to the recording's admission, counsel withdrew the objection after the court adjourned the matter so that counsel could research the issue. The mother also failed to preserve her further contention that the court erred in admitting in evidence an audio recording of a telephone call the father made to 911, during which the father told the 911 dispatcher that the mother was trying to take the child without his permission. In fact, when the father's counsel offered the recording in evidence, the mother's counsel stated "I have no objection, Your Honor." The Attorney for the Child (AFC) also had no objection to the second audio recording. In any event, we conclude that the court properly admitted both recordings.

The remaining evidentiary-based contention advanced by the mother is that the court erred in admitting in evidence a sworn statement given to the police by her adult daughter concerning an incident that occurred between the parties at the daughter's house. Although the mother correctly concedes that the daughter's testimony at the custody hearing was inconsistent with parts of her sworn statement, she

contends that the statement should not have been admitted because the daughter acknowledged that she gave the statement to the police and testified that everything in the statement was true (*see generally People v Buffington*, 29 AD2d 229, 231-232). Even assuming, arguendo, that the court erred in admitting the written statement, such error is harmless considering that the inconsistent statements were explored by the father's counsel during his cross-examination of the daughter, and the evidence was not particularly prejudicial to the mother (*see generally Beth M. v Susan T.*, 81 AD3d 1396, 1396). Moreover, there is ample other evidence in the record supporting the court's custody determination (*see Matter of Saletta v Vecere*, 137 AD3d 1685, 1685-1686).

Finally, according deference to the hearing court's assessment of witness credibility, we conclude that there is a sound and substantial basis in the record for awarding custody of the child to the father with visitation to the mother (*see Matter of DeNise v DeNise*, 129 AD3d 1539, 1540; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172–174).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

524

CA 15-01750

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

IN THE MATTER OF KENNETH M. BUTKOWSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRENDAN J. KIEFER, AS CHIEF OF VILLAGE OF
KENMORE FIRE DEPARTMENT, AND VILLAGE OF
KENMORE, RESPONDENTS-RESPONDENTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MARK A. MOLDENHAUER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 7, 2015 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the amended petition and dismissed the amended petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the amended petition is reinstated, and the amended petition is granted.

Memorandum: On March 5, 2014, petitioner commenced this proceeding seeking an order directing respondents to reinstate him to his part-time firefighter position with the Village of Kenmore Fire Department, together with back pay and benefits. By letter dated November 13, 2013, respondent Village of Kenmore advised petitioner that his employment was terminated, effective that day, because his certification as a first responder or as an emergency medical technician had expired. Pursuant to CPLR 7804 (f), respondents moved to dismiss the amended petition on various grounds, and Supreme Court granted the motion on the ground that the proceeding was time-barred. That was error.

We agree with petitioner that this proceeding was in the nature of mandamus to compel inasmuch as he was entitled to a hearing pursuant to Civil Service Law § 75 (1) (c), but no such hearing was held (*see generally Matter of De Milio v Borghard*, 55 NY2d 216, 219). Respondents contend that no hearing was required because petitioner lacked a qualification for his employment, which is “separate and

distinct from an act of misconduct by a municipal employee in the performance of his or her work" (*Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498, 505; *see Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 282-283). In *Felix* and other cases relied upon by respondents, however, there was a local law, ordinance, or regulation setting forth the employment requirement (*see Felix*, 3 NY3d at 501-502 [local law]; *Matter of Stolzman v New York State Dept. of Transp.*, 68 AD3d 1331, 1332 [civil service classification standard], *lv denied* 14 NY3d 708; *Mandelkern v City of Buffalo*, 64 AD2d 279, 280 [ordinance]). Similarly, in *Lanterman*, the collective bargaining agreement set forth the credentials required of the employee (*id.* at 282-283). Here, respondents did not rely on any rule, ordinance, or regulation, but rather relied on a collective bargaining agreement that applied only to full-time firefighters, not to part-time firefighters such as petitioner. "[B]oth due process and fundamental fairness require that a qualification or requirement of employment be expressly stated in order for an employer to bypass the protections afforded by the Civil Service Law or a collective bargaining agreement and summarily terminate an employee" (*Matter of Lutz v Krokoff*, 102 AD3d 146, 149-150, *lv denied* 20 NY3d 860).

In a proceeding in the nature of mandamus to compel, the statute of limitations runs from the date the petitioner's demand for reinstatement is refused (*see De Milio*, 55 NY2d at 220). Petitioner's commencement of this CPLR article 78 proceeding constitutes such a demand (*see Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182-1183; *Matter of Thomas v Stone*, 284 AD2d 627, 628, *lv dismissed* 96 NY2d 935, *lv denied* 97 NY2d 608, *cert denied* 536 US 960), and therefore this proceeding is not barred by the statute of limitations. We reject respondents' alternative ground for affirmance (*see Matter of Harnischfeger v Moore*, 56 AD3d 1131, 1131-1132; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), i.e., that service of the petition and notice of petition was untimely pursuant to CPLR 306-b. We construe respondents' motion to dismiss as a refusal of petitioner's demand for reinstatement (*see generally Thomas*, 284 AD2d at 628), which began the running of the statute of limitations. Thus, at the time respondents made their motion, petitioner still had time to serve his pleadings within the time limits of CPLR 306-b.

We reject respondents' further alternative ground for affirmance that this proceeding is barred by the doctrine of laches. A petitioner may not unreasonably delay in making a demand or the proceeding will be barred by laches (*see Speis*, 114 AD3d at 1182; *Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839). Inasmuch as petitioner commenced this proceeding less than four months after he was terminated and the right to make the demand for reinstatement arose, we conclude that respondents' contention is without merit (*cf. Thomas*, 284 AD2d at 628; *Densmore*, 265 AD2d at 839).

Finally, respondents contend as another alternative ground for

affirmance that the amended petition should be dismissed because the determination to terminate petitioner was not arbitrary and capricious or contrary to law. We reject that contention, and we conclude that the termination of petitioner without a hearing is arbitrary and capricious (*see Lutz*, 102 AD3d at 150). Ordinarily, when a motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms as may be just" (CPLR 7804 [f]). Where, however, the "facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer," a remittal to allow the respondent to file an answer is not necessary (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY3d 100, 102; *see Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944). Upon examining the submissions of the parties, we conclude that there exists no issue " 'which might be raised by answer concerning the merits of the petitioner's application' " (*Matter of Julicher v Town of Tonawanda*, 34 AD3d 1217, 1217; *see Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1310-1311; *cf. Matter of Timmons v Green*, 57 AD3d 1393, 1394-1395). Indeed, counsel for respondents indicated during oral argument of this appeal that it would be appropriate for this Court to render a decision on the merits if we disagreed with their contentions raised on the appeal, and counsel did not request an opportunity to submit an answer. We therefore reverse the judgment and grant the amended petition seeking reinstatement, as well as back pay and benefits, to the date of the commencement of this proceeding (*see Matter of Diggins v Honeoye Falls-Lima Cent. Sch. Dist.*, 50 AD3d 1473, 1474).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

529

KA 13-01457

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT D. STANLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 1, 2013. The appeal was held by this Court by order entered May 8, 2015, decision was reserved and the matter was remitted to Genesee County Court for further proceedings (128 AD3d 1472). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: We previously held this case, reserved decision, and remitted the matter for County Court to conduct a hearing to determine whether defendant lied to the probation officer during his interview for the presentence report (PSR), thereby violating a condition of his sentence promise and authorizing the court to impose an enhanced sentence (*People v Stanley*, 128 AD3d 1472). This case is before us again following remittal.

The probation officer who prepared defendant's PSR testified at the hearing that, at the outset of the interview, he asked defendant to describe the nature of his sexual offenses. In response, defendant accurately described his conduct with respect to one of the two victims, admitting that he repeatedly had sexual intercourse with her while she was less than 13 years old. With respect to the other victim, however, defendant said that he merely touched the victim's breasts and did not go further because he could tell that she was uncomfortable. Defendant further said that the incident with the second victim was a "one-time thing." Considering that defendant admitted under oath when he pleaded guilty that he had sexual intercourse with both victims, we agree with the court that defendant lied to the probation officer when describing the nature of his

offenses, and that the court was therefore not bound by its sentence promise. As noted in our prior decision, the court made clear that its sentence promise was contingent upon, among other things, defendant truthfully answering any questions asked of him by the probation officer who prepared the PSR (*id.* at 1473).

We agree with defendant, however, that the enhanced sentence imposed by the court is unduly harsh and severe, and we therefore exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). Pursuant to the plea offer extended by the People, defendant was to be sentenced concurrently to an aggregate prison term of ten years, plus a period of postrelease supervision. At sentencing, the People initially requested the promised sentence. After an off-the-record conference at the bench, however, the prosecutor asked for an enhanced aggregate sentence of 15 years based on defendant's lie to the probation officer. The court eventually sentenced defendant to 22 years in prison, 12 more years than contemplated by the plea agreement and seven more than requested by the People. We conclude that, although defendant should suffer consequences for lying to the probation officer, an additional five years in prison is sufficient for that purpose. We therefore modify the sentences as a matter of discretion in the interest of justice by directing that they be served concurrently, rather than consecutively. The result is an aggregate prison term of 15 years, i.e., the sentence requested by the People.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

532

KA 12-00819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYNELL L. TISDALE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL LLP, NEW YORK CITY (CHRISTOPHER G. HORNIG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered March 15, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, unlawful possession of marihuana and consumption or possession of alcoholic beverages in certain motor vehicles.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion seeking to suppress physical evidence relating to the first and second counts of the indictment is granted, the first and second counts of the indictment are dismissed and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment of Supreme Court (Winslow, J.) convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), unlawful possession of marihuana (§ 221.05), and consumption or possession of alcoholic beverages in certain motor vehicles (Vehicle and Traffic Law § 1227 [1]). We agree with defendant that County Court (Geraci, J.) erred in refusing to suppress the cocaine recovered during an unlawful search of his person by the police.

According to the evidence presented at the suppression hearing, the police approached a vehicle parked more than 12 inches from the curb on a city street, which constitutes a traffic infraction. Upon observing two open bottles of beer in the center console, an officer directed defendant, who was in the front passenger seat, to exit the vehicle. Defendant complied, identifying himself and providing the officer with his name, address, and social security number. Noting

that defendant's left hand was clenched, the officer asked defendant to open that hand and, when defendant did so, the officer observed a dollar bill containing marihuana residue. The officer handcuffed defendant and asked him if there was anything on his person that could harm the officer. Defendant responded in the negative. When asked if he had any illicit substances on him, defendant directed the officer to the front pocket of his sweatpants, from which the officer pulled a small bag of marihuana. Defendant denied having any other contraband.

Without conducting any further pat down of defendant or gathering any other information, the officer untied the string holding up defendant's sweatpants, pulled the front of the sweatpants and defendant's underwear away from defendant's body, and looked down the front of defendant's body, past his genitals to his thighs. Observing no contraband, the officer directed defendant to lean over the rear of the vehicle, whereupon he pulled back defendant's sweatpants and underwear at the rear of defendant's body and observed a bag in the area "underneath" his buttocks. The officer retrieved the bag, which was later determined to contain crack cocaine. Another small bag containing crack cocaine was found by the officer in the same general area.

As the People correctly concede, the search performed by the officer constituted a strip search (*see People v Smith*, 134 AD3d 1453, 1454), which must be justified by "a reasonable suspicion that the arrestee is concealing evidence underneath clothing" (*People v Hall*, 10 NY3d 303, 310-311, *cert denied* 555 US 938). We conclude that the officer did not have the requisite reasonable suspicion. Defendant was fully cooperative with the officer, admitting his possession of marihuana and denying possession of any other contraband. There was no indication that defendant might be concealing any contraband under his clothing, and the mere fact that he possessed marihuana does not justify a strip search. Although the People assert that the search was justified because defendant appeared to be nervous about being searched, the record reflects that defendant became nervous only after the officer began to perform the strip search (*cf. People v Walker*, 27 AD3d 899, 900-901, *lv denied* 7 NY3d 764). We therefore reverse the judgment, vacate the plea, grant that part of defendant's motion seeking to suppress the cocaine, dismiss the first and second counts of the indictment, and remit the matter to Supreme Court for further proceedings on the remaining counts.

Frances E. Cafarell

Entered: June 17, 2016

Clerk of the Court

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

538

KA 14-00336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. HENDERSON, JR., DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered August 12, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oswego County Court for a reconstruction hearing.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]), defendant contends, inter alia, that his plea was involuntarily entered. The transcript of the plea proceeding is incomplete, however, and we are unable to determine the merits of his contentions on appeal. The plea proceeding was not transcribed by a court reporter; instead, it was digitally recorded, and numerous statements apparently made by defendant during the proceeding are designated as "inaudible" in the transcript before us. We therefore hold the case, reserve decision, and remit the matter to Oswego County Court for a reconstruction hearing with respect to the portions of the plea proceeding that were not transcribed because of the inaudibility of the digital recording (*see Matter of Naquan L.G. [Carolyn C.]*, 119 AD3d 567, 567-568).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

540

KA 14-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER L. WALTERS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ANTHONY M. ROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress the weapon found by the police in the pocket of a sweatshirt that they recovered from an unoccupied seat on a city bus. According to defendant, the weapon should be suppressed because he was illegally detained by police for 1½ hours before they arrested him for possession of the weapon. We reject defendant's contention. The record of the suppression hearing establishes that the police asked defendant to leave the bus because he matched the description provided by an identified complainant. Before the complainant arrived for a showup identification procedure, a police officer returned to the bus to look for a black sweatshirt, based on the description of the suspect's clothing that was provided by the complainant, and the sweatshirt was located in a seat that was in proximity to where defendant was seated. The officer observed the gun in the pocket when he picked up the sweatshirt. Following the complainant's identification of defendant as the man who boarded the bus with a gun, defendant was transported to police headquarters; however, he was not formally charged until the police had reviewed the videotape from the bus, which showed him removing the sweatshirt and changing seats after the bus had stopped and the police arrived.

The court properly determined that defendant abandoned the gun

following proper police conduct and thus that he lacked standing to seek suppression of that evidence (*see People v Stevenson*, 273 AD2d 826, 827; *see also People v Hall*, 152 AD2d 905, 905-906, *affd* 74 NY2d 822; *see generally People v Ramirez-Portoreal*, 88 NY2d 99, 110). In any event, contrary to defendant's contention, the 1½ hour detention during which the police obtained the videotape does not constitute an illegal detention (*cf. People v Ryan*, 12 NY3d 28, 30-31). Indeed, the police had probable cause to arrest defendant at the scene following the positive identification of defendant and the seizure of the weapon (*see People v Williams*, 129 AD3d 1583, 1584, *lv denied* 26 NY3d 973; *cf. Ryan*, 12 NY3d at 30).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

543

CAF 15-00550

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

IN THE MATTER OF JOSHUA T.N., JUSTIN W.N., AND TAWNY L.M.

---------- MEMORANDUM AND ORDER

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

TOMMIE M., JR., RESPONDENT-APPELLANT.

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

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

V. BRUCE CHAMBERS, ATTORNEY FOR THE CHILDREN, NEWARK.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered March 13, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that terminated his parental rights with respect to the subject children on the ground of permanent neglect and transferred guardianship and custody of the children to petitioner. Contrary to the father's contention, we conclude that petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children, taking into consideration the particular problems facing the father and tailoring its efforts to assist him in overcoming those problems (*see* § 384-b [7] [a]; *cf. Matter of Olivia L.*, 41 AD3d 1226, 1226-1227). The evidence adduced at the fact-finding hearing established that petitioner, inter alia, scheduled regular visitation and referred the father to services designed to address his needs regarding his mental health, anger management, alleged substance abuse, and parenting skills. We reject the father's contention that petitioner could not engage in diligent efforts to reunite him with his children while simultaneously planning for the children's potential adoption (*see Matter of Anastasia S. [Michael S.]*, 121 AD3d 1543, 1544, *lv denied* 24 NY3d 911; *see generally Matter of Maryann Ellen F.*, 154 AD2d 167, 169-170, *appeal dismissed* 76 NY2d 773).

We also reject the father's contention that petitioner did not prove that he failed to plan for the children's future, " 'including that [he failed to] address[ ] the problems that caused the removal' of the child[ren]" (*Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374, *lv denied* 15 NY3d 708). Although the father took advantage of some of the services offered by petitioner, petitioner demonstrated that, among other things, the father "inconsistently appl[ied] the knowledge and benefits [he] obtained from the services provided," continued to "act[ ] inappropriately in the child[ren]'s presence" (*Matter of Douglas H. [Catherine H.]*, 1 AD3d 824, 825, *lv denied* 2 NY3d 701), and on occasion failed to cooperate with representatives of petitioner despite a prior order directing that he do so. We therefore conclude that petitioner demonstrated by clear and convincing evidence "that the father 'failed to address successfully the problems that led to the removal of the child[ren] and continued to prevent the child[ren]'s safe return' " (*Matter of Justain R. [Juan F.]*, 93 AD3d 1174, 1175; *see Matter of Nathaniel T.*, 67 NY2d 838, 841-842).

Finally, the father failed to preserve for our review his contention that Family Court abused its discretion in failing to issue a suspended judgment (*see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315, *lv denied* 25 NY3d 909). In any event, a suspended judgment was not warranted under the circumstances, despite the father's participation in services, inasmuch as the father did not, in the two years between the removal of the children and the filing of the permanent neglect petition, make any progress " 'sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Donovan W.*, 56 AD3d 1279, 1280, *lv denied* 11 NY3d 716).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

547

CA 15-01795

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

PATRICIA KAREN KILLIAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAPTAIN SPICER'S GALLERY, LLC, SPICER HOLDINGS, LLC, KENNETH A. HOOSON AND GREGORY K. HOOSON, DEFENDANTS-RESPONDENTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered April 13, 2015. The order, among other things, granted defendants' motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the first cause of action against defendant Captain Spicer's Gallery, LLC for the six-year period before the filing of the complaint insofar as it seeks compensation in the nature of wages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking unpaid wages and reimbursement of certain credit card charges and funds she advanced while she was the manager of a gift shop owned by defendant Captain Spicer's Gallery, LLC (Gallery). The complaint, as amplified by plaintiff's responses to defendants' interrogatories, also sought damages for, inter alia, the use of a trademark allegedly registered to plaintiff. Plaintiff appeals from an order granting defendants' motion for partial summary judgment dismissing certain claims and denying her cross motion for partial summary judgment.

Plaintiff concedes that Supreme Court properly concluded that the statute of limitations barred all of her claims that accrued prior to August 2006, i.e., more than six years prior to the commencement of the action (*see generally* CPLR 213). She contends, however, that the court erred in dismissing those claims in their entirety rather than permitting them to be used to set off defendants' counterclaims. "Whether setoff is an affirmative defense (CPLR 3018 [b]) or is more akin to a counterclaim (CPLR 3019 [a]), the facts in support thereof must be pleaded in the" responsive pleading (*Kivort Steel v Liberty*

Leather Corp., 110 AD2d 950, 952). Plaintiff's failure to assert facts in support of her alleged right to a setoff in her reply constitutes a waiver of that right (*see Ellenville Natl. Bank v Freund*, 200 AD2d 827, 828; *Kivort Steel,* 110 AD2d at 952). Furthermore, even assuming, arguendo, that a setoff could be raised despite that waiver, we note that it is well settled that a time-barred claim may be used to set off another claim only to the extent that the two claims arise from the same incident or transaction (*see Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 791-792; *Robson & Miller, LLP v Sakow*, 121 AD3d 562, 563; *Matter of Watson*, 8 AD3d 1092, 1093-1094), which is not the case here.

Contrary to plaintiff's further contention, the court properly granted that part of defendants' motion with respect to the trademark infringement claim that was arguably raised in her third cause of action, as amplified by her responses to the interrogatories. "To prevail on [a trademark] infringement action, . . . plaintiff must demonstrate: (1) 'that [she] has a valid mark entitled to protection,' and (2) 'that the defendant[s'] use of that mark is likely to cause confusion' " (*Juicy Couture, Inc. v Bella Intl. Ltd.*, 930 F Supp 2d 489, 498 [SD NY], quoting *Time, Inc. v Petersen Publ. Co. LLC*, 173 F3d 113, 117 [2nd Cir]; *see Van Praagh v Gratton*, 993 F Supp 2d 293, 301 [ED NY]). Initially, we note that, as discussed above and conceded by plaintiff, this claim is time-barred insofar as it seeks recovery for events occurring more than six years prior to the filing of the complaint. With respect to that part of the claim that seeks recovery for events allegedly occurring within the six-year period prior to filing, defendants met their burden of establishing that plaintiff's trademark was not valid because it had been cancelled before that time, and plaintiff failed to raise a triable issue of fact whether she "has a valid mark entitled to protection" (*Time, Inc.*, 173 F3d at 117 [internal quotation marks omitted]).

We agree with plaintiff, however, that the court erred in granting that part of defendants' motion with respect to the first cause of action as asserted against the Gallery insofar as she sought damages in the nature of unpaid wages for the six years prior to the filing of the complaint. We therefore modify the order accordingly. "In order to make out a cause of action in quantum meruit or quasi contract, a plaintiff must establish (1) the performance of services in good faith; (2) the acceptance of those services by the person [or entity] to whom [or which] they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*Landcom, Inc. v Galen-Lyons Joint Landfill Commn.*, 259 AD2d 967, 968). " '[T]he performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services' " (*Farina v Bastianich*, 116 AD3d 546, 547-548; *see Matter of Adams*, 1 AD2d 259, 262, *affd* 2 NY2d 796). Here, the court concluded that no such inference could be drawn, based on its further conclusion that, " 'because of the relationship between the parties, it is natural that such service[s] should be rendered without expectation of pay' " (*Moors v Hall*, 143 AD2d 336, 338, quoting *Robinson v Munn*, 238 NY 40, 43; *see Matter of Alu*, 302 AD2d 520, 520). Although defendants met their initial burden on the motion by

establishing that such a relationship existed between plaintiff and defendant Kenneth A. Hooson, the principal of the Gallery, we conclude that plaintiff raised a triable issue of fact whether "she expected to be paid for the services" despite that relationship and, if so, whether that expectation was reasonable (*Moors*, 143 AD2d at 338; *see Alu*, 302 AD2d at 520), i.e., whether the employee services for which plaintiff seeks recovery are not the type of "personal services between unmarried persons living together" for which there would not be an expectation of repayment (*Morone v Morone*, 50 NY2d 481, 489; *see generally Umscheid v Simnacher*, 106 AD2d 380, 382-383).

Plaintiff further contends that the court erred in granting that part of defendants' motion with respect to the remainder of the first cause of action, i.e., the non-time-barred claims seeking reimbursement for loans she allegedly made to the Gallery and for merchandise that she allegedly purchased for sale in the Gallery using her personal credit card. Defendants moved for summary judgment dismissing those claims based on several theories, including that they were barred by the statute of frauds, and the court granted that part of defendants' motion with respect to those claims based on the statute of frauds. Plaintiff failed to address that ground in her brief on appeal, however, "and thus any issue with respect to that part of the order is deemed abandoned" (*Razey v Wacht*, 281 AD2d 941, 942, citing *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

548

CA 15-01862

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

IN THE MATTER OF WELLSVILLE CITIZENS FOR RESPONSIBLE DEVELOPMENT, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., WAL-MART REAL ESTATE BUSINESS TRUST, WAL-MART STORES EAST, LP, TOWN OF WELLSVILLE, TOWN BOARD OF TOWN OF WELLSVILLE, DEAN ARNOLD, IN HIS OFFICIAL CAPACITY AS HIGHWAY SUPERINTENDENT OF TOWN OF WELLSVILLE, RESPONDENTS-RESPONDENTS, VILLAGE OF WELLSVILLE, ET AL., RESPONDENTS.

PARKER R. MACKAY, KENMORE, FOR PETITIONER-APPELLANT.

MANATT, PHELPS & PHILLIPS, LLP, NEW YORK CITY (KENNETH D. FRIEDMAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS WAL-MART STORES, INC., WAL-MART REAL ESTATE BUSINESS TRUST, AND WAL-MART STORES EAST, LP.

LAW OFFICES OF HUTTER & FINN, WELLSVILLE (MICHAEL B. FINN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF WELLSVILLE, TOWN BOARD OF TOWN OF WELLSVILLE, AND DEAN ARNOLD, IN HIS OFFICIAL CAPACITY AS HIGHWAY SUPERINTENDENT OF TOWN OF WELLSVILLE.

Appeal from a judgment (denominated order) of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered June 12, 2015 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the resolution of respondent Town Board of Town of Wellsville (Town Board) adopting a negative declaration pursuant to the State Environmental Quality Review Act ([SEQRA] ECL article 8) with respect to the proposed construction of a Wal-Mart Supercenter (hereafter, project) in respondent Town of Wellsville (Town). We agree with petitioner that the Town Board failed to take the requisite hard look at the impact of the project on wildlife, the community character of respondent Village of Wellsville (Village) and surface water, and thus that Supreme Court erred in denying the petition.

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1313 [internal quotation marks omitted]; *see Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348). In determining whether the substantive requirements of SEQRA were met, the scope of judicial review is "limited to whether the lead agency . . . identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Mombaccus Excavating, Inc. v Town of Rochester, N.Y.*, 89 AD3d 1209, 1210, *lv denied* 18 NY3d 808 [internal quotation marks omitted]). However, "where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified" (*Vallone*, 100 NY2d at 348).

We initially reject petitioner's two contentions based on alleged procedural violations. First, we reject petitioner's contention that the Town Board improperly failed to complete part 3 of the environmental assessment form (EAF). As long as the factors set forth in part 3 of the EAF are addressed by the lead agency in its environmental review of the project, there is no need to complete part 3, or to nullify the negative declaration if the lead agency fails to do so (*see Matter of Residents Against Wal-Mart v Planning Bd. of Town of Greece*, 60 AD3d 1343, 1344, *lv denied* 12 NY3d 715). Here, because the Town Board addressed each of the potentially moderate-to-large impacts identified in part 2 of the EAF, the negative declaration need not be annulled because of the Town Board's failure to fill out the EAF part 3 form. We also reject petitioner's contention that the Town Board's failure to notify the Planning Board of the Town of Wellsville before assuming lead agency status requires nullification of the negative declaration. Under the circumstances of this case, any failure of the Town Board in that regard was "inconsequential" (*Matter of King v County of Monroe* [appeal No. 2], 255 AD2d 1003, 1004, *lv denied* 93 NY2d 801).

With respect to the substantive contentions of petitioner based on the Town Board's alleged failure to take a hard look at several relevant impacts of the project, we first reject petitioner's contention that the Town Board failed to take a hard look at the impact of the project on traffic. The Town Board reviewed two extensive traffic impact studies and a supplemental traffic impact study and, although there were modifications to the project after the supplemental traffic impact study was approved by the New York State Department of Transportation, the "overall result of the modifications in their final form did not significantly change the total square footage of building area . . . [or] the total size of parking and landscaped areas" (*Matter of Monteiro v Town of Colonie*, 158 AD2d 246, 249; *see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 233-234). Contrary to petitioner's further contention, any alleged shortcomings in the Town Board's review of plans to provide additional access to the Supercenter via a road called Airway Drive do not require the conclusion that the Town Board

failed to take a hard look at the impact of the project on traffic (*see Matter of Terrace Manor Civic Assn. v Town of N. Hempstead*, 301 AD2d 534, 535).

We agree with petitioner, however, that the Town Board failed to take the requisite hard look at the impact of the project on wildlife, the community character of the Village, and surface water, and that the resolution adopting the negative declaration must therefore be annulled. With respect to wildlife, the Town Board was apparently made aware in March 2014 that birds listed as "threatened" and of "special concern" by the New York State Department of Environmental Conservation (DEC), and listed on a "watch list" by the New York Natural Heritage Program (NHP), had been spotted on the project site. An ecological evaluation of the project site provided to the Town Board in August 2014, shortly before the negative declaration was issued, further noted that the area surrounding the project site is a habitat for "a myriad of songbirds and some raptors." Despite that knowledge, the Town Board, in making its determination that the project would have no significant impact on wildlife, merely relied on letters from NHP and the U.S. Fish and Wildlife Service indicating that those agencies did not have any records of any endangered or threatened species on the project site. The letter from NHP specifically warned, however, that the information therein "should not be substituted for on-site surveys that may be required for environmental impact assessment." The Town Board never undertook or demanded any such on-site surveys. Given the information received from the public that state-listed threatened species might be present on the project site and the failure of the Town Board to investigate the veracity of that information, we conclude that the Town Board failed to take a hard look at the impact of the project on wildlife, and the negative declaration with respect thereto was therefore arbitrary and capricious (*see Matter of Kittredge v Planning Bd. of Town of Liberty*, 57 AD3d 1336, 1337-1338; *Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1314-1315, *lv dismissed* 7 NY3d 803; *see generally Akpan v Koch*, 75 NY2d 561, 571).

With respect to the "community character" of the Village, we note that SEQRA defines "environment" as "the physical conditions which will be affected by a proposed action, including . . . existing community or neighborhood character" (ECL 8-0105 [6]), and "require[s] a lead agency to consider more than impacts upon the physical environment," including "the potential displacement of local residents and businesses" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 366). Therefore, contrary to the Town Board's apparent conclusion, "[a] town . . . board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development" (SEQR Handbook, at 179 [3d ed 2010]; *see Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 94-95, *lv dismissed* 12 NY3d 793, 15 NY3d 817; *Matter of Wal-Mart Stores v Planning Bd. of Town of N. Elba*, 238 AD2d 93, 98). Because there is no evidence in the record before us that the Town Board even considered the impact of the

project on the community character of the Village, we conclude that it failed to take a hard look at that impact, requiring annulment of the resolution adopting the negative declaration on that ground as well.

Finally, with respect to the impact of the project on surface water, we conclude that the Town Board erred in failing to consider the surface water impact of the entire project. While the Town Board considered surface water impacts relating to the footprint of the Supercenter and related areas, the project documents submitted to the Town Board make clear that the reconstruction of four golf course holes on a golf course adjacent to the project is a central part of the project, and the DEC specifically directed that the environmental assessment of the project include consideration of that reconstruction. Because the surface water studies presented to the Town Board did not include an analysis of the potential surface water impact of the golf course reconstruction portion of the project, and the record does not demonstrate that the Town Board otherwise considered that impact, we conclude that the Town Board failed to undertake the requisite hard look at the potential surface water impact of the entire project (*see Matter of Long Is. Pine Barrens Socy. v Town Bd. of Town of Riverhead*, 290 AD2d 448, 448-449, *lv denied* 98 NY2d 615). Thus, annulment of the Town Board's resolution adopting the negative declaration also is required on that ground.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

560

KA 14-00979

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEED JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 3, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the first degree (§ 120.25). We reject defendant's contention that the evidence is legally insufficient to support the conviction. "It is well settled that, even in circumstantial evidence cases, the standard of appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [internal quotation marks omitted]). Here, "the element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . [one of the shooters]" (*People v Daniels*, 125 AD3d 1432, 1433, *lv denied* 25 NY3d 1071, *reconsideration denied* 26 NY3d 928). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to defendant's contention that he was deprived of effective assistance of counsel, we note at the outset that, so long as "the evidence, the law, and the circumstances of a particular case,

viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," counsel's performance will not be found ineffective (*People v Baldi*, 54 NY2d 137, 147). Applying that standard, we conclude that defendant's contention is without merit. First, although counsel failed to request a circumstantial evidence charge, the court "otherwise properly instructed the jury with respect to the burden of proof" (*People v Torturica* [appeal No. 2], 23 AD3d 1040, 1041, *lv denied* 6 NY3d 819), and we conclude that the absence of a complete circumstantial evidence charge "did not deprive defendant of a fair trial or affect the outcome" (*People v Way*, 115 AD3d 558, 558-559, *lv denied* 24 NY3d 1048). Second, defendant failed to meet his burden of establishing that counsel was ineffective with respect to the court's suppression ruling covering certain identification evidence. In our view, counsel made every effort to suppress the identification evidence and, inasmuch as it eventuated that such evidence was not introduced at trial, we see no basis for faulting counsel's performance (*see People v Lott*, 55 AD3d 1274, 1275, *lv denied* 11 NY3d 898, *reconsideration denied* 12 NY3d 760).

Third, contrary to defendant's contention, defense counsel in fact challenged the introduction in evidence at trial of defendant's grand jury testimony. In any event, "defendant's waiver of immunity before his appearance in the [g]rand [j]ury contemplated the utilization of his testimony in any later proceeding in which it became material" (*People v Thomas*, 300 AD2d 1034, 1035, *lv denied* 99 NY2d 633 [internal quotation marks omitted]). Similarly, defendant's fourth and final ground for alleging ineffective assistance of counsel is belied by the record inasmuch as counsel objected to the prosecutor's use of a PowerPoint slide presentation on summation. In any event, we conclude that County Court properly determined that the prosecutor's use of the slide presentation, as well as the attendant commentary thereon, was "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954 [internal quotation marks omitted]; *see People v Weaver*, 118 AD3d 1270, 1271, *lv denied* 24 NY3d 965).

Finally, the sentence is not unduly harsh or severe.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

566

CAF 15-00264

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

IN THE MATTER OF LINDSAY A. ESPOSITO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW E. MAGILL, RESPONDENT-RESPONDENT.

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

THE WARD FIRM, PLLC, LIVERPOOL (MATTHEW E. WARD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

FARES A. RUMI, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered January 12, 2015 in proceedings pursuant to Family Court Act article 6. The order dismissed the petition dated September 8, 2014.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion and dismissing the petition dated August 15, 2014, and as modified the order is affirmed without costs.

Memorandum: On August 15, 2014, petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking to modify the custody and visitation provisions of a stipulated order (hereafter, first petition). On September 8, 2014, the mother brought a second modification petition alleging, inter alia, that her driving had been restricted by her doctor and requesting that respondent father be ordered to meet her at a location closer to her residence to exchange the child for visitation (hereafter, second petition). Thereafter, the father filed a motion to dismiss the first petition on the ground that the mother had failed to allege a substantial change in circumstances. In a memorandum decision, Family Court granted that relief and also dismissed the second petition. The court's order, however, referenced only the dismissal of the second petition. The mother appeals.

As a preliminary matter, we note that where, as here, there is a conflict between the decision and order, the decision controls (*see Matter of Edward V.*, 204 AD2d 1060, 1061), and the order "must be modified to conform to the decision" (*Waul v State of New York*, 27 AD3d 1114, 1115; *see* CPLR 5019 [a]). We therefore modify the order by

granting the motion seeking to dismiss the first petition. We further note that the mother does not address the second petition on appeal, and that she has thus abandoned any contentions related thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to the mother's contention, the court properly granted the father's motion to dismiss the first petition without a hearing. " 'A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order' " (*Matter of Consilio v Terrigino*, 114 AD3d 1248, 1248). Here, the mother " 'failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing' " (*Matter of Fowler v VanGee*, 136 AD3d 1320, 1320; *see Matter of Warrior v Beatman*, 70 AD3d 1358, 1359, *lv denied* 14 NY3d 711).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

571

CA 15-01429

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

IN THE MATTER OF THE ESTATE OF ERNEST EARL COWELL, DECEASED.

---------- MEMORANDUM AND ORDER

ERNEST COWELL, FORMER ADMINISTRATOR OF THE ESTATE OF ERNEST EARL COWELL, DECEASED, APPELLANT;

TERRI ROSS, ALLEGANY COUNTY TREASURER, PUBLIC ADMINISTRATOR, GLORIA LOUK, ET AL., RESPONDENTS.

GERALD J. VELLA, SPRINGVILLE, FOR APPELLANT.

ALAN L. SPEARS, ALLEGANY, FOR RESPONDENTS GLORIA LOUK, WILLIAM H. COWELL, ALFRED COWELL, NORMAN COWELL, VIVIAN CARPENTER, DARLENE HALL, DIANE MORRISON, KATHY WHITE, CHARLES GEE AND PATRICIA LIBKA.

Appeal from an order of the Surrogate's Court, Allegany County (Thomas P. Brown, S.), entered October 15, 2014. The order denied the motion of appellant to confirm his bid for an oil and gas lease.

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

Memorandum: Ernest Cowell (appellant), the former administrator and one of the beneficiaries of the estate of Ernest Earl Cowell (decedent), appeals from an order that denied his motion to confirm his bid to purchase a certain oil and gas lease owned by the estate. The bidding process was purportedly settled by stipulation of settlement, the terms of which were placed on the record before Surrogate's Court. Appellant tendered a bid to purchase the lease pursuant to his understanding of the stipulation. The Surrogate, however, held that there was no enforceable stipulation. We affirm.

Contrary to appellant's contention, the stipulation of settlement placed on the record in open court did not bind the parties. First, the stipulation of settlement did not meet the requirement of being "definite and complete" inasmuch as some of its material terms were not finalized in open court (*Town of Warwick v Black Bear Campgrounds*, 95 AD3d 1002, 1003; *see Diarassouba v Urban*, 71 AD3d 51, 55-56, *lv dismissed* 15 NY3d 741). Second, and perhaps more important, the "[stipulation of] settlement was expressly conditioned" on counsel for all parties obtaining client approval in writing (*Rivera v Triple M. Roofing Corp.*, 116 AD2d 561, 561; *see Matter of Brooks v Brooks*, 255 AD2d 382, 382; *Batties v Solis*, 171 AD2d 529, 530; *cf. Bella Vista*

Dev. Corp. v Estate of Birnbaum, 85 AD2d 891, 891-892, *lv dismissed* 55 NY2d 608, 55 NY2d 1038). The record establishes, however, that appellant himself never fulfilled that condition by giving his approval in writing.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

577

KA 15-01152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KATHRYN V. SMITH, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Vincent M. Dinolfo, J.), rendered January 29, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, burglary in the second degree and robbery in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of burglary in the first degree (Penal Law § 140.30 [4]), burglary in the second degree (§ 140.25 [2]), and three counts of robbery in the second degree (§ 160.10 [1]). The charges arose from two residential burglaries committed by defendant, her boyfriend and several other accomplices, one of whom cooperated with the prosecution and testified against defendant at trial. 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). Defendant's contention is based largely on her assertion that the accomplice testimony is incredible as a matter of law. "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues in this case.

We reject defendant's further contention that she unequivocally invoked her right to remain silent and that County Court therefore erred in refusing to suppress her statements to the police. Affording deference to the court's determination, which is supported by the

record, and viewing defendant's alleged invocation of the right to silence in context, we conclude that defendant did not unequivocally invoke her right to silence (*see People v Zacher*, 97 AD3d 1101, 1101, *lv denied* 20 NY3d 1015). Defendant failed to preserve for our review her further contention that the court erred in instructing the jury with respect to the count of burglary in the first degree (*see* CPL 470.05 [2]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, because it was not legally impossible for the jury to convict her of burglary in the first degree and acquit her of robbery in the first degree, as charged by the court, the verdict with respect to those counts is not repugnant (*see People v Muhammad*, 17 NY3d 532, 539-540; *People v James*, 112 AD2d 380, 381-382).

Finally, contrary to defendant's contentions, the court did not abuse its discretion in refusing to afford her youthful offender status (*see People v Middlebrooks*, 25 NY3d 516, 527), and her sentence is not unduly harsh or severe.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

581

KA 12-01872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO FELICIANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 2, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress physical evidence, i.e., a handgun, and his statement to the police. We reject that contention. According to the evidence presented at the suppression hearing, a police officer received radio dispatches that shots had been fired and that an anonymous caller had reported that a male suspect on a bicycle was in possession of a handgun. Upon responding to the vicinity within minutes of receiving the dispatches, the officer observed defendant, who generally matched the description of the suspect, riding a bicycle on the street (*see generally People v Moczo*, 174 AD2d 365, 365, *lv denied* 78 NY2d 1013). The officer pulled alongside defendant in his police vehicle and, without exiting his vehicle, the officer asked defendant to "stop his bike for a moment." Contrary to defendant's contention, we conclude that "the information provided in the . . . dispatch[es] coupled with the officer['s] observations provided the [officer] with 'an objective, credible reason for initially approaching defendant and requesting information from him' " (*People v Burnett*, 126 AD3d 1491, 1492; *see generally People v Hollman*, 79 NY2d 181, 184; *People v De Bour*, 40 NY2d 210, 223). The conduct of the officer in asking defendant to stop his bicycle for a moment did not elevate the encounter beyond a level one intrusion (*see People v Reyes*, 83 NY2d 945, 946, *cert denied* 513 US 991; *People v Bent*, 206

AD2d 926, 926, *lv denied* 84 NY2d 906).

Contrary to defendant's further contention, the officer engaged in mere observation, and was not in pursuit, when he followed defendant after defendant ignored the officer's question and continued to ride away on the bicycle (*see People v Rainey*, 122 AD3d 1314, 1314-1315, *lv denied* 25 NY3d 1169; *see generally People v Howard*, 50 NY2d 583, 592, *cert denied* 449 US 1023). The testimony at the suppression hearing established that the officer's conduct was unobtrusive and did not limit defendant's freedom of movement (*see Rainey*, 122 AD3d at 1314-1315; *People v Mack*, 89 AD3d 864, 865, *lv denied* 18 NY3d 959). The court thus properly determined that defendant's subsequent act of reaching into his waistband, an area known to the officer to be used for concealing firearms, and appearing to discard an object therefrom was not in response to any illegal police conduct, that the officer's ensuing pursuit of defendant when he began to flee was lawful, and that the abandoned handgun was properly seized by the police (*see People v Bachiller*, 93 AD3d 1196, 1197-1198, *lv dismissed* 19 NY3d 861; *Mack*, 89 AD3d at 865; *People v Foster*, 302 AD2d 403, 404, *lv denied* 100 NY2d 581). Inasmuch as the officer's conduct was lawful, defendant's statement to the police is not subject to suppression as fruit of the poisonous tree (*see People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

582

KA 14-00981

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME INGRAM, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 12, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence is legally insufficient to establish his guilt and the verdict is against the weight of the evidence. We reject those contentions. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crime[] of which he was convicted based on the evidence presented at trial" (*People v Scott*, 93 AD3d 1193, 1194, *lv denied* 19 NY3d 967, *reconsideration denied* 19 NY3d 1001; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jurors failed to give the evidence the weight it should be accorded (*see People v Canfield*, 111 AD3d 1396, 1397, *lv denied* 22 NY3d 1087; *People v Ettleman*, 109 AD3d 1126, 1128, *lv denied* 22 NY3d 1198).

We agree with defendant, however, that reversal is required based on Supreme Court's refusal to charge criminal trespass in the second degree (Penal Law § 140.15 [1]) as a lesser included offense of

burglary in the second degree. Viewing the evidence in the light most favorable to defendant, as we must in this context (*see People v Randolph*, 81 NY2d 868, 869), we conclude that there is "a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater" (*People v Van Norstrand*, 85 NY2d 131, 135; *see People v Borges*, 90 AD3d 1067, 1069), i.e., that he did not intend to commit a crime when he entered the victim's apartment without her permission.

In light of our determination, we need not address defendant's remaining contentions, none of which, if meritorious, would result in dismissal of the indictment.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

583

KA 14-01638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOVAN L. BARKSDALE, DEFENDANT-APPELLANT.

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

JOVAN L. BARKSDALE, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Kenneth F. Case, J.), dated July 29, 2014. 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 summarily denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), contending in his main and pro se supplemental briefs that he was entitled to a hearing on his claim that he was deprived of effective assistance of counsel at trial. We reject that contention inasmuch as defendant's challenges to his attorney's performance were already raised on direct appeal and rejected by this Court (*People v Barksdale*, 129 AD3d 1497, 1498, *lv denied* 26 NY3d 926, *reconsideration denied* 26 NY3d 1007). Defendant was therefore not entitled to a hearing (*see People v Chelley*, 137 AD3d 1720, 1720-1721).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

587

CA 15-00173

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

IN THE MATTER OF ARRELLO BARNES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered December 1, 2014 in a CPLR article 78 proceeding. The judgment dismissed the amended petition.

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

Memorandum: Petitioner, an inmate in state prison, commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination that he violated inmate rule 105.13 (7 NYCRR 270.2 [B] [6] [iv]), which prohibits the possession of gang-related material. The charge was based on letters containing gang-related references that had been sent to petitioner. We reject petitioner's contention that the Hearing Officer was biased against him and thus that he was deprived of his right to an impartial hearing officer. Petitioner was afforded ample opportunity to present his defense, which was that he only recently received the letters in the mail and did not have time to destroy them before they were found in his cell by a correction officer. "[T]he fact that the Hearing Officer rejected petitioner's testimony is not indicative of bias, nor is there anything in the record supporting petitioner's claim that the determination flowed from any alleged bias" (*Matter of Bekka v Annucci*, 137 AD3d 1446, 1447; *see Matter of Jay v Fischer*, 118 AD3d 1364, 1364, *lv denied* 24 NY3d 975). We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

590

CA 15-01856

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

VINCENT J. COONS, PLAINTIFF-RESPONDENT,

V ORDER

PREMIER PARKS, INC. AND DARIEN LAKE THEME PARK AND CAMPING RESORT, INC., DEFENDANTS-APPELLANTS.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THOMAS J. RZEPKA, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), dated November 26, 2014. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

593

KA 14-01489

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AHKEEM HUFFMAN, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 4, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *People v Lococo*, 92 NY2d 825, 827).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

596

KA 13-01280

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BROOKS, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN T. LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 24, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [3]) and sentencing him as a persistent violent felony offender to an indeterminate term of incarceration of 25 years to life. Defendant failed to preserve for our review his claim pursuant to CPL 30.20 that he was denied a speedy trial inasmuch as he did not move in writing to dismiss the indictment on that ground (*see* CPL 210.20 [1] [g]; 210.45 [1]; *see also People v Chinn*, 104 AD3d 1167, 1169, *lv denied* 21 NY3d 1014). In any event, we conclude, upon our evaluation of the pertinent factors (*see generally People v Vernace*, 96 NY2d 886, 887; *People v Taranovich*, 37 NY2d 442, 445), that the contention lacks merit (*see People v Johnson*, 134 AD3d 1388, 1388-1390).

County Court properly denied defendant's motion to dismiss the indictment on the ground that he was shackled while testifying before the grand jury. Although "a criminal defendant may not be physically restrained in the presence of a [grand] jury unless there is a rational basis, articulated on the record, for the restraint (*see People ex rel. Washington v Johnson*, 79 NY2d 934, 935; *People v Mendola*, 2 NY2d 270, 275)" (*People v Felder* [appeal No. 2], 201 AD2d 884, 885, *lv denied* 83 NY2d 871), reversal is not required here inasmuch as "the prosecutor twice gave cautionary instructions to the [g]rand [j]ury, which dispelled any prejudice that may have resulted" (*Felder*, 201 AD2d at 885). Moreover, the overwhelming nature of the

evidence adduced before the grand jury eliminated the possibility that defendant was prejudiced as a result of the improper shackling (*see People v Morales*, 132 AD3d 1410, 1410; *People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995; *see generally People v Huston*, 88 NY2d 400, 409).

The court did not err in granting defendant's request to represent himself at trial. "A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17). Here, the court conducted the requisite "searching inquiry" to "ensure that the defendant's waiver [was] knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385; *see People v Crampe*, 17 NY3d 469, 481-482, *cert denied sub nom. New York v Wingate*, ___ US ___, 132 S Ct 1746). Moreover, the court further inquired sufficiently to ensure that defendant "was aware of the dangers and disadvantages of proceeding without counsel" (*People v Providence*, 2 NY3d 579, 582 [internal quotation marks omitted]; *see Crampe*, 17 NY3d at 481-482).

Viewing the evidence in light of the elements of the crime of assault in the second degree 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). We note, specifically, that the verdict is not against the weight of the evidence with respect to whether defendant caused a physical injury to the correction officer, nor with respect to whether defendant intended to prevent the correction officer from performing a lawful duty (*see People v Pena*, 129 AD3d 600, 600, *lv denied* 26 NY3d 933; *see generally Danielson*, 9 NY3d at 348-349).

Finally, we conclude that, in light of defendant's history of violent crimes and his conduct in this case, the sentence imposed is not unduly harsh or severe.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

597

KA 14-01246

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. KOPPER, ALSO KNOWN AS SCOTT KOPPER, ALSO KNOWN AS SCOTT ANTHONY KOPPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 23, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]). Contrary to defendant's contention, he knowingly, voluntarily, and intelligently waived his right to appeal, and his valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). County Court advised defendant at the time of the waiver of the potential maximum term of incarceration, and thus the waiver encompasses defendant's present challenge to the severity of the sentence (*see Lococo*, 92 NY2d at 827).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

598

KA 14-01532

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY V. MALONEY, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), entered May 15, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that, upon his admission that he violated the terms and conditions of probation, revoked the sentence of probation imposed upon his conviction of, inter alia, vehicular manslaughter in the first degree (Penal Law § 125.13 [6]) and vehicular assault in the first degree (§ 120.04 [6]), and sentenced him to terms of imprisonment. We agree with defendant that his waiver of the right to appeal does not encompass the sentence imposed following his admission that he violated the terms and conditions of his probation because County Court failed to engage him " 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 96 NY2d 767; *see generally People v Lopez*, 6 NY3d 248, 256). We nevertheless reject defendant's contention that the sentence imposed upon his violation of probation is unduly harsh and severe. We note that the certificate of conviction incorrectly states that defendant was convicted of vehicular manslaughter in the second degree and must therefore be corrected to reflect that he was convicted of vehicular manslaughter in the first degree (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

599

KA 14-00470

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE J. STITT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 12, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree and robbery 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 his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]) and robbery in the third degree (§ 160.05). We reject defendant's contention that Supreme Court erred in failing to consider adequately his eligibility for youthful offender treatment (*see generally People v Middlebrooks*, 25 NY3d 516, 525-527; *People v Rudolph*, 21 NY3d 497, 499-501). At sentencing, the court denied defendant's request for youthful offender treatment, and attributed the denial to the seriousness of the crimes, defendant's prior legal history, and defendant's failure to take responsibility for his actions. The court's remarks establish that it "made an independent determination" whether to adjudicate defendant a youthful offender (*People v Richardson*, 128 AD3d 988, 989, *lv denied* 25 NY3d 1206; *see People v Fate*, 117 AD3d 1327, 1329, *lv denied* 24 NY3d 1083; *see generally People v Jackson*, 119 AD3d 1361, 1361-1362, *lv denied* 23 NY3d 1063), and that it did not deny defendant's request merely because defendant had been convicted of an armed felony (*cf. Middlebrooks*, 25 NY3d at 525-526), or in deference to the plea agreement (*cf. Rudolph*, 21 NY3d at 501; *People v Potter*, 114 AD3d 1183, 1184).

We recognize that the court did not explicitly address the threshold issue whether defendant was an eligible youth notwithstanding his conviction of an armed felony (*see* CPL 720.10 [2]

[a] [ii]; [3]), and that, in general, a court sentencing a defendant whose only barrier to youthful offender eligibility is his or her conviction of an armed felony "is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)" (*Middlebrooks*, 25 NY3d at 527). In our view, however, a court in an armed felony case can satisfy its obligation under *Middlebrooks* by declining to adjudicate the defendant a youthful offender after consideration on the record of factors pertinent to a determination whether an eligible youth should be adjudicated a youthful offender (*see id.* at 527; *People v Thomas R.O.*, 136 AD3d 1400, 1402), thereby demonstrating that it implicitly resolved the threshold issue of eligibility in the defendant's favor (*cf. People v Lowe*, 25 NY3d 516, 521 n 1), or assumed, arguendo, that the defendant was an eligible youth (*see e.g. People v Lewis*, 128 AD3d 1400, 1400, *lv denied* 25 NY3d 1203). We therefore conclude that the record here "belies defendant's contention that the court [erred in failing] to determine whether he was eligible for youthful offender status" (*People v Michael A.C.* [appeal No. 2], 128 AD3d 1359, 1360, *lv denied* 25 NY3d 1168; *cf. People v Melendez*, 132 AD3d 471, 471).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

602

KA 14-00190

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL F. SPRAGUE, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 22, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (28 counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Genesee County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him of 28 counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends, inter alia, that County Court erred in failing to grant his motion for a trial order of dismissal. In accordance with *People v Concepcion* (17 NY3d 192, 197-198) and *People v LaFontaine* (92 NY2d 470, 474, *rearg denied* 93 NY2d 849), we do not address that contention inasmuch as " 'we cannot deem the court's failure to rule on the . . . motion as a denial thereof' " (*People v White*, 134 AD3d 1414, 1415). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on the motion.

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

603

KA 15-00261

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK KREBBEKS, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered January 6, 2015. The judgment convicted defendant, after a nonjury trial, of falsifying business records in the first degree, making a punishable false written statement, and falsely reporting an incident 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 following a bench trial of falsifying business records in the first degree (Penal Law § 175.10), making a punishable false written statement (§ 210.45), and falsely reporting an incident in the third degree (§ 240.50 [3] [a]). We reject defendant's contention that the evidence is not legally sufficient to support those convictions. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by County Court with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495; *see generally People v Danielson*, 9 NY3d 342, 349).

With respect to the count of falsifying business records in the first degree, the evidence established that, at a bank, defendant completed and signed a form wherein he alleged that another individual had used his debit card without his permission and made a series of unauthorized withdrawals from an ATM machine. Photographic evidence taken at the ATM machine from the dates and times reported on the form established that defendant himself made the alleged unauthorized withdrawals. Thus, the evidence established that defendant "inten[ded] to commit" the crime of larceny by seeking reimbursement for overdraft fees associated with those transactions (Penal Law

§ 175.10).

With respect to the counts charging him with making a punishable false written statement and falsely reporting an incident in the third degree, we reject defendant's contention that the evidence is legally insufficient with respect to the element of knowledge. Defendant was directed by bank personnel that he must file a criminal complaint in order to recover overdraft fees he claimed were generated by the unauthorized transactions, and the court was entitled to credit the testimony of the People's witnesses, and not defendant's testimony, in determining that defendant's report of the theft to the police and his written statement were knowingly false (*see generally Danielson*, 9 NY3d at 349; *Bleakley*, 69 NY2d at 495).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

604

KA 15-01732

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORDERO R. GIBSON, DEFENDANT-APPELLANT.

DOMINIC SARACENO, BUFFALO, FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered October 31, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]). The conviction arises from an attempted robbery committed by defendant and a codefendant, during which the codefendant shot and killed a man. Defendant was charged with, inter alia, felony murder (§ 125.25 [3]), and he pleaded guilty to manslaughter in the first degree as a lesser included offense under the felony murder count. The factual allocution at the plea proceeding, however, established the elements of felony murder rather than those of manslaughter.

Initially, we conclude that defendant made a knowing, voluntary, and intelligent waiver of his right to appeal (*see People v Adams*, 94 AD3d 1428, 1428-1429, *lv denied* 19 NY3d 970; *see generally People v Sanders*, 25 NY3d 337, 340-342), and that the waiver encompasses his challenge to the severity of his sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Bailey*, 137 AD3d 1620, 1621; *cf. People v Maracle*, 19 NY3d 925, 927-928).

Defendant further contends that his plea of guilty was not knowingly, voluntarily, and intelligently entered. To the extent that defendant's contention survives his waiver of the right to appeal (*see People v Bishop*, 115 AD3d 1243, 1244, *lv denied* 23 NY3d 1018, *reconsideration denied* 24 NY3d 1082), we conclude that it is not preserved for our review inasmuch as his motion to withdraw his plea

was made on grounds different from those advanced on appeal (*see People v Green*, 132 AD3d 1268, 1268-1269; *cf. People v Johnson*, 23 NY3d 973, 975).

We further conclude that this case does not fall within the "narrow exception" to the preservation rule (*People v Lopez*, 71 NY2d 662, 666). Although the plea allocution did not establish every element of manslaughter in the first degree, it neither negated an essential element of that crime nor otherwise cast doubt on the voluntariness of the plea (*see People v Brown*, 115 AD3d 1204, 1205-1206, *lv denied* 23 NY3d 1060; *People v Royal*, 306 AD2d 886, 887, *lv denied* 100 NY2d 624), and no factual basis for a guilty plea is necessary where, as here, the defendant enters a negotiated plea to a lesser offense than that charged in the indictment (*see Johnson*, 23 NY3d at 975; *People v Norman*, 128 AD3d 1418, 1419, *lv denied* 27 NY3d 1003). We note that a guilty plea to manslaughter in the first degree is permissible in satisfaction of a felony murder charge involving the same victim even though the former crime is not technically a lesser included offense of the latter (*see People v Adams*, 57 NY2d 1035, 1037-1038; *People v Lebron*, 238 AD2d 150, 150, *lv denied* 90 NY2d 895, *cert denied* 522 US 1032; *see generally* CPL 220.20; *People v Johnson*, 89 NY2d 905, 907-908), and we reject defendant's contention that the discrepancy between his plea to manslaughter and his allocution to felony murder, standing alone, is sufficient to undermine the validity of the plea (*see People v Foster*, 19 NY2d 150, 152-154; *People v Torres*, 125 AD2d 252, 253, *lv denied* 69 NY2d 834; *cf. Johnson*, 23 NY3d at 975-976; *People v Worden*, 22 NY3d 982, 985-986). Contrary to defendant's further contention, we conclude that the court was not obligated to conduct any inquiry of him concerning the statutory affirmative defense to felony murder (*see generally* Penal Law § 125.25 [3]) because nothing in the plea colloquy raised the possibility that the affirmative defense was applicable in this case (*see People v Heyward*, 111 AD2d 420, 420-421; *see generally People v Hill*, 128 AD3d 1479, 1480, *lv denied* 26 NY3d 930; *People v Masterson*, 57 AD3d 1443, 1443).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

607

CA 15-01206

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

RUSSELL PECORARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY W. MILLER, DEFENDANT-RESPONDENT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (CAMILLE A. SARKEES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 23, 2015. The order, inter alia, granted the cross motion of defendant to dismiss the complaint.

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

Memorandum: Supreme Court properly granted defendant's cross motion to dismiss the complaint against her for lack of personal jurisdiction. Defendant was the owner and operator of a vehicle involved in an accident with a vehicle operated by plaintiff. After plaintiff filed the summons and complaint, he attempted to serve defendant where she resided on the day of the accident. Two months after the accident, however, defendant moved to a different residence in the same apartment complex. Two years later, defendant relocated to Texas. After learning that defendant had relocated out of state and had not left a forwarding address with the apartment complex manager, plaintiff attempted service pursuant to Vehicle and Traffic Law § 253, made applicable to defendant under section 254. Plaintiff mailed the requisite documents via certified and registered mail, return receipt requested, but mailed those documents to the residence at which defendant resided on the day of the accident. The mailing was returned, stamped "Return to Sender Attempted Not Known."

Defendant correctly contends that statutory conditions of Vehicle and Traffic Law § 253 were not met inasmuch as that statute permits service only where a mailing is returned as either "refused" or "unclaimed" (*see Ross v Hudson*, 303 AD2d 393, 393-394; *Nunez v Nunez*, 145 AD2d 347, 348; *Bingham v Ryder Truck Rental*, 110 AD2d 867, 869; *Zimmerman v Elsner*, 102 AD2d 707, 708). Thus, the court properly determined that personal jurisdiction over defendant was never obtained.

Plaintiff, however, contends that, because defendant failed to notify the Department of Motor Vehicles (DMV) of her change of address, she is estopped from challenging the validity of service pursuant to Vehicle and Traffic Law § 505 (5). Even assuming, arguendo, that plaintiff properly raised the estoppel contention in a sur-surreply (*cf. Mikulski v Battaglia*, 112 AD3d 1355, 1356; *Seefeldt v Johnson*, 13 AD3d 1203, 1203-1204), we nevertheless conclude that plaintiff's contention lacks merit. Where a plaintiff attempts to serve a defendant at the address on file with the DMV "at the time of service" (*Canelas v Flores*, 112 AD3d 871, 872), but the defendant has since relocated and failed to notify the DMV of the change of address as required by section 505 (5), the defendant is estopped from challenging the propriety of service made to that former address (*see id.* at 871-872; *Velasquez v Gallelli*, 44 AD3d 934, 935).

Here, the address on file with the DMV at the time of service was the second address in the apartment complex, which suggests that plaintiff did, in fact, notify the DMV of that address change. Plaintiff, however, attempted to serve defendant at the first residence in that apartment complex. Inasmuch as defendant apparently filed a change of address with the DMV to serve as notification that she had moved from the first apartment to the second apartment, she is not estopped from challenging defendant's attempted service made to the first apartment (*see Canelas*, 112 AD3d at 872; *see also Rodriguez v Morales*, 200 AD2d 406, 407).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court

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

608

CA 15-01829

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
WILSON CENTRAL SCHOOL DISTRICT,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

WILSON TEACHERS' ASSOCIATION,
RESPONDENT-RESPONDENT.

HARRIS BEACH, PLLC, BUFFALO (TRACIE L. LOPARDI OF COUNSEL), FOR PETITIONER-APPELLANT.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order (denominated order and judgment) of the Supreme Court, Niagara County (Mark Montour, J.), entered March 20, 2015 in a proceeding pursuant to CPLR article 75. The order denied the petition to stay arbitration and granted the cross petition to compel arbitration.

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

Memorandum: Petitioner appeals from an order denying its petition pursuant to CPLR article 75 seeking a permanent stay of arbitration and granting respondent's cross petition for an order compelling arbitration. Respondent demanded arbitration concerning the transfer of a physical education teacher from the high school to the elementary school. The sole issue on appeal is whether the parties "have agreed to arbitrate the dispute at issue" pursuant to their collective bargaining agreement (CBA) (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278; *see Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, *lv denied* 14 NY3d 712). "Our review of that question is limited to the language of the grievance and the demand for arbitration, as well as to the reasonable inferences that may be drawn therefrom" (*Niagara Frontier Transp. Auth.*, 71 AD3d at 1390). Contrary to petitioner's contention, Supreme Court properly determined that, because the CBA contains a broad arbitration clause, and there is a reasonable relationship between the subject matter of the dispute, i.e., the transfer of a teacher to another position, and the general subject matter of the CBA, " 'it is for the arbitrator to determine whether the subject matter of the

dispute falls within the scope of the arbitration provisions of the [CBA]' " (*Matter of County of Herkimer v Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO*, 124 AD3d 1370, 1371; *see generally Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143).

Entered: June 17, 2016

Frances E. Cafarell
Clerk of the Court