SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 7, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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KA 14-01172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE JOHNSTON, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

JESSE JOHNSTON, DEFENDANT-APPELLANT PRO SE.

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (DAVID MASHEWSKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered June 10, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in refusing to suppress his statement to the police. According to defendant, he was not properly advised of his *Miranda* rights because he was advised that "anything he said could be used in a court of law" but was not specifically advised that anything he said could be used *against* him in a court of law. We reject that contention. "[T]he *Miranda* prophylaxis does not require a ritualistic incantation of warnings in any particular language or form . . . The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his [or her] rights as required by *Miranda*" (*People v Bakerx*, 114 AD3d 1244, 1247, *lv denied* 22 NY3d 1196 [internal quotation marks omitted]; *see People v Barber-Montemayor*, 138 AD3d 1455, 1455).

We reject defendant's further contention that he was "tricked" into providing his statement. No specific promises were made to defendant, and his statement was not rendered involuntary merely because an officer suggested that it would be generally beneficial for defendant to confess to any crime that he may have committed (*see People v Sanderson*, 68 AD3d 1716, 1716, *lv denied* 14 NY3d 844; *People v Martin*, 55 AD3d 1236, 1237, *lv denied* 11 NY3d 927, *reconsideration denied* 12 NY3d 855). Defendant failed to preserve for our review his contention that his statement was rendered involuntary because he was

under the influence of methadone (*see People v Lewis*, 124 AD3d 1389, 1390, *lv denied* 26 NY3d 931) and, in any event, that contention lacks merit. The sentence is not unduly harsh or severe.

Finally, we have considered defendant's contentions in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01542

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

HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOHNSTON'S L.P. GAS SERVICE, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

JOHNSTON'S L.P. GAS SERVICE, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

ANTHONY A. DEMARCO, ANTHONY W. DEMARCO AND ANTHONY DEMARCO & SONS, INC., THIRD-PARTY DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS,

V

ANTHONY A. DEMARCO, ANTHONY W. DEMARCO AND ANTHONY DEMARCO & SONS, INC., ET AL., DEFENDANTS.
(ACTION NO. 2.)

BARCLAY DAMON, LLP, ELMIRA (BRYAN J. MAGGS OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 27, 2015. The order denied the motion of defendant Johnston's L.P. Gas Service, Inc., for summary judgment dismissing the amended complaint against it in action No. 1 and denied in part the motion of third-party defendants for summary judgment

dismissing the third-party complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Johnston's L.P. Gas Service, Inc. in part and dismissing all claims based on allegations that the propane gas was not properly odorized, and by granting that part of the motion of third-party defendants with respect to plaintiff Lucio Jimenez Gabriel, also known as Marco Antonio Jimenez, and further dismissing the third-party complaint insofar as it sought contribution and/or indemnification for the injuries sustained by that plaintiff, and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiffs, undocumented farm workers who were employed at a farm in Oswego County, commenced action No. 1 seeking damages for injuries they allegedly sustained when their living quarters exploded. Defendant-third-party plaintiff (hereafter, Johnston's), the entity that supplied propane gas to the farm where plaintiffs worked, commenced a third-party action against defendants-third-party defendants (hereafter, DeMarco defendants), the owners of the farm and plaintiffs' employers, seeking contribution and/or indemnification for the injuries sustained by the plaintiffs in the main action. The parties also commenced other actions that are not relevant to this appeal. After discovery was complete, Johnston's moved for summary judgment dismissing the amended complaint against it, and the DeMarco defendants moved for summary judgment dismissing the third-party complaint. Johnston's and the DeMarco defendants now appeal from an order that, inter alia, denied the motion of Johnston's in its entirety and granted those parts of the DeMarco defendants' motion with respect to only seven of the nine plaintiffs.

Addressing first the appeal of the DeMarco defendants, we conclude that Supreme Court erred in denying that part of their motion with respect to Lucio Jimenez Gabriel, also known as Marco Antonio Jimenez (plaintiff). We therefore modify the order accordingly. The DeMarco defendants established that they are plaintiffs' employers and provide them with workers' compensation benefits. Consequently, they met their burden of establishing that they cannot be held liable in the third-party action "for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' " (Workers' Compensation Law § 11). In this case Johnston's alleges that plaintiff's qualifying grave injury was a "permanent and severe facial disfigurement" (*id.*). "A disfigurement is severe if a reasonable person viewing the plaintiff's face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly. In finding that a disfigurement is severe, plaintiff's injury must greatly alter the appearance of the face from its appearance before the accident" (*Fleming v Graham*, 10 NY3d 296, 301). Here, the DeMarco defendants met their burden on their motion with respect to plaintiff by submitting photographs of plaintiff demonstrating that he is not severely disfigured within the meaning of the statute (*see id*. at 301-302; *Pilato v Nigel Enters.,*

Inc., 48 AD3d 1133, 1135-1136; *Krollman v Food Automation Serv. Techniques, Inc.*, 13 AD3d 1209, 1210), and Johnston's failed to raise a triable issue of fact (*see generally Zuckerman v City of New York,* 49 NY2d 557, 562).

With respect to the appeal by Johnston's, we note at the outset that the court stated in its bench decision that it was dismissing all claims insofar as they were based on allegations that Johnston's and the upstream suppliers of propane did not properly odorize the propane, but the order on appeal does not include any such language. It is well settled that, "[w]here, as here, the [order] omits a determination made by the court in its decision, the decision controls and the [order] must be modified to conform to the decision" (*Waul v State of New York*, 27 AD3d 1114, 1115, *lv denied* 7 NY3d 705; *see Abbo-Bradley v City of Niagara Falls*, 125 AD3d 1469, 1470-1471). We therefore further modify the order accordingly.

We reject the contention of Johnston's that it established as a matter of law that it did not cause the explosion and thus that the court erred in denying its motion for summary judgment dismissing the amended complaint on that ground. It is well settled that a " 'gas company is required to use reasonable care in the handling and distribution of gas. In view of the dangerous and explosive character of gas and its tendency to escape, a gas company has the duty to use that degree of caution which is reasonably necessary to prevent the escape or explosion of gas from its pipes and equipment' " (*New York Cent. Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638, 1641, quoting PJI 2:185). Therefore, in order to meet its burden on the motion, Johnston's was required to submit evidence establishing that it "had no actual or constructive notice of any defect on the premises that would cause the gas leak" that allegedly caused the explosion (*IDE Pontiac v D.V.G. Elec. Gen. Contr.*, 298 AD2d 912, 913; *see Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). Here, however, Johnston's failed to "submit[ ] sufficient evidence that during service calls it provided adequate care to ensure that all aspects of the propane system were operating safely and effectively" (*Jackson v Gas Co.*, 2 AD3d 1104, 1105) and, "[t]hus, the question as to whether the conduct of [its] employees amounted to negligence was properly determined to be one for the trier of fact" (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 133). Contrary to the contention of Johnston's, its "[f]ailure to make [the requisite] showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853).

We also reject the further contention of Johnston's that the court erred in denying that part of its motion for summary judgment dismissing the failure to warn claims insofar as they are based on its negligent failure to advise plaintiffs or the DeMarco defendants to obtain or use propane detectors, and on Johnston's failure to supply such detectors. "Generally, the adequacy of the warning in a products liability case based on failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial"

(*Johnson v Delta Intl. Mach. Corp.*, 60 AD3d 1307, 1309 [internal quotation marks omitted]), and Johnston's failed to meet its burden on its motion of establishing as a matter of law that no such warning was required (*see generally Winegrad*, 64 NY2d at 853).

We have considered the further contentions of Johnston's and the DeMarco defendants, and we conclude that they are without merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01646

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

JD&K ASSOCIATES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SELECTIVE INSURANCE GROUP, INC., DEFENDANT,
SELECTIVE INSURANCE COMPANY OF AMERICA AND
SELECTIVE WAY INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, NEW YORK CITY (RICHARD S. MILLS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 6, 2015. The order denied the motion of defendants Selective Insurance Company of America and Selective Way Insurance Company for summary judgment dismissing plaintiff's fourth cause of action and granted the cross motion of plaintiff for leave to amend its complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the motion is granted and the fourth cause of action is dismissed.

Memorandum: As we stated on the prior appeal in this matter (*JD&K Assoc., LLC v Selective Ins. Group, Inc.*, 118 AD3d 1402, 1402), plaintiff obtained a commercial insurance policy from defendant Selective Way Insurance Company (Selective Way) that provided coverage for, among other things, a building that plaintiff owned and leased to a limousine service. Defendant Selective Insurance Company of America (Selective Insurance) is an affiliate of Selective Way and serves as its claims administrator. After two large depressions appeared in the concrete slab floor of the building insured under the policy, plaintiff submitted a claim for that loss. Selective Insurance hired Peter Vallas Associates (Vallas) to investigate the loss. Selective Way subsequently disclaimed coverage, relying upon the findings in the "Investigative Engineering Analysis Report" (report) prepared by Vallas' investigator, who was not an engineer, as well as its interpretation of the policy. Plaintiff commenced this action against Selective Way and Selective Insurance (defendants) and another company that is no longer a party. On the prior appeal, we concluded, among

other things, that Supreme Court properly determined that plaintiff was entitled to partial summary judgment on its breach of contract cause of action inasmuch as an extension of coverage in the policy unambiguously provided coverage for plaintiff's loss (*id.* at 1403). We further concluded that the court properly denied as premature that part of defendants' motion seeking summary judgment dismissing plaintiff's fourth cause of action, alleging deceptive acts and practices under General Business Law § 349, because certain discovery related to that cause of action remained outstanding (*id.*). In that cause of action, plaintiff alleged, among other things, that defendants retained a non-engineer to conduct the investigation and misrepresented the investigator's credentials to plaintiff in disclaiming coverage for the property loss. Upon completion of such discovery, defendants again moved for summary judgment dismissing plaintiff's section 349 cause of action, and plaintiff cross-moved for leave to amend the complaint with respect to that cause of action. We conclude that the court erred in denying defendants' motion and, thus, in granting plaintiff's cross motion.

Pursuant to General Business Law § 349, "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" are unlawful (§ 349 [a]), and the statute provides an injured party with a private right of action to enjoin such unlawful acts or practices and to recover for violations of the statute (*see* § 349 [h]). "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29; *see Electrical Waste Recycling Group, Ltd. v Andela Tool & Mach., Inc.*, 107 AD3d 1627, 1629-1630, *lv dismissed* 22 NY3d 1111).

We agree with defendants that they met their initial burden of establishing as a matter of law that their conduct was not consumer-oriented. It is well settled that, although the conduct need not be repetitive or recurring to qualify as consumer-oriented, a plaintiff "must demonstrate that the acts or practices have a broader impact on consumers at large" and, thus, "[p]rivate contract disputes, unique to the parties, . . . [do] not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321). Defendants established that the conflict here stems from "a 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large" (*New York Univ.*, 87 NY2d at 321). Indeed, the record establishes that defendants' decision to disclaim coverage was based on the particular facts concerning the nature of plaintiff's property damage and the language in the policy (*see Security Mut. Life Ins. Co. of N.Y. v DiPasquale*, 283 AD2d 182, 182, *lv dismissed* 97 NY2d 653, 700), and that the alleged deceptive practice here, i.e., defendants' use of the report from a non-engineer in disclaiming coverage, had the potential to affect only a single commercial property loss claim between plaintiff and defendants (*see Canario v Gunn*, 300 AD2d 332, 333). Contrary to plaintiff's

contention, the information concerning defendants' prior use of Vallas' investigative services contained in the affidavit of defendants' in-house complex claims counsel, which was based upon his personal knowledge, established that defendants had not implemented any type of practice of hiring an unqualified site investigator and then misrepresenting his or her qualifications to render an investigative report as a method of deceiving unsuspecting policyholders and improperly disclaiming coverage. We further conclude that the fact that defendants may have disclaimed coverage based in part on reports drafted by Vallas in a few commercial property cases closed within the last 15 years is insufficient to raise a material issue of fact whether the allegedly deceptive practice was standard or routine such that it potentially affected similarly situated consumers (*cf. Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26-27; *North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 14), or whether the alleged conduct had a broad impact on consumers at large as contemplated by the statute (*see Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 479-480). Furthermore, we reject plaintiff's contention that the court properly determined that the investigator's deposition testimony indicating that he prepared a significant number of engineering analysis reports for defendants in the past raises a material issue of fact whether the allegedly deceptive conduct impacted consumers at large. The underlying inference supporting that determination is that, if the investigator had prepared other reports for defendants, then defendants must have also misrepresented the investigator as an engineer to other policyholders, and such an inference is purely speculative and unsupported by the evidence in the record (*see generally Edelman v O'Toole-Ewald Art Assoc., Inc.*, 28 AD3d 250, 251, *lv denied* 7 NY3d 706; *Drepaul v Allstate Ins. Co.*, 299 AD2d 391, 392-393; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 149, *lv dismissed in part and denied in part* 87 NY2d 937).

Even assuming, arguendo, that there is an issue of fact whether defendants' conduct was materially misleading, we nonetheless further agree with defendants that the record establishes that plaintiff was not injured as a result of the allegedly deceptive act or practice. "[W]hile the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm" (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26; *see generally Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55-56). Here, the submissions establish as a matter of law that the alleged misrepresentation of the investigator's credentials, and/or any reliance on the conclusions set forth in the report, did not cause actual harm to plaintiff. With respect to the claimed injury arising from the disclaimer of coverage, the record establishes that defendants' decision was based upon the factual observations contained in the report, i.e., that the depressions in the concrete slab were caused by settling of the fill with water discharge from a drain pipe as a contributing factor, coupled with defendants' interpretation of the policy exclusions as applied to those facts. The disclaimer was wholly unrelated to any

misrepresentation made by defendants to plaintiff regarding the investigator's credentials. That conclusion is further supported by the fact that defendants erroneously continued to disclaim coverage even after the policy extension applicable to certain water damage was brought to their attention (*see JD&K Assoc., LLC*, 118 AD3d at 1402-1403). To the extent that plaintiff contends that it suffered actual harm because it was compelled to retain a professional engineer to investigate the cause of the property damage, that decision resulted from defendants' adherence to the disclaimer given its interpretation of the policy despite the investigator's factual observations that supported coverage under the applicable policy extension (*see id.*). We note that the factual findings in the report are not challenged by plaintiff and are essentially indistinguishable from the findings made by plaintiff's professional engineer. We thus conclude that plaintiff's alleged injuries were caused by a disclaimer made on the basis of the undisputed factual circumstances of the property damage and defendants' adherence to its erroneous interpretation of the policy language, and did not result from any misrepresentation to plaintiff about the investigator's credentials (*see Amalfitano v NBTY, Inc.*, 128 AD3d 743, 746, *lv denied* 26 NY3d 913).

In light of our determination, defendants' remaining contention is academic.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01273

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

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

V MEMORANDUM AND ORDER

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

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (DOUGLAS M. MCRAE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 25, 2015 in a proceeding pursuant to CPLR article 75. The order denied petitioner's motion for leave to renew the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 75 proceeding challenging his termination as a tenured administrator of the Jordan-Elbridge Central School District. On a prior appeal, we modified an order denying the amended petition by granting the amended petition in part (*Matter of Hamilton v Alley*, 137 AD3d 1564, 1565). Petitioner now appeals from an order denying his subsequent motion for leave to renew his amended petition. As Supreme Court properly concluded, petitioner failed in support of his motion to offer new facts that were unavailable when the court initially denied the amended petition. "Thus, . . . [petitioner's] motion purportedly seeking leave to renew was actually seeking leave to reargue, and no appeal lies from an order denying leave to reargue" (*Hill v Milan*, 89 AD3d 1458, 1458; *see Westrick v County of Steuben*, 309 AD2d 1246, 1246-1247). We therefore dismiss the appeal.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

691

KA 15-01532

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENISE HADDAD SMITH, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX 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 Oneida County Court (Michael L. Dwyer, J.), dated July 27, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Oneida County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: On appeal from an order denying her motion pursuant to CPL 440.10 to vacate a judgment convicting her of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the second degree (§ 120.05 [2]) on the ground of ineffective assistance of counsel, defendant contends, among other things, that County Court erred in denying her motion without a hearing. We agree.

At trial, the People presented proof that defendant sliced her estranged husband’s neck with a kitchen knife while he was lying upon a bed at his parents’ residence, but he was able to flee and call for assistance. The police thereafter found defendant in the residence with allegedly self-inflicted stab wounds, including an abdominal stab wound that required removal of her spleen. Defendant testified in her own defense at trial and asserted that her husband attacked her with the knife, and that her husband’s neck was cut in the ensuing struggle over the knife. The jury, apparently disbelieving defendant’s version of events, convicted her of attempted murder and assault.

Defendant did not appeal her conviction, but filed the instant CPL 440.10 motion to vacate the judgment, contending that her trial attorney was ineffective because he failed to show the jury a wound behind her left armpit, failed to engage a medical expert to testify about that wound, and failed to examine the clothing she was wearing

at the time of the stabbings and to show that clothing to the jury. In support of her motion, defendant submitted an affidavit from a medical expert who opined that the wound behind defendant's left armpit could not have been self-inflicted and was not, as the medical testimony at trial appeared to establish, a surgical wound where a chest tube was inserted when defendant was treated at the hospital. According to defendant, the armpit wound aligned with holes in the shirts she was wearing at the time of the altercation, which supported her claim that her husband stabbed her from behind. At trial, defendant's attorney noted that he had not examined the shirts defendant was wearing at the time of the altercation before they were offered for admission in evidence, and the record is unclear whether trial counsel examined those shirts before their admission. In an affirmation submitted in support of the instant motion, defendant's trial counsel asserted that he did not recall having examined the shirts. The jury did not examine the shirts at trial, although a witness for the People testified that the only holes in the shirts aligned with injuries to defendant's abdomen.

Defendant also submitted an affirmation from her appellate counsel, who examined the shirts and asserted that, contrary to the testimony of the above-mentioned prosecution witness, the holes in the shirts matched precisely the location of defendant's alleged stab wound behind her left armpit. At oral argument of the motion, appellate counsel urged the court to examine the garments before ruling on the motion. The court declined to do so and denied defendant's motion without a hearing.

We conclude that, if, as appellate counsel asserts, there are holes in the shirts defendant was wearing at the time of the altercation matching the wound behind her left armpit, in the absence of some strategic explanation, the failure of defendant's trial attorney to examine that clothing, coupled with his failure to call a medical expert to discuss the wound and to show the wound to the jury, would have been so " 'egregious and prejudicial' " as to deprive defendant of a fair trial (*People v Turner*, 5 NY3d 476, 480). Because defendant's "submissions [thus] 'tend[ ] to substantiate all the essential facts' necessary to support [her] claim of ineffective assistance of counsel" (*People v Hill*, 114 AD3d 1169, 1169, quoting CPL 440.30 [4] [b]; *see People v Howard*, 12 AD3d 1127, 1128), we conclude that the court should have held a hearing on the motion (*see* CPL 440.30 [5]; *People v Frazier*, 87 AD3d 1350, 1351). We therefore reserve decision and remit the matter to County Court for a limited hearing on the issue relating to the location of the holes in the shirts.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-02049

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

UNIQUE BROWN, BY HER PARENT AND NATURAL GUARDIAN DENISE STEVENS, FINA BELL, SIRMANUEL BELL AND MARK BELL, BY THEIR PARENTS AND NATURAL GUARDIANS RUSSELL AND TAMMY BELL, SAMANTHA CRUZ, BY HER PARENT AND NATURAL GUARDIAN MARIA DALMAU, GISELLE ALOMA JACOBS, BY HER PARENT AND NATURAL GUARDIAN INGRID JOHNSON-JACOBS, TISHAWN WALKER, BY HIS GRANDMOTHER AND LEGAL GUARDIAN MICHELLE EMANUEL, AND NORTHEAST CHARTER SCHOOLS NETWORK, INC., PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

OPINION AND ORDER

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

HERRICK, FEINSTEIN LLP, NEW YORK CITY (LEAH KELMAN OF COUNSEL), AND CONNORS LLP, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 19, 2015. The order, insofar as appealed from, denied that part of defendants' motion seeking to dismiss the complaint against defendant State of New York.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first cause of action is dismissed insofar as it is asserted by plaintiff Northeast Charter Schools Network, Inc., the complaint is dismissed insofar as plaintiffs seek injunctive relief, and judgment is granted in favor of defendant State of New York as follows:

> It is ADJUDGED and DECLARED that the charter school funding scheme of the State of New York has not been shown in this case to be unconstitutional.

Opinion by TROUTMAN, J.:

I. Background

Plaintiffs are seven students who attend four nonparty charter

schools located in Buffalo and Rochester (hereafter, infant plaintiffs), and Northeast Charter Schools Network, Inc. (Network), an advocacy group of which those charter schools are members. In September 2014, plaintiffs commenced this action against, inter alia, the State of New York (defendant) challenging the validity of defendant's charter school funding scheme under the New York State Constitution. More particularly, plaintiffs allege that defendant's refusal to provide charter schools with facilities funding violates its obligation to provide the charter school students with a sound basic education under the Education Article (NY Const, art XI, § 1), and denies plaintiffs the equal protection of the laws under the Equal Protection Clause (art I, § 11).

According to the allegations set forth in the complaint, New York's charter schools receive approximately 60 to 80 cents for every dollar received by traditional public schools. A "major factor" contributing to the funding gap is that the Legislature does not provide charter schools with facilities funding, a particular category of funding generally made available only to traditional public schools. The lack of facilities funding, plaintiffs allege, forces charter schools to divert funds away from student instruction to cover construction, renovation, and other facilities costs. As a result, charter schools have "inadequate facilities, such as cafeterias with no kitchens, cramped classrooms with insufficient windows and lighting, and inadequate desk and seating space." They also lack "key resources, such as science labs, computer rooms, libraries, gymnasiums, art and music rooms, and theater space." Plaintiffs submit that such facilities are constitutionally inadequate, and present a barrier to the charter school students' right to a sound basic education. Plaintiffs nonetheless cite to test scores and graduation rates, which they allege "demonstrate that the charter schools are outperforming the district schools" in both Buffalo and Rochester. For example, a high school student at a traditional Buffalo public school has a 56% chance of graduating in four years; a high school student at a Buffalo charter school has an 83.6% chance of doing the same. For that reason, plaintiffs allege, parents increasingly choose to send their children to charter schools, which have inadequate facilities and instrumentalities of learning, to avoid poorly performing traditional public schools. Plaintiffs further allege that the impact of the funding gap disproportionately falls on racial and ethnic minority groups, which comprise over 90% of charter school students. The first cause of action asserts a claim under the Education Article; the second and third causes of action assert equal protection claims under disparate treatment and disparate impact theories, respectively. For relief, plaintiffs seek a declaration that defendant's failure to provide facilities funding to charter schools is unconstitutional and a judgment enjoining defendant from "withholding" facilities funding.

Defendant, along with other defendants, filed a pre-answer motion to dismiss the complaint on the grounds that, inter alia, the complaint fails to state a cause of action, the Network lacks capacity to bring the action, and plaintiffs lack standing under the Education Article. Supreme Court granted the motion only to the extent of

dismissing the complaint against the other defendants. We conclude that the Network lacks standing to sue under the Education Article and that the complaint fails to state a cause of action. Thus, the court erred insofar as it denied defendant's motion with respect to those grounds and the injunctive relief sought by plaintiffs. We note, in addition, that the court erred in failing to declare the rights of the parties (*see generally Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881; *Seneca Nation of Indians v State of New York*, 89 AD3d 1536, 1538, *lv denied* 18 NY3d 808).

II. Network's Legal Capacity to Sue

We address first defendant's contention that the Network lacks legal capacity to challenge the constitutionality of charter school funding legislation on behalf of its member charter schools because charter schools are political subdivisions of the State. We reject that contention. There is no dispute that the Network has the capacity to sue under the circumstances of this case if its member charter schools have such capacity (*see generally New York State Assn. of Small City Sch. Dists., Inc. v State of New York*, 42 AD3d 648, 649). It is also true that each charter school is "a political subdivision" (Education Law § 2853 [1] [c]; *see* L 2014, ch 56), and that "[t]he general rule of law is that a political subdivision of the State may not challenge the constitutionality of an act of the State Legislature restricting its governmental powers" (*Town of Black Brook v State of New York*, 41 NY2d 486, 488; *see City of New York v State of New York*, 86 NY2d 286, 291-292). Nevertheless, charter schools benefit from a broad exemption from all "state and local laws, rules, regulations or policies governing . . . political subdivisions . . . except as specifically provided in the school's charter or in [article 56 of the Education Law]" (§ 2854 [1] [b]). Here, defendant does not allege that the charters of any of the schools specifically prohibit them from challenging the constitutionality of legislative acts, nor that article 56 specifically prohibits the schools from doing so. We therefore conclude that the Network has the legal capacity to bring this constitutional challenge on behalf of its members.

III. Standing to Assert a Cause of Action Under the Education Article

A. Network's Standing

We agree with defendant, however, that the Network lacks standing to sue defendant under the Education Article. As with capacity, the Network has standing only if its member charter schools do (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211) and, here, we conclude that the member charter schools do not have standing. To establish standing, a member charter school would have to allege an injury or interest that falls within the zone of interests that the Education Article protects (*see Matter of Assn. for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773). The Education Article does not protect schools; it protects the "students['] . . . constitutional right to a 'sound basic education' " (*Paynter v State of New York*, 100 NY2d 434, 439, quoting

Board of Educ., Levittown Union Free Sch. Dist. v Nyquist, 57 NY2d 27, 48). For that reason, the Network lacks standing to sue under the Education Article on behalf of its member schools, and we therefore dismiss the first cause of action insofar as it is asserted by the Network.

B. Infant Plaintiffs' Standing

Defendant further contends that infant plaintiffs lack standing to sue defendant under the Education Article because infant plaintiffs' allegations are vague, conclusory, and fail to establish injury in fact. We note, however, that defendant's contention erroneously "conflates standing with the merits of the case" (*Kosmider v Garcia*, 111 AD3d 1134, 1135 [internal quotation marks omitted]). We therefore conclude that defendant has failed to meet its burden on its motion of establishing as a matter of law that infant plaintiffs lack standing (*see U.S. Bank N.A. v Guy*, 125 AD3d 845, 847).

IV. The Cause of Action Under the Education Article

Having determined that infant plaintiffs, at least, have standing to assert a cause of action against defendant under the Education Article, we now address the merits of that part of defendant's motion dealing therewith. The Education Article states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). Those words enshrined in the State Constitution the traditional, centuries-old system of school districts in which communities make decisions on funding and operating publically-funded local schools (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 181 *[NYCLU]*; *Paynter*, 100 NY2d at 442). Its purpose was to constitutionalize the traditional public school system, not to alter its substance (*see NYCLU*, 4 NY3d at 181; *Paytner*, 100 NY2d at 442). If that system—"which is what is to be maintained and supported"—offers students a "sound basic education," then "the constitutional mandate is satisfied" (*Nyquist*, 57 NY2d at 48).

The traditional system of public schools carried out the State's constitutional mandate for more than 100 years before the Legislature authorized "a system of charter schools . . . that operate independently of existing schools and school districts" (Education Law § 2850 [2]; *see New York Charter Schs. Assn., Inc. v DiNapoli*, 13 NY3d 120, 123). Charter schools are not mandated by the State Constitution, but are independent creations of the Legislature, fashioned for noble purposes, such as to enhance learning among students in general and at-risk youth in particular, to encourage academic innovation, and to offer choices beyond those offered in the traditional public schools (*see* § 2850 [2]). Although charter schools are deemed to be public schools under the auspices of the Board of Regents (*see* §§ 2850 [2] [e]; 2853 [1] [c]), they are governed by an independent, self-selecting board of trustees and are exempt from a multitude of rules and regulations that are applicable to traditional public schools (*see* §§ 2853 [1] [f]; 2854 [1] [b]). For example, charter schools are not obliged to educate "all the children" within

their respective districts (NY Const, art XI, § 1), but instead may place a cap on admission (*see* § 2854 [2] [b]).

New York's charter school law aims for both fiscal integrity and academic achievement. Charter schools receive public monies paid directly from the local school districts on a per capita basis under a fixed formula (*see* Education Law § 2856 [1]). To obtain approval for a charter, a prospective school must submit a detailed application showing that, given the funds available, the school will be able to achieve the student performance standards set by the Board of Regents (*see* § 2851 [2]), standards which the Court of Appeals has ruled exceed the constitutional floor (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 315-316 [*CFE 1*]). Once approved, each charter school periodically must apply to renew its charter, at which time it must demonstrate progress in achieving its educational objectives (*see* § 2851 [4] [a]). Underachieving schools may be closed without violating the Education Article (*see generally Pinnacle Charter Sch. v Board of Regents of the Univ. of the State of N.Y.*, 108 AD3d 1024, 1027, *appeal dismissed* 21 NY3d 1029, *lv denied* 22 NY3d 951).

Given the foregoing constitutional and statutory scheme, we conclude that the Education Article cannot serve as a legal basis for challenging the constitutionality of charter school funding legislation. The well-established analytical framework for an Education Article claim requires that a plaintiff plead deficient inputs, such as inadequate teaching, facilities, or instrumentalities of learning; deficient outputs, such as poor test results and graduation rates; and a causal connection between the deficient inputs and outputs (*see Paynter*, 100 NY2d at 440; *CFE 1*, 86 NY2d at 318). More fundamentally, "because school districts, not individual schools, are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts, a claim under the Education Article requires that a district-wide failure be pleaded" (*NYCLU*, 4 NY3d at 182).

There is, in our view, no meaningful way to apply those requirements in the context of a charter school funding challenge. In this particular action, the thrust of the complaint is that infant plaintiffs were forced into charter schools that suffer deficient *inputs*, in order to avoid traditional public schools that suffer deficient *outputs*. They do not and cannot allege that the charter schools' allegedly deficient inputs cause the traditional public schools' allegedly deficient outputs. Moreover, even assuming, arguendo, that plaintiffs have pleaded a district-wide failure in the Buffalo and Rochester city school districts, the provision of facilities funding to charter schools cannot be considered a proper remedy for such a deficiency. To the contrary, to divert public education funds away from the traditional public schools and towards charter schools would benefit a select few at the expense of the "common schools, wherein all the children of this State may be educated" (NY Const, art XI, § 1). We therefore conclude that plaintiffs' cause of action based on the Education Article fails as a matter of law.

V. The Cause of Action for Denial of Equal Protection, Disparate Treatment

We likewise agree with defendant that the court erred in concluding that plaintiffs stated causes of action for the denial of "equal protection of the laws of this state" (NY Const, art I, § 11). In their second cause of action, plaintiffs assert a denial of equal protection based on a disparate treatment theory. Plaintiffs allege that Buffalo and Rochester public schools receive facilities funding while charter schools do not. In support of its motion to dismiss, defendant sets forth numerous rationales for the disparity in funding. For example, charter schools are exempt from costly regulations that apply only to traditional public schools, have the discretion to limit their enrollment, are nonunion, and have access to sources of funding that public schools do not. A further legislative rationale for the disparity in facilities funding is that charter schools are experimental and more likely to be transitory (*see J.D. ex rel. Scipio-Derrick v Davy*, 2 A3d 387, 395 [NJ Super Ct, App Div 2010]). Contrary to plaintiffs' assertion, charter schools do not receive precisely "zero dollars" for facilities. Plaintiffs concede, even in the allegations of their complaint, that charter schools receive public funds pursuant to the statutory scheme, and that some of those funds are spent on facilities costs. Thus, to the extent that the school funding scheme provides traditional public and charter schools with disparate levels of funding, we conclude that the scheme is supported by a rational basis (*see Reform Educ. Fin. Inequities Today [R.E.F.I.T.] v Cuomo*, 86 NY2d 279, 285). Furthermore, to the extent that this cause of action is based on the disparate levels of facilities funding between upstate and downstate charter schools, plaintiffs conceded at oral argument of this appeal that they do not seek to invalidate legislation that provides facilities funding to certain New York City-based charter schools. We therefore conclude that plaintiffs' second cause of action fails as a matter of law.

VI. The Cause of Action for Denial of Equal Protection, Disparate Impact

In their third cause of action, plaintiffs set forth a cause of action for denial of equal protection based on a disparate impact theory. Plaintiffs allege that defendant's failure to provide charter schools with facilities funding impacts racial and ethnic minorities more severely. We agree with defendant that plaintiffs' acknowledged failure to plead discriminatory intent is fatal to their cause of action (*see CFE 1*, 86 NY2d at 320). We therefore conclude that plaintiffs' third cause of action fails as a matter of law.

VII. Conclusion

Accordingly, we conclude that Network lacks standing to sue defendant under the Education Article and that the first cause of action should therefore be dismissed insofar as it is asserted by Network. We further conclude that the complaint fails to state a cause of action and that it should be dismissed insofar as plaintiffs seek injunctive relief. Finally, judgment should be granted to

defendant declaring that defendant's charter school funding scheme has not been shown in this case to be unconstitutional.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

702

CA 15-02040

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

BROADWAY WAREHOUSE COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO BARN BOARD, LLC, DEFENDANT,
EMPIRE BUILDING DIAGNOSTICS, INC., EBD
MANAGEMENT, LLC, AND DAVID R. PFALZGRAF, JR.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS EMPIRE BUILDING DIAGNOSTICS, INC. AND EBD MANAGEMENT, LLC.

BOND SCHOENECK & KING, PLLC, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT DAVID R. PFALZGRAF, JR.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 30, 2015. The order, among other things, denied in part plaintiff's motion for partial summary judgment and denied in part the cross motion of defendants Empire Building Diagnostics, Inc., and EBD Management, LLC, for summary judgment dismissing the second amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, Broadway Warehouse Company, and defendants Empire Building Diagnostics, Inc. (Empire), EBD Management, LLC (EBD), and David R. Pfalzgraf, Jr., appeal from an order that denied plaintiff's motion for partial summary judgment on the second cause of action in the consolidated second amended complaint (complaint); granted plaintiff's motion for partial summary judgment against Pfalzgraf on the sixth cause of action; granted that part of the cross motion of Empire and EBD seeking summary judgment dismissing the second and third causes of action against them; and denied that part of their cross motion seeking summary judgment dismissing the fourth and fifth causes of action against them. We agree with Pfalzgraf that Supreme Court erred in granting plaintiff's motion insofar as it sought partial summary judgment against him on the sixth

cause of action, for breach of contract, and we therefore modify the order accordingly.

Plaintiff commenced this action seeking damages for, among other things, the alleged breach of a January 2008 lease agreement between plaintiff and defendant Buffalo Barn Board, LLC (BBB) pursuant to which BBB leased a warehouse from plaintiff for the purpose of storing lumber. Under the terms of the lease agreement, which was to expire in July 2009, plaintiff was "grant[ed] a security interest . . . in all of [BBB's] personal property used on or about the premises, including equipment, inventory and accounts," and plaintiff was authorized to "file an appropriate UCC financing statement . . . to perfect or confirm such security interest." Before plaintiff perfected its security interest on June 23, 2009, BBB sold all of its assets to EBD for $100 via an Asset Purchase Agreement (APA) dated May 28, 2009. The APA was intended to satisfy debts owed to Empire and its principals, who were also principals of EBD.

Subsequent to the APA, BBB sought and was granted several extensions to the lease agreement, the last of which was granted on October 20, 2009. In November 2009, BBB moved the lumber to a facility owned by an entity that was itself owned in part by several of the principals of Empire and EBD.

By December 2009, BBB owed plaintiff over $70,000 under the terms of the lease but, when notified of the amounts due and owing under the lease, defendant David R. Pfalzgraf, Jr., an attorney representing, inter alia, BBB, Empire, and EBD, asked plaintiff to "forebear from commencing any actions for 90 days" as BBB attempted to remain solvent through a restructuring of its business. By email, one of plaintiff's representatives agreed, but wrote that plaintiff "need[s] to be reasonably assured that [plaintiff's] security interest in BBB's inventory, etc. is not impaired while [plaintiff] defers initiating action(s) as [Pfalzgraf] requested . . . To that end, [plaintiff] requests that [Pfalzgraf] keep [plaintiff] informed every 30 days about . . . anything that is happening or has happened (not in the ordinary course of business) that has or might impair [plaintiff's] security interest." Pfalzgraf responded, writing "We will update you every 30 days. . ." As noted above, by the time of those emails, BBB had already transferred all of its assets to EBD and had moved those assets to a different facility.

BBB eventually went out of business, and plaintiff secured a judgment against BBB's principal, based on his personal guarantee of the lease. After BBB commenced bankruptcy proceedings, plaintiff learned that BBB's assets had been "commingled" with assets of others and thus concluded that a replevin action was no longer a viable remedy. As a result, plaintiff commenced this action against, inter alia, Empire, EBD and Pfalzgraf. In "counts" (hereafter, causes of action) two and three of the complaint, plaintiff alleged that Empire and EBD were liable on the lease because they were silent partners with BBB and had caused a dissolution of that partnership. In the fourth and fifth causes of action, plaintiff further alleged that Empire and EBD were liable for conversion and fraudulent conveyance of

BBB's assets. In addition, in the sixth and seventh causes of action, plaintiff alleged that, as a result of the email agreement for plaintiff to forbear pursuing any action against BBB, Pfalzgraf was liable to plaintiff for breach of contract, as well as fraud and misrepresentation.

Contrary to the contention of plaintiff, the court properly denied that part of its motion seeking summary judgment on the second cause of action and properly granted that part of the cross motion of Empire and EBD seeking summary judgment dismissing the second and third causes of action against them. Plaintiff failed to establish as a matter of law that Empire and EBD intended to act in a partnership with BBB; rather, Empire and EBD established as a matter of law that "there was [no] sharing of profits and losses, and [that] there was [no] joint control and management of [BBB's] business" (*Fasolo v Scarafile*, 120 AD3d 929, 930, *lv denied* 24 NY3d 992; *see Kyle v Ford*, 184 AD2d 1036, 1036-1037). Although plaintiff submitted evidence that Pfalzgraf mentioned that BBB was "business partners" with Empire while representing BBB in bankruptcy proceedings, that reference was preceded by statements that BBB and Empire were "two separately incorporated businesses with separate and distinct ownership," and that the two entities would collaborate on projects to demolish barns to refurbish the wood and sell it. Contrary to plaintiff's contention, the "use of partnership terminology is insufficient [to establish or] to raise an issue of fact with respect to the existence of a partnership" (*Fasolo*, 120 AD3d at 931; *see Kyle*, 184 AD2d at 1037).

Although plaintiff contends that the court erred in failing to conform the pleadings to the proof pursuant to CPLR 3025 (c) in order to incorporate plaintiff's new theories of liability based on, inter alia, agency, we conclude that the court did not abuse or improvidently exercise its discretion in failing to amend the pleadings in the absence of any motion by plaintiff (*see generally Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801). We decline to exercise our authority to do so as well, inasmuch as Empire and EBD would be prejudiced by adding those new theories of liability at this late stage in the proceedings, i.e., now that discovery is complete (*see Panasia Estate, Inc. v Broche*, 89 AD3d 498, 498; *Newburgh Winnelson Co. v Baisch Mech., Inc.*, 30 AD3d 495, 496; *cf. River Val. Assoc. v Consol. Rail Corp.*, 182 AD2d 974, 976).

Empire and EBD contend that the court erred in denying that part of their cross motion seeking summary judgment dismissing the fourth and fifth causes of action against them. We reject that contention. Initially, we note that, based on the record before this Court, Empire and EBD improperly contend for the first time on appeal that the court erred in failing to analyze the conversion and fraudulent conveyance claims against Empire and EBD separately (*see Oram v Capone*, 206 AD2d 839, 840). In any event, we conclude that, even assuming, arguendo, Empire and EBD established their entitlement to judgment as a matter of law on the conversion and fraudulent conveyance causes of action, plaintiff raised triable issues of fact sufficient to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to the fourth cause of action, for conversion, "[t]wo key elements of conversion are (1) plaintiff's possessory right or interest in the property . . . and (2) [a] defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50; *see Palermo v Taccone*, 79 AD3d 1616, 1619-1620). In this case, it is undisputed that BBB's principal provided the lease agreement between plaintiff and BBB, which provided plaintiff with a security interest in BBB's assets, to the principals of Empire and EBD before EBD entered into the APA with BBB. Thus, "[a]lthough plaintiff's security interest was unperfected, plaintiff's rights would be superior to those of a buyer [such as Empire or EBD] who purchased [the secured assets] with actual knowledge of plaintiff's security interest" (*Reisdorf Bros. v Clinton Corn Processing Co.*, 130 AD2d 951, 951). Here, plaintiff raised triable issues of fact whether the principals of Empire and EBD had actual knowledge of plaintiff's security interest and, therefore, summary judgment on the conversion cause of action was properly denied.

With respect to the fifth cause of action, for fraudulent conveyance, we conclude that Empire and EBD failed to meet their initial burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman*, 49 NY2d at 562). While it is well settled that "[n]o relief is available to a judgment creditor on a [fraudulent conveyance] cause of action . . . against a party who . . . is not a transferee of the assets or a beneficiary of an alleged fraudulent conveyance" (*Citicorp Trust Bank, FSB v Makkas*, 127 AD3d 907, 908, *lv denied* 26 NY3d 901; *see Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842), the evidence submitted by Empire and EBD raised triable issues of fact whether Empire, as well as EBD, benefitted from the conveyance of assets from BBB to EBD. Moreover, despite the contentions of Empire and EBD that the assets were "worthless" at the time of the conveyance, the evidence submitted by Empire and EBD in support of their cross motion raised triable issues of fact whether the conveyance was made without fair consideration or whether BBB, as grantor of the assets, was insolvent or "rendered insolvent by the conveyance" (*Berner Trucking v Brown*, 281 AD2d 924, 924; *see* Debtor & Creditor Law §§ 271 [1]; 272 [a]; 273-275; *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176-177).

Finally, addressing the sixth cause of action, for breach of contract against Pfalzgraf, we conclude that the court erred in granting that part of plaintiff's motion seeking summary judgment on that cause of action. As plaintiff conceded in its complaint, Pfalzgraf was at all times acting "as an attorney at law and agent for BBB and [its principal]." "An agent dealing on behalf of a disclosed principal is not liable for [his or] her principal's breach of contract absent evidence that the agent intended to be bound personally on the contract" (*Sirles v Harvey*, 256 AD2d 1227, 1228; *see Salzman Sign Co. v Beck*, 10 NY2d 63, 67). Plaintiff failed to meet its initial burden of establishing by "clear and explicit evidence" that Pfalzgraf intended "to substitute or superadd his personal liability for, or to, that of his principal" (*Salzman Sign Co.*, 10 NY2d at 67 [internal quotation marks omitted]). Based on our

conclusion, we do not address the other grounds raised by Pfalzgraf on his appeal.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

711

KA 13-00944

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER YOUNG, DEFENDANT-APPELLANT.

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

CHRISTOPHER YOUNG, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated May 13, 2013. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order denying his motion to set aside his sentence pursuant to CPL 440.20, contending that he was improperly sentenced to consecutive terms of imprisonment for the intentional murder of two victims because the People failed to prove at trial that the victims were killed by separate bullets. The proof at trial tends to support defendant's contention that he fired only three bullets in the fatal interaction, and that the first victim, the owner of the store where the murders occurred, was struck by all three bullets. It also appears that the second victim, a young woman standing behind the owner, was struck by one of the bullets that also struck the owner. The record does not conclusively establish, however, that the single bullet that was fatal to the young woman, which was from the first shot taken by defendant, was also fatal to the owner. Indeed, a witness who was present in the store at the time of the shooting testified that the first shot struck the young woman, and that defendant thereafter moved toward the owner and fired two more shots at him, seemingly indicating that defendant did not believe that his first shot was fatal to the owner.

Although on defendant's direct appeal the burden would have been on the People to prove that consecutive sentencing was legal (*see*

People v Taveras, 12 NY3d 21, 25; *People v Parks*, 95 NY2d 811, 814-815; *People v Laureano*, 87 NY2d 640, 643), defendant did not raise that issue on his direct appeal. On this CPL 440.20 motion to set aside the sentence, the burden is on defendant to prove, by a preponderance of the evidence, that the consecutive sentencing was not authorized (*see generally People v Lasky*, 31 NY2d 146, 149). CPL 440.30 (4) (b) allows a court to deny a motion to set aside a sentence without a hearing if the motion "is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts." Here, defendant's motion papers do not contain sworn allegations tending to substantiate the "essential fact" on which his motion rests, i.e., that the single bullet that killed the young woman also killed the owner, and that the murders were therefore the result of a single act, requiring the imposition of concurrent sentences (*see People v Brathwaite*, 63 NY2d 839, 843; *People v Scandell*, 143 AD2d 423, 423-424, *lv denied* 73 NY2d 790, *cert denied* 489 US 1080; *cf. People v Luster*, 148 AD2d 305, 306, *lv denied* 74 NY2d 666). Thus, we conclude that Supreme Court properly denied defendant's motion without a hearing.

Finally, defendant's contention that his sentence is unduly harsh and severe is not properly before us because such a contention "may not be raised on a CPL 440.20 motion" (*People v Jean-Louis*, 74 AD3d 1481, 1483, *lv denied* 15 NY3d 953).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

716

KA 15-01477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE L. LEUBNER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PHIL MODRZYNSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 25, 2015. The judgment convicted defendant, after a nonjury trial, of 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 motion is granted, the indictment is dismissed, and the matter is remitted to Cayuga County Court for proceedings pursuant to CPL 470.45.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, following a nonjury trial, of criminal possession of a controlled substance in the seventh degree ([CPCS 7th] Penal Law § 220.03). In appeal No. 2, defendant appeals from a judgment convicting him, following that same nonjury trial, of criminal possession of marihuana in the second degree ([CPM 2nd] § 221.25), and growing of the plant known as Cannabis by unlicensed persons (Public Health Law § 3382). In these consolidated appeals, defendant contends that County Court erred in denying his motion to dismiss the indictments on speedy trial grounds (*see* CPL 30.30). We agree.

The relevant facts are undisputed. Defendant was arrested on August 13, 2013 after the police discovered marihuana plants growing behind the trailer in which he lived, and controlled substances for which there was no prescription inside the trailer. Defendant's arraignment later that day started the speedy trial clock (*see generally People v Cortes*, 80 NY2d 201, 208). By letter dated August 24, 2013, defendant's retained attorney requested a 30-day adjournment.

By letter dated September 27, 2013, the District Attorney notified the court and defense counsel that he intended to present the

case to the grand jury, and he asked the court to "have the files divested to County Court." On October 6, 2013, defense counsel sent a letter to the District Attorney, stating, in relevant part: "I would request that prior to your presentation of these matters to the Grand Jury that I be granted the opportunity to speak with a member of your staff regarding some type of plea disposition."

The District Attorney did not respond until more than five months later, when he sent a letter to defense counsel dated March 11, 2014, stating that he had heard nothing from defense counsel since he received defense counsel's October 2013 letter and setting forth the terms of a plea offer. There is no indication in the record whether defense counsel responded to that letter. Following the District Attorney's presentation to the grand jury, the indictment in appeal No. 2 was filed on March 21, 2014. That indictment charged defendant with the felony count of CPM 2nd, and two misdemeanors, including one count of CPCS 7th.

Upon defendant's motion, County Court dismissed the CPCS 7th count as duplicitous. After the People re-presented the evidence relating to that offense to another grand jury, the indictment in appeal No. 1, charging defendant with four separate counts of CPCS 7th, was filed on August 1, 2014, with the People announcing readiness for trial on August 19, 2014.

After the two indictments were consolidated, defendant moved to dismiss them on speedy trial grounds. The court denied the motion without explanation. Defendant was eventually convicted of CPM 2nd and unlawful growing of cannabis under the first indictment (appeal No. 2) and one count of CPCS 7th, as charged in the second indictment (appeal No. 1).

Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *see generally People v Cooper*, 90 NY2d 292, 294). The six-month period is calculated by "computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute" (*Cortes*, 80 NY2d at 208). Although a defendant may waive his or her rights under CPL 30.30, such waiver must be explicit, and "[m]ere silence is not a waiver" (*People v Dickinson*, 18 NY3d 835, 836). The Court of Appeals has repeatedly stated that "prosecutors would be well advised to obtain unambiguous written waivers" (*People v Waldron*, 6 NY3d 463, 468; *see Dickinson*, 18 NY3d at 836).

Here, as the parties recognize, defendant's speedy trial motion turned on whether defense counsel waived defendant's speedy trial rights in the October 6, 2013 letter to the District Attorney, thereby excluding the 166-day period from that date until March 21, 2014, when the indictment in appeal No. 2 was filed. We conclude that the 166 days should have been charged to the People. Defense counsel did not explicitly state or even suggest in his letter that he was waiving his client's rights to a speedy trial under CPL 30.30; instead, counsel

merely requested an opportunity to discuss a plea bargain before the District Attorney presented the case to the grand jury. In our view, that request does not constitute an explicit and "unambiguous" waiver of defendant's speedy trial rights (*Waldron*, 6 NY3d at 468; *see Dickinson*, 18 NY3d at 836), and we thus conclude that "the People failed to meet their burden of proving that the disputed . . . period was not chargeable to them" (*People v Smith*, 110 AD3d 1141, 1143). We therefore grant defendant's motion and dismiss the indictments.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

717

KA 15-01479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE L. LEUBNER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PHIL MODRZYNSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 25, 2015. The judgment convicted defendant, after a nonjury trial, of criminal possession of marihuana in the second degree and growing of the plant known as Cannabis by unlicensed persons.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, the indictment is dismissed, and the matter is remitted to Cayuga County Court for proceedings pursuant to CPL 470.45.

Same memorandum as in *People v Leubner* ([appeal No. 1] ___ AD3d ___ [Oct. 7, 2016]).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

723

CA 16-00042

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

CLAYTON A. POTTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD PADILLA, MICHAEL S. ZINK AND ROBERT F. HYLAND & SONS, LLC, DEFENDANTS-RESPONDENTS.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CALIHAN LAW PLLC, ROCHESTER (ROBERT B. CALIHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 20, 2015. The order, insofar as appealed from, granted those parts of the motion of defendants seeking to dismiss plaintiff's first and second causes of action.

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

Memorandum: Plaintiff commenced this action seeking, in his first two causes of action, an accounting and money damages for breach of contract, and to compel defendants to provide their records related thereto. Defendants moved to dismiss the complaint, and Supreme Court granted those parts of the motion seeking dismissal of the first two causes of action. We affirm. To resolve prior litigation, the parties executed an agreement under which plaintiff assigned to defendant Robert F. Hyland & Sons, LLC (Hyland) all of his right, title and interest in an "Assigned Membership Interest" in Hyland in exchange for a specific payment. The "Assigned Membership Interest" was defined in the agreement as plaintiff's "entire membership interest" in Hyland, including all of plaintiff's "rights to and claims for distributions" from Hyland "and all rights and remedies in relation thereto." Additionally, in the stipulation discontinuing the prior litigation, the parties agreed that the discontinuance of the litigation was "on the merits and with prejudice."

Contrary to plaintiff's contention, the court did not err in referencing the definition of "Assigned Membership Interest" in construing the agreement, even though the definition was found only in the agreement's "whereas" clause, because such recital paragraphs may be used to "assist in determining the proper construction of a contract" (*Frenchman & Sweet v Philco Discount Corp.*, 21 AD2d 180,

182; *see Bintz v City of Hornell*, 268 App Div 742, 747, *affd* 295 NY 628). Using that definition, the court properly concluded that plaintiff, by executing the agreement and accepting the payment made thereunder, assigned to Hyland the claims he makes in the first and second causes of action in the instant case. In any event, because plaintiff also agreed to discontinue the prior litigation "on the merits and with prejudice," and the claims he makes in the first and second causes of action in the instant case could have been raised in the prior litigation, the court also properly determined that those causes of action are barred by the doctrine of res judicata (*see Incredible Invs. Ltd. v Grenga* [appeal No. 2], 125 AD3d 1362, 1363). Plaintiff has abandoned on appeal his contention that res judicata does not apply because the individual defendants were not parties to the prior litigation (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

729

CA 15-01904

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

IN THE MATTER OF CLAIM OF KIMBERLY TURLINGTON,
ON BEHALF OF NICOLE TURLINGTON, AN INFANT,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

BROCKPORT CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (CRISTINA A. BAHR OF COUNSEL), FOR RESPONDENT-APPELLANT.

R. BRIAN GOEWEY, ROCHESTER, FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered July 6, 2015. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Supreme Court abused its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) approximately one year after the incident in which her daughter was injured occurred. "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining a defense on the merits" (*Le Mieux v Alden High Sch.*, 1 AD3d 995, 996). "While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Henderson v Town of Van Buren*, 281 AD2d 872, 873; *see Hilton v Town of Richland*, 216 AD2d 921, 921). It is well established that "[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)" (*Lemma v Off Track Betting Corp.*, 272 AD2d 669, 671), and the claimant has the

burden of demonstrating that the respondent had actual timely knowledge (*see Matter of Riordan v East Rochester Schs.*, 291 AD2d 922, 923, *lv denied* 98 NY2d 603). Here, in support of her application for leave to serve a late notice of claim, claimant presented evidence that respondent was aware of the order of protection requiring, inter alia, that one of its students stay away from the school attended by claimant's daughter. Nevertheless, claimant failed to meet her burden of establishing that respondent had actual knowledge that her daughter sustained any injury as a result of any violation of the order of protection. Specifically, claimant did not apprise respondent of any injuries until she served a proposed notice of claim with her late notice of claim application, which set forth that her daughter sustained "emotional distress," "lost scholarships" and "lost opportunities," and she did not establish that respondent otherwise acquired knowledge of any such injuries.

Furthermore, while there is no apparent prejudice to respondent stemming from the delay in this case, claimant failed to provide any excuse for the failure to serve a timely notice of claim (*see generally Matter of Felice v Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138, 152-153).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

734

KA 14-02279

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEVI W. MAYNARD, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, 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 July 17, 2014. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of sexual abuse in the first degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law § 130.96), sexual abuse in the first degree (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that County Court erred in refusing to suppress his confession inasmuch as his waiver of *Miranda* rights was involuntary in light of his insulin dependence, and the fact that he ate only a single cookie while with the police. We reject that contention. The police officers who questioned defendant testified that defendant waived his *Miranda* rights and agreed to speak with them; defendant did not ask for food after receiving a cookie, did not ask for medication or to go home, and did not appear to be distressed, confused, or disoriented. In fact, defendant described his physical condition to the officers as " 'awesome.' " We accord great weight to the determination of the suppression court " 'because of its ability to observe and assess the credibility of the witnesses,' " and we perceive no basis to disturb the court's determination that defendant understood the *Miranda* warnings and knowingly and intelligently waived his rights, despite the testimony of defendant's expert to the contrary (*People v McConnell*, 233 AD2d 867, 867, *lv denied* 89 NY2d 987; *see generally People v Williams*, 62 NY2d 285, 288-290).

Contrary to defendant's contention, the court did not abuse its discretion in denying his application for a pretrial "taint hearing" (*People v Weber*, 25 AD3d 919, 923, *lv denied* 6 NY3d 839; *see People v Thompson*, 59 AD3d 1115, 1116, *lv denied* 12 NY3d 860). "Defendant's attempt to show that . . . [the] victim[] had been subjected to undue suggestion or coercion was speculative, and the defense had a full opportunity to address this allegation on cross-examination of the victim[]" (*Weber*, 25 AD3d at 923).

Although defendant made specific challenges to the legal sufficiency of the evidence after the People rested their case, he failed to renew those specific challenges at the close of all proof and thus failed to preserve for our review his legal sufficiency contention (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the evidence in light of the elements of the crimes of predatory sexual assault against a child and endangering the welfare of a child 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 with respect to those crimes (*see generally People v Bleakley*, 69 NY2d 490, 495). While there were some discrepancies in the victim's testimony, "the complained of inconsistencies did not relate to whether the alleged sexual conduct occurred," and we therefore cannot conclude that the victim's testimony was incredible as a matter of law (*People v Raymo*, 19 AD3d 727, 728, *lv denied* 5 NY3d 793; *see People v Whipset*, 137 AD3d 1743, 1743, *lv denied* 27 NY3d 1141).

Defendant contends that his conviction of sexual abuse in the first degree must be reversed inasmuch as that conviction is against the weight of the evidence. We agree. Count two of the indictment was based solely on defendant's confession that the victim touched his penis with her hand. CPL 60.50 requires corroboration of such a confession: "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed." Here, there is no such corroboration. The People assert that defendant's confession "was sufficiently corroborated by the testimony of the child victim and her numerous hearsay disclosures solicited by the defense." The record does not support that assertion, however, inasmuch as the victim never testified that she touched defendant's penis with her hand, and there is no other evidence—hearsay or otherwise—independent of defendant's confession to support defendant's conviction of sexual abuse. Although it is well settled that "additional proof 'need not corroborate every detail of the confession,' " we conclude that defendant's conviction of sexual abuse in the first degree was "based solely on [defendant's] uncorroborated [confession]" (*People v Bjork*, 105 AD3d 1258, 1260, *lv denied* 21 NY3d 1040, *cert denied* ___ US ___, 134 S Ct 1306). Since there was "no corroborating proof 'of whatever weight,' [count two of the indictment] must be dismissed" (*id.*). We therefore modify the judgment by reversing that part convicting defendant of sexual abuse in the first degree and dismissing count two of the indictment. In light of our conclusion, we do not reach defendant's contention that sexual abuse in the first degree is a lesser included offense of predatory sexual assault against a child.

We reject defendant's contention that the court erred in allowing the six-year-old victim to give unsworn testimony (*see People v DelPrince*, 70 AD3d 1350, 1350, *lv denied* 14 NY3d 840). "Although the victim did not understand the nature of an oath and thus could not give sworn testimony, [s]he possessed 'sufficient intelligence and capacity' to give unsworn evidence" (*id.*; *see People v Scott*, 86 NY2d 864, 865).

Contrary to defendant's contention, the court did not abuse its discretion in refusing to admit evidence that the victim's maternal uncle who, like defendant, had babysat the victim, had been convicted of, inter alia, a sex crime in Florida. It is well established that third-party culpability evidence must be reviewed "under the general balancing analysis that governs the admissibility of all evidence" (*People v Primo*, 96 NY2d 351, 356). Here, we conclude that proof of the uncle's conviction "would have caused 'undue delay, prejudice and confusion[,]' " and the court therefore properly refused to admit such proof (*People v Clarkson*, 78 AD3d 1573, 1574, *lv denied* 16 NY3d 829).

Contrary to defendant's further contention, the court did not err in precluding a defense expert from offering an opinion on the credibility of the victim. " '[E]xpert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand,' " but such testimony "is not permitted . . . for the purpose of showing that the expert considers a particular complainant to be credible" (*People v Williams*, 20 NY3d 579, 584). We reject defendant's contention that the court erred in allowing a prosecution witness to testify as an expert upon defendant's challenge that she was not qualified to provide an expert opinion on child abuse behaviors. It is well settled that "[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert" (*People v Owens*, 70 AD3d 1469, 1470, *lv denied* 14 NY3d 890 [internal quotation marks omitted]). We conclude that the court properly determined that the People's expert witness possessed sufficient practical experience in dealing with child victims of sexual abuse to qualify her to give expert testimony, despite the fact that she is not a psychologist or a medical doctor.

We also reject defendant's contention that he was denied effective assistance of counsel. "[I]t is well settled that disagreement over trial strategy is not a basis for a determination of ineffective assistance of counsel" (*People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959). Here, the alleged instances of ineffective assistance are based entirely on defendant's " 'hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies' " (*People v Inman*, 134 AD3d 1434, 1435, *lv denied* 27 NY3d 999). We will not "second-guess" defense counsel's strategic decisions and, in any event, our review of the record as a whole establishes that defense counsel provided meaningful representation to defendant (*People v Cherry*, 46 AD3d 1234, 1238, *lv denied* 10 NY3d 839; *see generally People v Baldi*, 54 NY2d

137, 147).

The sentence is not unduly harsh or severe. Defendant's remaining contentions are unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, they are without merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

760

KA 14-00662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANTE RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 4, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [4]), robbery in the first degree (§ 160.15 [4]), and criminal possession of a weapon in the second degree (§ 265.03 [3]) in connection with a home invasion. Viewing the elements of the crimes of burglary in the first degree and robbery in the first 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 on the element of unlawful entry with respect to the burglary count and the taking of property with respect to the robbery count (*see generally People v Bleakley*, 69 NY2d 490, 495).

Because he did not object to the use of restraints when he testified before the grand jury, defendant failed to preserve for our review his contention that he was thereby denied his right to due process (*see People v Williams*, 90 AD3d 1514, 1515, *lv denied* 18 NY3d 999). We nevertheless exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant that he should not have been required to appear before the grand jury in restraints without a statement by the prosecutor on the record supporting a reasonable basis for the use of restraints (*see People v Gilmore*, 12 AD3d 1155, 1156).

Furthermore, we note that no cautionary instruction was given to the grand jurors (*cf. id.*). We nevertheless conclude that the error is harmless beyond a reasonable doubt, because the evidence presented to the grand jury was overwhelming and there is no reasonable possibility that the error affected the determination to indict defendant for these offenses (*see People v Clyde*, 18 NY3d 145, 153-154). To the extent that defendant contends that he was denied effective assistance of counsel based both upon his first attorney's failure to object to the use of restraints and his attorney's remarks to defendant regarding the subject, those matters are outside the record on appeal and thus must be raised by a motion pursuant to CPL 440.10 (*see generally People v Roman*, 107 AD3d 1441, 1443, *lv denied* 21 NY3d 1045).

We reject defendant's further contention that his statement to the police was not voluntary because it was obtained in violation of his right to be protected from unreasonable search and seizure. There is no reason to disturb County Court's determination that defendant's grandmother consented to the entry of the police into her home by opening the door wider when asked whether they could talk to defendant (*see People v Gardner*, 45 AD3d 1371, 1371, *lv denied* 9 NY3d 1033; *People v Long*, 124 AD2d 1016, 1017; *cf. People v Christianson*, 57 AD3d 1385, 1387-1388). With respect to defendant's contention that he was denied effective assistance of counsel because his second attorney failed to raise a *Payton* violation in his omnibus motion and instead made the argument at the *Huntley* hearing, we reject that contention inasmuch as it was established at the *Huntley* hearing that there was no such violation (*see People v Orsini*, 50 AD3d 1541, 1541; *People v Johnson*, 41 AD3d 1298, 1298, *lv denied* 9 NY3d 877).

We also reject defendant's contention that the court abused its discretion in denying his motion for a mistrial based upon the spontaneous testimony of a police witness that he identified defendant as the person he saw running from the house after viewing a mugshot (*see People v Scott*, 107 AD3d 1635, 1636, *lv denied* 21 NY3d 1077; *see generally People v Ortiz*, 54 NY2d 288, 292). In any event, by striking the testimony and providing a curative instruction, the court minimized any prejudicial effect (*see People v Santiago*, 52 NY2d 865, 866).

We reject defendant's contention that his third attorney abdicated his responsibility during jury selection by allegedly deferring to defendant with respect to the exercise of peremptory challenges. It is well settled that, "[i]f defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is 'for the attorney, not the accused to make' because it is not fundamental, the defendant is deprived of 'the expert judgment of counsel to which the Sixth Amendment entitles him' or her" (*People v Hogan*, 26 NY3d 779, 786). Here, however, the record establishes that, although defense counsel properly provided defendant the opportunity to provide meaningful input with respect to the exercise of peremptory challenges (*see generally People v Starks*, 88 NY2d 18, 29), he did not make peremptory challenges "solely in deference to defendant" (*People v Black*, 137 AD3d 1679, 1679-1680, *lv*

denied 27 NY3d 1128).

Although we agree with defendant that he was denied effective assistance of counsel when his third attorney took a position that was adverse to him with respect to his pro se motion pursuant to CPL 330.30 challenging the use of restraints at the grand jury proceeding (*see People v Hunter*, 35 AD3d 1228, 1228), we nevertheless conclude that, under the unique circumstances presented here, no corrective action is required. The court had denied three prior motions challenging the use of restraints at the grand jury proceeding, two of which were pro se, and defendant's third attorney advised the court that he had explained to defendant that the issue would be raised on appeal, which it was. Because there would be no benefit to defendant to hold the appeal and remit the matter to County Court for a de novo review of the motion with new counsel (*cf. People v King*, 129 AD3d 992, 993; *Hunter*, 35 AD3d at 1228-1229), we decline to do so. Contrary to defendant's contention, he was not denied effective assistance of counsel at sentencing, and thus we reject defendant's contention that the matter should be remitted for resentencing (*cf. People v Lawrence*, 27 AD3d 1091, 1091-1092). We have reviewed defendant's remaining contentions with respect to the alleged denial of effective assistance of counsel and conclude that they are without merit (*see generally People v Benevento*, 91 NY2d 708, 711-714).

Although defendant failed to preserve for our review his contention that the court erred in calculating the expiration date of the order of protection, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Because we agree with defendant that the court erred, we modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify an expiration date in accordance with CPL 530.13 (4) (A) (*see People v Bradford*, 61 AD3d 1419, 1421, *affd* 15 NY3d 329). We reject defendant's challenge to the severity of the sentence. We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

765

CA 14-01555

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

WALTER F. REYNOLDS, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM KREBS, INDIVIDUALLY AND AS MAYOR OF VILLAGE OF SPRINGVILLE, AND VILLAGE OF SPRINGVILLE, DEFENDANTS-RESPONDENTS.

THE LAW OFFICE OF PARKER R. MACKAY, KENMORE (PARKER R. MACKAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 5, 2014. The order dismissed the complaint upon defendants' motion.

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

Memorandum: In a prior appeal (*Reynolds v Krebs*, 81 AD3d 1269), we concluded that Supreme Court erred in granting that part of defendants' motion for summary judgment dismissing plaintiff's cause of action alleging that defendants were negligent, inter alia, in ordering the demolition of a building owned by plaintiff. The court thereafter granted defendants' motion for leave to amend their answer to add the affirmative defense of governmental immunity, and upon defendants' subsequent motion, granted defendants summary judgment dismissing the complaint based on that defense (*see* CPLR 5501 [a] [1]; *Oakes v Patel*, 20 NY3d 633, 644-645). Plaintiff's contention that the court erred in granting defendants' motion for leave to amend their answer is brought up for our review on his appeal from the order granting defendants summary judgment dismissing the complaint.

Plaintiff contends that defendants are barred by the doctrine of judicial estoppel from raising the affirmative defense of governmental immunity because they allegedly asserted in a prior federal action that an adequate postdeprivation remedy was available in a state court action (*Reynolds v Krebs*, 336 Fed Appx 27 [2nd Cir 2009]). " 'The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because [the party's] interests have changed' " (*Popadyn v Clark*

Constr. & Prop. Maintenance Servs., Inc., 49 AD3d 1335, 1336). Here, however, defendants did not allege as a basis for summary judgment in the federal action that a negligence action would provide an adequate remedy but, instead, argued that there was no dispute that there was an adequate remedy in state court (*Reynolds*, 336 Fed Appx at 29). Thus, we conclude that the court did not abuse its discretion in granting defendants' motion for leave to amend their answer to allege as an affirmative defense that the determination to demolish plaintiff's building was protected by the doctrine of governmental immunity (*see generally Carro v Lyons Falls Pulp & Paper, Inc.,* 56 AD3d 1276, 1277).

We reject plaintiff's further contention that the court erred in granting summary judgment dismissing the complaint. It is well established that "an agency of government is not liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public.' Such a duty . . . — 'a duty to exercise reasonable care toward the plaintiff'— is 'born of a special relationship between the plaintiff and the governmental entity' " (*McLean v City of New York*, 12 NY3d 194, 199; *see Bower v City of Lockport*, 115 AD3d 1201, 1202-1203, *lv denied* 24 NY3d 905). Defendants established their entitlement to summary judgment dismissing the complaint on the ground that they did not owe a special duty to plaintiff (*see Valdez v City of New York*, 18 NY3d 69, 75; *Bower*, 115 AD3d at 1202-1203), but instead acted under their police power to protect the general public. In opposition to defendants' motion, plaintiff failed to raise an issue of fact that defendants owed him a special duty (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and indeed, failed even to allege that defendants owed him a special duty (*cf. Bower*, 115 AD3d at 1203).

We further conclude, in any event, that defendants are also entitled to summary judgment based on the defense of governmental function immunity (*see Bower*, 115 AD3d at 1203). "That defense 'shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions' " (*id.*, quoting *Valdez*, 18 NY3d at 76; *see Haddock v City of New York*, 75 NY2d 478, 484). Here, section 77-11 of the Code of the Village of Springville affords the mayor the discretion to demolish a building in an emergency situation.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

773

KA 14-01519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN R. BOMBARD, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 26, 2014. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). Defendant was sentenced to an indeterminate prison term of 1⅓ to 4 years and ordered to pay a fine in the amount of $2,000. 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contentions that County Court erred in admitting evidence of his refusal to submit to a breathalyzer test and in instructing the jury that an adverse inference could be drawn from his refusal (*see People v Kithcart*, 85 AD3d 1558, 1559, *lv denied* 17 NY3d 818; *see generally* CPL 470.05 [2]). In any event, defendant's contentions lack merit. "To establish a refusal, the People must show that the failure to register a sample is the result of defendant's action and not of the machine's inability to register the sample" (*People v Adler*, 145 AD2d 943, 944, *lv denied* 73 NY2d 919; *see People v Bratcher*, 165 AD2d 906, 907, *lv denied* 77 NY2d 958; *Matter of Van Sickle v Melton*, 64 AD2d 846, 846; *see generally* Vehicle and Traffic Law § 1194 [2] [f]), and we conclude that the People met that burden here. The People also were therefore entitled to an adverse inference charge based on defendant's refusal (*see*

People v Thomas, 46 NY2d 100, 110, *appeal dismissed* 444 US 891; CJI2d[NY] Vehicle & Traffic Law § 1192 [3]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe, particularly in view of defendant's history of convictions of driving while intoxicated.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

774

KA 14-01506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLASCO P. ROZIER, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 12, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The facts are largely undisputed. On the evening of September 13, 2012, two officers of the Buffalo Police Department were patrolling a high crime area on the east side of the city when they saw a vehicle stop abruptly outside of a house. Defendant exited the vehicle, looked several times at the officers' patrol car, and walked quickly towards the back of the house. The officers suspected defendant of trespassing and quietly followed him, approaching the house from different directions. They lost sight of defendant for approximately 15 to 30 seconds. Defendant suddenly emerged from behind the house, and one officer began questioning him about his behavior. The other officer reported that he had seen defendant "standing next to" a blue City of Buffalo garbage tote located nearby. When one officer lifted the lid of the garbage tote, defendant dropped his head and said, "oh man." A loaded gun was inside. Defendant was arrested and confessed to having possessed the gun.

Defendant moved to suppress the gun and his statements to the police, arguing that he abandoned the gun in response to unlawful police pursuit and that he was arrested without probable cause. County Court held a suppression hearing at which the officers testified to the foregoing facts, and defendant testified that he

abandoned the gun in the garbage tote before the officers caught up with him. The court concluded that defendant had been arrested without probable cause and suppressed any statements made after the arrest; the court denied defendant's motion, however, insofar as defendant sought to suppress the gun. Defendant contends that the latter ruling was error. We reject that contention. When the officers followed defendant toward the back of the house, they "were engaged merely in observation," not pursuit (*People v Foster*, 302 AD2d 403, 404, *lv denied* 100 NY2d 581; *see People v Feliciano*, 140 AD3d 1776, 1777). That observation "was unobtrusive and did not limit the defendant's freedom of movement" (*Feliciano*, 140 AD3d at 1777; *see generally People v Howard*, 50 NY2d 583, 592, *cert denied* 449 US 1023). The court thus properly determined that defendant's abandonment of the gun was not in response to unlawful police conduct (*see Feliciano*, 140 AD3d at 1777).

Contrary to defendant's contention, we conclude that the conviction is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We nonetheless agree with defendant's contention that he was denied a fair trial owing to prosecutorial misconduct. Although defendant failed to preserve that contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). At trial, the People presented testimony of a forensic expert to discuss DNA evidence collected from the gun, but the testimony was not conclusive. The expert testified that she analyzed the DNA mixture and determined that defendant was among 1 in 15 Americans who could not be excluded as a contributor. Nevertheless, on summation, the prosecutor grossly exaggerated the DNA evidence as "overwhelming" proof establishing defendant's "guilt beyond all doubt" and posited: "If the defendant had not possessed the gun, wouldn't science have excluded him?" In our view, the prosecutor's flagrant distortion of the DNA evidence caused defendant such substantial prejudice that he was denied due process of law, particularly in light of the circumstantial nature of the People's case (*see People v Jones*, 134 AD3d 1588, 1589; *see generally People v Wright*, 25 NY3d 769, 783). In light of the foregoing, we agree with defendant's related contention that he was denied effective assistance of counsel owing to defense counsel's failure to object to the prosecutor's misconduct during summation (*see Wright*, 25 NY3d at 780-783).

In light of our determination, defendant's challenge to the severity of his sentence is academic.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

776

KA 14-00231

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS E. CARDUCCI, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (E. Jeannette Ogden, A.J.), rendered September 3, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that the People violated County Court's pretrial ruling that a detective who investigated the burglarized house could not present opinion testimony because he was not an expert in tool mark identification. The People adhered to the ruling inasmuch as the detective did not render an opinion whether the tool marks on the frame of the door leading from the mud room into the house matched the burglar tools found in defendant's vehicle; he testified as a lay witness about his observations and actions, which was proper (*see generally People v Hoppe*, 47 AD2d 571, 572). In addition, the court did not err in admitting the other evidence of the tool marks, including photographs thereof (*see People v Marini*, 114 AD2d 686, 687-688, *lv denied* 67 NY2d 653). Defendant did not preserve his further contention that he was prejudiced when the prosecutor elicited significant testimony from the detective regarding his scientific background and education despite the court's ruling that the detective was not permitted to testify as an expert (*see* CPL 470.05 [2]), 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]; *People v Valdez*, 53 AD3d 172, 173-176, *lv denied* 11 NY3d 836).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that the attached

mud room and the garage of the house in which he was discovered by the homeowner were part of the "dwelling" for purposes of Penal Law §§ 140.00 (3) and 140.25 (2) (*see People v Rivera*, 301 AD2d 787, 788, *lv denied* 99 NY2d 631; *People v Vasquez*, 277 AD2d 1023, 1023, *lv denied* 96 NY2d 788). In any event, that contention is without merit (*see People v Jackson*, 126 AD3d 1508, 1510; *Rivera*, 301 AD2d at 788-789; *People v Carmel*, 298 AD2d 928, 928-929, *lv denied* 99 NY2d 556). We reject defendant's contention that the evidence is legally insufficient to establish that he intended to commit a crime when he unlawfully entered the house (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to infer beyond a reasonable doubt that defendant intended to commit a crime inside the building based on the evidence of the fresh tool marks on the frame of the door leading from the mud room into the house, defendant's possession of burglar tools, his unexplained presence on the premises, and his actions and statements when confronted by the homeowner, the witnesses from whom the homeowner sought help, and the police (*see People v James*, 114 AD3d 1202, 1205, *lv denied* 22 NY3d 1199; *People v Freeman*, 103 AD3d 1177, 1177-1178, *lv denied* 21 NY3d 912; *People v Vivenzio*, 103 AD2d 1044, 1044-1045). Contrary to defendant's further contention, 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, we conclude that he was not deprived of a fair trial by prosecutorial misconduct during the opening statement (*see People v Castro*, 281 AD2d 935, 935-936, *lv denied* 96 NY2d 860), and that the alleged instances of prosecutorial misconduct on summation were either "a fair response to defense counsel's summation or fair comment on the evidence" (*People v Walker*, 117 AD3d 1441, 1442, *lv denied* 23 NY3d 1044 [internal quotation marks omitted]; *see People v Hassem*, 100 AD3d 1460, 1461, *lv denied* 20 NY3d 1099).

We further conclude that the court properly declined to give defendant's requested supplemental jury charge inasmuch as an adverse inference instruction was not warranted in this case (*see generally People v Durant*, 26 NY3d 341, 347; *People v Matos*, 138 AD3d 426, 427, *lv denied* 27 NY3d 1135). In addition, defendant failed to preserve for our review his contention that the court's instructions on the burglary count were erroneous inasmuch as he did not request that the court omit the "or remains" language from its proposed charge and failed to object to the charge as given on that ground (*see People v Smith*, 140 AD3d 1396, 1398; *People v Bonner*, 256 AD2d 1219, 1220, *lv denied* 93 NY2d 871). 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]; *Smith*, 140 AD3d at 1398). Contrary to defendant's further contention, this case does not involve the possibility that the jury rendered a nonunanimous verdict, i.e., that defendant was convicted on different theories of the burglary as presented in the court's charge, inasmuch as the evidence adduced here could not have established that defendant entered the house lawfully and formed the

intent to commit a crime while remaining therein (*cf. People v Graves*, 136 AD3d 1347, 1348, *lv denied* 27 NY3d 1069).

Finally, the sentence is not unduly harsh or severe. The certificate of conviction, however, incorrectly reflects that defendant was sentenced as a second felony offender, and it must therefore be amended to reflect that he was sentenced as a second violent felony offender (*see People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959; *People v Afrika*, 79 AD3d 1678, 1680, *lv denied* 17 NY3d 791).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

777

KA 13-00576

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS MANSILLA, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 13, 2011. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant, an inmate in state prison, contends that the evidence is legally insufficient to establish that he knowingly possessed the contraband in question, i.e., a sharpened piece of metal found in his shoe, and that the verdict is against the weight of the evidence in that regard. As a preliminary matter, we note that defendant failed to preserve his challenge to the sufficiency of the evidence because he made only a general motion for a trial order of dismissal at the close of the People's case (*see People v Hawkins*, 11 NY3d 484, 492). Moreover, defendant failed to renew his motion after he and the People's rebuttal witnesses testified (*see People Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that the evidence, when viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), provided a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495), i.e., that defendant knew that the piece of metal was in his shoe. 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).

Defendant's remaining contentions, all of which relate to his sentence, are unpreserved for our review and in any event lack merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

780

CAF 15-00091

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

IN THE MATTER OF RONALD CRAMER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DULSA CRAMER, RESPONDENT-APPELLANT.

IN THE MATTER OF DULSA CRAMER,
PETITIONER-APPELLANT,

V

RONALD CRAMER, RESPONDENT-RESPONDENT.

IN THE MATTER OF MARY HUMPHREY, ESQ., ATTORNEY
FOR THE CHILDREN, PETITIONER-RESPONDENT,

V

RONALD CRAMER, RESPONDENT-RESPONDENT,
AND DULSA CRAMER, RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR PETITIONER-RESPONDENT RONALD CRAMER AND RESPONDENT-RESPONDENT.

MARY HUMPHREY, ATTORNEY FOR THE CHILDREN, NEW HARTFORD.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered December 5, 2014 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded Ronald Cramer sole custody of the subject children.

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

Memorandum: Respondent-petitioner-respondent mother appeals from an order granting sole custody of the children to petitioner-respondent-respondent father and supervised visitation with the mother. Contrary to the mother's contention, Family Court made sufficient findings of fact, and its determination has a sound and substantial basis in the record (*see Matter of Ladd v Krupp*, 136 AD3d

1391, 1392-1393). "It is well settled that a concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*id.* at 1393 [internal quotation marks omitted]). Here, the evidence before the court established that the mother was alienating the children from the father. The mother made it apparent during her testimony that she did not want the children to have a relationship with the father. The mother denied or obstructed the father's visitation with the children and would not cooperate with the visitation supervisors. The totality of the circumstances supported the court's award of custody to the father (*see Matter of Marino v Marino*, 90 AD3d 1694, 1695).

Contrary to the mother's contention, the court's order does not require her to complete a parenting program and comply with mental health counseling as a prerequisite to filing a petition for modification of custody or visitation (*see generally Matter of Avdic v Avdic*, 125 AD3d 1534, 1535; *Matter of Adam H.*, 195 AD2d 1074, 1075). Rather, the court's order states that the mother's completion of such a program and substantial compliance with the mental health counseling ordered by the court would constitute a substantial change of circumstances for any future petition for modification of the order. Nothing in the order prevents the mother from supporting a modification petition with a showing of a different change of circumstances. The court also properly ordered the mother to attend mental health counseling as a component of its order granting her visitation (*see generally Avdic*, 125 AD3d at 1535).

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

786

CA 15-00217

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

VAN WIE CHEVROLET, INC., DOING BUSINESS AS
EVANS CHEVROLET, PLAINTIFF-APPELLANT,

V ORDER

GENERAL MOTORS, LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

BRESSLER, AMERY & ROSS, NEW YORK CITY (ERIC L. CHASE OF COUNSEL), AND RIVETTE & RIVETTE, P.C., SYRACUSE, FOR PLAINTIFF-APPELLANT.

LAVIN, O'NEIL, CEDRONE & DISIPIO, NEW YORK CITY (JOHN J. O'DONNELL, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered November 9, 2012. The order, among other things, granted in part the motion of defendant General Motors, LLC to dismiss the complaint against it by dismissing five of the seven causes of action and granted the motion of defendant Sharon Chevrolet, Inc. to dismiss the complaint against it.

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

787

CA 15-00218

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

VAN WIE CHEVROLET, INC., DOING BUSINESS AS
EVANS CHEVROLET, PLAINTIFF-APPELLANT,

V ORDER

GENERAL MOTORS, LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

BRESSLER, AMERY & ROSS, NEW YORK CITY (ERIC L. CHASE OF COUNSEL), AND RIVETTE & RIVETTE, P.C., SYRACUSE, FOR PLAINTIFF-APPELLANT.

LAVIN, O'NEIL, CEDRONE & DISIPIO, NEW YORK CITY (JOHN J. O'DONNELL, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL) FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered June 16, 2014. The order, among other things, granted in part the motion of defendant General Motors, LLC for summary judgment and granted in part plaintiff's motion for summary judgment.

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

788

CA 15-00219

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

VAN WIE CHEVROLET, INC., DOING BUSINESS AS
EVANS CHEVROLET, PLAINTIFF-RESPONDENT-APPELLANT,

V OPINION AND ORDER

GENERAL MOTORS, LLC, DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 3.)

LAVIN, O'NEIL, CEDRONE & DISIPIO, NEW YORK CITY (JOHN J. O'DONNELL, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BRESSLER, AMERY & ROSS, NEW YORK CITY (ERIC L. CHASE OF COUNSEL), AND RIVETTE & RIVETTE, P.C., SYRACUSE, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered November 10, 2014. The judgment, among other things, granted in part the motion of defendant General Motors, LLC to dismiss the complaint, granted in part the motion of defendant General Motors, LLC for summary judgment and granted in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety, granting the motion of General Motors, LLC in its entirety, and granting judgment in favor of defendant General Motors, LLC as follows:

> It is ADJUDGED AND DECLARED that defendant General Motors, LLC did not violate Vehicle and Traffic Law § 463 (2) (ff) (1),

and as modified the judgment is affirmed without costs.

Opinion by CENTRA, J.P.:

I.

The primary issue raised on this appeal is whether defendant, General Motors, LLC (GM), violated Vehicle and Traffic Law § 463 (2) (ff) (1) when it approved the relocation request of a Chevrolet dealer in the Syracuse area, but failed to give notice thereof to plaintiff, Van Wie Chevrolet, Inc., doing business as Evans Chevrolet, another

Chevrolet dealer in the same area. We conclude that no violation of the statute occurred.

II.

Plaintiff and defendant Sharon Chevrolet, Inc. (Sharon) both operate Chevrolet dealerships, franchised by GM. Plaintiff and GM entered into a standard GM Dealer Sales and Service Agreement (Dealer Agreement). Pursuant to the Dealer Agreement, every GM dealer is assigned an "Area of Primary Responsibility" (APR). The APR is comprised of census tracts based upon the geography in which a particular dealer is deemed to have a competitive advantage in attracting customers. The APR is used by GM to assess the performance of dealers in its dealer network.

Sharon, whose dealership is located 5.28 miles away from plaintiff's dealership, requested approval from GM to relocate its dealership to a site that is 3.97 miles away from plaintiff's dealership. At first, GM denied Sharon's request, concluding that the relocation would not be in the interests of GM, Chevrolet, or the GM dealer network in Syracuse. However, after Sharon commenced a federal lawsuit against GM seeking monetary damages for GM's denial of its relocation request, GM approved the relocation and settled the lawsuit.

Plaintiff commenced this action against GM and Sharon seeking to enjoin GM from taking any action to relocate Sharon. Supreme Court (DeJoseph, J.) granted Sharon's motion to dismiss the complaint against it, and granted in part GM's motion to dismiss the complaint against it by dismissing five causes of action, leaving only a cause of action for the violation of Vehicle and Traffic Law § 463 (2) (ff) (1) and a cause of action for breach of fiduciary duty (appeal No. 1). Following discovery, plaintiff and GM moved for summary judgment on the remaining two causes of action. Supreme Court (Gilbert, J.) granted plaintiff's motion in part on its cause of action pursuant to section 463 (2) (ff) (1) and granted GM's motion in part by dismissing the cause of action for breach of fiduciary duty (appeal No. 2). A judgment was thereafter entered on the orders in appeal Nos. 1 and 2 (appeal No. 3). GM appealed from the judgment in appeal No. 3, and plaintiff cross-appeals from the orders in appeal Nos. 1 and 2.

III.

As a preliminary matter, although plaintiff did not cross-appeal from the judgment in appeal No. 3, we exercise our discretion to treat plaintiff's notice of cross appeal in appeal Nos. 1 and 2 as valid and deem its cross appeal as taken from the judgment in appeal No. 3 (*see Ironwood, L.L.C. v JGB Props., LLC* [appeal No. 2], 130 AD3d 1527, 1528, *lv denied* 26 NY3d 908). As another preliminary matter, we reject plaintiff's contention that the appeal and cross appeal are moot. In September 2015, GM approved Sharon's request to relocate to a different site than it had previously requested. In the letter approving the request, GM explained that Sharon's prior relocation request was currently "closed" as a result of the judgment rendered in

this case, but it further explained that the status of that prior relocation request might change if GM prevailed on the pending appeal. GM stated that, if it prevailed on the appeal, then Sharon would have to choose whether to pursue its current proposed relocation or its prior relocation request. We agree with GM that Sharon did not withdraw its prior relocation request, which is the subject of this appeal, and the appeal and cross appeal are therefore not moot.

IV.

Plaintiff's second cause of action alleges that GM violated the notification requirements of Vehicle and Traffic Law § 463 (2) (ff) (1). Plaintiff sought a declaration that GM's approval of Sharon's relocation would result in a modification of plaintiff's APR and its franchise; that GM violated the notice requirements under the law; that the modification of plaintiff's franchise would adversely affect plaintiff's rights, obligations, investments, or return on investments; and that the modification was not undertaken in good faith or for good cause.

New York enacted the Franchised Motor Vehicle Dealer Act (Dealer Act), codified at Vehicle and Traffic Law § 460 *et seq.*, to protect dealers from "[u]nfair business practices by franchisors" (§ 463). "By enacting the Dealer Act, the legislature sought to address a historical inequality in the vehicle franchise business that favored automobile manufacturers over motor vehicle dealers" (*Beck Chevrolet Co., Inc. v General Motors LLC*, 27 NY3d 379, 393, *rearg denied* 27 NY3d 1187). "The imbalance placed dealers at the mercy of manufacturers who were able to draft and impose protectionist agreements favorable to manufacturers, placing at risk a dealer's financial investment" (*id.*). The statute " 'provide[s] certain basic protection for the dealer in areas where such protection is deemed necessary[, and] . . . the protection afforded the dealer through the [statute] . . . counterbalance[s] the numerous protections afforded the manufacturer under the terms of its franchise agreement with the dealer' " (*id.*, quoting the Memorandum in Support of Legislation). The Dealer Act thus "statutorily overrid[es] agreement provisions that [are] unfair to dealers" (*id.* at 394).

The Dealer Act specifically addresses relocations of dealers and notice to other dealers of the relocation. Vehicle and Traffic Law § 463 (2) (cc) (1) provides that it is unlawful for any franchisor to, inter alia, "relocat[e] an existing new motor vehicle dealer into the relevant market area of an existing franchise motor vehicle dealer of the same line make unless the franchisor provides notice pursuant to the terms of this subdivision." Written notice of the proposed relocation must be given to all dealers "that have a relevant market area that encompasses the proposed site," and the franchisor has the "burden of proving that there exists good cause for any such . . . relocation" (§ 463 [2] [cc] [1]). Section 463 (2) (cc) does not apply, however, to the relocation of

> "an existing new motor vehicle dealer within that dealer's own existing relevant market area,

> provided that the relocation not be to a site within the relevant market area of a licensed new motor vehicle dealer for the same line make of motor vehicle, unless such existing franchise was previously located within such new motor vehicle dealer's relevant market area" (§ 463 [2] [cc] [2] [i]).

Inasmuch as it is undisputed that plaintiff's location and Sharon's current and proposed location were within the same relevant market area, we conclude that the exception under section 463 (2) (cc) (2) (i) applied, and plaintiff was not entitled to notice of the proposed relocation pursuant to section 463 (2) (cc) (1). Plaintiff does not contest the dismissal of its first cause of action, which alleges a violation of that section.

As stated above, plaintiff's second cause of action alleges a violation of Vehicle and Traffic Law § 463 (2) (ff) (1), which provides that it is unlawful for any franchisor "[t]o modify the franchise of any franchised motor vehicle dealer unless the franchisor notifies the franchised motor vehicle dealer, in writing, of its intention to modify the franchise of such dealer at least [90] days before the effective date thereof, stating the specific grounds for such modification." Under that subdivision, a modification "means any change or replacement of any franchise if such change or replacement may substantially and adversely affect the new motor vehicle dealer's rights, obligations, investment or return on investment" (§ 463 [2] [ff] [2]). "A modification is deemed unfair if it is not undertaken in good faith; is not undertaken for good cause; or would adversely and substantially alter the rights, obligations, investment or return on investment of the franchised motor vehicle dealer under an existing franchise agreement" (§ 463 [2] [ff] [3]).

The decision by the Court of Appeals in *Beck Chevrolet Co., Inc.* (27 NY3d 379) was issued after the judgment was rendered in this case. In that case, GM gave notice to its dealer that it was changing its area of geographic sales and service advantage (AGSSA) (*id.* at 387), which was a subset of the dealer's APR (*id.* at 396). The Court, answering a question certified by the Second Circuit Court of Appeals, held that "a change in the AGSSA is a change to the franchise" inasmuch as a "revised AGSSA has the potential to significantly impact the franchise agreement" (*id.*). The Court further explained, however, that, "by its terms, section 463 (2) (ff) (1) is concerned only with those modifications that result in *negative* consequences for the dealer, and which meet its requirements for determining whether a change is statutorily impermissible" (*id.* [emphasis added]). Thus, a revision to the AGSSA did not "categorically violate[] section 463 (2) (ff)" (*id.*), but rather the change needed to be "assessed on a case-by-case basis, upon consideration of the impact of the revision on a dealer's position" (*id.* at 397).

In light of the decision in *Beck Chevrolet Co., Inc.*, GM has abandoned its argument that a change in plaintiff's APR was not a modification to the franchise under Vehicle and Traffic Law § 463 (2)

(ff). GM maintains, however, that while it must give notice to plaintiff of any change in its APR, it is not required to give plaintiff notice under section 463 (2) (ff) (1) of GM's approval of Sharon's relocation request. GM contends that plaintiff's APR will not change until after Sharon relocates, and no notice is required before then. Plaintiff, on the other hand, contends that it must have notice of the proposed relocation before it occurs, because the relocation will eventually result in a changed APR.

We agree with GM that the change to plaintiff's franchise is only the change in the APR, and that has not occurred yet, so no notice is yet required under Vehicle and Traffic Law § 463 (2) (ff) (1). We reject plaintiff's contention that GM's approval of Sharon's relocation request ipso facto results in a modification of plaintiff's franchise for which notice may be required under section 463 (2) (ff) (1). To construe section 463 (2) (ff) (1) to require notice to a dealer when a franchisor approves a relocation request of another dealer would essentially render section 463 (2) (cc) (1), which requires notice to certain dealers of relocations of other dealers, superfluous. It is well settled that

> "[a] court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent . . . , and, where possible, should 'harmonize[] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof' "

(*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115, citing McKinney's Cons Laws of NY, Book 1, Statutes § 98; *see Yatauro v Mangano*, 17 NY3d 420, 426-427). Courts should construe a statute "to avoid rendering any of its language superfluous" (*Matter of Monroe County Pub. Sch. Dists. v Zyra*, 51 AD3d 125, 130; *see Matter of Ebanks v Skyline NYC, LLC*, 70 AD3d 943, 945).

By enacting Vehicle and Traffic Law § 463 (2) (cc), the Legislature saw fit to require franchisors to give notice to *certain* dealers when relocating another motor vehicle dealer to their relevant market area. If we construe section 463 (2) (ff) (1) to require notice to be given to *all* dealers who assert that the proposed relocation would result in a modification of their franchise, that would not be harmonizing the two statutory provisions (*see generally Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [must read statutes together and "harmonize the related provisions in a way that renders them compatible"]). Instead, consistent with *Beck Chevrolet Co., Inc.*, we conclude that a modification to plaintiff's APR is a change to its franchise for which notice under section 463 (2) (ff) (1) may be required if the modification substantially and adversely affects plaintiff's rights, obligations, investments, or return on investments. But GM's approval of Sharon's relocation, by itself, is not a change to plaintiff's franchise for which notice under section 463 (2) (ff) (1) is required.

Inasmuch as plaintiff's second cause of action sought a declaration, the court erred in failing to declare the rights of the parties (*see* CPLR 3001; *Kemper Independence Ins. Co. v Ellis*, 128 AD3d 1529, 1530). We conclude that the judgment should be modified by denying plaintiff's motion in its entirety, granting GM's motion in its entirety, and declaring that GM did not violate Vehicle and Traffic Law § 463 (2) (ff) (1).

V.

On its cross appeal, plaintiff contends that the court erred in dismissing the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, equitable estoppel, and breach of fiduciary duty. We conclude that those causes of action were properly dismissed.

The court dismissed the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and equitable estoppel upon GM's motion pursuant to CPLR 3211 (a) (1) and (7). On such a motion, "plaintiff's complaint is to be afforded a liberal construction, . . . the facts alleged therein are accepted as true, and . . . plaintiff is to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint fit within any cognizable legal theory" (*Gilewicz v Buffalo Gen. Psychiatric Unit*, 118 AD3d 1298, 1299 [internal quotation marks omitted]).

Article 17.12 of the Dealer Agreement provided that the agreement "is governed by the laws of the State of Michigan." Parties are "generally free to reach agreements on whatever terms they prefer," including choice of law provisions (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 368; *see Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201, *rearg denied* 85 NY2d 1033, *cert denied* 516 US 811). Such provisions will be upheld unless "the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal" (*Brown & Brown, Inc.*, 25 NY3d at 368 [internal quotation marks omitted]). "This public policy exception is reserved for those foreign laws that are truly obnoxious[, and] [t]he party seeking to invoke the exception bears a heavy burden of proving that application of [the chosen] law would be offensive to a fundamental public policy of this State" (*id.* at 368-369 [internal quotation marks omitted]).

Here, plaintiff failed to meet its burden of establishing that the public policy exception applied and that New York law should govern this dispute. Plaintiff's contention that it is a New York business and that the claims relate to New York is clearly insufficient to override the parties' choice of law provision in the Dealer Agreement.

A.

Plaintiff's fourth cause of action alleges that GM breached the Dealer Agreement, including articles 4.1, 4.2, and 4.3. Plaintiff

alleges that Sharon's proposed relocation and impact on plaintiff's APR was in essence a unilateral modification by GM of the Dealer Agreement.

"To prevail on its claim for breach of contract . . . , [plaintiff] must establish by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach" (*Bank of Am., NA v First Am. Title Ins. Co.*, 499 Mich 74, 100, 878 NW2d 816, 829 [2016]). "If the language of a contract is unambiguous, [courts] must enforce the contract as written" (*id.* at 86, 821).

Article 4.1 of the Dealer Agreement provided that GM would "monitor marketing conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location . . ." Article 4.2 of the Dealer Agreement provided that, if GM "determines that marketing conditions warrant a change in Dealer's [APR], it will advise Dealer in writing of the proposed change, the reasons for it, and will consider any information the Dealer submits . . . If [GM] thereafter decides the change is warranted, it will issue a revised Notice of [APR]." Article 4.3 of the Dealer Agreement provided that GM had no obligation "to provide notice . . . for a dealer replacement or relocation, and such events are within the sole discretion of [GM] pursuant to its business judgment."

We conclude that the court properly dismissed the breach of contract cause of action on the ground that the Dealer Agreement did not obligate GM to provide notice or obtain approval from plaintiff before relocating another dealership. Although article 4.2 of the Dealer Agreement required GM to provide notice to plaintiff of any change in its APR, GM did not violate that section because it has not yet changed plaintiff's APR. What plaintiff is really seeking is notice of the relocation, but article 4.3 of the Dealer Agreement specifically provides that GM is not required to provide notice of another dealer relocation. Plaintiff therefore failed to state a claim for breach of contract because there simply was no breach, as established by the language of the Dealer Agreement (*see generally* CPLR 3211 [a] [1]; *Sheriff's Silver Star Assn., Inc. v County of Oswego*, 27 AD3d 1104, 1105-1106, *lv denied* 7 NY3d 712).

B.

Plaintiff's fifth cause of action alleges that GM owed an implied contractual duty of good faith and fair dealing to plaintiff, and GM breached that duty by approving Sharon's relocation.

There are cases from Michigan that state that "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing" (*Fodale v Waste Mgmt. of Michigan, Inc.*, 271 Mich App 11, 35, 718 NW2d 827, 841 [2006]; *see Engel Mgmt., Inc. v Ford Motor Credit Co.*, 2009 WL 348828 *4-5 [Mich Ct App, Feb. 12, 2009, No. 279868], *lv denied* 484 Mich 869, 769 NW2d 686 [2009]; *see also Robert Basil Motors, Inc. v General Motors Corp.*, 2004 WL

1125164, *10 [WD NY, Apr. 17, 2004, No. 13-CV-315A]). However, as explained by a Federal Court, while Michigan does not recognize an *independent* tort action for breach of implied covenant of good faith and fair dealing, it does recognize a breach of contract claim based on the defendant's breach of the duty of good faith and fair dealing (*see McLiechey v Bristol W. Ins. Co.*, 408 F Supp 2d 516, 522 [WD Mich 2005], *affd* 474 F3d 897 [6th Cir 2007]; *see also Lancia Jeep Hellas S.A. v Chrysler Group Intl. LLC*, 2016 WL 1178303, *9 [Mich Ct App, Mar. 24, 2016, No. 329481]; *see generally Hubbard Chevrolet Co. v General Motors Corp.*, 873 F2d 873, 876 [5th Cir 1989], *reh'g denied* 879 F2d 1435 [1989], *cert denied* 493 US 978 [1989]). "Breach of contract actions based upon the breach of an implied covenant of good faith and fair dealing are limited to contracts where a contractual term leaves the manner of performance to one party's discretion" (*McLiechey*, 408 F Supp 2d at 522; *see Buckhardt v City Natl. Bank of Detroit*, 57 Mich App 649, 652, 226 NW2d 678, 680 [1975]; *Lancia Jeep Hellas S.A.*, 2016 WL 1178303, at *9). "However, there is no implied duty of good faith where the parties have 'unmistakably expressed their respective rights,' because the implied duty 'cannot override express contract terms' " (*Lancia Jeep Hellas S.A.*, 2016 WL 1178303, at *9; *see Hubbard Chevrolet Co.*, 873 F2d at 877).

Here, as noted above, article 4.3 of the Dealer Agreement provides that GM had no obligation "to provide notice . . . for a dealer replacement or relocation, and such events are within the sole discretion of [GM] pursuant to its business judgment." Thus, the Dealer Agreement " 'unmistakably expressed' " terms regarding relocations, and there is no implied duty of good faith with respect thereto (*Hubbard Chevrolet Co.*, 873 F2d at 878; *see Parlovecchio Bldg., Inc. v Charter County of Wayne Bldg. Auth.*, 2014 WL 631264, *4 [Mich Ct App, Feb. 13, 2014, No. 313257], *lv denied* 497 Mich 868 [2014]).

C.

Plaintiff's seventh cause of action alleges that GM should be equitably estopped from approving Sharon's relocation. Plaintiff alleges that it "has done all the tasks, and fulfilled all the requirements that GM has imposed upon [plaintiff]," including expending substantial sums for a certain program, yet GM first disapproved, then approved, Sharon's relocation, which would do grievous harm to plaintiff.

Estoppel is an equitable doctrine that " 'prevents one party to a contract from enforcing a specific provision contained in the contract' " (*City of Grosse Pointe Park v Michigan Mun. Liab. & Prop. Pool*, 473 Mich 188, 203-204, 702 NW2d 106, 116 [2005]). A party seeking to invoke the doctrine must establish "(1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party" (*Cincinnati Ins. Co. v Citizens Ins. Co.*, 454 Mich 263, 270, 562 NW2d 648, 651 [1997], *reh'g denied* 456 Mich 1201 [1997]; *see Okrie v State*

of Michigan, 2016 WL 3365308, *7 [Mich Ct App, June 16, 2016, No. 326607]).

We agree with the court that the complaint fails to state any misrepresentations that were made by GM. Plaintiff alleges in the complaint that it would be inequitable for GM "to deny its misconduct," but alleges no actual misrepresentation that was made by GM. The complaint does not state a cause of action for equitable estoppel, and the cause of action was therefore properly dismissed.

D.

Plaintiff's third cause of action alleges that GM "owe[d] significant and material fiduciary duties to [p]laintiff." Plaintiff listed the factors establishing the fiduciary relationship, including various requirements imposed upon plaintiff under the terms of the Dealer Agreement. Plaintiff alleges that GM breached its fiduciary duty by approving Sharon's relocation, which it knew would cause great harm to plaintiff. Although this cause of action survived GM's motion to dismiss, the court dismissed it upon GM's motion for summary judgment.

Under Michigan law, "[a] fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice" (*Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich App 509, 515, 309 NW2d 645, 648 [1981]; *see Ulrich v Federal Land Bank of St. Paul*, 192 Mich App 194, 196, 480 NW2d 910, 911 [1992]). "[A] fiduciary duty arises where there is a fiduciary relationship between the parties" (*Robert Basil Motors, Inc.*, 2004 WL 1125164, at *9 [applying Michigan law]). Although whether a fiduciary relationship exists is generally a question of fact, Michigan courts are "reluctant to extend the cause of action for breach of fiduciary relationship beyond the traditional context" (*Bero Motors v General Motors Corp.*, 2001 WL 1167533, *4 [Mich Ct App, Oct. 2, 2001, No. 224190], *lv denied* 467 Mich 868, 651 NW2d 917 [2002]).

In *Bero Motors*, the Michigan Court of Appeals held that no fiduciary relationship existed between GM and its franchisee (*id.* at *5). The Court held that "the parties were 'experienced for-profit entities in a commercial setting' and plaintiff's simple allegations of reliance on another was insufficient to establish a fiduciary relationship" (*id.*). In addition, in that case, as in this case, a provision of the franchise agreement stated that no fiduciary obligations were created by the agreement (*id.*). The Court held that this provision "provided notice of the context of the parties' course of business and thus any reposing of faith, confidence, and trust, and reliance upon the judgment and advice of another by plaintiff would have been misplaced, self-defeating and unwise" (*id.*). The holding in *Bero Motors* was followed by Federal District Courts applying Michigan law in other cases involving automobile makers and dealers, with the courts dismissing the breach of fiduciary duty claims (*see Ford Motor Co. v Ghreiwati Auto*, 945 F Supp 2d 851, 868 [ED Mich 2013] [holding that the defendants "do not make allegations that take this case's

controversy outside of a commercial setting"]; *see also Robert Basil Motors, Inc.*, 2004 WL 1125164, at *9). We therefore agree with GM that the breach of fiduciary duty claim was properly dismissed in this case.

VI.

Accordingly, we conclude that the judgment should be modified by denying plaintiff's motion in its entirety, granting GM's motion in its entirety, and declaring that GM did not violate Vehicle and Traffic Law § 463 (2) (ff) (1).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

790

CA 15-02099

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

IN THE MATTER OF ARBITRATION BETWEEN ALLSTATE INSURANCE COMPANY, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

MICHAEL J. CAPPADONIA, RESPONDENT-APPELLANT.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (GEORGE A. KOHL, II, OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAW OFFICE OF JOHN TROP, DEWITT (BARNEY F. BILELLO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered June 23, 2015. The order granted the petition to permanently stay arbitration.

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

Memorandum: In this dispute over supplementary uninsured/underinsured motorist (SUM) coverage, respondent insured appeals from an order granting the petition of petitioner insurer to stay arbitration permanently pursuant to CPLR 7503 (c). We agree with respondent that Supreme Court erred in granting the petition. Respondent obtained an automobile liability insurance policy from petitioner for a pickup truck and two passenger vehicles. The policy provided SUM coverage to respondent, and also included an arbitration clause. While the policy was in effect, respondent sustained personal injuries when a motorcycle he was operating was struck by an allegedly underinsured vehicle. Although the motorcycle was not covered under the policy issued to him by petitioner, respondent made a claim with petitioner for SUM coverage. Petitioner disclaimed coverage on the ground that the motorcycle was not covered under the policy, prompting respondent to demand arbitration pursuant to CPLR 7503 (c). More than five months after respondent's demand, petitioner commenced this proceeding to stay arbitration, asserting, as it did in the disclaimer letter, that no SUM coverage existed in connection with the accident because the motorcycle on which petitioner was riding was not a covered vehicle under the policy. In opposition, respondent argued, inter alia, that the petition was untimely. The court granted the petition without explanation, and we now reverse.

We agree with respondent that the petition to stay arbitration is time-barred because it was not filed within 20 days of respondent's formal arbitration demand (*see* CPLR 7503 [c]; *Aetna Life & Cas. Co. v Stekardis*, 34 NY2d 182, 185-186; *John W. Cowper Co. v Clintstone Props.*, 120 AD2d 976, 977, *lv denied* 68 NY2d 610). Although the 20-day time limit of CPLR 7503 (c) does not apply if the parties never had "any agreement to arbitrate" (*Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 268), the "*Matarasso* exception is inapplicable" because "the contract[] at issue in this case contain[s] an arbitration provision" (*Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 145, *rearg denied* 11 NY3d 801; *see Matter of Steck [State Farm Ins. Co.]*, 89 NY2d 1082, 1084). Indeed, so long as the subject insurance policy contains some type of arbitration agreement between the parties, as it does here, an untimely stay application which "conten[ds] that there is no coverage under [the] policy's [SUM] provisions . . . is outside the [*Matarasso*] exception" (*Matter of Nova Cas. Co. v Martin*, 57 AD3d 548, 549; *see Steck*, 89 NY2d at 1084; *Matter of State Farm Mut. Auto. Ins. Co. v Urban*, 78 AD3d 1064, 1065-1066; *State Farm Ins. Cos. v DeSarbo*, 52 AD3d 936, 937). Because the petition was untimely, the court had no power to entertain it (*see Fiveco, Inc.*, 11 NY3d at 145; *Steck*, 89 NY2d at 1084; *Aetna Life & Cas. Co.*, 34 NY2d at 185-186).

In light of our determination, we need not address respondent's remaining contentions.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

791

CA 15-02106

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

JOHN FREDERICK AND JAN FREDERICK, DOING BUSINESS AS FREDERICK FARM, CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY AUTHORITY, DEFENDANT-APPELLANT.
(CLAIM NO. 121048.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Renée Forgensi Minarik, J.), entered March 23, 2015. The order, insofar as appealed from, required defendant to obtain or pay the cost of the insurance for the testing to be performed by claimants' environmental expert.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is granted in its entirety.

Memorandum: In this real property tort action, claimants assert that deicing agents have run off of the Thruway and onto their farm located adjacent to the Thruway, thereby contaminating the soil and water. In order to prove their claim, claimants sought to inspect, test, and sample the Thruway shoulder and median adjacent to their farm. The testing would include, among other things, air, soil, and water testing and would involve "six visits to the site during the winter and early spring." Claimants located a professor who agreed to perform the testing as their expert in exchange for permission to use the tests in his research and teaching; however, neither claimants nor the professor could afford the liability insurance routinely required by defendant in connection with inspections performed on its property.

Defendant moved for a protective order "requiring [c]laimants to provide satisfactory liability insurance in connection with proposed testing." The Court of Claims issued an order stating, inter alia, that "[d]efendant shall be required to obtain or pay the costs of the insurance necessary to cover the anticipated testing activities" and that "the amount of insurance necessary shall be as determined by [d]efendant." Defendant appeals from that part of the order requiring

it to obtain or pay the cost of the insurance for the testing to be performed by claimants' environmental expert, contending that it violates Court of Claims Act § 27.

As a preliminary matter, we reject claimant's contention that defendant's appeal is moot. Contrary to claimant's contention, the record before us does not establish that all of the expert's proposed testing visits have taken place, and thus the appeal is not moot because "the case presents a live controversy and enduring consequences potentially flow from the order appealed from" (*Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 576).

Turning to the merits, we agree with defendant that the court erred in denying its motion in part and, further, directing it to pay the cost of the insurance. Under Court of Claims Act § 27, "costs, witnesses' fees and disbursements shall not be taxed . . . by the court to any party." The court therefore did not "have authority to direct defendant to pay the fees incurred by claimant[s] in retaining an expert witness" (*Russo v State of New York*, 50 AD3d 1554, 1555, *lv denied* 11 NY3d 702; *see generally Martinez v State of New York*, 111 AD3d 1445, 1446, *lv dismissed* 23 NY3d 956; *Mihileas v State of New York*, 266 AD2d 866, 866). We therefore reverse the order insofar as appealed from and grant the motion in its entirety.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

795

KA 11-01473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY WENNER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered May 19, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he entered the victim's dwelling. We reject that contention. Defendant was charged both as a principal and an accomplice and, to establish defendant's liability as an accomplice, the People were not required to prove that he entered the victim's residence. We conclude that the evidence is legally sufficient to establish defendant's liability as an accomplice inasmuch as he "importuned and intentionally aided [another] in breaking into [the victim's] home with the intent that they commit a crime therein" (*People v Hill*, 188 AD2d 949, 950; *see People v Soto*, 216 AD2d 337, 337, *lv denied* 86 NY2d 803). In any event, contrary to defendant's contention, the evidence is legally sufficient to establish defendant's liability as a principal. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is " 'a valid line of reasoning and permissible inferences from which a rational jury' " could have found that defendant personally entered the residence and removed the large television that he and his codefendant were seen carrying in the vicinity of the victim's residence shortly before the crime was discovered (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is

not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we conclude that defendant's waiver of his *Antommarchi* rights was valid (*see People v Flinn*, 22 NY3d 599, 601-602, *rearg denied* 22 NY3d 940).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

801

KA 14-00532

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD MOSS, 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 (Michael F. Pietruszka, J.), rendered March 17, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts one and three of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]). We agree with defendant that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 210.35 (4) because he was denied his right to testify before the grand jury. It is undisputed that, on March 1, 2013, defendant sent a written letter to the District Attorney stating that "the defendant herein demands the right, pursuant to CPL [190.50 (5) (a)], to testify in any Grand Jury proceedings, concerning the above titled action, prior to any voting of said Grand Jury, concerning the allegations contained in the above titled complaint." We conclude that defendant's letter satisfied the statutory requirements for notifying the People of a request to appear before the grand jury inasmuch as the letter was served upon the District Attorney prior to the filing of an indictment, asserted defendant's right to appear in an impending grand jury proceeding, and set forth an address to which communications may be sent (*see* CPL 190.50 [5] [a]; *People v Evans*, 79 NY2d 407, 412). Pursuant to CPL 190.50 (5) (b), "[u]pon service upon the district attorney of notice requesting appearance before a grand jury pursuant to paragraph (a), the district attorney must . . . serve upon the applicant . . . a notice that he

will be heard by the grand jury *at a given time and place*" (emphasis added). "The requirements of CPL 190.50 are to be strictly enforced" (*People v Kirk*, 96 AD3d 1354, 1359, *lv denied* 20 NY3d 1012 [internal quotation marks omitted]).

Here, we conclude that, after receiving defendant's March 1, 2013 request to appear before the grand jury, the People did not provide defendant with notice "of the time and place of the grand jury presentation" (*People v Caswell*, 56 AD3d 1300, 1302, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781, *cert denied* 556 US 1286; *see People v Pattison*, 63 AD3d 1600, 1601), as is required by CPL 190.50 (5) (b), and we therefore reverse. We note that, on March 25, 2013, the People sent a letter to defense counsel stating that, "during the week of April 8, 2013, the Erie County Grand Jury will hear testimony concerning this matter. In accordance with CPL 190.50, should your client wish to testify, please clearly state so, in writing, no later than April 5, 2013, so that I can make the necessary arrangements to receive his testimony." Although that letter would have been sufficient to satisfy the initial and separate requirement set forth in CPL 190.50 (5) (a) that the People notify defendant of his right to appear before the grand jury (*see generally People v Sawyer*, 96 NY2d 815, 816, *rearg denied* 96 NY2d 928), the letter did not satisfy the requirements of CPL 190.50 (5) (b) to inform defendant of the time and place of the grand jury presentation, which were triggered by defendant's March 1, 2013 request to appear before the grand jury. It is of no moment that defendant did not respond to the People's letter because nothing in CPL 190.50 requires a defendant to resubmit a valid notice pursuant to CPL 190.50 (5) (a) when he has already done so. We further note that the prosecutor's oral statement to defense counsel on April 10, 2013 that "he will be presenting the matter to the Erie County Grand Jury the next day" was insufficient to satisfy the notice requirement inasmuch as it did not provide defendant with the requisite notice of the time and place of the grand jury presentation (*see* CPL 190.50 [5] [b]; *see generally Caswell*, 56 AD3d at 1302).

In light of our determination, we do not address defendant's contention that he was denied effective assistance of counsel or his challenge to the severity of the sentence. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

807

CA 15-01241

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

DAWN M. PLACE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHAFFEE-SARDINIA VOLUNTEER FIRE COMPANY AND JOHN VAN CURRAN, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 1, 2015. The order, insofar as appealed from, denied those parts of the cross motion of defendants seeking to strike the complaint, to dismiss the action and to impose sanctions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' cross motion seeking the imposition of sanctions pursuant to 22 NYCRR 130-1.1 (a) and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages for alleged sexual harassment. In appeal No. 1, defendants appeal from an order that, inter alia, denied those parts of their cross motion seeking to strike the complaint and dismiss the action pursuant to CPLR 3126 (3) and to impose sanctions, including fees and costs, pursuant to 22 NYCRR 130-1.1. In appeal No. 2, defendants appeal from an order that held in abeyance that part of their motion seeking to strike the note of issue and certificate of readiness and denied that part of their motion seeking sanctions pursuant to 22 NYCRR 130-1.1 in addition to those sought in their cross motion.

In appeal No. 1, we conclude that Supreme Court did not err in refusing to strike the complaint and dismiss the action pursuant to CPLR 3126 (3). "[I]t is well settled that the court has broad discretion to determine motions under [CPLR 3126] and that the dismissal sanction is considered a harsh remedy" (*Strauss v Vladeck*, 173 AD2d 1063, 1064). Although plaintiff's conduct in this case was unacceptable, we cannot conclude that the court abused its discretion in refusing to strike the complaint (*see Quiceno v 101 Park Ave.*

Assoc., 272 AD2d 107, 107-108). We agree with defendants, however, that plaintiff's conduct warrants a sanction under 22 NYCRR 130-1.1.

Pursuant to 22 NYCRR 130-1.1 (a), a court may award to any party fees and costs resulting from frivolous conduct, i.e., conduct that is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; . . . [or that is] undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or . . . asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). Factors to consider in determining whether the conduct undertaken was frivolous include "the circumstances under which the conduct took place," and whether "the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*id.*).

Here, plaintiff's conduct was clearly frivolous inasmuch as she submitted an affidavit that disregarded a court order and, in response to a second order, she submitted a second affidavit that contained a material falsehood. When that conduct is viewed along with plaintiff's failure to comply with discovery demands and other orders, we conclude that it was an abuse of discretion for the court to refuse to sanction plaintiff. We therefore modify the order in appeal No. 1 by granting that part of defendants' cross motion seeking sanctions pursuant to 22 NYCRR 130-1.1, and we remit the matter to Supreme Court for the determination of an appropriate sanction (*see generally Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084, 1085; *Matter of Wagner*, 114 AD3d 1235, 1238).

In appeal No. 2, we agree with defendants that the court erred in holding in abeyance that part of their motion seeking to strike the note of issue and certificate of readiness and instead should have granted that part of their motion. It is well established that a note of issue should be vacated when it is based upon a certificate of readiness that contains an erroneous material fact (*see Donald v Ahern*, 96 AD3d 1608, 1611). Here, defendants established that discovery was incomplete when the note of issue and certificate of readiness were filed, and they therefore established that " 'a material fact in the certificate of readiness [was] incorrect' " (*Suphankomut v Chi-The Yu*, 66 AD3d 1360, 1360; *see Erena v Colavita Pasta & Olive Oil Corp.*, 199 AD2d 729, 730, *lv dismissed* 83 NY2d 847). We therefore modify the order in appeal No. 2 accordingly.

Contrary to defendants' final contention in appeal No. 2, we perceive no abuse of discretion in the court's denial of that part of the motion seeking additional sanctions pursuant to 22 NYCRR 130-1.1.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

808

CA 15-01242

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

DAWN M. PLACE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHAFFEE-SARDINIA VOLUNTEER FIRE COMPANY AND JOHN VAN CURRAN, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 17, 2015. The order held in abeyance that part of the motion of defendants seeking to strike the note of issue and certificate of readiness and denied that part of the motion seeking sanctions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and striking the note of issue and certificate of readiness and as modified the order is affirmed without costs.

Same memorandum as in *Place v Chaffee-Sardinia Volunteer Fire Co.* ([appeal No. 1] ___ AD3d ___ [Oct. 7, 2016]).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

812

CA 15-01901

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

CATHERINE MAHAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HELEN PROPER, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

THE LAW OFFICES OF JON LOUIS WILSON, LOCKPORT (JON LOUIS WILSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CATHERINE MAHAR, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), entered May 8, 2015. The order modified a judgment of the Wilson Town Court (Robert J. Botzer, J.) by vacating the award of damages and remitted the matter for a new trial on the issue of damages.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the remittal of the matter to Wilson Town Court with respect to defendant Helen Proper and dismissing the claim against her, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this small claims action seeking damages for conversion based upon allegations that defendants stole numerous items of personal property from a home that plaintiff had been renting to certain defendants. Following a trial, Town Court rendered a judgment in plaintiff's favor in the amount of $3,000 and, on defendants' appeal, County Court modified the judgment by vacating the award of damages and remitted the matter to Town Court for a new trial on the issue of damages. County Court determined that defendants were liable for conversion, but found that plaintiff failed to provide sufficient evidence of the value of the stolen items. Helen Proper (defendant) now appeals from County Court's order (*see* CPLR 5703 [b]); the remaining two defendants have not appealed and thus are not affected by our order herein (*see generally Hecht v City of New York*, 60 NY2d 57, 61-62).

We agree with defendant that County Court erred in remitting the matter for a new trial on the issue of damages with respect to her, and we therefore modify the order accordingly. "[S]ubstantive justice cannot permit plaintiff[] a second opportunity to prove [her] damages merely because [she] failed to meet [her] prima facie burden in the

first instance" (*Yanni v Beck*, 138 AD3d 1365, 1366). Thus, upon determining that there was insufficient evidence of damages with respect to defendant, County Court was obligated to dismiss the claim against her rather than remit the matter for a new trial (*see id.*).

In light of our determination, defendant's remaining contentions are academic. Plaintiff's contention that County Court erred in determining that the evidence of damages is insufficient is not properly before us because she did not cross-appeal from County Court's order (*see Hecht*, 60 NY2d at 63).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

813

CA 15-01909

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

LORRAINE MURRAY, PLAINTIFF-APPELLANT,

V ORDER

SHANITA P. PARSON, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (SCOTT D. CARLTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (EMILY M. COBB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 31, 2015. The order denied the motion of plaintiff for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 30, 2016, and filed in the Monroe County Clerk’s Office on September 22, 2016,

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

820

KA 14-01107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WINSTON R. PENDARVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 10, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that the evidence is legally insufficient to support the conviction because the People did not establish that he entered the victims' house with intent to commit a crime therein (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well established that "[a] defendant's intent to commit a crime may be inferred from the circumstances of the entry . . . , as well as from defendant's actions and assertions when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [internal quotation marks omitted]). Here, we conclude that there is legally sufficient evidence from which a jury could infer defendant's criminal intent based on those factors, i.e., defendant was on the victims' premises without any explanation, broke a screen door, entered the victims' house, and immediately fled, albeit slowly and calmly, after one of the victims saw him in the house (*see People v Beaty*, 89 AD3d 1414, 1416-1417, *affd* 22 NY3d 918; *see also People v Hymes*, 132 AD3d 1411, 1411-1412, *lv denied* 26 NY3d 1146; *People v Bergman*, 70 AD3d 1494, 1494, *lv denied* 14 NY3d 885). 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).

Contrary to defendant's contention, the People articulated a sufficient race-neutral explanation for using a peremptory challenge

to remove a prospective juror (*see People v Barber*, 156 AD2d 1022, 1023, *lv denied* 75 NY2d 866). Defendant failed to preserve for our review his related contention that the prosecutor's explanation for striking a prospective juror in response to his *Batson* challenge was pretextual (*see People v Cooley*, 48 AD3d 1091, 1092, *lv denied* 10 NY3d 861; *People v Dandridge*, 26 AD3d 779, 779-780, *lv denied* 9 NY3d 1032), 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]).

Defendant contends that County Court improperly permitted the male victim to give testimony with respect to a certain statement that the female victim made to him at the time of the burglary. According to defendant, that testimony constituted hearsay and improperly bolstered the female victim's testimony. Defendant's bolstering contention is not preserved for our review inasmuch as defendant did not object to the testimony on that ground (*see People v Capers*, 94 AD3d 1475, 1476, *lv denied* 19 NY3d 971). In any event, inasmuch as the disputed statement made by the female victim was an excited utterance, it did not constitute hearsay or improper bolstering (*see People v Miller*, 115 AD3d 1302, 1304, *lv denied* 23 NY3d 1040). Defendant's related contention that follow-up testimony given by the male victim was hearsay is also not preserved for our review. In any event, that contention lacks merit inasmuch as that testimony also falls under the excited utterance exception to the hearsay rule (*see id.* at 1303-1304; *People v Cordero*, 272 AD2d 924, 924-925, *lv denied* 95 NY2d 851).

Although we agree with defendant that the police officers' testimony concerning the victims' identification of defendant constituted improper bolstering, defendant failed to preserve that contention for our review. In any event, the admission of that testimony was harmless inasmuch as the evidence against defendant, including the strong identification testimony of the victims, was overwhelming, and there " 'is [no] significant probability' " that the jury would have acquitted defendant but for that error (*People v Johnson*, 57 NY2d 969, 970-972; *see People v Hampton*, 121 AD3d 1538, 1539, *lv denied* 24 NY3d 1084; *People v Elliott*, 294 AD2d 870, 870, *lv denied* 98 NY2d 696).

Contrary to defendant's further contention, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

825

KA 15-00954

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

KHADIJAH LANE, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated April 17, 2015. The order granted the motion of defendant to suppress physical evidence.

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

Memorandum: On appeal from an order granting defendant's motion to suppress physical evidence, the People contend that Supreme Court failed to properly credit their witnesses and erred in granting the motion. We reject that contention. " 'It is well settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*People v Sylvester*, 129 AD3d 1666, 1667, *lv denied* 26 NY3d 1092). Here, the court found the testimony of one of the police witnesses to be "unworthy of belief" and therefore concluded that "the People failed to meet the burden of establishing the legality of the police action in the first instance" (*People v Rumph*, 199 AD2d 434, 435). We conclude that the court's credibility determination is supported by the record, and thus we see no basis to disturb it (*see Sylvester*, 129 AD3d at 1667).

Contrary to the People's further contention, the court did not "assume the role of defense counsel." "A [t]rial [j]udge in a criminal action is not merely an observer nor only a referee. It is the [j]udge's duty to assume an active role in the examination of witnesses where proper or necessary to elicit or develop significant facts, to clarify or enlighten an issue, or to facilitate or expedite the orderly progress of the trial" (*People v Ellis*, 62 AD2d 469, 470). There is no evidence in this record that the court acted improperly; rather, upon review of the hearing transcript, we conclude that the

court attempted to clarify issues because the police officer's testimony was confusing and contradictory.

In view of our determination, the indictment must be dismissed because " 'the unsuccessful appeal by the People precludes all further prosecution of defendant for the charges contained in the accusatory instrument' " (*People v Moxley*, 137 AD3d 1655, 1656-1657).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

835

CA 15-01999

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

IN THE MATTER OF ANNA V. LEWANDOWSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT, THERESA L. PULOS, SUPERINTENDENT OF SCHOOLS OF THE CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT AND CRAIG PAWLAK, PRINCIPAL OF THE CLYDE-SAVANNAH JUNIOR SENIOR HIGH SCHOOL, RESPONDENTS-RESPONDENTS.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (AMY L. HEMENWAY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered February 27, 2015 in a proceeding pursuant to CPLR article 78. The judgment granted respondents' motion to dismiss the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking annulment of respondent Clyde-Savannah Central School District Board of Education's determination to discontinue her probationary appointment on the grounds that it was arbitrary and capricious, and an abuse of discretion. Petitioner sought, inter alia, reinstatement to her probationary teaching position with back pay.

We conclude that Supreme Court properly granted respondents' motion to dismiss the petition on the ground that petitioner failed to serve pursuant to Education Law § 3813 (1) a notice of claim within three months after the claim arose. Service of a notice of claim is a "condition precedent to bringing an action against a school district or a board of education" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547), and such service was required here. We conclude that petitioner has not commenced a special proceeding in the nature of mandamus seeking to vindicate a judicially enforceable right conferred on her by the law (*cf. Matter of Speis v Penfield Cent.*

Schs., 114 AD3d 1181, 1183; *Matter of Brunecz v City of Dunkirk Bd. of Educ.*, 23 AD3d 1126, 1127; *Matter of Piaggone v Board of Educ., Floral Park-Bellrose Union Free Sch. Dist.*, 92 AD2d 106, 108). Therefore, contrary to petitioner's contention, this case "is not exempt from the notice of claim requirement" (*Matter of Silvernail v Enlarged City Sch. Dist. of Middletown*, 40 AD3d 1004, 1005).

In light of our conclusion, we do not address petitioner's remaining contentions.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

838

KA 15-00606

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL TEDESCO, JR., DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 20, 2015. 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 imposed upon his conviction of criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]) and sentencing him to a determinate term of imprisonment, followed by a period of postrelease supervision. Even assuming, arguendo, that defendant executed a valid waiver of the right to appeal at the underlying plea proceeding, we conclude that the waiver does not encompass his challenge to the severity of the sentence imposed following his violation of probation (*see People v Russell*, 133 AD3d 1231, 1231; *People v Dexter*, 71 AD3d 1504, 1504-1505, *lv denied* 14 NY3d 887). We further conclude, however, that the sentence imposed upon defendant's violation of probation is not unduly harsh or severe.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

839

KA 14-01533

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSEAN GOSS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 24, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). Defendant's conviction stems from the seizure of cocaine and drug paraphernalia during a search of his residence conducted by parole officers and police officers. Defendant's parole officer testified at the suppression hearing that he made the determination to search defendant's residence based on defendant's recent parole violations and the fact that, despite being unemployed, on one occasion he possessed a large sum of cash (*see People v Maynard*, 67 AD3d 1391, 1391, *lv denied* 14 NY3d 890). We agree with Supreme Court that the search was "rationally and reasonably related to the performance of the parole officer's duty" (*People v Huntley*, 43 NY2d 175, 181; *see People v Escalera*, 121 AD3d 1519, 1520, *lv denied* 24 NY3d 1083). Contrary to defendant's contention, the fact that another parole officer and police officers assisted defendant's parole officer during the search did not render it a police operation (*see People v Adams*, 126 AD3d 1405, 1405-1406, *lv denied* 25 NY3d 1158). Defendant's remaining contentions regarding the search of his residence were not raised in his motion papers or before the suppression court and are therefore not preserved for our review (*see generally People v Schluter*, 136 AD3d 1363, 1363, *lv denied* 27 NY3d

1138; *People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, the period of postrelease supervision is not unduly harsh or severe (*see People v Singer*, 104 AD3d 1311, 1312).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

840

KA 13-00938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDUARDO HERNANDEZ, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Douglas A. Randall, J.), rendered March 19, 2013. 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: Defendant appeals 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]). We conclude that County Court properly denied defendant's motion to suppress evidence seized from defendant's home pursuant to a search warrant. Contrary to defendant's contention, the in camera testimony of the confidential informant at the *Darden* hearing established that the confidential informant existed and imparted to the police the information referred to in the search warrant application (*see People v Brown* [appeal No. 1], 93 AD3d 1231, 1231, *lv denied* 19 NY3d 958*; see generally People v Darden*, 34 NY2d 177, 181-182, *rearg denied* 34 NY2d 995). We therefore conclude that the informant's testimony allayed any concerns that the informant "might have been wholly imaginary and the communication from him entirely fabricated" (*Darden*, 34 NY2d at 182; *see People v Edwards*, 95 NY2d 486, 494). Contrary to defendant's further contention, we conclude that the warrant application was facially sufficient inasmuch as the supporting affidavit established that the informant was reliable and had a basis of knowledge for the information imparted to the police (*see generally People v Flowers*, 59 AD3d 1141, 1142-1143; *People v Hernandez*, 262 AD2d 1032, 1032, *lv denied* 94 NY2d 863; *People v Ferron*, 248 AD2d 962, 963, *lv denied* 92

NY2d 879). Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

841

KA 14-00517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH KLUSS, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered November 19, 2013. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree and welfare fraud in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of offering a false instrument for filing in the first degree (Penal Law former § 175.35) and welfare fraud in the fifth degree (§ 158.05). Defendant was convicted of failing to report her income from a part-time job on a recertification application for food stamp benefits that she submitted to the Yates County Department of Social Services (DSS).

Defendant contends that she was denied effective assistance of counsel because counsel failed to request an adverse inference instruction based upon the destruction of one page of her recertification application. We reject that contention. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152), and that is not the case here. Although an "adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State" (*People v Handy*, 20 NY3d 663, 669), in this case the DSS employee who destroyed the document was not acting as an agent of the police or prosecution within the meaning of *Handy* at the time she destroyed the document (*see generally People v Heise*, 41 AD3d 1255, 1256, *lv denied* 9 NY3d 1006). Indeed, the record establishes that the document was destroyed in accordance with the DSS employee's normal practices approximately six months before DSS learned that defendant had a part-time job and

commenced the investigation that culminated in the instant conviction. In any event, even assuming, arguendo, that defendant was entitled to an adverse inference charge and defense counsel erred in failing to request that charge, we conclude that the error did not deprive defendant of meaningful representation (*see People v Blake*, 24 NY3d 78, 81-82; *see generally People v Baldi*, 5 NY2d 137, 147).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The People established that defendant began working at her part-time job in October 2011 and knowingly failed to list the income from that job on a recertification application that she signed on November 19, 2011 with the intent to defraud DSS (*see People v Hure*, 16 AD3d 774, 775, *lv denied* 4 NY3d 854; *see generally People v Oberlander*, 60 AD3d 1288, 1291). Although defendant testified that she told a DSS employee about the income from her part-time job during a telephone call, and that she "most likely" listed that income on the page of the application that was destroyed by a DSS employee prior to trial, that DSS employee testified that she did not receive such a telephone call from defendant, and that the missing page of the application was destroyed because it contained no information other than a request to change the time of a scheduled appointment. 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

842

KA 10-01942

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE D. GARCIA, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered September 7, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, Supreme Court properly denied his request to charge the jury on the lesser included offense of manslaughter in the first degree (§ 125.20 [1]). An eyewitness testified that the victim was seated on a porch listening to music when defendant, who was on the steps, fired a single shot to the victim's head. Defendant admitted to the police that he shot the victim in the head and killed him, and the Medical Examiner testified that the "stippling" present on the victim's body, i.e., unspent gunpowder and small bits of metal, indicated that the shot was fired from a distance of 1 to 1½ feet. We therefore conclude that there is no reasonable view of the evidence that defendant intended to cause serious physical injury but did not intend to kill the victim (*see People v Muhammad*, 100 AD3d 1021, 1022, *lv denied* 20 NY3d 1102; *see generally People v Miller*, 6 NY3d 295, 302; *People v Glover*, 57 NY2d 61, 64).

Contrary to defendant's further contention, the court properly admitted in evidence photographs taken during the autopsy inasmuch as they assisted the jury in understanding the Medical Examiner's testimony concerning the gunshot wound (*see People v Trinidad*, 107 AD3d 1432, 1432, *lv denied* 21 NY3d 1046). Defendant also contends that the court abused its discretion in admitting photographs of the

victim taken at the crime scene because they were not relevant and were highly prejudicial. We reject that contention (*see People v Pobliner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; *see also People v Stevens*, 76 NY2d 833, 835). In any event, the evidence of defendant's guilt is overwhelming, and there is no significant probability that he would have been acquitted in the absence of the photographs of the crime scene. We therefore conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's contention that the court erred in denying his *Batson* objections with respect to the use of peremptory challenges for two prospective jurors. The court's determination of *Batson* objections is entitled to "great deference" (*Batson v Kentucky*, 476 US 79, 98 n 21; *see People v Hernandez*, 75 NY2d 350, 356, *affd* 500 US 352; *People v Luciano*, 10 NY3d 499, 505), and we conclude that the court did not abuse its discretion in this case. With respect to one of the prospective jurors, defendant failed to present "facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenge[] to exclude [the] potential juror because of [her] race" (*People v Childress*, 81 NY2d 263, 266; *see People v Green*, 60 AD3d 1320, 1321, *lv denied* 12 NY3d 915). With respect to the second prospective juror, the court properly determined that the prosecutor offered a race-neutral explanation for the exercise of the peremptory challenge, i.e., that the prospective juror's brother had been imprisoned for a rape conviction (*see People v Johnson*, 74 AD3d 1912, 1913; *People v Jackson*, 37 AD3d 1091, 1091, *lv denied* 8 NY3d 946). Defendant failed to preserve for our review his contention that the exercise of peremptory challenges for three of four female African-American prospective jurors constituted a *Batson* violation (*see generally People v Cooley*, 48 AD3d 1091, 1092, *lv denied* 10 NY3d 861). In any event, we conclude that defendant's "numerical argument [is] unsupported by factual assertions or comparisons that would serve as a basis for a prima facie case of impermissible discrimination" (*People v Brown*, 97 NY2d 500, 508).

Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

844

KA 15-00045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRIEK A. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). We reject defendant's contention that County Court's factual findings at the suppression hearing are against the weight of the evidence (*see People v Wilmot*, 204 AD2d 750, 751, *lv denied* 84 NY2d 835; *People v Wolf*, 160 AD2d 1076, 1077-1078, *lv denied* 76 NY2d 868). Contrary to defendant's further contention, the court properly determined that the police had reasonable suspicion to stop the vehicle driven by defendant. "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113; *see People v Mitchell*, 118 AD3d 1417, 1417, *lv denied* 24 NY3d 963). At the suppression hearing, a police officer with 23 years of experience in investigating narcotics identified the vehicle as the one used during an attempted controlled buy. He testified that he observed a hand-to-hand transaction between the driver of the vehicle and someone outside the vehicle, and he observed the vehicle make three quick stops in at least two drug-prone areas. We conclude under the totality of the circumstances that the police had reasonable suspicion to believe that

defendant had participated in a drug transaction (*see People v Cespedes*, 120 AD3d 585, 586, *lv denied* 24 NY3d 1082; *People v Jones*, 63 AD3d 1582, 1582-1583, *lv denied* 13 NY3d 797; *People v Soto*, 28 AD3d 264, 264, *lv denied* 7 NY3d 795; *see generally People v Jones*, 90 NY2d 835, 837).

We dismiss the appeal to the extent that defendant contends that the sentence is unduly harsh and severe inasmuch as defendant has completed serving his sentence and thus that part of the appeal is moot (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860; *People v Bald*, 34 AD3d 1362, 1362). We have examined defendant's remaining contention and conclude that it is without merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

845

KA 15-01171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATEEK NEWTON, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered November 19, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]), defendant contends that his guilty plea was not voluntary, knowing and intelligent because County Court failed to inquire into a possible defense. That contention is actually a challenge to the factual sufficiency of the plea allocution (*see generally People v Hicks*, 128 AD3d 1358, 1359, *lv denied* 27 NY3d 999; *People v Rios*, 93 AD3d 1349, 1349, *lv denied* 19 NY3d 966), and is therefore encompassed by defendant's valid waiver of the right to appeal (*see People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888; *People v Peters*, 59 AD3d 928, 928, *lv denied* 12 NY3d 820; *see generally People v Lopez*, 6 NY3d 248, 256). Moreover, that contention is not preserved for our review inasmuch as defendant failed to move to withdraw his plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Lugg*, 108 AD3d 1074, 1075). This case does not fall within the rare exception to the preservation requirement inasmuch as the plea allocution neither negated an essential element of the crime nor otherwise cast doubt on the voluntariness of the plea (*see Lopez*, 71 NY2d at 666).

To the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal (*see People v Strickland*, 103 AD3d 1178, 1178), we conclude that it is without merit. "In the context of a

guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404), and that is the case here (*see People v Garner*, 86 AD3d 955, 956).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

846

KA 14-01525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO PACE, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (TIMOTHY J. GARVIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 16, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon 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: 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 weapon in the third degree (§ 265.02 [3]), defendant contends that Supreme Court erred in refusing to suppress a handgun and his oral statements to the police. We reject that contention. The police were entitled to arrest defendant for a violation of the local open container ordinance committed in their presence (*see People v Taylor*, 294 AD2d 825, 825; *People v Bothwell*, 261 AD2d 232, 234-235, *lv denied* 93 NY2d 1026; *see generally* CPL 140.10 [1] [a]; *People ex rel. Johnson v New York State Div. of Parole*, 299 AD2d 832, 834, *lv denied* 99 NY2d 508), and the police were authorized to search defendant's person incident to his lawful arrest (*see People v Williams*, 39 AD3d 1269, 1270, *lv denied* 9 NY3d 871; *Johnson*, 299 AD2d at 834; *Taylor*, 294 AD2d at 826). The sentence is not unduly harsh or severe.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

847

CAF 14-02250

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

IN THE MATTER OF ASHLEY FINZER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE MANNING, III, RESPONDENT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered November 25, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, placed respondent on probation for one year.

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

Memorandum: Respondent appeals from an order that, inter alia, granted the family offense petition and imposed a one-year period of probation and a two-year order of protection. Contrary to respondent's contention, Family Court did not abuse its discretion by imposing a term of probation pursuant to Family Court Act § 841 (c) (*see generally Martin v Flynn*, 133 AD3d 1369, 1370).

Contrary to respondent's further contention, "[t]he record, viewed in its totality, establishes that [respondent] received meaningful representation" (*Matter of Heffner v Jaskowiak*, 132 AD3d 1418, 1418; *see generally People v Benevento*, 91 NY2d 708, 712). Indeed, respondent's contention that he did not receive effective assistance of counsel "is impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf" (*Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1819).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

848

CAF 14-01949

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

IN THE MATTER OF YVETTE NOBLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TROY PARIS, RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT PRO SE.

LISA H. BLITMAN, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered October 6, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

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

Memorandum: Petitioner mother commenced this proceeding seeking to modify a prior order pursuant to which respondent father had sole legal and physical custody of their daughter. The mother and the Attorney for the Child (AFC) appeal from an order that granted the father's motion to dismiss the petition without a hearing, and we affirm.

We reject the mother's contention that Family Court erred in deciding the father's motion on the same day that it was filed and served. Although motion papers generally must be "served at least eight days before the time at which the motion is noticed to be heard" (CPLR 2214 [b]; *see* Family Ct Act § 165 [a]), "[a] court has discretion to overlook late or defective service of a motion where the nonmoving party is not prejudiced" (*Barnaba-Hohm v St. Joseph's Hosp. Health Ctr.*, 130 AD3d 1482, 1483; *see generally* CPLR 2214 [c]; *Perez v Perez*, 131 AD2d 451, 451). Here, we conclude that the mother was not prejudiced by the timing of the father's motion (*see generally Bucklaew v Walters*, 75 AD3d 1140, 1141).

We also reject the contention of the mother and the AFC that the court erred in dismissing the petition without conducting a hearing. " 'A hearing is not automatically required whenever a parent seeks modification of a custody order' " (*Matter of Warrior v Beatman*, 70 AD3d 1358, 1359, *lv denied* 14 NY3d 711), and here the mother failed to "make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]; *see Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, *lv denied* 13 NY3d 715; *Matter of Chittick v Farver*, 279 AD2d 673, 675-676; *cf. Matter of Christopher B. v Patricia B.*, 75 AD3d 871, 872-873).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

849

CAF 14-02047

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

IN THE MATTER OF JACKIE L. MICKLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL P. MICKLE, RESPONDENT-RESPONDENT.

ROY G. FRANKS, MARION, FOR PETITIONER-APPELLANT.

DAVID E. CODDINGTON, ATTORNEY FOR THE CHILDREN, HORNELL.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered October 14, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the children to respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the provision requiring petitioner to participate in counseling as a prerequisite for seeking visitation, and as modified the order is affirmed without costs.

Memorandum: Petitioner mother appeals from an order granting respondent father sole custody of the children. We reject the mother's contention that she was denied effective assistance of counsel. The mother failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [internal quotation marks omitted]). We agree with the mother, however, that Family Court erred in requiring the mother to "actively engage[]" in individual counseling before seeking visitation with the children (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546; *Matter of Vieira v Huff*, 83 AD3d 1520, 1522). "Although a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Avdic v Avdic*, 125 AD3d 1534, 1535). We therefore modify the order accordingly.

The mother's contention that the court erred in issuing an order of protection is moot inasmuch as the order has expired by its own terms (*see Matter of Whitney v Judge*, 138 AD3d 1381, 1382, *lv denied* 27 NY3d 911; *Matter of Perez v Sepulveda*, 60 AD3d 1072, 1073, *lv dismissed* 12 NY3d 899). We have considered the mother's remaining

contentions and conclude that they are without merit.

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

850

CA 15-01585

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

CLAUDETTE E. STRUZIK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLADYS FULLINGTON AND BRYANT L. FULLINGTON,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

CLAUDETTE E. STRUZIK, PLAINTIFF,

V

SHAWN A. GAJEWSKI, DEFENDANT.
(ACTION NO. 2.)

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered April 27, 2015. The order granted the motion of defendants Gladys Fullington and Bryant L. Fullington for summary judgment dismissing the complaint against them.

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

Memorandum: In this action by plaintiff to recover damages for injuries allegedly sustained in a motor vehicle accident, plaintiff appeals from an order granting the motion of Gladys Fullington and Bryant L. Fullington (defendants) for summary judgment dismissing the complaint against them. We note at the outset that, in opposition to the motion and on this appeal, plaintiff has abandoned all of her claims of serious injury except those alleging a permanent consequential limitation of use or a significant limitation of use (*see generally Hartley v White*, 63 AD3d 1689, 1689; *Harris v Carella*, 42 AD3d 915, 915-916).

Supreme Court properly granted defendants' motion. By submitting plaintiff's deposition testimony and the affirmation of an orthopedic surgeon who examined plaintiff, defendants established as a matter of law that plaintiff did not sustain a serious injury as a result of the

subject accident. Those submissions established that plaintiff's injuries were preexisting conditions attributable to either degenerative processes or a prior unrelated motor vehicle accident (*see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400; *see generally Carrasco v Mendez*, 4 NY3d 566, 578-580). In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see Hartley*, 63 AD3d at 1690; *Zeigler v Ramadhan*, 5 AD3d 1080, 1082; *Sewell v Kaplan*, 298 AD2d 840, 840-841). Indeed, plaintiff's submission of MRI reports and the notes of her treating chiropractor confirm that the subject accident did not cause any new injury or exacerbate any preexisting injury, thereby refuting the conclusory opinion of the chiropractor in his affidavit (*see generally Edwards v Devine*, 111 AD3d 1370, 1371-1372; *Kwitek v Seier*, 105 AD3d 1419, 1421).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

851

CA 15-01617

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

BONNY J. MOMBREA AND MICHAEL MOMBREA, JR.,
PLAINTIFFS-APPELLANTS,

V ORDER

DANNY R. LAIRD, ANNIE LAIRD, AND DANNY R. LAIRD
AND ANNIE LAIRD, DOING BUSINESS AS D&A PERFORMANCE
HORSES, DEFENDANTS-RESPONDENTS.

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered July 22, 2014. The order, insofar as appealed from, denied the cross motion of plaintiffs for summary judgment dismissing defendants' counterclaim.

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: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

852

CA 15-00121

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

MANFRED SACHS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 122079.)

MANFRED SACHS, CLAIMANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered November 21, 2014. The judgment dismissed the claim against defendant.

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

Memorandum: Claimant commenced this action seeking, inter alia, damages for injuries he sustained as a result of allegedly improper medical treatment that he received at the correctional facilities where he was incarcerated. Contrary to claimant's contention, the Court of Claims properly granted defendant's motion to dismiss at the close of claimant's proof at trial based upon his failure to present any expert medical evidence (*see McDonald v State of New York*, 13 AD3d 1199, 1200). Issues concerning whether the treatment deviated from the accepted standard of care and whether it caused injuries are not "matters within the ordinary experience and knowledge of laypersons" (*Mosberg v Elahi*, 80 NY2d 941, 942; *see Abascal v State of New York*, 93 AD3d 1216, 1217, *lv denied* 19 NY3d 805). We reject claimant's contention that the claim sounds in ordinary negligence. Rather, we conclude that the claim is substantially related to medical diagnosis and treatment, and thus that "the action it gives rise to is by definition one for medical malpractice" (*McDonald*, 13 AD3d at 1200 [internal quotation marks omitted]; *see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

853

CA 15-02085

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

PATRICIA FARRAUTO AND JOSEPH A. FARRAUTO, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF JOSEPH FARRAUTO, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE BON-TON DEPARTMENT STORES, INC., DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (TODD M. SCHIFFMACHER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 14, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: In this personal injury action, plaintiffs seek damages for injuries allegedly sustained by Patricia Farrauto (plaintiff) when she tripped and fell while working for a fragrance company in a department store operated by defendant. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and defendant appeals. We affirm.

Defendant contends that it is entitled to summary judgment because plaintiff cannot identify the cause of her fall without engaging in speculation (*see Smart v Zambito*, 85 AD3d 1721, 1721). Even assuming, arguendo, that this contention was advanced in defendant's initial motion papers and thus that it is properly before us (*cf. Ozog v Western N.Y. Motocross Assn.*, 100 AD3d 1393, 1394), we conclude that defendant did not meet its burden of establishing its entitlement to summary judgment on that ground (*see Mandzyk v Manor Lanes*, 138 AD3d 1463, 1464; *Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365). Defendant submitted excerpts of plaintiff's deposition testimony in which she described the gift box over which she allegedly tripped, and her testimony is sufficient to enable a jury to determine that the gift box was the cause of her fall without resorting to speculation (*see Paternostro v Advance Sanitation, Inc.*, 126 AD3d 1376, 1377; *Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70

AD3d 439, 440; *see also Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1488).

We also reject defendant's contention that it is entitled to summary judgment on the ground that it neither created nor had actual or constructive notice of the allegedly dangerous condition (*see generally King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415). Defendant's submissions were insufficient to establish as a matter of law that its employees did not create the allegedly dangerous condition by placing the gift box on the floor (*see Guilfoyle v Parkash*, 123 AD3d 1088, 1089; *Hagin v Sears, Roebuck & Co.*, 61 AD3d 1264, 1265-1266; *Frank v Price Chopper Operating Co.*, 275 AD2d 940, 941), and defendant therefore also failed to establish that it did not have actual notice of the gift box on the floor prior to plaintiff's fall (*see McDonell v Wal-Mart Stores, Inc.*, 133 AD3d 1350, 1351; *see generally Walsh v Super Value, Inc.*, 76 AD3d 371, 375-376).

With respect to constructive notice, we conclude that defendant "failed to meet [its] burden of establishing that the allegedly dangerous condition was not visible and apparent for a sufficient length of time prior to the accident to permit [defendant], in the exercise of reasonable care, to discover and remedy it" (*Mikolajczyk v Morgan Contrs.*, 273 AD2d 864, 865; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). While defendant submitted evidence that its employees were generally expected to identify and remedy tripping hazards, it did not submit any evidence establishing when the area of plaintiff's fall was last inspected (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1470; *Webb v Salvation Army*, 83 AD3d 1453, 1454); that reasonable care did not require any such inspection (*cf. Pommerenck v Nason*, 79 AD3d 1716, 1717-1718; *see generally Catalano v Tanner*, 23 NY3d 976, 977); or that the gift box would not have been visible had the area been inspected (*see O'Bryan v Tonawanda Hous. Auth.*, 140 AD3d 1702, 1703; *cf. Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857-858). Plaintiff's testimony that she did not see the gift box before she tripped "does not establish [defendant's] entitlement to judgment as a matter of law on the issue whether the [gift box] was visible and apparent" (*Gwitt v Denny's, Inc.*, 92 AD3d 1231, 1232; *see Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

854

CA 15-01910

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

MIDLAND FUNDING, LLC, AS PURCHASER OF WEBBANK,
PLAINTIFF-RESPONDENT,

V ORDER

GLIEE GUNSALUS, DEFENDANT-APPELLANT.

DAVID M. KAPLAN, PENFIELD, FOR DEFENDANT-APPELLANT.

FORSTER & GARBUS, LLP, COMMACK (VALERIE E. WATTS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered August 5, 2015. The order denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 6, 2016, and filed in the Ontario County Clerk’s Office on May 9, 2016,

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

855

CA 15-01911

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

PORTFOLIO RECOVERY ASSOCIATES, LLC, AS PURCHASER OF GE CAPITAL RETAIL BANK, PLAINTIFF-RESPONDENT,

V ORDER

SHELLY FIUMANO, DEFENDANT-APPELLANT.

DAVID M. KAPLAN, PENFIELD, FOR DEFENDANT-APPELLANT.

FORSTER & GARBUS, LLP, COMMACK (VALERIE E. WATTS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered August 5, 2015. The order denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 1, 2016, and filed in the Ontario County Clerk's Office on July 19, 2016,

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

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court

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

856

CA 15-01956

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

JANE FIXTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF LIVINGSTON, LIVINGSTON COUNTY PROBATION DEPARTMENT, LIVINGSTON COUNTY SHERIFF DEPARTMENT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

JANE FIXTER, PLAINTIFF-APPELLANT PRO SE.

WEBSTER SZANYI LLP, BUFFALO (JEREMY COLBY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Evelyn Frazee, J.), entered March 11, 2015. The order granted the motion of defendants County of Livingston, Livingston County Probation Department and Livingston County Sheriff Department to dismiss the complaint against them and dismissed the complaint against those defendants.

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

Memorandum: Plaintiff appeals from an order granting the pre-answer motion of the County of Livingston, the Livingston County Probation Department, and the Livingston County Sheriff Department (defendants) to dismiss the complaint against them based on plaintiff's failure to serve a timely notice of claim. In the complaint, plaintiff sought damages for injuries sustained as a result of being wrongfully incarcerated following alleged violations of probation. We reject plaintiff's contention that Supreme Court erred in granting defendants' motion. Service of a notice of claim within 90 days after the claim arises is a condition precedent to commencement of a negligence action against a county or its officers, agents, servants, or employees (*see* County Law § 52 [1]; General Municipal Law § 50-e [1] [a]; *see generally Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61), but the plaintiff may seek and obtain leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]). Here, plaintiff concedes that she served an untimely notice of claim without first obtaining leave of the court. We therefore conclude that the untimely notice of claim was "a nullity, requiring dismissal of the complaint" (*Wollins v New York City Bd. of Educ.*, 8 AD3d 30, 31; *see Wall v Erie County*, 26 AD3d 753, 753). Contrary to

plaintiff's contention, defendants' failure to reject plaintiff's late notice of claim did not constitute a waiver of the defense of failure to serve a timely notice of claim (*see Wollins*, 8 AD3d at 31; *see generally Wall*, 26 AD3d at 753).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court