
# *SUPREME COURT OF THE STATE OF NEW YORK*

## *APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

NOVEMBER 17, 2017

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

**653/15**

**CA 14-02082**

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

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KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, SHANNON FROIO, AS PARENT AND NATURAL GUARDIAN OF INFANT SHAWN DARLING, BRENDA FORTINO, AS PARENT AND NATURAL GUARDIAN OF INFANT JULIE FORTINO, MARIE MARTIN, AS PARENT AND NATURAL GUARDIAN OF INFANT KENNETH KENYON, JENNY LYNN COWHER, AS PARENT AND NATURAL GUARDIAN OF INFANT WILLIAM MARTIN, HOLLAN CRIPPEN, AS PARENT AND NATURAL GUARDIAN OF INFANT DEVAN MATHEWS, JESSICA RECORE, AS PARENT AND NATURAL GUARDIAN OF INFANT SAMANTHA MCLOUGHLIN, LAURIE AND DOMINICK RIZZO, AS LEGAL CUSTODIANS OF INFANT JACOB MCMAHON, JASON MONTANYE, AS PARENT AND NATURAL GUARDIAN OF INFANT KADEM MONTANYE, AND FRANCES SHELLINGS, AS PARENT AND NATURAL GUARDIAN OF INFANT RAYNE SHELLINGS,
PLAINTIFFS-RESPONDENTS,

V ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, SMALL SMILES DENTISTRY OF SYRACUSE, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

HACKERMAN FRANKEL, P.C., HOUSTON, TEXAS (RICHARD FRANKEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (DANIELLE N. MEYERS OF COUNSEL), FOR DEFENDANTS FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., WILLIAM A. MUELLER, D.D.S., AND MICHAEL W. ROUMPH.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (ELIZABETH J. GROGAN OF COUNSEL), FOR DEFENDANTS NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., YAQOOB KHAN, D.D.S. AND TAREK ELSAFTY, D.D.S.

AHMUTY DEMERS & MCMANUS, ALBERTSON (JOHN A. MCPHILLIAMY OF COUNSEL), FOR DEFENDANT ADOLPH R. PADULA, D.D.S.

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Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 7, 2014. The order denied the motion of defendants Forba Holdings, LLC, now known as Church Street Health Management, LLC, Forba NY, LLC, and Small Smiles Dentistry of Syracuse, LLC, for recusal of the court.

Now, upon the stipulations and orders of discontinuance signed by the attorneys for the named parties listed above on September 27, October 4, 9 and 12, 2016, and by the court on December 13, 2016, and filed in the Onondaga County Clerk’s Office on December 13, 2016,

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

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**746/16**

**CA 15-01248**

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

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ALLISON PLANTE, ON BEHALF OF HERSELF AND ALL OTHER EMPLOYEES SIMILARLY SITUATED, PLAINTIFF-RESPONDENT,

V ORDER

SOUTH BRISTOL RESORTS LLC, DEFENDANT-APPELLANT.

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

CORDELLO LAW PLLC, ROCHESTER (JUSTIN M. CORDELLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment and order (one paper) of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered March 9, 2015. The judgment and order, insofar as appealed from, granted in part the motion of plaintiff for summary judgment on the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 30, 2017,

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

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**998**

**CA 16-02142**

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

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J.N.K. MACHINE CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TBW, LTD., WOOLSCHLAGER, INC., AND BERNARD C. WOOLSCHLAGER, DEFENDANTS-APPELLANTS.

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TBW, LTD., WOOLSCHLAGER, INC., AND BERNARD C. WOOLSCHLAGER, THIRD-PARTY PLAINTIFFS,

V

PAMELA LODESTRO, AS EXECUTOR OF THE ESTATE OF G. MARV SCHUVER AND BART SCHUVER, THIRD-PARTY DEFENDANTS.

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SCHUVER'S TRUCK & TRAILER LLC AND G. BARTON SCHUVER, PLAINTIFFS,

V

BERNARD C. WOOLSCHLAGER, TBW, LTD., DOING BUSINESS AS JAMESTOWN UNIT PARTS AND WOOLSCHLAGER, INC., DEFENDANTS.

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ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered August 23, 2016. The judgment, among other things, awarded plaintiff J.N.K. Machine Corporation damages as against defendants-third-party plaintiffs.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of the posttrial motion to set aside the verdict against defendant-third-party plaintiff Bernard C. Woolschlager and dismissing the complaint against him, and as modified the judgment is affirmed without costs.

Memorandum: In this breach of contract action, defendants-third-party plaintiffs, TBW, LTD., Woolschlager, Inc., and Bernard C.

Woolschlager (defendants), appeal from a judgment entered upon a jury verdict finding that they were liable for the breach of a contract between plaintiff and "TBW, INC." Although Woolschlager had executed that contract as president of TBW, INC., it is undisputed that such a corporation did not exist. Rather, Woolschlager was the president of TBW, LTD., a corporation whose name changed to Woolschlager, Inc. in 2001.

The instant action was commenced in 2007, and the parties have appeared before this Court in three prior appeals (*J.N.K. Mach. Corp. v TBW, Ltd.*, 134 AD3d 1515 [4th Dept 2015]; *J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259 [4th Dept 2012]; *J.N.K. Mach. Corp. v TBW, Ltd.*, 81 AD3d 1438 [4th Dept 2011]). None of the prior appeals is relevant to the instant appeal from the final judgment.

In January 2014, and before our decision in the third appeal, the note of issue and statement of readiness was filed. Two years later, defendants filed a CPLR 3211 motion to dismiss the complaint against Woolschlager, contending that he could not be individually liable for any alleged breach of the corporation's contract with plaintiff because he had signed the agreement as the president of "TBW, LTD." Plaintiff opposed the motion, contending that it was an untimely CPLR 3212 motion and that Woolschlager could be individually liable because he signed the agreement "as President of TBW, LTD." and, at the time the agreement between plaintiff and "TBW, LTD." was executed, "TBW, LTD." did not exist. We note that the record establishes that TBW, LTD. was dissolved in 1995 for failure to pay taxes and fees, but that dissolution was annulled in June 2001, i.e., several years before the agreement was executed. In its opposition to defendants' motion, plaintiff did not contend that Woolschlager could be individually liable because "TBW, INC." was a nonexistent corporation. Supreme Court denied the motion.

Thereafter, during and immediately following trial, defendants repeatedly sought to have the action against Woolschlager dismissed by making a motion for a directed verdict, and a posttrial motion for a judgment notwithstanding the verdict (JNOV) or, in the alternative, to set aside the verdict. Even assuming, arguendo, that the court properly denied the CPLR 3211 motion, the motion for a directed verdict and that part of the posttrial motion for a JNOV, we nevertheless agree with defendants that the court erred in denying that part of the posttrial motion to set aside the verdict against Woolschlager.

"According to the well settled general rule, 'individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually' . . . However, it is also well established that an agent who acts on behalf of a nonexistent principal may be held personally liable on the contract" (*BCI Constr., Inc. v Whelan*, 67 AD3d 1102, 1103 [3d Dept 2009]; *see Production Resource Group L.L.C. v Zanker*, 112 AD3d 444, 444-445 [1st Dept 2013]; *Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC*, 31 AD3d 722, 723 [2d Dept 2006]). "The rule [was] designed to protect a party who enters into a contract

where the other signatory represents that he is signing on behalf of a business entity that in fact does not exist, under *any* name . . . [Thus,] 'as long as the identity of the corporation can be reasonably established from the evidence[,] . . . [an e]rror in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey' . . . In such a situation, . . . there is no need or basis to impose personal liability on the person who signed the contract as agent for the entity" (*Quebecor World [USA], Inc. v Harsha Assoc., L.L.C.*, 455 F Supp 2d 236, 242-243 [WD NY 2006]). "Accordingly, absent an allegation that, at the time of the contract, a plaintiff was under an actual misapprehension that there was some other, unincorporated group with virtually the same name as that of the actual business entity, 'the [c]ourt will not permit the [plaintiff] to capitalize on [a] technical naming error in contravention of the parties' evident intentions' " (*id.* at 242; *see BCI Constr., Inc.*, 67 AD3d at 1103; *cf. Bay Ridge Lbr. Co. v Groenendaal*, 175 AD2d 94, 96 [2d Dept 1991]).

Thus, courts have determined that the individual who signed the contract may be liable where there was *no* existing corporation *under any name* because, under those circumstances, the plaintiff has "no remedy except against the individuals who acted as agents of those purported corporations" (*Animazing Entertainment, Inc. v Louis Lofredo Assoc.,* 88 F Supp 2d 265, 271 [SD NY 2000]). Where, as here, there was an existing corporation and merely a misnomer in the name of the corporation, courts have declined to impose liability on the individual who signed the contract because the plaintiff has a remedy against the existing, albeit misnamed, corporation (*see BCI Constr., Inc.*, 67 AD3d at 1103; *Quebecor World [USA], Inc.*, 455 F Supp 2d at 241-243).

Here, we conclude that no one was under an actual misapprehension that there was an entity with the name TBW, INC. It is clear that plaintiff was well aware that the contract was with Woolschlager, Inc. (as renamed from TBW, LTD.) because, one month after the agreement was executed, plaintiff's own attorney stated that the contract was between plaintiff and "Woolschlager, Inc.," and the bill of sale for a transaction that occurred pursuant to the contract states that plaintiff sold various items to Woolschlager, Inc. Moreover, under the circumstances of this case, we conclude that it would be inconsistent to determine that TBW, LTD./Woolschlager, Inc. can be liable on a contract between TBW, INC. and plaintiff while, at the same time, determining that Woolschlager could be individually liable for that same contract on the ground that TBW, INC. did not exist.

Contrary to plaintiff's contention, the evidence at trial does not establish that Woolschlager intended to be individually liable under the contract. All documents generated in relation to the agreement were addressed to corporate responsibility and liability. The fact that Woolschlager provided some of the funds for the initial payment is not enough to establish that he intended to be individually liable for the agreement. Moreover, his failure to sign any note or mortgage related to his personal assets establishes that he did not intend to have any personal liability on the contract (*cf. Humble Oil*

*& Ref. Co. v Jaybert Esso Serv. Sta.*, 30 AD2d 952, 952 [1st Dept 1968]). We therefore modify the judgment by granting that part of the posttrial motion to set aside the verdict with respect to Woolschlager and dismissing the complaint against him.

Based on our determination, we do not address defendants' remaining contentions concerning Woolschlager's individual liability.

Contrary to defendants' further contentions, the court properly denied their motion pursuant to CPLR 3126 to strike the complaint inasmuch as defendants did not file a motion to compel discovery pursuant to CPLR 3124 (*see Double Fortune Prop. Invs. Corp. v Gordon*, 55 AD3d 406, 407 [1st Dept 2008]), did not file an affirmation pursuant to 22 NYCRR 202.7 (a), and did not establish that any failure to disclose was a willful failure that would justify striking a pleading or precluding plaintiff from offering evidence in opposition to defendants' defenses and counterclaim (*cf. Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]; *Hill v Oberoi*, 13 AD3d 1095, 1096 [4th Dept 2004]). Plaintiff alleged that the additional documents sought by defendants had been destroyed in a fire, and defendants failed to refute that allegation. As plaintiff correctly contends, a party cannot be compelled to produce documents that no longer exist and should not be punished for failing to do so (*see Mary Imogene Bassett Hosp. v Cannon Design, Inc.*, 97 AD3d 1030, 1032 [3d Dept 2012]; *Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793, 794 [2d Dept 2005]).

Defendants further contend that evidentiary errors at trial warrant reversal of the judgment. To the extent that defendants' various contentions are preserved for our review, we conclude that they either lack merit or constitute harmless error. At trial, the court redacted Exhibit N on the ground that it contained evidence of settlement negotiations in violation of CPLR 4547. Inasmuch as defendants offered Exhibit N "subject to whatever redactions [the court] want[ed] to make" and failed to object to any of those redactions, we conclude that defendants failed to preserve for our review and, indeed, waived their contention that the exhibit was improperly redacted (*see Spath v Storybook Child Care, Inc.*, 137 AD3d 1736, 1738 [4th Dept 2016]; *Chase v Mullings*, 291 AD2d 330, 330 [1st Dept 2002]). With respect to Exhibit O, defendants erroneously contend that the exhibit was precluded under CPLR 4547. In actuality, the court properly precluded the admission in evidence of that exhibit on the ground that it was a letter authored by someone who had no personal knowledge of the allegations or events discussed therein (*see Reynolds v Towne Corp.*, 132 AD2d 952, 953 [4th Dept 1987], *lv denied* 70 NY2d 613 [1987]). Even if we were to agree with defendants that the exhibit was improperly precluded, we would conclude that "any error [is] harmless since the precluded [exhibit] was cumulative of evidence already before the jury" (*Sweeney v Peterson*, 24 AD3d 984, 985 [3d Dept 2005]; *see Mohamed v Cellino & Barnes,* 300 AD2d 1116, 1116 [4th Dept 2002], *lv denied* 99 NY2d 510 [2003]).

Before trial, the court made a "conditional ruling" to preclude certain testimony about conversations with one of the deceased principals of plaintiff pursuant to the Dead Man's Statute (*see* CPLR

4519). Inasmuch as defendants' attorney "consented to [the court's] ruling," defendants failed to preserve for our review their contention that the court erred in making a blanket ruling to preclude such evidence (*Stay v Horvath*, 177 AD2d 897, 898 [3d Dept 1991]). At trial, the court precluded a witness from answering a question concerning the deceased principal's reaction to certain complaints made by Woolschlager. Such testimony would normally have been precluded under CPLR 4519. Nevertheless, even assuming, arguendo, that plaintiff opened the door to such testimony by submitting deposition testimony of the deceased principal relating to the subject of those complaints (*see Matter of Lamparelli*, 6 AD3d 1218, 1219-1220 [4th Dept 2004]; *Matter of Radus*, 140 AD2d 348, 349 [2d Dept 1988]), we conclude that any error is harmless (*see* CPLR 2002).

Finally, defendants contend that the court erred in striking the entire testimony of their financial expert concerning the amount of damages for lost profits related to their counterclaim. We conclude that any error in striking that testimony is harmless. The jury found that, although defendants had entered into a separate contract with plaintiff for the use of plaintiff's computer inventory program, plaintiff had performed its obligations under that contract. Pursuant to the court's instructions, if the jury were to find that plaintiff performed its obligations under that separate contract, the jury was not to consider whether defendants were entitled to any damages on their counterclaim for the breach of that separate contract. Where, as here, "an error at trial bears only upon an issue that the jury did not reach, the error is harmless and may not serve as a ground for a new trial" (*Gilbert v Luvin*, 286 AD2d 600, 600 [1st Dept 2001]; *see Harden v Faulk*, 111 AD3d 1380, 1380 [4th Dept 2013], *amended on other grounds* 115 AD3d 1274 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1042**

**CA 17-00259**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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IN THE MATTER OF ARBITRATION BETWEEN MONROE COUNTY DEPUTY SHERIFFS' ASSOCIATION, INC., PETITIONER-RESPONDENT-RESPONDENT,

AND MEMORANDUM AND ORDER

MONROE COUNTY AND MONROE COUNTY SHERIFF, RESPONDENTS-PETITIONERS-APPELLANTS.

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HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR RESPONDENTS-PETITIONERS-APPELLANTS.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 14, 2016 in a proceeding pursuant to CPLR article 75. The order granted the petition of petitioner-respondent to confirm an award rendered in a labor arbitration, and denied respondents-petitioners' cross petition to vacate that award.

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

Memorandum: In this proceeding pursuant to CPLR article 75, respondents-petitioners (respondents) appeal from an order that granted the petition to confirm the award rendered in a labor arbitration, and denied respondents' cross petition to vacate that award. The award directed respondents to provide qualified retirees and future retirees from the Monroe County Sheriff's Office with the same health insurance coverage (i.e., coverage for the dependent child of a retiree until the child reaches the age of 26 years) as they provided to active employees pursuant to the federal Affordable Care Act (*see* 42 USC § 300gg-14 [a]) and the collective bargaining agreement (CBA) between the parties.

We reject respondents' contention that the arbitrator exceeded his power in fashioning the award. It is well settled that an arbitrator exceeds his or her power within the meaning of CPLR 7511 (b) (1) (iii) where, inter alia, the arbitrator's award " 'clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]). "To exclude a substantive issue from arbitration

. . . generally requires specific enumeration in the arbitration clause itself of the subjects intended to be put beyond the arbitrator's reach" (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984], *rearg denied* 62 NY2d 803 [1984]; *see Matter of Communication Workers of Am., Local 1170 v Town of Greece*, 85 AD3d 1668, 1669 [4th Dept 2011], *lv denied* 18 NY3d 802 [2011]). Here, contrary to respondents' contention, we conclude that the arbitrator did not exceed a specifically enumerated limitation on his power.

We also reject respondents' contention that the arbitrator's award is irrational. "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached' " (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 540 US 940 [2006]; *see Matter of Rochester City Sch. Dist. [Rochester Teachers Assn. NYSUT/AFT-AFL/CIO]*, 38 AD3d 1152, 1153 [4th Dept 2007], *lv denied* 9 NY3d 813 [2007]). Here, we conclude that the arbitrator's "interpretation of the [CBA], not being completely irrational, is beyond [our] review power" (*Matter of Lackawanna City Sch. Dist. [Lackawanna Teachers Fedn.]*, 237 AD2d 945, 945 [4th Dept 1997]; *see Rochester City Sch. Dist.*, 38 AD3d at 1153).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1049**

**CA 16-01516**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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LAURA D. STIGGINS, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA S. STIGGINS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF NORTH DANSVILLE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOSEPH B. RIZZO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered April 14, 2016. The order, inter alia, granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying defendant's motion seeking summary judgment dismissing the complaint and reinstating the complaint, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following memorandum: These consolidated appeals arise from an accident in which nonparty Clayton Benedict lost control of his vehicle while driving with four passengers on a road maintained by defendant. The vehicle ultimately struck a tree and flipped over, resulting in the death of Joshua S. Stiggins, the plaintiff's decedent in appeal No. 1 (decedent), and injury to Jesse T. Galton, the plaintiff in appeal No. 2. The road ended in a parking lot that was part of a public park, and Benedict lost control of the vehicle at a curve just past the park gate, which was open. Based on a police diagram of the accident scene, it appears that the gate was roughly 300 feet from the parking lot. A sign near the gate stated that the park was open from dawn until dusk, and the accident occurred at about 2:00 a.m. Benedict had been drinking on the night of the accident, and he eventually pleaded guilty to aggravated vehicular homicide, vehicular assault, and driving while intoxicated. In separate complaints, plaintiff Laura D. Stiggins, individually and as administratrix of the estate of Joshua S. Stiggins, and Galton (collectively, plaintiffs) alleged that defendant was negligent in, inter alia, failing to close the park gate, failing to provide

adequate lighting for the road, and failing to provide a speed limit sign or a sign warning of the curve. Supreme Court, inter alia, granted defendant's motions seeking summary judgment dismissing the complaints. In view of its determinations, the court did not address the alternative relief sought by defendant in its motions.

As an initial matter in both appeals, we note that plaintiffs do not contend in their joint brief that the court erred in denying their motions for summary judgment, and we therefore deem any such contention abandoned (*see Clark v Perry*, 21 AD3d 1378, 1379 [4th Dept 2005]).

We agree with plaintiffs in both appeals, however, that the court erred in granting defendant's motions seeking summary judgment dismissing their complaints on the ground that the road was reasonably safe as a matter of law. A municipality has a duty to maintain its roads in a reasonably safe condition "in order to guard against contemplated and foreseeable risks to motorists," including risks related to a driver's negligence or misconduct (*Pinter v Town of Java*, 134 AD3d 1446, 1447 [4th Dept 2015]; *see Turturro v City of New York*, 28 NY3d 469, 482 [2016]; *Stiuso v City of New York*, 87 NY2d 889, 890-891 [1995]). In other words, a municipality is not relieved of liability for failure to keep its roadways in a reasonably safe condition "whenever [an accident] involves driver error" (*Turturro*, 28 NY3d at 482; *see Dodge v County of Erie*, 140 AD3d 1678, 1679 [4th Dept 2016]; *cf. Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]). Defendant's duty to maintain the road was therefore not negated by Benedict's intoxication or the fact that the park was closed when the accident occurred (*see Sirface v County of Erie*, 55 AD3d 1401, 1401-1402 [4th Dept 2008], *lv dismissed* 12 NY3d 797 [2009]; *Cappadona v State of New York*, 154 AD2d 498, 499-500 [2d Dept 1989]), and we conclude that defendant did not establish as a matter of law that Benedict's presence under those circumstances was unforeseeable (*see Turturro*, 28 NY3d at 483-484; *Sirface*, 55 AD3d at 1402; *cf. Palloni v Town of Attica*, 278 AD2d 788, 788 [4th Dept 2000], *lv denied* 96 NY2d 709 [2001]). Inasmuch as defendant presented no evidence that the road was reasonably safe at night in the absence of the safety measures proposed by plaintiffs, we conclude that defendant failed to establish as a matter of law that it was not negligent (*see Purves v County of Erie*, 12 AD3d 1112, 1112 [4th Dept 2004]; *cf. Pinter*, 134 AD3d at 1447).

We further agree with plaintiffs that the court erred in determining as a matter of law that Benedict's actions were the sole proximate cause of the accident. Although defendant presented evidence that Benedict was intoxicated and driving "at high speed," we conclude that its submissions did not establish as a matter of law that Benedict's manner of driving "would have been the same" if the safety measures proposed by plaintiffs had been in place (*Trent v Town of Riverhead*, 262 AD2d 260, 261 [2d Dept 1999]; *see Humphrey v State of New York*, 60 NY2d 742, 744 [1983]; *Land v County of Erie*, 138 AD3d 1462, 1463 [4th Dept 2016]; *Torelli v City of New York*, 176 AD2d 119, 122-123 [1st Dept 1991], *lv denied* 79 NY2d 754 [1992]), particularly

in view of defendant's submission of evidence that Benedict had never been on the subject road before the accident (*cf. Atkinson v County of Oneida*, 59 NY2d 840, 842 [1983], *rearg denied* 60 NY2d 587 [1983]). Furthermore, even assuming, arguendo, that defendant met its initial burden with respect to causation, we conclude that plaintiffs raised triable issues of fact by submitting conflicting evidence with respect to the speed of the vehicle and whether Benedict would have heeded visible traffic signals (*see O'Buckley v County of Chemung*, 88 AD3d 1140, 1141 [3d Dept 2011]; *see generally Race v Town of Orwell*, 28 AD3d 1112, 1113 [4th Dept 2006]).

Defendant contends, as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]), that these actions are barred by the doctrine of primary assumption of risk because decedent and Galton chose to ride with Benedict even though they knew that he was intoxicated. We reject that contention inasmuch as the accident did not arise from a sporting event or an athletic or recreational activity to which the doctrine may apply (*see Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]; *Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 396 [2010]; *Mata v Road Masters Leasing Corp.*, 128 AD3d 780, 781 [2d Dept 2015]).

We therefore modify the order in each appeal by denying defendant's motion seeking summary judgment dismissing the complaint and reinstating the complaint, and we remit each matter to Supreme Court for a determination of the alternative relief sought by defendant in its motions, i.e., consolidation of the actions.

All concur except NEMOYER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm the order in each appeal.

"Municipalities have a duty to maintain their roads . . . in a reasonably safe condition for 'people who obey the rules of the road' " (*Palloni v Town of Attica*, 278 AD2d 788, 788 [4th Dept 2000], *lv denied* 96 NY2d 709 [2001], quoting *Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]; *see Pinter v Town of Java*, 134 AD3d 1446, 1446-1447 [4th Dept 2015]). In this case, defendant adequately established that the road in question was reasonably safe (i.e., that defendant did not breach its road-maintenance duty), and plaintiffs thereafter "failed to sustain their burden of raising a triable question of fact on the issue whether the road [was] reasonably safe for [its] lawful, intended and foreseeable use" (*Palloni*, 278 AD2d at 788-789).

When "a defendant comes forward with evidence that the accident was not necessarily attributable to a defect, the burden shifts to the plaintiff to come forward with direct evidence of a defect" (*Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 759 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000]; *see Sideris v Simon A. Rented Servs.*, 254 AD2d 408, 409 [2d Dept 1998]). Here, as Supreme Court found, defendant submitted compelling evidence that the road in question "is a very short park road that goes to a parking lot. It has very subtle curvature . . . The area is basically flat and wide open." There were

no prior accidents on the road, nor were there any safety complaints related to the road itself. This evidence is sufficient to meet defendant's initial summary judgment burden on the element of breach (*see Palloni*, 278 AD2d at 788). In opposition, plaintiffs tendered no expert affidavit calling the road's safety in doubt, nor did they come forward with any direct evidence of an unsafe condition in the road. Rather, they simply speculated, from the fact of the crash alone, that the road must have been unsafe. And that is insufficient to raise a triable issue of fact on the element of breach (*see Portanova*, 270 AD2d at 759; *Sideris*, 254 AD2d at 409).

"Undoubtedly, certain risks are unavoidable . . . [A]ny public roadway, no matter how careful its design and construction, can be made safer" (*Tomassi*, 46 NY2d at 97). "Nevertheless, the [government] is not an insurer" (*Mesick v State of New York*, 118 AD2d 214, 223 [3d Dept 1986, Casey, J., dissenting], *lv denied* 68 NY2d 611 [1986]), and for purposes of assessing alleged municipal negligence, it does not matter whether the road could be marginally safer—it only matters whether the road is reasonably safe. In this case, there can be no real debate as to whether defendant breached its duty to provide a reasonably safe road under the circumstances: it did not.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1050**

**CA 16-01517**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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JESSIE T. GALTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF NORTH DANSVILLE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOSEPH B. RIZZO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered April 14, 2016. The order, inter alia, granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying defendant's motion seeking summary judgment dismissing the complaint and reinstating the complaint, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the same memorandum as in *Stiggins v Town of N. Dansville* (___ AD3d ___ [Nov. 17, 2017]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1052**

**CA 16-01521**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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MONICA HARRIS AND DEMAR HARRIS,
PLAINTIFFS-APPELLANTS,

V ORDER

EVAN CAMPBELL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 4, 2015. The order denied the motion of plaintiffs to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens,* 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1053**

**CA 16-01523**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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MONICA HARRIS AND DEMAR HARRIS,
PLAINTIFFS-APPELLANTS,

V ORDER

EVAN CAMPBELL, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 20, 2015. The order denied the motion of plaintiffs to preclude certain evidence at trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1054**

**CA 16-01524**

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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MONICA HARRIS AND DEMAR HARRIS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EVAN CAMPBELL, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

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RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered November 20, 2015. The judgment dismissed the complaint upon a jury verdict in favor of defendant.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Monica Harris (plaintiff) when the vehicle that she was driving was rear-ended by a vehicle that was owned and operated by defendant. A jury subsequently returned a verdict in favor of defendant upon determining that plaintiff did not sustain a serious injury under any of the four categories in Insurance Law § 5102 (d) alleged by plaintiffs. Supreme Court thereafter denied plaintiffs' motion to set aside the verdict based on juror misconduct and as against the weight of the evidence. We affirm.

We address first plaintiffs' contentions concerning the court's allegedly erroneous rulings at trial that contributed to the jury's verdict that plaintiff did not sustain a serious injury. Contrary to plaintiffs' contention, the court properly limited the testimony of one of plaintiff's treating physicians. "CPLR 3101 (d) (1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses" (*Rook v 60 Key Ctr.*, 239 AD2d 926, 927 [4th Dept 1997]). " 'Where . . . a plaintiff's intended expert medical witness is a treating physician whose records and reports have been fully disclosed . . . , a failure to serve a CPLR 3101 (d) notice regarding that doctor does not warrant preclusion of that expert's testimony on causation, since the defendant has sufficient notice of the proposed

testimony to negate any claim of surprise or prejudice' " (*Hamer v City of New York*, 106 AD3d 504, 509 [1st Dept 2013]). Here, one of plaintiff's treating physicians did not provide any expert disclosure, and during trial he indicated that, in addition to being a medical doctor, he received a Ph.D. in biomechanical engineering and he often relies on his engineering background in his medical practice. Subsequently, that treating physician was asked some questions pertaining to biomechanics, and specifically was asked about the amount of force needed to cause a lumbar injury. We conclude that defendant's objections to that line of questioning were properly sustained inasmuch as defendant did not receive sufficient notice that the treating physician relied on his engineering background to support his opinions and conclusions about plaintiff's injuries (*see generally id.*). Indeed, plaintiffs made no attempt in response to defendant's objections to point to any medical records or other documentation that would establish that defendant had such notice.

Contrary to plaintiffs' further contention, even assuming, arguendo, that the court erred in admitting plaintiff's uncertified medical records in evidence, we conclude that the error is harmless inasmuch as those records were never published to the jury or provided to the jury during deliberations. Moreover, the records amount to only eight pages and include, inter alia, general references to pre-accident back pain, which was an issue addressed by both parties during trial (*see* CPLR 2002).

Plaintiffs contend that the court erred in admitting in evidence photographs of plaintiff's and defendant's vehicles. Plaintiffs' contention with respect to the photographs of defendant's vehicle is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We reject plaintiffs' contention with respect to the photographs of plaintiff's vehicle inasmuch as it is well established that "[p]hotographs showing no damage to a plaintiff's vehicle are admissible to impeach a plaintiff's credibility on the issue whether the accident caused the alleged injuries" (*Tout v Zsiros*, 49 AD3d 1296, 1297 [4th Dept 2008], *lv denied* 10 NY3d 713 [2008]). Furthermore, "even when liability is not at issue, 'proof as to the happening of an accident is probative and admissible as it describes the force of an impact or other incident that would help in determining the nature or extent of injuries and thus relate to the question of damages' " (*Anderson v Dainack*, 39 AD3d 1065, 1066 [3d Dept 2007]). Here, we conclude that the court did not abuse its discretion in allowing the defense to use the photographs to impeach plaintiff's credibility with "evidence indicating that her vehicle sustained minimal physical damage, if any" (*Torres v Esaian*, 5 AD3d 670, 671 [2d Dept 2004]).

We reject plaintiffs' contention that the court erred in refusing to set aside the verdict on the ground of juror misconduct based upon an affidavit from plaintiffs' counsel that contained hearsay statements made by the jury foreperson. " '[A]bsent exceptional circumstances, juror affidavits may not be used to attack a jury verdict' " (*Herbst v Marshall*, 89 AD3d 1403, 1404 [4th Dept 2011]),

and neither may affidavits from counsel that simply recite the hearsay statements of a juror (*see id.*). Plaintiffs' contention that the statements of the foreperson fall under the excited utterance exception to the hearsay rule is raised for the first time on appeal and thus is not properly before us (*see Ciesinski*, 202 AD2d at 985). Furthermore, contrary to plaintiffs' contention, the trial record is "devoid of evidence indicating the existence of [substantial] juror confusion" (*Wylder v Viccari*, 138 AD2d 482, 484 [2d Dept 1988]; *see Young Mee Oh v Koon*, 140 AD3d 861, 862 [2d Dept 2016]; *Lopez v Kenmore-Tonawanda Sch. Dist.*, 275 AD2d 894, 896 [4th Dept 2000]).

We also reject plaintiffs' contention that the court erred in failing to set aside the verdict as against the weight of the evidence. It is well established that " '[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " (*Sauter v Calabretta,* 103 AD3d 1220, 1220 [4th Dept 2013]). "That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; *see Todd v PLSIII, LLC–We Care*, 87 AD3d 1376, 1377 [4th Dept 2011]). Here, even assuming, arguendo, that plaintiffs established a prima facie case of serious injury, we conclude that "the jury nevertheless was entitled to reject the opinions of plaintiff's physicians and expert witnesses" in determining that she did not sustain a serious injury (*Sanchez v Dawson*, 120 AD3d 933, 935 [4th Dept 2014]; *see McMillian v Burden*, 136 AD3d 1342, 1344 [4th Dept 2016]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1057**

**KA 14-00826**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. MASTOWSKI, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 6, 2014. The judgment convicted defendant, upon a jury verdict, of vehicular manslaughter in the first degree and driving while intoxicated, a class E felony (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of driving while intoxicated and dismissing counts two and three of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of vehicular manslaughter in the first degree (Penal Law § 125.13 [3]) and two counts of driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]). Defendant contends that he was deprived of a fair trial by prosecutorial misconduct during summation. As an initial matter, we note that defendant failed to object to all but one of the instances of alleged misconduct (*see* CPL 470.05 [2]; *People v Gonzalez*, 81 AD3d 1374, 1374 [4th Dept 2011]), and we decline to exercise our power to review those unpreserved instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We nevertheless take this opportunity to admonish the prosecutor "and remind him that prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388 [4th Dept 2012], *lv denied* 20 NY3d 1099 [2013], quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]).

With respect to the one preserved instance of alleged misconduct, we conclude that defendant's contention is without merit. Contrary to defendant's contention, the prosecutor did not call him a "liar"

during summation; rather, the prosecutor argued that defendant "lie[d] to the police about his alcohol consumption" prior to operating his motor vehicle at the time and place at issue. We conclude that the prosecutor's remark was fair comment on the evidence (*see generally People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]). Contrary to defendant's further contention, "examin[ing] the trial as a whole," we conclude that defendant was afforded meaningful representation (*People v Schulz*, 4 NY3d 521, 530 [2005]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

The People correctly concede, however, that counts two and three, charging driving while intoxicated, must be dismissed as lesser inclusory counts of count one, charging vehicular manslaughter in the first degree (*see People v Bank*, 129 AD3d 1445, 1448 [4th Dept 2015], *affd* 28 NY3d 131 [2016]), and we therefore modify the judgment accordingly. Defendant's failure to preserve the issue for our review is of no moment because preservation is not required (*see People v Moore*, 41 AD3d 1149, 1152 [4th Dept 2007], *lv denied* 9 NY3d 879 [2007], *reconsideration denied* 9 NY3d 992 [2007]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1112**

**CAF 16-00101**

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

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IN THE MATTER OF CYLE F. AND COREY F.

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SENECA COUNTY DIVISION OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALEXANDER F., RESPONDENT-APPELLANT.

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MARYBETH D. BARNET, ESQ., ATTORNEY FOR THE CHILD
COREY F., APPELLANT.

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MARY M. WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR RESPONDENT-APPELLANT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD COREY F., CANANDAIGUA, APPELLANT PRO SE.

FRANK R. FISHER, COUNTY ATTORNEY, WATERLOO (DAVID R. MORABITO, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

JEFFREY R. HARPER, ATTORNEY FOR THE CHILD CYLE F., WOLCOTT.

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Appeals from an order of the Family Court, Seneca County (Dennis F. Bender, J.), entered December 22, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: In these consolidated appeals arising from proceedings pursuant to Social Services Law § 384-b, respondent father and the Attorney for the Child (AFC) for Corey F. each appeal from an order that, among other things, terminated the father's parental rights on the ground of permanent neglect with respect to his children, Cyle F. and Corey F., and transferred guardianship and custody of the children to petitioner. We affirm.

Contrary to the father's contention, petitioner properly laid a foundation for those parts of the case file that Family Court admitted in evidence at the fact-finding hearing through the testimony of its caseworkers and typist, which established that they contemporaneously made those entries in the case file within the scope of their "statutory duty to maintain a comprehensive case record for [the

children] containing reports of any transactions or occurrences relevant to [their] welfare" (*Matter of Leon RR*, 48 NY2d 117, 123 [1979]; *see* CPLR 4518 [a]; Social Services Law § 372; 18 NYCRR 441.7 [a]). We agree with the father, however, that the court erred in failing to consider his hearsay objections to the entries in the case file that contained statements by persons under no business duty to report to petitioner (*see Leon RR*, 48 NY2d at 123). Nonetheless, even assuming, arguendo, that the court improperly admitted in evidence the entries in the case file that contained hearsay, we conclude that the error is harmless because " 'the result reached herein would have been the same even had such record[s], or portions thereof, been excluded' " (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]; *cf. Leon RR*, 48 NY2d at 122-124). Indeed, "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]; *see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

The father failed to preserve for our review his contention that the court improperly admitted and relied upon evidence that the father was regularly using marihuana after the date of the petition inasmuch as the father failed to object on that ground to the admission of such evidence. In any event, to the extent that the court erred in considering evidence of the father's postpetition conduct, and in sua sponte taking judicial notice following the conclusion of the fact-finding hearing of the father's prepetition marihuana use as established in the underlying neglect proceeding, without affording the father an opportunity to challenge such judicially-noticed facts (*see Matter of Justin EE.*, 153 AD2d 772, 774 [3d Dept 1989], *lv denied* 75 NY2d 704 [1990]), we conclude that any errors are harmless. Even without reference to such evidence, the record of the fact-finding hearing contains sufficient admissible facts to support the court's permanent neglect finding (*see Matter of Isaiah F.*, 55 AD3d 1004, 1006 n 2 [3d Dept 2008]; *Matter of Anjoulic J.*, 18 AD3d 984, 987 [3d Dept 2005]; *see generally Matter of Chloe W. [Amy W.]*, 148 AD3d 1672, 1673-1674 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]).

Contrary to the contentions of the father and the AFC for Corey F., we conclude that petitioner "established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children, taking into consideration the particular problems facing the father and tailoring its efforts to assist him in overcoming those problems" (*Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *see* Social Services Law § 384-b [7] [f]; *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500 [4th Dept 2015]; *see generally Matter of Sheila G.*, 61 NY2d 368, 373 [1984]).

Contrary to the further contentions of the father and the AFC for Corey F., we conclude that "the record supports the court's determination that termination of [the father's] parental rights is in the best interests of the [children], and that a suspended judgment was not warranted under the circumstances inasmuch as any progress

made by the [father] prior to the dispositional determination was insufficient to warrant any further prolongation of the [children's] unsettled familial status" (*Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]; *see Joshua T.N.*, 140 AD3d at 1764). To the extent that there are new facts and allegations relevant to our review of the dispositional determination (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]), we note that, although Corey F. is now over 14 years old and is not prepared to consent to adoption (*see* Domestic Relations Law § 111 [1] [a]), the desires of a child who is over 14 years old is but one factor to consider in determining whether termination of parental rights is in the child's best interests (*see* Social Services Law § 384-b [3] [k]; *Matter of Teshana Tracey T. [Janet T.]*, 71 AD3d 1032, 1034 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]). Under the circumstances of this case, we conclude that "termination of the [father's] parental rights with respect to [Corey F.] is in his best interests, notwithstanding his hesitancy toward adoption" (*Teshana Tracey T.*, 71 AD3d at 1034).

Finally, contrary to the father's contention, he was not deprived of effective assistance of counsel by his attorney's failure to make evidentiary objections and other arguments to the court that had "little or no chance of success" (*Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014]). We further conclude that the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's [other] alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1115**

**CA 17-00003**

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

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IN THE MATTER OF DARYL ORTLIEB,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LEWIS COUNTY SHERIFF'S DEPARTMENT AND
MICHAEL CARPINELLI, AS LEWIS COUNTY SHERIFF,
RESPONDENTS-APPELLANTS.

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THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered March 30, 2016 in a proceeding pursuant to CPLR article 78. The judgment granted the petition, rescinded the resignation letter of petitioner and directed that petitioner be restored to his position as a deputy in respondent Lewis County Sheriff's Department.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to withdraw his resignation and be restored to his position as a deputy in respondent Lewis County Sheriff's Department. Petitioner had previously tendered his resignation to respondent Michael Carpinelli, as Lewis County Sheriff (Sheriff), during a meeting at which the Sheriff threatened to terminate petitioner for misconduct unless petitioner resigned. There had been no predisciplinary hearing pursuant to Civil Service Law § 75. When petitioner asked to withdraw his resignation shortly thereafter, the Sheriff denied his request. Supreme Court concluded that the Sheriff abused his discretion in refusing to allow petitioner to withdraw his resignation and granted the relief requested in the petition. We affirm.

Our review is limited to whether the Sheriff's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Because the decision whether to allow petitioner to withdraw his resignation was within the Sheriff's discretion (*see* Public Officers Law § 31 [4]), the issue before us is whether his denial of

petitioner's request was arbitrary and capricious or an abuse of that discretion (*see Matter of Martinez v State Univ. of N.Y.-Coll. at Oswego*, 13 AD3d 749, 750 [3d Dept 2004]).

It is well settled that " '[a] resignation under coercion or duress is not a voluntary act and may be nullified' " (*Matter of Meier v Board of Educ. Lewiston Porter Cent. Sch. Dist.*, 106 AD3d 1531, 1531-1532 [4th Dept 2013]; *cf. Matter of Manel v Mosca*, 216 AD2d 468, 469 [2d Dept 1995]). Although a threat to terminate an employee does not constitute duress if the person making the threat has the legal right to terminate the employee (*see Meier*, 106 AD3d at 1532), such a threat does constitute duress if it is wrongful and precludes the exercise of free will (*see Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124, 130 [1971], *rearg denied* 29 NY2d 749 [1971]; *Yoon Jung Kim v An*, 150 AD3d 590, 593 [1st Dept 2017]). It follows that a resignation obtained under the threat of wrongful termination is involuntary and may be withdrawn upon request, and that it is an abuse of discretion for an officer to deny such a request (*cf. Meier*, 106 AD3d at 1532).

Here, petitioner tendered his resignation under the threat of wrongful termination, and we therefore conclude that the Sheriff abused his discretion in refusing to allow petitioner to withdraw the resignation. Civil Service Law § 75 provides that a public employer may not terminate or otherwise discipline certain public employees "except for incompetency or misconduct shown after a hearing upon stated charges" (§ 75 [1]). A covered employee "against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing" (§ 75 [2]). Thereafter, a hearing must be held (*see id.*). There is no dispute that petitioner was covered by the statute and that he was not provided with the requisite predisciplinary hearing. Thus, the Sheriff had no legal right to terminate him.

We reject respondents' contention that petitioner waived his right to a predisciplinary hearing. It is well settled that parties may modify or replace Civil Service Law § 75 through collective bargaining (*see* § 76 [4]; *Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1495-1496 [4th Dept 2013]). Nevertheless, "such a provision [of a collective bargaining agreement] must be clear and unambiguous in effecting the modification or replacement in order to be enforceable" (*Matter of Delmage v Mahoney*, 224 AD2d 688, 689 [2d Dept 1996], *lv denied* 88 NY2d 812 [1996]). Here, article XXII, section 2 (A), of the collective bargaining agreement at issue (CBA) allows the County of Lewis to discharge or otherwise discipline an employee for "just cause," and provides that an employee covered by section 75 may elect to exercise the rights guaranteed thereunder after such discipline has been imposed. Because it is impossible to provide an employee with a predisciplinary hearing after he or she has already been disciplined, the provision of the CBA containing the ostensible section 75 waiver is ambiguous and thus unenforceable (*see Delmage*, 224 AD2d at 689-690). In any event, the CBA provision appears to preserve the

employee's section 75 rights, not waive them.

Contrary to respondents' further contention, the court properly refused to dismiss the petition because of certain misrepresentations therein. We conclude that the alleged misrepresentations were immaterial. In the absence of "a scheme designed to conceal critical matters from the court" (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 321 [2014]), the extreme remedy of dismissal was unwarranted.

Finally, respondents' challenge to the court's issuance of a temporary restraining order (TRO) is not properly before us. A provisional remedy designed to maintain the status quo, such as a TRO, does not "necessarily affect[] the final judgment," and thus is not brought up for review in an appeal from that judgment (CPLR 5501 [a] [1]; *see Two Guys From Harrison-NY v S.F.R. Realty Assoc.*, 186 AD2d 186, 189 [2d Dept 1992]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1139**

**CA 17-00432**

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

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LODGE II HOTEL LLC, AND JAY GELB,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSO REALTY LLC, DEFENDANT-APPELLANT.

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GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 2, 2016. The judgment granted the motion of plaintiffs for summary judgment seeking a declaration that they are not liable to defendant for the nonsale of a commercial property owned by plaintiffs, and for summary judgment dismissing the counterclaims.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that they are not liable to defendant for the nonsale of a commercial property in Painted Post, New York, after plaintiffs ended negotiations with defendant. In its answer, defendant asserted counterclaims for damages based on, inter alia, breach or repudiation of contract and promissory estoppel. Plaintiffs moved for summary judgment with respect to the above declaration and for summary judgment dismissing the counterclaims against them, and Supreme Court granted the motion.

Contrary to defendant's contention, plaintiffs met their initial burden of establishing their entitlement to the declaration sought as a matter of law (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475-476 [2013]), and defendant failed to raise a triable issue of fact (*see Alvarez*, 68 NY2d at 324). In particular, we note that defendant's conclusory assertions that plaintiffs negotiated in bad faith are insufficient to defeat summary judgment (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]).

Crucially, although the parties' letter of intent required them to negotiate a purchase and sale agreement in good faith, it failed to identify any specific, objective criteria or guidelines by which to measure the parties' efforts (*see 2004 McDonald Ave. Realty, LLC v 2004 McDonald Ave. Corp.*, 50 AD3d 1021, 1022-1023 [2d Dept 2008]), and the unambiguous language of the letter of intent establishes that neither party intended to be contractually bound or obligated to negotiate the transaction to completion (*see generally Gerber v Empire Scale*, 147 AD3d 1434, 1435 [4th Dept 2017]; *Pullman Group v Prudential Ins. Co. of Am.*, 288 AD2d 2, 4 [1st Dept 2001], *lv denied* 98 NY2d 602 [2002]). According defendant the benefit of every favorable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that the undisputed evidence in the record demonstrates that plaintiffs prepared a proposed purchase and sale agreement in accordance with the letter of intent, and that plaintiffs thereafter revised the proposed purchase and sale agreement to incorporate and accommodate requests made by defendant during several weeks of negotiations. "[S]imply because those negotiations ultimately failed, it cannot be said that [plaintiffs] acted in bad faith" (*Mode Contempo, Inc. v Raymours Furniture Co., Inc.*, 80 AD3d 464, 465 [1st Dept 2011]). To the contrary, the evidence establishes that plaintiffs proceeded within the framework outlined in the letter of intent and did not renounce its terms or insist on conditions that were inconsistent with the letter of intent (*see L-7 Designs, Inc. v Old Navy, LLC*, 647 F3d 419, 430 [2d Cir 2011]).

We reject defendant's further contention that the court erred in granting the motion insofar as it sought summary judgment dismissing its counterclaim for breach or repudiation of contract. In that counterclaim, defendant alleged that the parties reached a meeting of the minds on all terms of a purchase and sale even though plaintiffs never signed a purchase and sale agreement. That allegation, however, does not support a claim for breach or repudiation of contract inasmuch as plaintiffs and defendant explicitly expressed their mutual intent not to be contractually bound unless and until both signed a formal purchase and sale agreement in form and content satisfactory to plaintiffs and defendant and their counsel in their sole discretion. "[I]f the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Scheck v Francis*, 26 NY2d 466, 469-470 [1970]).

Contrary to defendant's further contention, we conclude that the court properly granted the motion insofar as it sought summary judgment dismissing its counterclaim based on promissory estoppel. "[T]he representations made by [plaintiffs] d[id] not constitute a clear and unambiguous promise to [defendant]" (*Chemical Bank v City of Jamestown*, 122 AD2d 530, 531 [4th Dept 1986], *lv denied* 68 NY2d 608 [1986]; *see DiPizio Constr. Co., Inc. v Niagara Frontier Transp.*

*Auth.*, 107 AD3d 1565, 1567 [4th Dept 2013]). We have considered the remaining contention of defendant and conclude that it is without merit.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1148**

**CA 17-00520**

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

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DAVID FLOWERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARBORCENTER DEVELOPMENT, LLC, AND
M.A. MORTENSON COMPANY, DEFENDANTS-APPELLANTS.

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RUSSO & TONER, LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered January 12, 2017. The order, inter alia, granted the motion of plaintiff for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim and denied those parts of the cross motion of defendants for summary judgment with respect to the section 240 (1) claim and the section 241 (6) claim insofar as the latter is based on violations of 12 NYCRR 23-6.1 (d) and 23-8.1 (f) (6).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the cross motion with respect to the Labor Law § 241 (6) claim insofar as it is based on an alleged violation of 12 NYCRR 23-6.1 (d) and dismissing the claim to that extent, and as modified the order is affirmed without costs.

Memorandum: In this Labor Law action, plaintiff moved for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiff's motion and granted defendants' cross motion in part, denying those parts of the cross motion with respect to the section 240 (1) claim and the section 241 (6) claim insofar as the latter is based on the violation of Industrial Code (12 NYCRR) sections 23-6.1 (d) and 23-8.1 (f) (6). As a preliminary matter, we note that plaintiff moved to dismiss this appeal as moot, and we denied the motion with leave to renew it at oral argument of the appeal. To the extent that plaintiff did in fact renew the motion at oral argument, we deny it unconditionally and address the substantive legal issues presented by the appeal. We conclude that the court erred in denying that part of the cross motion concerning 12 NYCRR 23-6.1 (d), and we therefore modify the order

accordingly.

Plaintiff was injured while attempting to move a bundle of steel rebar to another location on the subject construction site. According to plaintiff, the rebar had to be moved by stacking it and then tying around the resulting bundle a nylon strap, which is also known as a "choker." The choker is then attached to a steel hook, which is in turn attached to a main crane hook. The bundle is then raised by a crane and is guided by a worker on the ground who communicates with the crane operator via a two-way radio. At the time of the accident, plaintiff and his foreman had already rigged chokers around the rebar, and plaintiff was using the radio to communicate with the tower crane operator and to direct the rebar's placement. While the load was in the air, it fell and struck plaintiff's head.

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, the three witness statements submitted by plaintiff were unsworn and therefore not in admissible form, and the court should not have considered them in determining whether plaintiff met his initial burden of proof (*see Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812, 812-813 [2d Dept 2015]).

We nonetheless conclude, contrary to defendants' contention, that the court properly granted plaintiff's motion with respect to Labor Law § 240 (1). To recover under section 240 (1) for injuries sustained in a falling object case, a plaintiff must establish "both (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking, and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential" (*Floyd v New York State Thruway Auth.*, 125 AD3d 1456, 1457 [4th Dept 2015] [internal quotation marks omitted]; *see Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267-268 [2001]). Here, we conclude that plaintiff established those factors and therefore met his burden on his motion. We note, in particular, that the deposition testimony and two witness affidavits tendered by plaintiff established "that any safety devices in fact used[, i.e., the chokers] 'failed in [their] core objective of preventing the [rebar] from falling,' " and that such failure was a proximate cause of the accident (*Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1073 [3d Dept 2009]; *see Brown v VJB Constr. Corp.*, 50 AD3d 373, 377 [1st Dept 2008]). In opposition, defendants failed to raise a material issue of fact inasmuch as the opinions of their expert were conclusory (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277 [4th Dept 2005]).

Contrary to defendants' further contention, plaintiff's actions were not the sole proximate cause of his injuries. "[W]here a plaintiff's own actions are the sole proximate cause of the accident,

there can be no liability" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). To establish their "sole proximate cause" theory, defendants were required to present "some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff [was] the sole proximate cause of his . . . injuries" (*Ball v Cascade Tissue Group–N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]). Here, the record establishes that plaintiff was not alone in rigging the rebar bundle and transporting it to a different area of the construction site, and thus plaintiff's conduct could not be the sole proximate cause of his injuries. We therefore conclude that plaintiff's action in participating in the rigging process raises, at most, an issue concerning his comparative negligence, which is not an available defense under Labor Law § 240 (1) (*see Signs v Crawford*, 109 AD3d 1169, 1170 [4th Dept 2013]).

We further conclude that the court properly denied that part of defendants' cross motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-8.1 (f) (6). That regulation provides that "[m]obile cranes, tower cranes and derricks shall not hoist or carry any load over and above any person except as otherwise provided in this Part" (*id.*). In our view, there are triable issues of fact whether that regulation was violated, i.e., whether the rebar was above plaintiff while it was being moved by the tower crane and, if so, whether such placement was a proximate cause of the accident (*see generally Gray v Balling Constr. Co.*, 239 AD2d 913, 914 [4th Dept 1997]).

We agree with defendants, however, that the court erred in denying that part of their cross motion with respect to the alleged violation of 12 NYCRR 23-6.1 (d). That regulation "cannot serve as the basis for Labor Law § 241 (6) liability because the [tower] crane used by . . . plaintiff is specifically exempt from the mandate" of the regulation (*Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2d Dept 2006]; *see* 12 NYCRR 23-6.1 [a]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1165**

**CAF 16-01541**

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

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IN THE MATTER OF RACHEL A. MONTALBANO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY F. BABCOCK, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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DAVIS LAW OFFICE, PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO.

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Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, R.), entered July 12, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody of the subject child.

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

Same memorandum as in *Matter of Montalbano v Babcock* ([appeal No. 2] ___ AD3d ___ [Nov. 17, 2017]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1166**

**CAF 16-01542**

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

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IN THE MATTER OF RACHEL A. MONTALBANO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY F. BABCOCK, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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DAVIS LAW OFFICE, PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO.

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Appeal from an amended order of the Family Court, Oswego County (Thomas Benedetto, R.), entered July 29, 2016 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, awarded petitioner sole legal custody of the subject child.

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

Memorandum: Petitioner mother commenced this proceeding alleging that respondent father took the parties' son on a boat ride in violation of an order requiring that his visitation with the child be supervised. In her petition, the mother requested that she be awarded sole legal custody of the child. Following fact-finding and dispositional hearings, Family Court issued an order and amended order that, inter alia, modified the prior order of custody and visitation to grant the mother sole legal custody and to provide that the father's visitation would take place through a particular agency. At the outset, we dismiss the father's appeal from the order in appeal No. 1 because that order was superseded by the amended order in appeal No. 2 (*see Matter of Tuttle v Mateo* [appeal No. 3], 121 AD3d 1602, 1603 [4th Dept 2014]).

The father contends that the court erred in failing to conduct a *Lincoln* hearing with the child, who was 13 years old at the time of the fact-finding and dispositional hearings. That contention is not preserved for our review because the father did not request a *Lincoln* hearing (*see Matter of Olufsen v Plummer*, 105 AD3d 1418, 1419 [4th Dept 2013]). In any event, we conclude that the court did not abuse

its discretion in failing to conduct such a hearing, inasmuch as the Attorney for the Child provided the court with sufficient information concerning the child's wishes, i.e., that the child was in favor of the mother's petition (*see Matter of Pfalzer v Pfalzer*, 150 AD3d 1705, 1706 [4th Dept 2017], *lv denied* 29 NY3d 918 [2017]; *cf. Matter of Noble v Brown*, 137 AD3d 1714, 1714-1715 [4th Dept 2016]; *see generally Matter of Walters v Francisco*, 63 AD3d 1610, 1611 [4th Dept 2009]).

We reject the father's further contention that the court erred in permitting the mother to testify to out-of-court statements made by the child. Such statements, if corroborated, are admissible in custody and visitation proceedings that are "based in part upon allegations of abuse or neglect" (*Matter of Cobane v Cobane*, 57 AD3d 1320, 1321 [3d Dept 2008], *lv denied* 12 NY3d 706 [2009]; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Hamilton v Anderson*, 143 AD3d 1086, 1087 [3d Dept 2016]; *Matter of East v Giles*, 134 AD3d 1409, 1410-1411 [4th Dept 2015]). Here, the mother's petition included a screenshot of a Facebook post in which the father stated that the child himself had operated the boat for the first time, and had raced another boat at 70 miles per hour. We conclude that the father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat in that manner "would support a finding of neglect" (*Matter of Bernthon v Mattioli*, 34 AD3d 1165, 1166 [3d Dept 2006]; *see generally* § 1012 [f] [i] [B]), and that the child's statements about the incident were corroborated by the screenshot (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 462 [1st Dept 2009]), which was properly admitted in evidence at the fact-finding hearing based on the mother's testimony that it accurately represented the father's Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past (*see Matter of Rutland v O'Brien*, 143 AD3d 1060, 1062 [3d Dept 2016]; *see generally People v Price*, 29 NY3d 472, 478-480 [2017]).

We also reject the father's contention that the court erred in failing to set a more specific schedule for his supervised visitation (*cf. Matter of Ordona v Cothern*, 126 AD3d 1544, 1545-1546 [4th Dept 2015]). In its decision, the court stated that it intended that the father receive visitation comparable in "frequency and duration" to his visitation under the prior order, "subject to the availability of" the supervising agency. We conclude that the court thereby satisfied its obligation to set a visitation schedule even though it did not specify the days of the week or times of day that visitation would occur (*see Matter of Izrael J. [Lindsay F.]*, 149 AD3d 630, 630 [1st Dept 2017]; *Matter of Alan U. v Mandy V.*, 146 AD3d 1186, 1189 [3d Dept 2017]; *see generally Matter of Vieira v Huff*, 83 AD3d 1520, 1521 [4th Dept 2011]).

We further conclude that there is a sound and substantial basis in the record for the court's award of sole legal custody to the mother (*see Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1671 [4th Dept 2017]). The record establishes that joint custody was no longer feasible in view of the parties' inability to communicate (*see Matter of Smith v O'Donnell*, 107 AD3d 1311, 1313 [3d Dept 2013]; *see*

*generally Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]), and that an award of sole custody to the mother was in the child's best interests (*see generally Matter of Gorton v Inman*, 147 AD3d 1537, 1538-1539 [4th Dept 2017]). Even assuming, arguendo, that the court did not set forth sufficient findings with respect to the best interests of the child, we conclude that reversal is not thereby warranted inasmuch as the record is adequate for us to make a best interests determination, and it supports the result reached by the court (*see generally Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]).

We have considered the father's remaining contentions and conclude that they do not warrant reversal or modification of the amended order.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1168**

**CA 17-00016**

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

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MICRO-LINK, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-RESPONDENT.

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RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ROBERT C. SINGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 19, 2016. The order granted defendant's motion for summary judgment dismissing the amended complaint, denied plaintiff's motion to compel disclosure and denied defendant's cross motion for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the breach of contract cause of action and as modified the order is affirmed without costs.

Memorandum: As we have noted in prior appeals, plaintiff commenced this action seeking payment based on a performance contract pursuant to which plaintiff managed a wastewater treatment plant on defendant's behalf. Supreme Court (Curran, J.) previously granted in part defendant's motion to dismiss the amended complaint by dismissing in part the causes of action for a breach of contract and an account stated and, on a prior appeal, this Court modified that order by denying the motion in its entirety and reinstating those causes of action in their entirety (*Micro-Link, LLC v Town of Amherst*, 73 AD3d 1426 [4th Dept 2010]). Additional motion practice ensued.

In two subsequent, consolidated appeals, we addressed an order in which Supreme Court (Michalek, J.), inter alia, denied that part of plaintiff's amended motion for summary judgment on the causes of action for a breach of contract and an account stated, denied defendant's motion for summary judgment dismissing the amended complaint "as moot," denied that part of plaintiff's amended motion for summary judgment dismissing the counterclaim on the ground of defendant's lack of legal capacity to sue, and awarded defendant summary judgment on the merits of its counterclaim based upon its evidentiary determination that defendant had overpaid plaintiff on the

contract (*Micro-Link, LLC v Town of Amherst*, 109 AD3d 1130 [4th Dept 2013] [*Micro-Link II*]; *Micro-Link, LLC v Town of Amherst*, 109 AD3d 1132 [4th Dept 2013] [*Micro-Link III*]). Initially, we dismissed the appeal from that part of the order in appeal No. 1 that "concern[ed] the counterclaim" because it was subsumed in the judgment entered on the counterclaim in appeal No. 2, i.e., *Micro-Link III* (*Micro-Link II,* 109 AD3d at 1131). We concluded that the court properly denied that part of plaintiff's amended motion for summary judgment on two of its causes of action, but that the court should have granted that part of plaintiff's amended motion for summary judgment dismissing the counterclaim because defendant lacked the legal capacity to assert that counterclaim (*Micro-Link II,* 109 AD3d at 1131-1132). In our ordering paragraph in appeal No. 1, we wrote that the "appeal from the order insofar as it concerns the counterclaim is unanimously dismissed and the order is otherwise affirmed without costs" (*id.* at 1131). We thus vacated the money judgment in appeal No. 2, directing that "the judgment so appealed from is unanimously vacated without costs, and the order entered February 8, 2012 is modified on the law by granting plaintiff's amended motion in part and dismissing the counterclaim" (*Micro-Link III,* 109 AD3d at 1132).

Following our decisions in *Micro-Link II* and *Micro-Link III*, defendant moved for summary judgment dismissing the amended complaint and, in the alternative, limiting the amount of interest. Defendant contended, inter alia, that the court's prior evidentiary determination on the counterclaim, i.e., that defendant had overpaid plaintiff, was the law of the case because this Court's 2013 decision did not explicitly overrule that factual finding when it "otherwise affirmed" the order. Plaintiff thereafter moved to compel disclosure of, inter alia, the results of a forensic accountant's audit and to stay determination of defendant's summary judgment motion pending that discovery. Defendant then cross-moved for a protective order, contending that the disclosure sought by plaintiff was precluded by a 2009 decision (Curran, J.) granting defendant's motion for a protective order. Although no order implementing the 2009 decision had ever been entered, defendant contended that the motion underlying that decision had not been abandoned and that the 2009 decision constituted the law of the case. Supreme Court (Walker, A.J.), granted defendant's motion for summary judgment dismissing the amended complaint, denied plaintiff's motion to compel disclosure and denied defendant's cross motion for a protective order.

We agree with plaintiff that the court erred in awarding defendant summary judgment dismissing the breach of contract cause of action, and we therefore modify the order accordingly. Contrary to defendant's contention, the court's prior evidentiary determination concerning the counterclaim is not the law of the case and has no preclusive effect. "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on . . . Supreme Court, as well as on the appellate court . . . '[T]he "law of the case" operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law' " (*J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2d Dept 2007]). Nevertheless, "where a court has vacated an earlier order,

the doctrine of . . . law of the case no longer applies . . . Indeed, 'a vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case' " (*Schwartz v Chan*, 142 F Supp 2d 325, 330 [ED NY 2001], citing, inter alia, *Johnson v Board of Educ.*, 457 US 52, 53-54 [1982]; *see Universal City Studios, Inc. v Nintendo Co., Ltd.,* 578 F Supp 911, 919 [SD NY 1983], *affd* 746 F2d 112 [2d Cir 1984]; *see also City of New York v State of New York*, 284 AD2d 255, 255-256 [1st Dept 2001]). While this Court may have "otherwise affirmed" the order insofar as it concerned the issues unrelated to the counterclaim, we dismissed the appeal from that part of the order concerning the counterclaim and vacated the judgment. That necessarily means that any determinations related to the counterclaim were not encompassed by the "otherwise affirmed" language related to the order (*cf. Dune Deck Owners Corp. v JJ & P Assoc. Corp.*, 71 AD3d 1075, 1076 [2d Dept 2010]; *J-Mar Serv. Ctr., Inc.*, 45 AD3d at 809-810).

Even assuming, arguendo, that defendant met its initial burden of establishing its entitlement to judgment as a matter of law with respect to the breach of contract cause of action, we conclude that plaintiff raised triable issues of fact whether defendant breached the contract when it refused to pay plaintiff on the invoices submitted. We thus do not address plaintiff's remaining contentions concerning that cause of action.

We agree with defendant, however, that the court properly awarded defendant summary judgment dismissing the account stated and unjust enrichment causes of action. " 'An account stated represents an agreement between the parties reflecting an amount due on a prior transaction . . . An essential element of an account stated is an agreement with respect to the amount of the balance due' . . . Thus, '[w]here either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails' " (*Seneca Pipe & Paving Co., Inc. v South Seneca Cent. Sch. Dist.,* 83 AD3d 1540, 1541-1542 [4th Dept 2011]; *see Micro-Link II*, 109 AD3d at 1131). Defendant established as a matter of law that it disputed the correctness of the account, and plaintiff failed to raise a triable issue of fact. Under the circumstances of this case, the fact that defendant did not voice its dispute with every subsequent invoice does not require denial of the motion. " 'Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible' " (*Schwerzmann & Wise, P.C. v Town of Hounsfield* [appeal No. 2], 126 AD3d 1483, 1484 [4th Dept 2015]). In our view, there is only one inference rationally possible from the parties' longstanding course of conduct as well as defendant's resolution directing its employees not to process the invoices or make any payments thereon. Plaintiff submitted nothing that would raise any triable issue of fact on the issue "whether defendant's silence upon receiving the bills may be construed as acceptance of the amount due" (*id.* at 1485).

With respect to the unjust enrichment cause of action, defendant

met its initial burden of proving the existence of a valid contract, and plaintiff failed to raise a triable issue of fact. " 'The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter' " (*Auble v Doyle*, 38 AD3d 1264, 1266 [4th Dept 2007]; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

Plaintiff further contends that the court erred in refusing to stay determination of the motion pending additional discovery (*see* CPLR 3212 [f]). The discovery sought by plaintiff was relevant only to the breach of contract cause of action and, inasmuch as we are determining that the court erred in awarding defendant summary judgment on that cause of action, we do not address the merits of plaintiff's contention concerning the stay.

With respect to the court's denial of plaintiff's motion to compel disclosure, plaintiff contends that the court erred in relying on a 2009 decision, which granted defendant's motion for a protective order based upon the court's determination that a forensic accountant and his firm were retained solely and exclusively for litigation pursuant to CPLR 3101 (d) (2). Inasmuch as defendant never submitted an order related to the 2009 decision, plaintiff contends that defendant's underlying motion for a protective order must "be deemed . . . abandon[ed]" (22 NYCRR 202.48 [b]). As a result, plaintiff contends that the 2009 decision cannot serve as the law of the case and that the court erred in denying its motion to compel.

Even if the motion for a protective order was not abandoned and the 2009 decision constituted the law of the case (*see Forbush v Forbush*, 115 AD2d 335, 336 [4th Dept 1985], *appeal dismissed* 67 NY2d 756 [1986]), it is nevertheless well settled that " 'this Court is not bound by the doctrine of law of the case, and may make its own determinations' " whether the information is privileged under CPLR 3101 (d) (2) because the doctrine does not prohibit our review of an unappealed subordinate court's decision (*Smalley v Harley-Davidson Motor Co. Group LLC*, 134 AD3d 1490, 1492 [4th Dept 2015]; *see Town of Angelica v Smith*, 89 AD3d 1547, 1549-1550 [4th Dept 2011]; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]).

With respect to the merits of the contention, plaintiff contends that the materials related to the forensic accountant and his firm are discoverable because they were not "prepared in anticipation of litigation" (CPLR 3101 [d] [2]), i.e., the forensic accountant was not hired "solely" or "exclusively" for litigation purposes. We reject that contention. "[T]o fall within the conditional privilege of CPLR 3101 (subd [d], par 2), the material sought must be prepared *solely* in anticipation of litigation . . . 'Mixed purpose reports are not exempt from disclosure under CPLR 3101 (subd [d], par 2)' " (*Zampatori v United Parcel Serv.*, 94 AD2d 974, 975 [4th Dept 1983]; *see Tenebruso v Toys 'R' Us–NYTEX*, 256 AD2d 1236, 1237-1238 [4th Dept 1998]). "When a

party claims that particular records or documents are exempt or immune from disclosure, the burden is on the party asserting such immunity . . . This burden is imposed because of the strong policy in favor of full disclosure" (*Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943, 944 [4th Dept 1988], citing *Koump v Smith*, 25 NY2d 287, 294 [1969]), and it " 'cannot be satisfied with wholly conclusory allegations' " (*Madison Mut. Ins. Co. v Expert Chimney Servs., Inc.*, 103 AD3d 995, 996 [3d Dept 2013]). Rather, "[s]uch burden is met 'by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation' " (*Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]).

We conclude that defendant met its burden of establishing that the forensic accountant and his firm were retained in anticipation of litigation. Although we concluded in *Micro-Link II* and *Micro-Link III* that defendant's Town Board did not resolve to commence a counterclaim until years after plaintiff commenced its action, the Town Board had begun discussing possible litigation on the contract with plaintiff well before the accountant was retained, as a result of a State Comptroller's report suggesting that plaintiff had been overpaid.

Contrary to plaintiff's final contentions, the forensic accountant's materials do not constitute a " 'mixed file' subject to disclosure" (*Commerce & Indus. Ins. Co. v Laufer Vision World*, 225 AD2d 313, 314 [1st Dept 1996]), and plaintiff has "failed to establish that [it] had a substantial need for the [materials] . . . and could not, without undue hardship, obtain the substantial equivalent of the [materials] by other means" (*Daniels v Armstrong*, 42 AD3d 558, 558 [2d Dept 2007]; *cf. Litvinov v Hodson*, 74 AD3d 1884, 1886 [4th Dept 2010]). Indeed, plaintiff may hire its own forensic accountant to obtain the information sought.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1171**

**CA 17-00682**

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

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VALERIE KOVACH, AS ADMINISTRATRIX OF THE ESTATE OF WESLEY ALAN KOVACH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KATHLEEN MCCOLLUM, AS CO-ADMINISTRATRIX OF THE ESTATE OF CALDON S. MCCOLLUM, DECEASED, AND DALE S. MCCOLLUM, AS CO-ADMINISTRATOR OF THE ESTATE OF CALDON S. MCCOLLUM, DECEASED, DEFENDANTS-APPELLANTS.

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FITZGERALD & ROLLER, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered July 6, 2016. The order granted the motion of plaintiff for, inter alia, summary judgment dismissing the affirmative defense of culpable conduct on the part of plaintiff's decedent, and denied the cross motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion with respect to the affirmative defense of culpable conduct on the part of plaintiff's son and reinstating that defense, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for the death of her son, who was a passenger in a pickup truck operated by defendants' son that went off the road and struck a tree, causing the death of both occupants. Plaintiff moved for, inter alia, summary judgment dismissing the affirmative defense of culpable conduct on the part of her son. Defendants cross-moved for summary judgment dismissing the complaint on the ground that the accident occurred during an "illegal street race" in which plaintiff's son participated, that his death was the direct result of his own serious violation of the law, and that recovery on his behalf was therefore precluded as a matter of public policy under the rule of *Barker v Kallash* (63 NY2d 19 [1984]) and *Manning v Brown* (91 NY2d 116 [1997]). In the alternative, defendants sought summary judgment on the issue whether plaintiff's

son had been comparatively negligent. Supreme Court granted plaintiff's motion and denied defendants' cross motion, and defendants appeal.

We agree with defendants that the *Barker/Manning* rule may apply to a high-speed street race between motor vehicles, i.e., "a drag race as that term is commonly understood" (*People v Senisi*, 196 AD2d 376, 381 [2d Dept 1994]; *see Hathaway v Eastman*, 122 AD3d 964, 965-967 [3d Dept 2014], *lv denied* 25 NY3d 904 [2015]; *La Page v Smith*, 166 AD2d 831, 832-833 [3d Dept 1990], *lv denied* 78 NY2d 855 [1991]; *see generally Finn v Morgan*, 46 AD2d 229, 231-232 [4th Dept 1974]), even if the participants did not plan a particular race course and the incident thus did not qualify as a "speed contest" within the meaning of Vehicle and Traffic Law § 1182 (a) (1) (*see People v Grund*, 14 NY2d 32, 34 [1964]). The record here, however, supports conflicting inferences with respect to whether defendants' son was engaged in a race with other pickup truck drivers (*see O'Connor v Kuzmicki*, 14 AD3d 498, 498 [2d Dept 2005]; *Merlini v Kaperonis*, 179 AD2d 556, 556-557 [1st Dept 1992]) and, if so, whether plaintiff's son was a "willing participant" in the race (*Manning*, 91 NY2d at 120; *see Prough v Olmstead*, 210 AD2d 603, 603-604 [3d Dept 1994]; *cf. Hathaway*, 122 AD3d at 966). Thus, the applicability of the *Barker/Manning* rule is an issue of fact (*see generally Pfeffer v Pernick*, 268 AD2d 262, 263 [1st Dept 2000]). In addition, there are issues of fact with respect to the alleged comparative negligence of plaintiff's son in choosing to ride with defendants' son, in view of evidence that defendants' son was under the influence of alcohol and had said that he intended to "chase . . . down" the other trucks (*see Strychalski v Dailey*, 65 AD3d 546, 547 [2d Dept 2009]; *Posner v Hendler*, 302 AD2d 509, 509 [2d Dept 2003]; *cf. Stickney v Alleca*, 52 AD3d 1214, 1215-1216 [4th Dept 2008]). We therefore conclude that the court properly denied defendants' cross motion but erred in granting that part of plaintiff's motion with respect to the culpable conduct defense, and we modify the order accordingly.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1174**

**CA 17-00827**

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

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DAVID CLEERE, MARNY CLEERE, W. SCOTT COLLINS
AND BETSY COLLINS, PLAINTIFFS-PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

FROST RIDGE CAMPGROUND, LLC, INDIVIDUALLY AND
DOING BUSINESS AS THE RIDGE NY RECREATION &
CAMPING, GREGORY LUETTICKE-ARCHBELL, INDIVIDUALLY
AND DOING BUSINESS AS THE RIDGE NY RECREATION &
CAMPING, DAVID LUETTICKE-ARCHBELL, INDIVIDUALLY AND
DOING BUSINESS AS THE RIDGE NY RECREATION & CAMPING,
TOWN OF LEROY AND TOWN OF LEROY ZONING BOARD OF APPEALS,
CONSISTING OF DEBBI JACKET, CHARLES VAN BUSKIRK,
MARTY BRODIE, CARL SEABURG, TOM SPADARO AND KEN
MATTINGLY, DEFENDANTS-RESPONDENTS-RESPONDENTS.
(ACTION NO. 1.)

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TOWN OF LEROY, PLAINTIFF,

V

FROST RIDGE CAMPGROUND, LLC AND THE BARN
GRILL, LLC, DEFENDANTS.
(ACTION NO. 2.)

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DAVID CLEERE, MARNY CLEERE, W. SCOTT COLLINS
AND BETSY COLLINS, PLAINTIFFS-PETITIONERS-APPELLANTS,

V

FROST RIDGE CAMPGROUND, LLC, INDIVIDUALLY AND
DOING BUSINESS AS THE RIDGE NY RECREATION &
CAMPING, GREGORY LUETTICKE-ARCHBELL, INDIVIDUALLY
AND DOING BUSINESS AS THE RIDGE NY, DAVID
LUETTICKE-ARCHBELL, INDIVIDUALLY AND DOING BUSINESS
AS THE RIDGE NY RECREATION & CAMPING, TOWN OF
LEROY AND TOWN OF LEROY ZONING BOARD OF APPEALS,
DEFENDANTS-RESPONDENTS-RESPONDENTS.
(ACTION NO. 3.)

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THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-APPELLANTS.

DIMATTEO & ROACH, ATTORNEYS AT LAW, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT FROST RIDGE CAMPGROUND,

LLC, INDIVIDUALLY AND DOING BUSINESS AS THE RIDGE NY RECREATION & CAMPING.

THE WHITING LAW FIRM, LEROY (REID A. WHITING OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT AND PLAINTIFF TOWN OF LEROY.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT TOWN OF LEROY ZONING BOARD OF APPEALS, CONSISTING OF DEBBI JACKET, CHARLES VAN BUSKIRK, MARTY BRODIE, CARL SEABURG, TOM SPADARO AND KEN MATTINGLY.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered November 9, 2016 in these consolidated, hybrid declaratory judgment actions/CPLR article 78 proceedings. The judgment, inter alia, dismissed the amended complaint/petition in action No. 1 and the complaint/petition in action No. 3.

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

Memorandum: In these consolidated, hybrid declaratory judgment actions/CPLR article 78 proceedings, plaintiffs-petitioners David Cleere, Marny Cleere, W. Scott Collins, and Betsy Collins (petitioners) appeal from a judgment that, inter alia, dismissed their amended complaint/petition in action No. 1 and complaint/petition in action No. 3 seeking to annul the determination of defendant-respondent Town of LeRoy Zoning Board of Appeals (ZBA) that, inter alia, the use of property at issue was a preexisting nonconforming use. We affirm.

Defendant-respondent Frost Ridge Campground, LLC, individually and doing business as The Ridge NY Recreation & Camping (Frost Ridge), owns a parcel of land (Property) that has functioned as a campsite and provider of recreational activities since the 1950s. In 2010, Frost Ridge began selling tickets for admission to concerts hosted on the Property as part of its summer concert series. In 2013, Frost Ridge applied for a special use permit to continue the performance of those concerts on the Property, but the ZBA determined that no special use permit was necessary. Thereafter, petitioners commenced a declaratory judgment action in action No. 1 seeking, inter alia, to annul that determination. In April 2015, Supreme Court converted action No. 1 into a CPLR article 78 proceeding, annulled the ZBA's determination for lack of public notice, and remitted the matter to the ZBA for a public hearing. Upon remittal to the ZBA, Frost Ridge did not apply for a special use permit, but instead sought an interpretation of certain provisions of the Code of the Town of LeRoy (Code) of defendant-respondent Town of LeRoy (Town) pertaining to the Property. In particular, Frost Ridge asked, inter alia, whether camping and attendant recreational activities, including live and recorded amplified music and limited food service, constituted a preexisting nonconforming use under section 165-13 of the Code. After a hearing, the ZBA issued a determination in which it answered that question in

the affirmative. Thereafter, petitioners commenced the hybrid action/proceeding in action No. 3, seeking to annul that determination as arbitrary and capricious, made in violation of the law, and not based on substantial evidence. Petitioners also amended the complaint/petition in action No. 1, and sought a declaratory judgment, injunctive relief and monetary damages in both actions/proceedings.

As a preliminary matter, the contentions that petitioners raise on appeal relate only to those causes of action in the nature of a CPLR article 78 proceeding, and they have thereby abandoned on appeal any contentions related to their causes of action seeking relief in the nature of a declaratory judgment, injunctive relief, or monetary damages (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Furthermore, the Town, which is the sole plaintiff in action No. 2 in addition to being a defendant-respondent in action Nos. 1 and 3, did not file a notice of appeal and thus the contentions raised as an appellant in its respondent's brief are not properly before us (*see Taub v Schon*, 148 AD3d 1202, 1203 [2d Dept 2017]).

Petitioners contend that the ZBA's determination was arbitrary and capricious because the ZBA refused to follow its own precedent and did not explain its reasons for failing to do so. We reject that contention. In 1998, the ZBA interpreted the Code to provide that a preexisting nonconforming use of land as a campsite runs with the land pursuant to section 165-13, notwithstanding section 165-39 (B), which requires that an existing campsite of record be brought into compliance with the Code upon being sold. Contrary to petitioners' contention, the ZBA's determination is consistent with that precedent (*see Matter of Buffalo Teachers Fedn., Inc. v New York State Pub. Empl. Relations Bd.*, 153 AD3d 1643, 1645 [4th Dept 2017]).

Petitioners also contend that the ZBA's determination was arbitrary and capricious, lacked a rational basis, and was not based on substantial evidence inasmuch as the use of the Property to host commercial concerts was not a preexisting nonconforming use. We reject that contention. It is well settled that a determination by a ZBA "must be sustained if it has a rational basis and is supported by substantial evidence" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]; *see Matter of Bounds v Village of Clifton Springs Zoning Bd. of Appeals*, 137 AD3d 1759, 1760 [4th Dept 2016]). "A record contains substantial evidence to support an administrative determination when reasonable minds could adequately accept the conclusion or ultimate fact based on the relevant proof" (*Bounds*, 137 AD3d at 1760 [internal quotation marks omitted]). Where there is conflicting evidence, it is the role of the administrative agency to weigh the evidence and make a choice, and the courts will not reject a choice based on substantial evidence (*see id.*).

"A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use" (*Matter of Tavano v Zoning Bd. of Appeals of the Town of Patterson*, 149 AD3d 755, 756 [2d Dept 2017] [internal quotation marks omitted]; *see Toys "R" Us*, 89 NY2d at 417). "The nature and extent of a preexisting nonconforming use generally will determine the amount of

protection accorded that use under a zoning ordinance" (*Matter of Rudolf Steiner Fellowship Found. v De Luccia*, 90 NY2d 453, 458 [1997]). "All zoning cases are by their nature fact specific, and as a leading authority recognizes, the right to a nonconforming use must necessarily be decided 'on a case-by-case basis' " (*Toys "R" Us*, 89 NY2d at 422). Here, there was substantial evidence that the Property was used for recreational activities and as a campsite prior to the adoption of the zoning ordinance. That evidence included the affidavit of a former employee of Frost Ridge's predecessor, who averred that the Property had been used for skiing and other recreational purposes since the 1950s. He averred that he began working there in the 1960s and observed numerous recreational activities on the Property, including winter sports, live music, and campsite rentals.

Furthermore, we conclude that the ZBA rationally interpreted the term "campsite" as used in the Code as encompassing recreational activities including live music in determining that the use of the Property was a preexisting nonconforming use. Where, as here, a zoning ordinance permits the ZBA to interpret its requirements (*see* Code § 165-46 [B] [2]), "specific application of a term of the ordinance to a particular property is . . . governed by the [ZBA's] interpretation, unless unreasonable or irrational" (*Matter of Frishman v Schmidt*, 61 NY2d 823, 825 [1984]; *see Bounds*, 137 AD3d at 1760). The Code contains no definition of "campsite" or any enumeration of what activities are permitted there. The ordinance does, however, require that any large campsite "provide a common open area suitable for recreation and play purposes" (§ 165-39 [C] [8]), and thus expressly contemplates that a campsite is a place for recreation. Although the kind of recreation is open to interpretation, it is rational in our view to conclude that live music, along with swimming and other outdoor activities, is the kind of recreation to be enjoyed at a campsite. Moreover, the interpretation of the term "campsite" as including attendant recreational activities such as live music is consistent with the record evidence. Several neighbors stated at the hearing that there was a history of live music on the Property, and at least one of them recalled that live, amplified bands played every summer weekend during the 1970s and 1980s.

Petitioners further contend that the ZBA's determination was arbitrary and capricious, lacked a rational basis, and was not based on substantial evidence inasmuch as the use of the Property to host live music was either abandoned or illegally expanded. We reject that contention as well. With respect to abandonment, the Code provides that a preexisting nonconforming use is deemed abandoned if discontinued for a period of one or more years (*see* Code § 165-13 [C] [5]). Here, it is undisputed that the Property functioned continuously as a recreational facility and campsite since the 1950s. To the extent that petitioners contend that use of the Property to host live music was abandoned in 2008 and 2009, we note that there is evidence in the record that live concerts were hosted on the Property during those years. With respect to expansion, we conclude that there is substantial evidence for the ZBA's determination that Frost Ridge's "actions were consistent with the essential character of the property

as a prior non-conforming use." Not only is there evidence of live concerts every summer weekend during the 1970s and 1980s, but Frost Ridge submitted an expert opinion that the noise from the concerts was quieter than other ambient noise in the neighborhood, including noise from a creek and a shooting range.

Finally, the contentions raised for the first time in petitioners' reply brief are not properly before us (*see Becker-Manning, Inc. v Common Council of City of Utica,* 114 AD3d 1143, 1144 [4th Dept 2014]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1188**

**CAF 16-01287**

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

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IN THE MATTER OF KH'NIAYAH D.

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ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NIANI J., RESPONDENT-APPELLANT,
AND KHALIL D., RESPONDENT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

TRICIA M. DORN, ATTORNEY FOR THE CHILD, SYRACUSE.

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Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered July 1, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, vacated a previously issued suspended judgment and terminated respondent Niani J.'s parental rights to the subject child.

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

Memorandum: In this termination of parental rights proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, vacated a previously issued suspended judgment, terminated her parental rights, and directed that the subject child be freed for adoption. Initially, we note that the mother's contention that "petitioner did not make significant efforts to reunite [her] with the child[ ] is not properly before us inasmuch as it was conclusively determined in the prior proceedings to terminate [the mother's] parental rights . . . We note in any event that the [mother] admitted to the permanent neglect of the child[ ] and consented to the entry of the suspended judgment, and thus no appeal would lie therefrom because [the mother was] not aggrieved, based on [her] consent" (*Matter of Cornelius L.N. [Cornelius N.]*, 117 AD3d 1487, 1488 [4th Dept 2014], *lv denied* 24 NY3d 901 [2014] [internal quotation marks omitted]). To the extent that the mother contends that her consent to the finding of permanent neglect and the entry of the suspended judgment was not given knowingly, voluntarily, and intelligently, we note that she "did not move to vacate [her] admission to having permanently neglected the subject child[ ]," and

thus her contention, which is raised for the first time on appeal, is not properly before us (*Matter of Nyasia E.R. [Michael R.]*, 121 AD3d 792, 793 [2d Dept 2014]).

We reject the mother's further contention that Family Court abused its discretion in revoking the suspended judgment and terminating her parental rights. It is well established that, "[i]f the court determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). Here, the court's determination that the mother failed to comply with the terms of the suspended judgment, and that it is in the child's best interests to terminate the mother's parental rights, is supported by the requisite preponderance of the evidence (*see Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015]; *Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014]). Although there is some evidence in the record that "the mother attempted to comply with 'the literal terms and conditions of the suspended judgment,' [termination of the suspended judgment will be upheld where, as here,] the record establishes that she was unable to overcome the specific problems that led to the removal of the child from her" care (*Matter of Erie County Dept. of Social Servs. v Anthony P., Sr.*, 45 AD3d 1384, 1385 [4th Dept 2007]; *see Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 899 [3d Dept 2016]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1189**

**CA 17-00234**

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

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DAVID M. ISABELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES F. JACKLING, INDIVIDUALLY AND AS TRUSTEE OF THE JAMES F. JACKLING AND JOAN G. JACKLING LIVING TRUST, AND JOAN G. JACKLING, INDIVIDUALLY AND AS TRUSTEE OF THE JAMES F. JACKLING AND JOAN G. JACKLING LIVING TRUST, DEFENDANTS-RESPONDENTS.

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RICHARD A. GOLDBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 26, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking specific performance of a contract for the purchase and sale of real property that was allegedly formed after plaintiff was the highest bidder at an auction for a parcel of property owned by defendants. Plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm.

It is fundamental that "[s]pecific performance may be awarded only where there is a valid existing contract for which to compel performance" (*Rojas v Paine*, 101 AD3d 843, 846 [2d Dept 2012]). Contrary to plaintiff's contention, we conclude that defendants met their initial burden on their motion by establishing that no valid contract existed inasmuch as the auction documents provided that the auction was conditional (*see generally Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 449 [2016]), and defendants rejected plaintiff's bid by declining to sign the purchase offer (*see* General Obligations Law § 5-703 [2]; *Tikvah Realty, LLC v Schwartz*, 43 AD3d 909, 909 [2d Dept 2007]; *see also Post Hill, LLC v E. Tetz & Sons, Inc.*, 122 AD3d 1126, 1127-1128 [3d Dept 2014]).

Plaintiff failed to raise a triable issue of fact in opposition

to the motion. Contrary to plaintiff's contention, we conclude that his participation in the auction and tender of a down payment upon signing the purchase offer were not "unequivocally referable" to a contract so as to render applicable the part performance exception to the statute of frauds (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]; *see* General Obligations Law § 5-703 [4]; *Tikvah Realty, LLC*, 43 AD3d at 909). Rather, plaintiff's actions constituted "preliminary steps which contemplate[d] the future formulation of an agreement" (*Francesconi v Nutter*, 125 AD2d 363, 364 [2d Dept 1986]; *see Post Hill, LLC*, 122 AD3d at 1128-1129; *see generally Gracie Sq. Realty Corp. v Choice Realty Corp.*, 305 NY 271, 282 [1953]). We reject plaintiff's further contention that defendants are equitably estopped from asserting the statute of frauds. Inasmuch as the auction was conditional and the formation of a binding contract remained subject to defendants' acceptance of the purchase offer (*see generally Stonehill Capital Mgt. LLC*, 28 NY3d at 449), plaintiff could not reasonably rely on his submission of the highest bid along with statements in the auction documents that the parcel would "sell subject to immediate confirmation" as establishing a promise by defendants to sell the property to him (*see Dates v Key Bank Natl. Assn.*, 300 AD2d 1090, 1090 [4th Dept 2002]). Defendants declined to accept plaintiff's purchase offer, and they were therefore entitled to enter into a contract for the sale of the parcel with another party. Thus, "estoppel does not lie" in this case (*id.*).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1191**

**CA 17-00681**

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

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BEVERLY BRADLEY, AS GUARDIAN OF THE PERSON AND PROPERTY OF RHOEMEL LAMPKIN, AND BEVERLY BRADLEY, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

RAMESH KONAKANCHI, D.O., DEFENDANT-APPELLANT, ET AL., DEFENDANT.

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CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI, LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 21, 2016. The order, among other things, denied the motion of defendant Ramesh Konakanchi, D.O., to dismiss the action against him.

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

Opinion by NEMOYER, J.: We hold that CPLR 3404 does not apply when the note of issue is vacated.

FACTS

The material facts are undisputed. Plaintiff's ward was admitted to the psychiatric unit of a hospital in the City of Niagara Falls. Shortly thereafter, he allegedly jumped off the hospital's roof and sustained serious physical injuries. Plaintiff subsequently commenced the instant medical malpractice action against, inter alia, Ramesh Konakanchi, D.O. (defendant). Discovery ensued, and plaintiff eventually filed a note of issue. Defendant moved to vacate the note of issue pursuant to 22 NYCRR 202.21 (e), arguing that discovery was incomplete. Supreme Court granted the motion, vacated the note of issue, and ordered additional discovery.

Over a year passed without the filing of a new note of issue.[1]

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[1] This is not to suggest that the case went dormant during this period. According to Supreme Court, the following occurred

Defendant then moved to dismiss the action against him pursuant to CPLR 3404, which provides for the administrative dismissal of inactive cases under certain circumstances. Plaintiff opposed the motion, arguing that CPLR 3404 is categorically inapplicable when the note of issue has been vacated. The court denied the motion, although it acknowledged the "conflicting decisions on the breadth of CPLR Rule 3404" and observed that "appellate clarification on the breadth of Rule 3404 would be instructive."

Defendant appeals, and we now affirm.

DISCUSSION

This appeal turns entirely on the proper interpretation of CPLR 3404, which says, in full:

> "A case in the supreme court or a county court marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order."

Defendant argues that the case was "marked 'off' " or "struck" from the calendar when the court vacated plaintiff's note of issue. Because plaintiff did not file a new note of issue (i.e., did not restore the case to the calendar) within one year, defendant reasons that the case was deemed abandoned and dismissed by operation of law pursuant to CPLR 3404. Plaintiff disagrees, arguing that CPLR 3404 is categorically inapplicable when the note of issue is vacated. In plaintiff's view, CPLR 3404 applies only when the case is "marked 'off' " or "struck" from the calendar for a reason other than the vacatur of the note of issue.

There is a Departmental split on this issue. In the First and Second Departments, it is very well established that "CPLR 3404 does not apply to cases in which . . . the note of issue has been vacated" (*Turner v City of New York*, 147 AD3d 597, 597 [1st Dept 2017]; *see Liew v Jeffrey Samel & Partners*, 149 AD3d 1059, 1061 [2d Dept 2017]; *Ortiz v Wakefern Food Corp.*, 145 AD3d 1024, 1025 [2d Dept 2016]; *Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011], *lv dismissed* 17 NY3d 923 [2011]). The Second Department has explained the rationale for this rule as follows: "The vacatur of a note of issue . . . returns the case to pre-note of issue status. It does not constitute a marking 'off' or striking the case from the court's calendar within the meaning of CPLR 3404" (*Montalvo v Mumpus Restorations, Inc.*, 110 AD3d 1045, 1046 [2d Dept 2013]; *see also Lane v New York City Hous. Auth.*, 62 AD3d 961, 961 [2d Dept 2009]; *Suburban Restoration Co., Inc.*

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after the note of issue was vacated: "an additional party was added; additional discovery continued; numerous court conferences were held; [and] two parties settled with plaintiff."

*v Viglotti*, 54 AD3d 750, 750-751 [2d Dept 2008]). This rule is a specific manifestation of the First and Second Departments' consistently narrow construction of CPLR 3404 (*see generally Berde v North Shore-Long Is. Jewish Health Sys., Inc.*, 98 AD3d 932, 933 [2d Dept 2012] ["Where a case is not marked off or stricken from the trial calendar, but is removed from the calendar for another reason, CPLR 3404 does not apply"]).

The Third Department, however, has effectively rejected the First and Second Departments' interpretation of CPLR 3404 (*see Hebert v Chaudrey*, 119 AD3d 1170, 1171-1172 [3d Dept 2014]). In *Hebert*, the plaintiff's note of issue was vacated on the defendant's motion, and the plaintiff did not file a new note of issue within the following year. "We must agree with defendant that, as a result, . . . the case was automatically dismissed pursuant to CPLR 3404," wrote the *Hebert* panel (*id.* at 1171). *Hebert* is the logical end point of the Third Department's oft-expressed view that, for purposes of CPLR 3404, a case is "marked 'off' " or "struck" from the calendar whenever the note of issue is vacated (*see Gray v Cuttita Agency*, 281 AD2d 785, 785-786 [3d Dept 2001]; *Threatt v Seton Health Sys.*, 277 AD2d 796, 796-797 [3d Dept 2000]; *Matter of State of New York v Town of Clifton*, 275 AD2d 523, 525 [3d Dept 2000]; *Meade v Lama Agency*, 260 AD2d 979, 980-981 [3d Dept 1999]).

We have not yet weighed in on this precise issue, but our case law is more aligned with the First and Second Departments' approach than with the Third Department's approach. In *Hausrath v Phillip Morris USA Inc.* (124 AD3d 1413, 1414 [4th Dept 2015]), we wrote that "CPLR 3404 does not apply because the case was never marked 'off' or struck from the calendar, nor was it unanswered on a clerk's calendar call." In so holding, we cited with approval to the Second Department's decision in *Berde*, a case that exemplifies the narrow construction of CPLR 3404 that prevails in the First and Second Departments.

More significantly, we have previously recognized that an order vacating the note of issue places the case in "pre-note-of-issue status" (*Meidel v Ford Motor Co.*, 117 AD2d 991, 991 [4th Dept 1986]). Our reasoning in *Meidel* essentially foretold the foundational premise of the First and Second Departments' rule——i.e., that CPLR 3404 does not apply when the note of issue has been vacated because the case is thereby returned to pre-note of issue status, as opposed to being "marked 'off' " or "struck" from the calendar. By the same token, our observation in *Meidel* is wholly inconsistent with the underlying premise of the Third Department's rule——i.e., that vacating the note of issue does *not* return the case to its pre-note of issue posture.

In accordance with the tenor and spirit of our existing case law, we now explicitly adopt the First and Second Departments' rule, and reject the Third Department's. It is axiomatic that CPLR 3404 has no applicability in the absence of an extant and valid note of issue (*see Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 191, 193-194, 198-199 [2d Dept 2001], *lv dismissed* 96 NY2d 937 [2001]; *accord Matter of*

*Giangualano [Birnbaum]*, 99 AD3d 1221, 1222 [4th Dept 2012]; *Chauvin v Keniry*, 4 AD3d 700, 702 [3d Dept 2004]*, lv dismissed* 2 NY3d 823 [2004]; *Johnson v Minskoff & Sons*, 287 AD2d 233, 234, 237 [1st Dept 2001]), and we agree with the Second Department that "[t]he vacatur of a note of issue . . . returns the case to pre-note of issue status [and] does not constitute a marking 'off' or striking the case from the court's calendar within the meaning of CPLR 3404" (*Montalvo*, 110 AD3d at 1046). To state the obvious, a note of issue does not survive its own vacatur, and it makes no sense to apply CPLR 3404 when the statute's operative premise—i.e., the continuing vitality of the note of issue—no longer exists.

The Third Department's contrary rule—like the textually-based arguments in defendant's brief—fails to recognize the technical distinction between vacating a note of issue and marking off/striking a *properly noted* case from the calendar. Indeed, "it is precisely in such [latter] circumstances that CPLR 3404, by its express terms, applies" (*Nieman v Sears, Roebuck & Co.*, 4 AD3d 255, 256 [1st Dept 2004]). In other words, while it is of course true (as defendant insists) that a case is "place[d]" on the calendar by filing a note of issue (CPLR 3402 [a]), it does not follow—as the Third Department consistently holds—that a case is "marked 'off' " or "struck" from the calendar within the meaning of CPLR 3404 whenever the note of issue is vacated pursuant to 22 NYCRR 202.21 (e).

The late Professor Siegel emphasized the import of this technical distinction to the proper understanding and application of CPLR 3404. The statute, he explained, "assumes the case is properly on the calendar. If it isn't, as when the note of issue itself is stricken because the case is not yet ready for calendar placement, . . . the case returns to 'pre-note of issue status' " (David D. Siegel, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3404:1, 2017 Pocket Part at 13, quoting *Travis v Cuff*, 28 AD3d 749, 750 [2d Dept 2006]).[2] And once the case returns to " 'pre-note of issue status,' " Professor Siegel continued, "CPLR 3404 is irrelevant and CPLR 3216 becomes the applicable tool" to seek dismissal for want of prosecution (*id.*).

Contrary to defendant's contention, the First and Second Departments' rule does not render CPLR 3404 meaningless in modern civil practice. Indeed, an action is still subject to dismissal under CPLR 3404 when it is struck from the calendar but the note of issue remains intact (*see e.g. Saint Mary Byzantine Catholic Church v Kalin*, 110 AD3d 708, 708-709 [2d Dept 2013]; *Nieman*, 4 AD3d at 255-256). And finally, "it is for the Legislature, not the courts," to address defendant's claim that CPLR 3216 is an ineffective, inefficient, and unduly burdensome mechanism for purging inactive cases from the docket (*Chavez v 407 Seventh Ave. Corp.*, 10 Misc 3d 33, 39 [App Term, 2d Dept, 2d & 11th Jud Dists 2005] [Patterson, J., dissenting], *revd* 39 AD3d 454 [2d Dept 2007]).

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[2]*Travis* is one of the many cases applying the First and Second Departments' interpretation of CPLR 3404.

CONCLUSION

Here, it is undisputed that the note of issue was vacated. Applying the First and Second Departments' rule, it follows that the case was not "marked 'off' " or "struck" from the calendar within the meaning of CPLR 3404. CPLR 3404 thus does not apply, and the action could not be dismissed on that basis. Accordingly, the order appealed from should be affirmed.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1195**

**CA 17-00657**

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

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NOAH DOOLITTLE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIXON PEABODY LLP, DEFENDANT-APPELLANT-RESPONDENT.

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THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

THOMAS & SOLOMON LLP, ROCHESTER (J. NELSON THOMAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 2, 2016. The order, inter alia, granted in part the posttrial motion of defendant to set aside the verdict as to damages and reduced the amount thereof, and otherwise denied defendant's motion.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the posttrial motion with respect to the Labor Law cause of action and dismissing that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former associate attorney in defendant's Rochester office, commenced this action seeking to recover a bonus that he allegedly earned during his employment with defendant. On a prior appeal, we determined that Supreme Court erred in granting defendant's motion for summary judgment dismissing certain causes of action, including those alleging violation of the Labor Law and breach of contract, and we reinstated those causes of action (*Doolittle v Nixon Peabody LLP*, 126 AD3d 1519 [4th Dept 2015]). The case proceeded to a jury trial at which plaintiff presented evidence, including his own testimony, that various partners of defendant advised him and other associates that an associate who generated a client for defendant would receive a bonus consisting of 5% of the fees paid by that client if such fees exceeded a threshold of $100,000 (hereafter, collections bonus). Although the collections bonus policy was never put in writing, it was verbally communicated to plaintiff on multiple occasions. Plaintiff acknowledged that he could not provide a date and time for every meeting in which the collections bonus was discussed, but he testified that the collections bonus was promised throughout the duration of his employment with defendant from 2002 to 2008. Among other discussions with partners about the collections

bonus, plaintiff recalled annual or biannual meetings in defendant's Rochester office conducted by the partner responsible for managing the firm's bonus programs (hereafter, compensation management partner) in which the compensation management partner discussed various compensation-related matters, including the collections bonus.

Plaintiff generated a new client for defendant through a personal connection with the client's general counsel. In particular, plaintiff met with the general counsel in late 2004 about having the client hire defendant to pursue a claim, and plaintiff also made a "personal pitch" to the general counsel by indicating that, if the client hired defendant, plaintiff would have the opportunity to earn a bonus amounting to a percentage of the fees collected in the matter. The client formally retained defendant in April 2005. In August 2008, an arbitration award was issued in favor of the client in the amount of approximately $19 million. Plaintiff left defendant's employ for a new job in September 2008. After further activity, the client ultimately accepted a settlement offer of approximately $16 million and, in November 2008, defendant collected a contingency fee of over $5 million from the client. Defendant, however, did not pay plaintiff the 5% collections bonus in connection with that fee.

The court reserved decision on defendant's motion for a directed verdict following plaintiff's proof. Defendant called several partners as witnesses, including the compensation management partner, who acknowledged that, among other things, defendant had the collections bonus practice during the relevant period, that he conducted annual meetings in the Rochester office during which he discussed associate bonuses including the collections bonus, and that he knew associates would rely on his representations because the collections bonus was not in writing. The jury returned a verdict in favor of plaintiff on the Labor Law and breach of contract causes of action.

Defendant appeals from those parts of an order denying its motion during trial for a directed verdict pursuant to CPLR 4401 and denying in part its posttrial motion to set aside the verdict pursuant to CPLR 4404 (a). Plaintiff cross-appeals from the order to the extent that the court granted that part of defendant's motion to set aside the verdict as to damages and reduced the amount thereof as a matter of law.

Defendant in its main brief on appeal does not challenge the court's denial of that part of its motion for a directed verdict under CPLR 4401 with respect to the Labor Law cause of action, and thus it has abandoned any contentions with respect to that part of the motion (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). To the extent that defendant seeks to challenge the denial of that part of the motion for the first time in its reply brief, that challenge is not properly before us (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]; *O'Sullivan v O'Sullivan*, 206 AD2d 960, 960-961 [4th Dept 1994]).

We agree with defendant that the court erred in denying that part of its posttrial motion to set aside the verdict on the Labor Law cause of action (*see* CPLR 4404 [a]), and we therefore modify the order accordingly. A court may set aside a jury verdict as not supported by legally sufficient evidence and enter judgment as a matter of law only where "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Matter of State of New York v Farnsworth*, 107 AD3d 1444, 1445 [4th Dept 2013]; *Niagara Vest v Alloy Briquetting Corp.*, 244 AD2d 892, 893 [4th Dept 1997]). Plaintiff's cause of action and the resulting jury verdict in this case are premised upon defendant's violation of Labor Law § 193 (1), which provides, with certain exceptions not applicable here, that "[n]o employer shall make any deduction from the wages of an employee" (*see generally Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 15-16 [2012]). Labor Law § 190 (1) defines "[w]ages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." The Court of Appeals has explained that, "[u]nlike in other areas where the Legislature chose to define broadly the term 'wages' to include every form of compensation paid to an employee, including bonuses . . . , the Legislature elected not to define that term in Labor Law § 190 (1) so expansively as to cover all forms of employee remuneration" (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]). Thus, "the more restrictive statutory definition of 'wages,' as 'earnings . . . for labor or services rendered,' excludes incentive compensation 'based on factors falling outside the scope of the employee's actual work' " because "the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled" (*id.*). By contrast, a bonus falls within the protection of the statute, i.e., it is considered "wages" rather than "incentive compensation," when the bonus is " 'expressly link[ed]' to [the employee's] 'labor or services personally rendered' " (*Ryan*, 19 NY3d at 16; *see Friedman v Arenson Off. Furnishings Inc.*, 129 AD3d 525, 525 [1st Dept 2015]).

Here, notwithstanding the foregoing legal principles, the law as stated in the court's unchallenged jury charge "became the law applicable to the determination of the rights of the parties in this litigation . . . and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged" (*Harris v Armstrong*, 64 NY2d 700, 702 [1984]; *see Murdock v Stewart's Ice Cream Co.*, 5 AD3d 1100, 1101 [4th Dept 2004]; *see also Kroupova v Hill*, 242 AD2d 218, 220 [1st Dept 1997], *lv dismissed* 92 NY2d 843 [1998], *lv dismissed in part and denied in part* 92 NY2d 1013 [1998]). The court instructed the jury, in relevant part, that an employee bonus is "incentive compensation" rather than "wages" protected by the statute "where the bonus is based on more than just the employee's performance." The court further instructed that, if the jury found "that the collections bonus is based on a portion of the fee collected by defendant in the . . . matter" and "that the fee collected by

defendant in the . . . matter is based on factors outside of plaintiff's control," it had to find that the collections bonus constitutes "incentive compensation."

Applying the facts to the law as stated in the jury charge, the evidence establishes that the collections bonus was "incentive compensation" because it was based on more than just plaintiff's performance. Among other things, the matter took considerable effort from other attorneys, some of whom billed far more hours on the matter than plaintiff, and a partner conducted international arbitration and filed enforcement proceedings to secure a settlement collectible by the client. Contrary to plaintiff's contention, inasmuch as the collections bonus was calculated as a percentage of the fee in the matter and "the fee collected" by defendant was based on the abovementioned factors outside of plaintiff's control, the jury could not have rationally concluded that the collections bonus was anything other than "incentive compensation" excluded from protection under Labor Law § 193 (1).

Additionally, even if inaccurate, the court's unchallenged charge provided that the jury could conclude that the collections bonus vested during plaintiff's employment with defendant only if it found that "the amount of the collections bonus, including the fee collected on the . . . matter, was expressly linked to labor or services personally rendered by plaintiff and that this amount was earned before plaintiff left his employment." Here, the evidence established that the amount of the collections bonus eventually owed to plaintiff for generating the client was not expressly linked to labor or services personally rendered by plaintiff; rather, the *amount* of the bonus—5% of collected fees from the client only if such fees ultimately exceeded $100,000—was dependent upon and linked to the contingency fee obtained by defendant through the efforts of its various employees after the client retained defendant. Thus, based on the law as stated by the court, the jury could not have rationally concluded that plaintiff's collections bonus was vested and earned for purposes of the Labor Law before he left defendant's employ (*cf. Ryan*, 19 NY3d at 16).

We reject defendant's further contention, however, that the court erred in denying that part of its motion seeking a directed verdict on the breach of contract cause of action based upon plaintiff's alleged failure to establish a prima facie case. It is well settled that " 'a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' " (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287-1288 [4th Dept 2014]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

We conclude on this record that there was a rational process by which the jury could find the essential elements of a cause of action to recover damages for breach of contract (*see generally Gianfrancisco v Conway*, 152 AD3d 494, 496 [2d Dept 2017]). Viewing the evidence in the light most favorable to plaintiff, the jury was entitled to infer that defendant held annual meetings at which the compensation management partner set forth the specific terms of the collections bonus under which an associate would receive 5% of any fees collected on a newly generated client if such fees exceeded $100,000; that plaintiff attended at least one such meeting prior to his meeting with the client's general counsel in late 2004 and the client's subsequent formal retention of defendant in April 2005 inasmuch as plaintiff's employment began in 2002; and that plaintiff was therefore aware of the collections bonus as a result of the compensation management partner's representations—which were in conformance with other similar indications by other partners—before he generated the client for defendant. Plaintiff's testimony further supports the inference that the collections bonus was promised to him by defendant from the beginning of his employment in 2002, and that such promise was made prior to plaintiff's performance of generating the client inasmuch as plaintiff mentioned the bonus opportunity to the client's general counsel in order to persuade the client to retain defendant as its law firm. In sum, the evidence adduced by plaintiff established, prima facie, that the parties entered into a binding oral agreement in which at least one of defendant's partners promised to pay plaintiff a bonus consisting of 5% of the fee collections from any client generated by plaintiff if such fees exceeded $100,000, that plaintiff subsequently performed under the agreement by generating the client, and that defendant breached the agreement by failing to pay the collections bonus, thereby causing plaintiff to incur damages (*see generally Gianfrancisco*, 152 AD3d at 496). The court thus properly denied defendant's motion for a directed verdict pursuant to CPLR 4401.

Contrary to defendant's further contention, we conclude that the court properly denied that part of defendant's motion pursuant to CPLR 4404 (a) to set aside the jury verdict on the breach of contract cause of action as contrary to the weight of the evidence inasmuch as the evidence "did not so preponderate in favor of the defendant that the verdict could not have been reached upon any fair interpretation of the evidence" (*Gianfrancisco*, 152 AD3d at 497).

In light of our determination, we do not address the remaining contentions raised by defendant on its appeal.

On his cross appeal, plaintiff challenges the order to the extent that the court, upon finding that the jury incorrectly calculated damages for defendant's breach of contract, granted that part of defendant's motion to set aside the verdict as to damages and reduced the amount thereof as a matter of law (*see* CPLR 4404 [a]). Plaintiff contends that the court erred in recalculating the damages award because the jury was entitled to determine that the collections bonus applied to 5% of the "total collections," including any reimbursements from the client for defendant's out-of-pocket expenses in pursuing the matter. We reject that contention. Plaintiff repeatedly testified at

trial that defendant promised to pay him 5% of the “fees” that it collected from the client if the threshold was met, and the record does not support plaintiff’s assertion that the “fees” included defendant’s out-of-pocket expenses subject to reimbursement by the client.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1202**

**KA 16-00068**

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BUDNACK, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered December 7, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the second degree and possessing a sexual performance by a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted course of sexual conduct against a child in the second degree (Penal Law §§ 110.00, 130.80 [1] [a]) and possessing a sexual performance by a child (§ 263.16). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255-256; *People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1204**

**KA 15-00160**

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN GRISWOLD, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 21, 2014. The judgment convicted defendant upon his plea of guilty of, inter alia, 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 guilty plea of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that County Court did not err in refusing to suppress evidence obtained during the execution of a search warrant inasmuch as the search warrant was issued with probable cause. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that the evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). Further, "[p]robable cause may be supplied, in whole or part, through hearsay information" (*id.*). The record establishes that the confidential informant had some basis of knowledge, and the confidential informant's reliability was established because his statement to the police was corroborated by independently verified details about the shooting that precipitated the search warrant (*see People v DiFalco*, 80 NY2d 693, 696-697 [1993]; *People v Elwell*, 50 NY2d 231, 237 [1980]).

Contrary to defendant's further contention, the bargained-for sentence is not unduly harsh or severe.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1217**

**CA 17-00870**

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

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NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF SYRACUSE AND CITY OF SYRACUSE DEPARTMENT OF WATER, DEFENDANTS-APPELLANTS.

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JOSEPH E. FAHEY, CORPORATION COUNSEL, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SOLOMON AND SOLOMON, P.C., ALBANY (DUSTIN B. HOWARD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 6, 2017. The order denied defendants' motion to dismiss.

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

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1247**

**KA 15-00943**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANAL J. ROOKER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [3]). Contrary to defendant's contention, we conclude that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]) and, because County Court discussed the possibility of adjudicating defendant a youthful offender during the plea colloquy (*see People v Daigler*, 148 AD3d 1685, 1686 [4th Dept 2017]; *cf. People v Anderson*, 90 AD3d 1475, 1475-1476 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]), that waiver encompasses defendant's challenge to the denial of his request for youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024 [2015]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1252**

**KA 16-00179**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH PRINGLE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated December 23, 2015. The order denied, without a hearing, the motion of defendant pursuant to CPL 440.10 (1) (g).

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

Memorandum: Defendant appeals from an order that denied, without a hearing, his motion pursuant to CPL 440.10 (1) (g) to vacate the judgment convicting him following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). On defendant's direct appeal, we affirmed the judgment (*People v Pringle*, 71 AD3d 1450 [4th Dept 2010], *lv denied* 15 NY3d 777 [2010]) In support of the motion, defendant submitted, inter alia, the sworn affidavit of the victim stating that, contrary to his testimony at trial, defendant was not the person who shot him.

"There is no form of proof so unreliable as recanting testimony" (*People v Shilitano*, 218 NY 161, 170 [1916], *rearg denied* 218 NY 702 [1916]), and such testimony is "insufficient alone to warrant vacating a judgment of conviction" (*People v Thibodeau*, 267 AD2d 952, 953 [4th Dept 1999], *lv denied* 95 NY2d 805 [2000]). "Consideration of recantation evidence involves the following factors: (1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie" (*People v Wong*, 11 AD3d 724,

725-726 [3d Dept 2004]).

Here, the victim gave abundant testimony at trial that amply supported his ultimate statement that he had "[n]o doubt" that defendant was the shooter. In contrast, the victim's affidavit was prepared more than 10 years following the shooting, after the victim had become an inmate at the same prison in which defendant is incarcerated, and the victim blamed an individual identified only as "Marvin," who was alleged to be deceased since 2008 (*see People v Cintron*, 306 AD2d 151, 152 [1st Dept 2003], *lv denied* 100 NY2d 641 [2003]). We therefore conclude that, "[n]otwithstanding the absence of an evidentiary hearing, the totality of the parties' submissions along with the trial record warrant a factual finding that the recantation is totally unreliable" (*id.*), and that the court properly denied defendant's motion.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1254**

**KA 14-02107**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD L. SMITH, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 21, 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 reversed on the law, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant was sentenced, as a first felony offender, to a six-year term of incarceration and a five-year period of postrelease supervision. Defendant contends that his plea was not knowing, voluntary, and intelligent because he was not advised of the direct sentencing consequences of his plea. We agree.

"While a trial court has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea" (*People v Catu*, 4 NY3d 242, 244 [2005]). Defendant failed to preserve for our review his contention that County Court failed to fulfill its obligation to advise him at the time of the plea that the sentence imposed would include a period of postrelease supervision (*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 [3] [c]). Nevertheless, the record supports defendant's further contention that he was not advised that the sentence to which he agreed when pleading guilty was fixed without regard to the outcome of the second violent felony offender hearing, and thus that he was not properly advised of the direct consequences of the plea (*see Catu*, 4 NY3d at 244).

Consequently, we reverse the judgment, vacate defendant's plea, and remit the matter to County Court for further proceedings on the indictment.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1256**

**KA 15-01851**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. FIORETTI, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 6, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of marihuana in the fifth 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]) and criminal possession of marihuana in the fifth degree (§ 221.10 [2]). Defendant contends that Supreme Court erred in refusing to suppress tangible evidence and statements obtained by members of law enforcement following their warrantless search of his home. We reject that contention. At the suppression hearing, agents from the Drug Enforcement Administration (DEA) testified that they received a tip that defendant was operating a marihuana growing business in his home in the Town of Amherst. Following several months of investigating the allegation with inconclusive results, two agents approached defendant's residence in plain clothes, and knocked on his front door in an effort to talk to him. From the front step, through an exterior glass door, the agents observed a quantity of electrical power cords running up the staircase to the second floor and marihuana leaves on defendant's stairs. When defendant answered the door and stepped outside to speak with the agents, one of them informed him that they were with the DEA and were investigating criminal activity in the neighborhood. Defendant asked if it was about his neighbor's "massage" business, and one of the agents responded that it was actually about defendant and drug activity. According to one of the agents, defendant pretended to be shocked, and the agent asked if there was anything in the house that

defendant wanted them to know about. Defendant told the agents that he had a few marihuana plants inside, and the agents asked defendant if they could search the house. Defendant answered affirmatively and, as the agents stood on the front step outside of defendant's home, one asked defendant to sign a consent to search form. The agent explained to defendant that consent to search meant that the agents could go inside his house and search without a warrant. Defendant agreed to sign the consent form, which contained an acknowledgment that he was asked by special agents from the DEA to consent to a search of his residence, he had not been threatened or forced in any way, and he freely consented to the search of his residence.

"[A] consent to search is not voluntary unless 'it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle' " (*People v Packer,* 49 AD3d 184, 187 [1st Dept 2008], *affd* 10 NY3d 915 [2008], quoting *People v Gonzalez,* 39 NY2d 122, 128 [1976]; *see People v Kendrick,* 147 AD3d 1419, 1420 [4th Dept 2017]). Whether consent is voluntary must be determined from the totality of the circumstances (*see Schneckloth v Bustamonte*, 412 US 218, 227 [1973]; *People v McCray,* 96 AD3d 1480, 1481 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]), including whether the accused was in police custody at the time consent was given; whether he or she knew that consent could be refused; whether the police employed threats or other forms of coercion; whether the accused had prior dealings with the police; and whether the accused offered resistance or exhibited uncooperative behavior prior to consenting (*see e.g. People v Caldwell*, 221 AD2d 972, 972 [4th Dept 1995], *lv denied* 87 NY2d 920 [1996]).

Here, defendant was not under arrest, handcuffed or in police custody at the time the consent was given, and the two agents were the only members of law enforcement who were present. There were no threats or promises made to induce defendant to consent to a search of his home, and there was no display of force or coercion. After defendant consented to the search, he secured his dog and took a seat in the living room to wait. He never asked the agents to stop or to leave his home, and he continued to cooperate even after the police discovered 56 marihuana plants and a loaded, stolen handgun inside the home. Defendant was cooperative and offered no resistance. He waived his *Miranda* rights and spoke to the agents and a detective, and he also signed a consent to destroy form that gave Amherst police the authority to dispose of his marihuana cultivation equipment. Defendant was 45 years old at the time, and he had prior contacts with the criminal justice system. We conclude that the record supports the court's determination that the People met their heavy burden of establishing that defendant's consent to search was voluntarily given. Although defendant testified that he never consented to a search, was physically restrained by the agents, was prevented from going back into his house, and was forced to sign a folded piece of paper without any knowledge of what he was forced to sign, we note that "[t]he 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 Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016] [internal quotation marks omitted]). Defendant's testimony is unsupported and refuted by all of the other evidence in the record, and we conclude that there is no basis to disturb the court's determination to credit the testimony of the police witnesses over defendant's testimony.

By pleading guilty, defendant forfeited his contention that the evidence before the grand jury was legally insufficient (*see People v Hansen*, 95 NY2d 227, 233 [2000]; *People v Colon,* 151 AD3d 1915, 1919 [4th Dept 2017]; *People v Newkirk,* 133 AD3d 1364, 1365 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]). Defendant's further contention that he was denied effective assistance of counsel "does not survive his guilty plea because there is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Abdulla,* 98 AD3d 1253, 1254 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012] [internal quotation marks omitted]). Finally, we reject defendant's contention that the period of postrelease supervision imposed is unduly harsh and severe.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1260**

**CA 17-00644**

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

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CERAMIC TECHNICS, LTD., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DESPIRT MOSAIC & MARBLE CO., INC., AND MERCHANTS BONDING COMPANY (MUTUAL), DEFENDANTS-RESPONDENTS.

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BANK, SHEER, SEYMOUR & HASHMALL, WHITE PLAINS (JAY B. HASHMALL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF RICHARD A. CLACK, BUFFALO (RICHARD A. CLACK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 28, 2017. The order, insofar as appealed from, denied those parts of the motion of plaintiff for summary judgment on the amended complaint and for summary judgment dismissing the counterclaim.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in part, the counterclaim is dismissed, and judgment is ordered in accordance with the following memorandum: Plaintiff commenced this breach of contract action against DeSpirt Mosaic & Marble Co., Inc. (defendant), incorrectly sued as DeSpirit Mosaic & Marble Co., Inc., and defendant Merchants Bonding Company (Mutual) seeking to recover $32,994.74 allegedly owed for certain natural stone tiles. In their answer, defendants admitted that plaintiff delivered the natural stone tiles to defendant and that defendant accepted them, but they denied that any further payment was owed to plaintiff. In addition, defendant interposed a counterclaim seeking, inter alia, an offset for certain porcelain tiles that plaintiff also delivered to defendant.

Plaintiff, as limited by its brief, contends that Supreme Court erred in denying those parts of its motion for summary judgment on the amended complaint and for summary judgment dismissing the counterclaim. We agree. It is well settled that "a buyer must pay for any goods accepted" (*Flick Lbr. Co. v Breton Indus.*, 223 AD2d 779, 780 [3d Dept 1996]; *see* UCC 2-607 [1]). A buyer may, however, defeat or diminish the seller's recovery by asserting a valid counterclaim seeking an offset for nonconforming goods (*see* UCC 2-714 [1]; *Hooper Handling v Jonmark Corp.*, 267 AD2d 1075, 1076 [4th Dept 1999]). Additionally, a buyer may interpose a valid counterclaim for material

misrepresentation or fraud (*see generally Cayuga Press of Ithaca v Lithografiks, Inc.*, 211 AD2d 908, 910 [3d Dept 1995]), and the remedies for such counterclaims are the same as those available for a nonfraudulent breach (*see* UCC 2-721). Here, defendants admitted that defendant accepted the natural stone tiles that are the subject of this action, and they do not allege that there was any nonconformity or material misrepresentation with respect to those natural stone tiles. Plaintiff thus met its burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and defendants failed to raise an issue that, "if established, could significantly diminish or negate plaintiff's recovery" (*Flick Lbr. Co.*, 223 AD2d at 781).

We therefore reverse the order insofar as appealed from, grant plaintiff's motion in part, dismiss the counterclaim and order that judgment be entered in favor of plaintiff in the amount of $30,792.13, together with interest at the rate of 9% (*see* CPLR 5004) commencing October 9, 2014, the earliest ascertainable date on which a breach of contract cause of action for damages in that amount existed (*see* CPLR 5001 [b]), and in the amount of $2,202.61, together with interest at the rate of 9% (*see* CPLR 5004) commencing October 27, 2014, the earliest ascertainable date on which a breach of contract cause of action for damages in that amount existed (*see* CPLR 5001 [b]), plus costs and disbursements.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1263**

**CA 17-00809**

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

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GENEVA ASSOCIATION OF RETIRED TEACHERS, BY ITS PRESIDENT, BARBARA HEINZMAN, BARBARA HEINZMAN, INDIVIDUALLY, BECKY ADDONA, AZIZEH BAROODY, ANNE BERGSTROM, MIDGE BURNS, BEVERLY CEROW, ELINOR CHILBERT, PHILLIP CHOFFIN, RICHARD COLUZZI, IRENE COPPER, JACKIE COSTELLO, CONSTANCE COVERT, SUSAN DAVIE, GERRY DEAL, MABEL DEAL, ANN DEFORGE, MICHELA DIDURO, DOROTHY DRONKERS, LORRAINE EADES, CYNTHIA EASTON, JOHN FOURACRE, MARGARET FRANCIS, LYNN FRIEFELD, JANET FRISINGER, DAWN GILLOTTI, BARBARA HAIGHT, ESTELLE HALL, EILEEN HALLING, MARY HANLON, MARGUERITE HARBER, BARBARA HEINZMAN, DIANE KHOURI, WES KUBACKI, CATHERINE LAWLER, CYNTHIA LYNCH, OLGA MALYI, CAROL MASTOWSKI, HELEN JANE MASTROGIOVANNI, DONALD MCCALL, JOAN MCCLURE, TOM MCCLURE, JOHN MCCULLY, MARY MCGREGOR, SANDRA MCGUIRE, BARBARA MESSUR, STUART MESSUR, ANNE MARIE MEYER, TRISH MLODZINSKI, ROSEANN MOFFE, CYNTHIA MUFFLEY, TERRY MUFFLEY, BILL MULVEY, CAROLE NARY, GALE NICHOLSON, CARMEN ORLANDO, JOSEPHINE PERRY, KEN PERRY, DON PLANO, RUSS PURDIE, ROBERT QUIGLEY, JAN RAO, MIDGE RUSSELL, ANNE SCAMMELL, CONNIE SCHERER, JUDY SIMMERS, BEVERLY SIMONS, GARY SKINNER, CAROL SMITH, MARY SPITTLER, JERILYN STEELE, MOLLIE STEELE, MARY LOU STRAWWAY, LINDA TURRI, MARTHA UTICONE, BRUCE VELTMAN, JANALEE WEAVER, SUE WEBSTER, PATRICIA WILTSE, CAROLE WOODROW, BARBARA WOOLSEY AND JAMES YAHNITE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GENEVA CITY SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

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MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FERRARA FIORENZA PC, EAST SYRACUSE (CRAIG M. ATLAS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 25, 2016. The order granted defendant’s motion to dismiss the complaint and denied plaintiffs’ cross motion for a default judgment.

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

Memorandum: Plaintiffs, individual retired employees of defendant, Geneva City School District, and their retirees association, commenced this breach of contract/declaratory judgment action seeking, inter alia, a declaration that they are entitled to the health insurance benefits provided in the collective bargaining agreement (CBA) in effect at the time each individual plaintiff retired. Defendant moved to dismiss the complaint, contending, inter alia, that plaintiffs had failed to serve a timely notice of claim as required by Education Law § 3813 (1) and that the action was barred by the one-year statute of limitations contained in section 3813 (2-b). Plaintiffs cross-moved for a default judgment, contending that defendant's motion was untimely or, in the alternative, for leave to serve a late notice of claim pursuant to Education Law § 3813 (2-a) and an amended complaint. We conclude that Supreme Court did not abuse its discretion in granting defendant's motion and denying plaintiffs' cross motion in its entirety.

Defendant does not dispute that, due to extensions granted by plaintiffs' attorney, it had until January 8, 2016 in which to file an answer or to make a motion to dismiss. Defendant's attorney attempted to complete the filing through the e-filing system on that date. Alleging technical difficulties with the e-filing system, defendant's attorney, on the next business day, filed and served hard copies of the documents and thereafter completed the e-filing within three business days as required by 22 NYCRR 202.5-b (i). Plaintiffs, in their cross motion, contended that the motion was untimely and that they were entitled to a default judgment. Even assuming, arguendo, that the averments of defendant's attorney are insufficient to establish a technical difficulty with the e-filing system and thus to establish that the motion was timely under 22 NYCRR 202.5-b (i), we nevertheless conclude that the court properly denied plaintiffs' cross motion for a default judgment. Plaintiffs do not dispute the court's finding that defendant had a reasonable excuse for its delay in filing and serving the motion, but they contend that defendant failed to establish a meritorious defense to their action. We reject that contention.

A defendant opposing an application for a default judgment need not establish that it will be successful on the merits, but must establish only that there is "a possible meritorious defense to the action" (*Knupfer v Hertz Corp.*, 35 AD3d 1237, 1238 [4th Dept 2006]). Here, defendant had several possible meritorious defenses to the complaint as a whole or to various claims within the complaint. For example, plaintiffs had not filed and served a notice of claim as required by Education Law § 3813 (1) (*see Lopez v City of New York*, 179 AD2d 388, 388-389 [1st Dept 1992]), and several claims were barred by the one-year statute of limitations contained in section 3813 (2-b) (*see Fapco Landscaping, Inc. v Valhalla Union Free Sch. Dist.*, 61 AD3d 922, 923 [2d Dept 2009]). Moreover, with respect to the underlying merits of the allegations, based on the language in the excerpts of

the CBAs contained in the record on appeal, it appears that defendant may have had a meritorious defense to all of the allegations in the complaint (*see Non-Instruction Adm'rs & Supervisors Retirees Assn. v School Dist. of City of Niagara Falls*, 118 AD3d 1280, 1282-1283 [4th Dept 2014]; *cf. Kolbe v Tibbetts*, 22 NY3d 344, 353-354 [2013]; *Guerrucci v School Dist. of City of Niagara Falls*, 126 AD3d 1498, 1499 [4th Dept 2015], *lv dismissed* 25 NY3d 1194 [2015]).

Plaintiffs further contend, in the alternative, that the court should have permitted them to serve a late notice of claim and an amended complaint. We reject that contention. "In determining whether to grant such leave, the court must consider, inter alia, whether the [plaintiff] has shown a reasonable excuse for the delay, whether the [school district] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [school district]" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1790 [4th Dept 2017]; *see generally* Education Law § 3813 [2-a]). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013] [internal quotation marks omitted]; *see Kennedy*, 148 AD3d at 1790). Here, the court determined that plaintiffs had failed to demonstrate a reasonable excuse for the delay, and we discern no clear abuse of discretion in that determination. Moreover, we conclude that plaintiffs failed to demonstrate that defendant had actual knowledge of the essential facts underlying the causes of action, i.e., actual " '[k]nowledge of the injuries or damages claimed by [the plaintiffs], rather than mere notice of the underlying occurrence' " (*Matter of Candino v Starpoint Cent. Sch. Dist.*, 115 AD3d 1170, 1171 [4th Dept 2014], *affd* 24 NY3d 925 [2014]).

Finally, plaintiffs contend that they are not time-barred from receiving the health care coverage that was in effect at the time they retired, based on the implied covenant of good faith and fair dealing as well as the continuing wrong doctrine. Those contentions are improperly raised for the first time on appeal, and we therefore do not address them (*see Associated Textile Rental Servs. v Xerox Corp.*, 2 AD3d 1301, 1301 [4th Dept 2003]; *Merchants Bank of N.Y. v Stahl*, 269 AD2d 236, 236 [1st Dept 2000]; *Velaire v City of Schenectady*, 235 AD2d 647, 649 [3d Dept 1997], *lv denied* 89 NY2d 816 [1997]; *Kingston v Braun*, 122 AD2d 543, 543 [4th Dept 1986]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1268**

**KA 17-00637**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC R. GESSNER, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered January 29, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]). Defendant's contention that the People acted vindictively in presenting the felony charge to the grand jury was forfeited by his plea of guilty (*see People v Taylor*, 65 NY2d 1, 5 [1985]; *People v Rodriguez*, 55 NY2d 776, 777 [1981]) and, in any event, is encompassed by his valid and unrestricted waiver of the right to appeal (*see generally People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017]; *People v Gilliam*, 96 AD3d 1650, 1650-1651 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]). Contrary to defendant's contention, "[t]he record establishes that County Court engage[d] [him] in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and informed him that the waiver was a condition of the plea agreement" (*People v Snyder*, 151 AD3d 1939, 1939 [4th Dept 2017] [internal quotation marks omitted]). The record further establishes that the court was aware of defendant's traumatic brain injury (TBI) and took pains to ensure that the TBI did not impair defendant's ability to understand the plea or the waiver of the right to appeal. The plea colloquy establishes, moreover, that the waiver of the right to appeal was knowing, voluntary, and intelligent despite defendant's TBI (*see People v Scott*, 144 AD3d 1597, 1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013]).

Defendant's constitutional speedy trial claim survives both his plea of guilty and his valid waiver of the right to appeal (*see People v Romeo*, 47 AD3d 954, 957 [2d Dept 2008], *affd* 12 NY3d 51 [2009], *cert denied* 588 US 817 [2009]), but the record supports the court's determination that defendant abandoned that claim by presenting no evidence and making no arguments in support of it (*see People v Smith*, 249 AD2d 426, 427 [2d Dept 1998], *lv denied* 92 NY2d 906 [1998]; *see generally People v Paduano*, 84 AD3d 1730, 1730-1731 [4th Dept 2011]).

By pleading guilty, defendant forfeited his right to appellate review of his contention that the People violated the notice requirement of CPL 710.30 with respect to the victim's identification (*see People v Perkins*, 140 AD3d 1401, 1403 [3d Dept 2016], *lv denied* 28 NY3d 1126 [2016], *reconsideration denied* 29 NY3d 951 [2017]; *People v La Bar*, 16 AD3d 1084, 1084 [4th Dept 2005], *lv denied* 5 NY3d 764 [2005]). In any event, that contention is also encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 118 AD3d 1190, 1191 [3d Dept 2014], *lv denied* 24 NY3d 1003 [2014]), as is his related contention that the court should have suppressed the victim's identification (*see People v Weinstock*, 129 AD3d 1663, 1663 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *People v Krouth*, 115 AD3d 1354, 1354 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1276**

**KA 16-01024**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES PACE, DEFENDANT-APPELLANT.

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KURT D. SCHULTZ, SAUQUOIT, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Herkimer County Court (Daniel R. King, A.J.), dated November 30, 2015. The order denied without a hearing the motion of defendant to vacate his judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, and the matter is remitted to Herkimer County Court for a hearing pursuant to CPL 440.30 (5).

Memorandum: We agree with defendant that County Court erred in denying without a hearing his motion pursuant to CPL 440.10 to vacate his judgment of conviction on the ground that he did not receive effective assistance of trial counsel. In June 2007, defendant was arrested and charged with three felonies, including criminal sexual act in the first degree (Penal Law § 130.50 [1]), and three misdemeanors, including assault in the third degree (§ 120.00 [1]) and unlawful imprisonment in the second degree (§ 135.05). He was subsequently indicted for all six crimes. Unbeknownst to the People, however, defendant had already pleaded guilty to the three misdemeanor charges when he was initially arraigned in Town Court. Shortly before jury selection, the People learned of the earlier disposition of the misdemeanor charges by plea after "obtaining the lower court paperwork." The court returned the misdemeanor charges to Town Court for sentencing and proceeded to trial against defendant on the felonies, without any objection by defense counsel that such separate prosecutions violated the double jeopardy provisions of CPL 40.20.

After defendant was convicted of the three felonies, he filed a direct appeal with this Court that raised numerous contentions, including the contention that he was denied effective assistance of counsel. We specifically noted in our decision affirming the judgment, however, that defendant did not contend that defense counsel

was ineffective in failing to seek dismissal of the felony charges under CPL 40.20 (*People v Pace*, 70 AD3d 1364, 1366 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]). Defendant thereafter filed the instant CPL 440.10 motion, raising that very contention. The court denied the motion without a hearing on the ground that defendant had unjustifiably failed to raise the contention on his direct appeal. We now reverse.

It is well settled that denial of a CPL 440.10 motion is required when a defendant unjustifiably fails to raise a ground or issue on a direct appeal and "sufficient facts appear[ed] on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion" (CPL 440.10 [2] [c]). There is no dispute that defendant, on direct appeal, did not raise the contention that his trial counsel was ineffective in failing to seek dismissal of the felony charges under CPL 40.20. The question is whether defendant could have raised that contention on direct appeal and thus whether his failure to do so was unjustifiable.

In order to succeed on a claim of ineffective assistance of trial counsel based on a failure to make a particular motion or objection, a defendant on a direct appeal or a CPL article 440 motion must demonstrate that the motion or objection, if made, would have been successful (*see People v Peterson*, 19 AD3d 1015, 1015 [4th Dept 2005], *lv denied* 6 NY3d 851 [2006]; *see also People v Caban*, 5 NY3d 143, 152 [2005]). Thus, defendant, in order to establish ineffective assistance of trial counsel on the direct appeal, would have been required to establish not only that trial counsel failed to seek dismissal under CPL 40.20, which is undisputed, but also that such a motion, if made, would have been successful. It is the latter factor that controls our analysis.

The People do not dispute that defendant was separately prosecuted for various offenses based upon the same act or criminal transaction, which is generally prohibited by CPL 40.20 (2), and defendant does not dispute that the occurrence of separate prosecutions was evident from the record on the direct appeal. Here, however, a determination whether a motion for dismissal under CPL 40.20 would have been successful could not have been made on the direct appeal and cannot be made on this appeal from the order denying the CPL article 440 motion. Resolution of that issue is dependent on a review of matters that were outside the record on direct appeal and are outside the record on this appeal. Moreover, considering the allegation that the "local court record is now missing," we conclude that defendant did not fail in his "obligation to prepare a proper record" (*People v Olivo*, 52 NY2d 309, 320 [1981], *rearg denied* 53 NY2d 797 [1981]).

As the People correctly contend, separate prosecutions are permitted under certain circumstances. Under subdivision CPL 40.20 (2) (a), separate prosecutions are permitted where "[t]he offenses *as defined* have substantially different elements *and* the acts establishing one offense are in the main clearly distinguishable from

those establishing the other" (emphasis added). Under subdivision (2) (b), separate prosecutions are permitted when "[e]ach of the offenses *as defined* contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil" (emphasis added). If *either* exception applies, then the motion for dismissal under CPL 40.20, if made, would not have been successful and trial counsel was not ineffective in failing to make such a motion.

Addressing first CPL 40.20 (2) (b), we conclude that the record on direct appeal was sufficient to determine whether that exception applied inasmuch as the applicability of that exception is based solely on the statutory definition of the offenses and the harm or evil those provisions were designed to prevent. Thus, the absence of the "lower court paperwork" is irrelevant to the analysis. In our view, defendant's contention, i.e., that CPL 40.20 (2) (b) would not have permitted the separate prosecutions, has merit. Even if the two misdemeanors of assault and unlawful imprisonment, as defined, contained different elements from the three felonies, "the evil to be inhibited—the prevalence of violence . . . —is common to [all five offenses] . . . [, and those five] offenses represent an aspect, to a varying degree of culpability, of deterring and punishing behavior likely to result in injury . . . It is significant in this regard to note that [those five offenses] gr[e]w out of acts nearly simultaneous in execution" (*People v Fernandez*, 43 AD2d 83, 91 [2d Dept 1973]). We need not resolve the applicability of subdivision (2) (b), however, because even if separate prosecutions were not permitted under subdivision 40.20 (2) (b), defendant must also establish that separate prosecutions were not permitted under CPL 40.20 (2) (a) in order to establish that a motion to dismiss the felonies under CPL 40.20, if made, would have been successful.

Unlike subdivision (2) (b), the determination whether separate prosecutions were permitted under subdivision (2) (a) could not have been made on the direct appeal because the "lower court paperwork" was not included in the record, and a review of the charging documents for the prior and current prosecutions is necessary to determine if acts establishing the misdemeanor offenses were "in the main clearly distinguishable from those establishing the [felony offenses]" (CPL 40.20 [2] [a]; *see generally Matter of Abraham v Justices of N.Y. Supreme Ct. of Bronx County*, 37 NY2d 560, 567 [1975]).

Inasmuch as the record on the direct appeal lacked the lower court paperwork, the record on direct appeal was insufficient to determine whether a motion to dismiss the felony counts under CPL 40.20, if made, would have been successful. We thus conclude that defendant did not "unjustifiabl[y]" fail to raise the contention on direct appeal and that the court erred in summarily dismissing the CPL 440.10 motion on that ground (CPL 440.10 [2] [c]). We therefore reverse the order and remit the matter to County Court to conduct a hearing on defendant's motion.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1284**

**CA 17-00083**

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

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DAVID B. SHAW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREN M. SHAW, DEFENDANT-RESPONDENT.

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MICHAEL D. SCHMITT, ROCHESTER, FOR PLAINTIFF-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (VINCENT M. FERRERO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered October 19, 2016. The order, insofar as appealed from, enforced the residency provision of the parties' Separation/Opting Out Agreement and denied that part of the cross motion of plaintiff seeking to modify the custody and visitation provisions of that agreement.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first and third ordering paragraphs are vacated and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this post-divorce proceeding, plaintiff father, as limited by his brief, appeals from those parts of an order that enforced the residency provision of the parties' Separation/Opting Out Agreement (Agreement) and denied that part of his cross motion seeking to modify the custody and visitation provisions of the Agreement. The Agreement provided for joint custody of the parties' child, with primary residence with defendant mother. Following the parties' divorce, the father relocated to the residence of his fiancée and their child. The Agreement expressly contemplated that the mother would relocate when the parties' child was to commence kindergarten, and the father agreed in that event to maintain his residence within a 15-mile radius of the mother's residence. After the mother relocated, the father continued to maintain his residence with his fiancée and their child, which is located more than 15 miles from the mother's new residence. The mother thereafter moved to modify the visitation provisions of the Agreement and cross-moved for, inter alia, an order enforcing the provision of the Agreement requiring that the father maintain a residence within 15 miles of her new residence. The father cross-moved for an order modifying the custody and visitation provisions of the Agreement and requiring that the parties undergo a custodial or psychological evaluation. Supreme Court, among other things, denied the father's cross motion and

ordered that the father had three months to establish a residence within 15 miles of the mother's new residence. We note that the court thereafter granted the father's motion to stay that part of the order concerning the residence requirement.

We agree with the father that the court erred in giving him a deadline to relocate within the 15-mile radius provided in the Agreement without conducting a hearing, and that the court further erred in denying that part of the father's cross motion seeking modification of the custody and visitation provisions of the Agreement, also without conducting a hearing. We therefore reverse the order insofar as appealed from, and we remit the matter to Supreme Court for a hearing to determine whether to enforce or modify the Agreement.

While " '[a] hearing is not automatically required whenever a parent seeks modification of a custody order' " (*Matter of Knuth v Westfall*, 72 AD3d 1642, 1642 [4th Dept 2010]), here we conclude that the combined effect of the parties' "relocation[s] was a change of circumstances warranting a reexamination of the existing custody arrangement" at an evidentiary hearing (*Matter of Muniz v Paradizo*, 258 AD2d 970, 970 [4th Dept 1999]; *see Matter of Dench-Layton v Dench-Layton*, 123 AD3d 1350, 1351 [3d Dept 2014]). While the parties' Agreement provided that the father must reside within a 15-mile radius of the mother's residence upon her relocation, the overriding consideration in determining whether to enforce such a provision is the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *Matter of Bodrato v Biggs*, 274 AD2d 694, 695 [3d Dept 2000]; *Matter of Griffen v Evans*, 235 AD2d 720, 721 [3d Dept 1997]). It is impossible to determine on this record the effect on the child of enforcing or modifying the Agreement, and we conclude that the parties should be afforded an opportunity to present evidence concerning the child's best interests.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1298**

**KA 16-00367**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY SMITH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered February 4, 2016. 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 guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Supreme Court properly denied without a hearing that part of defendant's omnibus motion seeking suppression of physical evidence seized during a search of the subject residence. Defendant's motion did not contain sworn allegations of fact supporting the conclusion that he has standing to contest the legality of the search of the residence (*see* CPL 710.60 [3] [b]; *see generally People v Brunson*, 226 AD2d 1093, 1093-1094 [4th Dept 1996], *lv dismissed* 88 NY2d 981 [1996]). In support of his motion, defendant submitted his written statement to the police in which he stated that he did not know the resident of the premises inasmuch as he had just met her on the night in question, and that he was at the premises for the purpose of socializing with her and other guests. Based on that statement, defendant was "no more than a casual visitor having 'relatively tenuous ties' to the [premises]" and he thus lacks standing to contest the legality of the search (*People v Pope*, 113 AD3d 1121, 1122 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014], quoting *People v Ortiz*, 83 NY2d 840, 842 [1994]; *see People v Gonzalez*, 45 AD3d 696, 696 [2d Dept 2007], *lv denied* 10 NY3d 811 [2008]).

In light of our determination, defendant's remaining contentions have been rendered academic.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1302**

**CA 16-01952**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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JOHN GUIDO AND SALLY GUIDO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, JACKIE WOJESKI, RN, CAROL WALLACE, RN, "JANE" LITTY, RN, CPT. JOHN MACK, C.O. "JOHN" FLETCHER, SGT. "JOHN" PERKINS, PANGH LAY KOOI, MD, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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COUNTY OF CAYUGA, JACKIE WOJESKI, RN, CAROL WALLACE, RN, CHRISTINE LITTY, RN, CPT. JOHN MACK, C.O. BRETT FLETCHER, SGT. SHANE PARKINS, AND PANGH LAY KOOI, MD, THIRD-PARTY PLAINTIFFS,

V

AUBURN COMMUNITY HOSPITAL, ALSO KNOWN AS AUBURN MEMORIAL HOSPITAL, PHILIP GOTTLIEB, MD, THIRD-PARTY DEFENDANTS-RESPONDENTS, ET AL., THIRD-PARTY DEFENDANTS.

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KENNETH B. GOLDBLATT, MOHEGAN LAKE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS.

FELDMAN KIEFFER, LLP, BUFFALO (JAMES E. EAGAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT AUBURN COMMUNITY HOSPITAL, ALSO KNOWN AS AUBURN MEMORIAL HOSPITAL.

MACKENZIE HUGHES LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT PHILIP GOTTLIEB, MD.

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Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered July 29, 2016. The order granted the motion of third-party defendant Philip Gottlieb, MD, to vacate the note of issue and certificate of readiness, and denied the cross motion of plaintiffs to sever the third-party action from the main action.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff John Guido after defendants allegedly failed to provide him with his prescription medication while he was incarcerated at a facility operated by defendant County of Cayuga. Third-party defendant Philip Gottlieb, MD moved to vacate the note of issue and certificate of readiness, and plaintiffs cross-moved pursuant to CPLR 1010 to sever the third-party action from the main action. Supreme Court granted Gottlieb's motion and denied plaintiffs' cross motion. We affirm.

Contrary to plaintiffs' contention, we conclude that the court did not abuse its discretion in denying the cross motion for severance inasmuch as plaintiffs failed to show substantial prejudice (*see* CPLR 1010; *Coffee v Tank Indus. Consultants, Inc.*, 133 AD3d 1305, 1306 [4th Dept 2015]; *Neckles v VW Credit, Inc.*, 23 AD3d 191, 192 [1st Dept 2005]). The court also properly granted the motion to vacate the note of issue and certificate of readiness because, among other things, "the third-party action was commenced after the note of issue was filed in the main action, and [Gottlieb] had outstanding requests for discovery" (*Coffee*, 133 AD3d at 1306; *see* 22 NYCRR 202.21 [e]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1306**

**CA 17-00843**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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OCTAVIA PORCHA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GRACE BINETTE AND JANET BINETTE,
DEFENDANTS-APPELLANTS.
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HUBERT F. RIEGLER, M.D., AND LEGAL MED,
NONPARTY APPELLANTS.

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LAW OFFICES OF JOHN WALLACE, ROCHESTER (VALERIE BARBIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR NONPARTY APPELLANTS.

THE WRIGHT FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeals from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 24, 2016. The order, inter alia, denied in part the motions of defendants and the nonparties to, among other things, quash a subpoena duces tecum served by plaintiff on the nonparties and defendants' insurer.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained in an automobile accident. At the request of defendants, plaintiff was examined by nonparty Hubert F. Riegler, M.D., who was employed by nonparty Legal Med, a third-party medical examination vendor (hereafter, nonparties). Defendants' insurer paid for the examination. After defendants gave notice that they intended to call Dr. Riegler as an expert witness at trial, plaintiff served a judicial subpoena duces tecum on the nonparties and defendants' insurer seeking the production of various documents and materials. As relevant to these appeals, in paragraph two of the subpoena plaintiff sought production of all billing and payment records related to examinations performed by Dr. Riegler on behalf of all insurance companies and attorneys for the prior five years. Plaintiff sought such information to ascertain any possible bias or interest on the part of Dr. Riegler.

The nonparties and defendants moved, inter alia, to quash the subpoena, and Supreme Court denied the motions in part. The nonparties and defendants now appeal. Contrary to the contention of the nonparties and defendants, the court properly denied those parts of the motions seeking to quash paragraph two of the subpoena. Plaintiff was entitled to the information to assist her in preparing questions for cross-examination of Dr. Riegler concerning his bias or interest (*see Dominicci v Ford*, 119 AD3d 1360, 1361 [4th Dept 2014]; *see generally Salm v Moses*, 13 NY3d 816, 818 [2009]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1308**

**CA 16-00827**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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MARITA E. HYMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SUSAN N. BURGESS, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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MARITA E. HYMAN, PLAINTIFF-APPELLANT PRO SE.

SUSAN N. BURGESS, DEFENDANT-RESPONDENT PRO SE.

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Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), dated August 28, 2015. The order granted defendant's motion to withdraw her counterclaims and dismissed the entire action.

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

Memorandum: Plaintiff appeals pro se from an order that granted defendant's motion to withdraw her counterclaims and dismissed the entire action. The Third Department previously affirmed an order that, inter alia, dismissed the complaint (*Hyman v Burgess*, 125 AD3d 1213, 1213-1216 [3d Dept 2015]).

We conclude that plaintiff's appeal must be dismissed because plaintiff is not an "aggrieved party" and thus lacks standing to appeal from the order (CPLR 5511). An aggrieved party is one whose interests are adversely affected by the judgment or order (*see generally Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]), and plaintiff is not aggrieved by the instant order discontinuing defendant's counterclaims against plaintiff and thus dismissing the entire case.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1309**

**CA 16-00828**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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MARITA E. HYMAN, PLAINTIFF-APPELLANT,

V ORDER

SUSAN N. BURGESS, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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MARITA E. HYMAN, PLAINTIFF-APPELLANT PRO SE.

SUSAN N. BURGESS, DEFENDANT-RESPONDENT PRO SE.

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Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 2, 2015. The order denied plaintiff's motion for leave to reargue her motion seeking leave to amend the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1310**

**CA 16-01250**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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IN THE MATTER OF THE APPLICATION OF GRACIA E. CAMPBELL AND CLARISSA L. VAIDA, PETITIONERS-APPELLANTS, FOR THE CONSTRUCTION OF THE WILL OF GRACIA M. CAMPBELL, DECEASED. (PROCEEDING NO. 1.)

ORDER

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IN THE MATTER OF THE APPLICATION OF GRACIA E. CAMPBELL AND CLARISSA L. VAIDA, PETITIONERS-APPELLANTS, FOR THE CONSTRUCTION OF THE WILL OF MARJORIE K.C. KLOPP, DECEASED. (PROCEEDING NO. 2.)

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MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., DECEASED, AND HSBC BANK USA, N.A., AS CO-TRUSTEES, RESPONDENTS.

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JAMES P. DOMAGALSKI, ESQ., GUARDIAN AD LITEM FOR INFANT CONTINGENT BENEFICIARIES, RESPONDENT-RESPONDENT.

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LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR PETITIONERS-APPELLANTS.

BARCLAY DAMON, LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), RESPONDENT-RESPONDENT PRO SE.

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Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered May 3, 2016. The order, insofar as appealed from, constructed the wills of Gracia M. Campbell and Marjorie K.C. Klopp and determined valid the disposition of Gracia M. Campbell.

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

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1311**

**CA 17-00085**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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KEYBANK NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP SIMAO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 5, 2016 in a foreclosure action. The judgment, among other things, directed the sale of the mortgaged premises.

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

Memorandum: In appeal No. 2, Philip Simao (defendant) purports to appeal from a decision of Supreme Court granting plaintiff's motion for a judgment of foreclosure and sale. Inasmuch as no appeal lies from a decision, that appeal is dismissed (*see* CPLR 5512 [a]; *Montanaro v Weichert*, 145 AD3d 1563, 1563 [4th Dept 2016]). In appeal No. 1, defendant appeals from the resulting judgment of foreclosure and sale. Defendant's sole contention on appeal is that the court should have denied plaintiff's motion because the referee appointed to ascertain and compute the amount due to plaintiff did not conduct a fact-finding hearing or provide notice of such a hearing to defendant. That contention, however, is improperly raised for the first time on appeal (*see Biro v Keen*, 153 AD3d 1571, 1572 [4th Dept 2017]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1312**

**CA 17-00784**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ.

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KEYBANK NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP SIMAO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

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MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a decision of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 9, 2016. The decision granted plaintiff's motion for a judgment of foreclosure and sale.

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

Same memorandum as in *KeyBank N.A. v Simao* ([appeal No. 1] ___ AD3d ___ [Nov. 17, 2017]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1313**

**KA 15-02161**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY T. SADDLER, JR., DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 18, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal contempt 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 criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. It is well settled that a "court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned" (*People v Lopez*, 6 NY3d 248, 256 [2006]). To the contrary, a court need only make "certain that . . . defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*id.*). Here, the record establishes that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]). In addition, the plea colloquy, together with the written waiver of the right to appeal (*see People v Gibson*, 147 AD3d 1507, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *see generally People v Ramos*, 7 NY3d 737, 738 [2006]), adequately apprised defendant that "the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256; *see Carr*, 147 AD3d at 1506).

The valid waiver of the right to appeal with respect to both the conviction and the sentence forecloses defendant's challenge to the

severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *Carr*, 147 AD3d at 1506; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Furthermore, although defendant purports to challenge the legality of the sentence, "when the label defendant assigned to his appellate claim is disregarded and the actual gist of the claim is examined, it is apparent that his challenge is addressed not to the legality of the sentence on its face, or even to the power of the court to impose the . . . sentence it chose" (*People v Callahan*, 80 NY2d 273, 281 [1992]). Here, upon examining the core of defendant's contention, we conclude that he is "essentially challenging the procedure pursuant to which he was sentenced as [a second felony offender]" (*People v Adams*, 64 AD3d 1186, 1187 [4th Dept 2009], *lv denied* 13 NY3d 834 [2009]; *see People v Carney,* 129 AD3d 1511, 1511 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016]), and his "valid waiver of his right to appeal precludes review of his claim that the procedure used to adjudicate him a second felony offender was defective" (*People v Kosse*, 94 AD3d 908, 908 [2d Dept 2012], *lv denied* 19 NY3d 963 [2012]; *see People v Holmes*, 122 AD3d 770, 770 [2d Dept 2014], *lv denied* 24 NY3d 1219 [2015]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1323**

**CAF 16-01245**

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

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IN THE MATTER OF LYDIA A.C.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY E.S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

JUSTIN F. BROTHERTON, ATTORNEY FOR THE CHILD, WATERTOWN.

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Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered June 23, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner visitation with the subject child.

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

Memorandum: The parties are the biological parents of the subject child. In March 2015, respondent-petitioner father and his spouse filed a petition seeking to adopt the child together (*see generally* Domestic Relations Law § 110). In June 2015, petitioner-respondent mother filed a petition seeking to modify the existing order of custody and visitation. In appeal No. 1, the father appeals from an order that granted the mother's petition and awarded her visitation with the child and, in appeal No. 2, he appeals from a subsequent order that dismissed the adoption petition. We affirm in both appeals.

The father contends that Family Court erred in refusing to find that the mother abandoned the child and thus that her consent to the adoption was not required. We reject that contention. A parent's consent to adoption is required unless that parent evinces an intent to forego his or her parental rights and obligations by failing for a period of six months to visit the child, or to communicate with the child or the person having legal custody of the child, although able to do so (*see* Domestic Relations Law § 111 [2] [a]). Where the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment is inappropriate (*see Matter of Edward Franz F.*, 186 AD2d 256, 257 [2d Dept 1992]; *cf. Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], *lv denied* 6 NY3d 708 [2006]). The

party seeking a finding of abandonment has the burden of establishing abandonment by clear and convincing evidence (*see Matter of Adrianna [Dominick I.—Jessica F.]*, 144 AD3d 1145, 1146 [2d Dept 2016]; *Brittany S.*, 24 AD3d at 1299).

At the hearing on the petitions, the mother testified that she repeatedly sent messages to the father and his spouse seeking to reestablish her relationship with the child and that, each time she did so, they ignored her messages or the father merely insisted that she agree to the adoption. The court credited the mother's testimony, and we see no reason to disturb that determination (*see generally Matter of Kolson [Janna A.—Michael T.]*, 153 AD3d 1665, 1666 [4th Dept 2017]). Inasmuch as the evidence established that the father and his spouse thwarted or interfered with the mother's efforts to visit or communicate with the child, we conclude that abandonment of the child by the mother was not established by clear and convincing evidence (*see Edward Franz F.*, 186 AD2d at 257; *cf. Brittany S.*, 24 AD3d at 1299).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1324**

**CAF 17-00121**

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

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IN THE MATTER OF THE ADOPTION OF A CHILD
WHOSE FIRST NAME IS JOSHUA
---------- MEMORANDUM AND ORDER
GREGORY E.S., PETITIONER-APPELLANT;

LYDIA A.C., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

JUSTIN F. BROTHERTON, ATTORNEY FOR THE CHILD, WATERTOWN.

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Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 9, 2016. The order dismissed the adoption petition.

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

Same memorandum as in *Matter of Lydia A.C.* ([appeal No. 1] ___ AD3d ___ [Nov. 17, 2017]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1338**

**KA 14-01664**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLBY CLAYFIELD, DEFENDANT-APPELLANT.

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

COLBY CLAYFIELD, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 9, 2010. The judgment convicted defendant, upon a jury verdict, of conspiracy 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 conspiracy in the second degree (Penal Law § 105.15), defendant contends in his pro se supplemental brief that County Court erred in admitting in evidence a videotape of a conversation between defendant and an undercover investigator because the videotape included captions setting forth what the parties to the conversation were saying, and the People presented no evidence establishing how the captions came to be on the videotape. We reject that contention. Inasmuch as "[t]he use of subtitles [or captions] for video recordings is tantamount to a transcript of the recording" (*United States v Morris*, 406 Fed Appx 758, 759 [4th Cir 2011], *cert denied* 564 US 1029 [2011]), the captions were properly placed before the jury based on the investigator's testimony that they fairly and accurately represented his conversation with defendant (*see People v Robinson*, 158 AD2d 628, 628-629 [2d Dept 1990]; *see generally People v Lubow*, 29 NY2d 58, 68 [1971]; *People v Caswell*, 49 AD3d 1257, 1257-1258 [4th Dept 2008], *lv denied* 11 NY3d 735 [2008]). We note that the court minimized any potential prejudice to defendant by instructing the jury that the captions were not evidence and were intended only to aid the jury in its review of the videotape (*see generally People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989], *lv denied* 74 NY2d 896 [1989]). Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. Finally, to the extent that defendant

contends in his main brief that the sentence constitutes cruel and unusual punishment, we conclude that the sentence is not " 'grossly disproportionate to the crime' " (*People v Thompson*, 83 NY2d 477, 479 [1994]), and that his contention is therefore without merit.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1339**

**KA 15-02166**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNELL ROBERSON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered December 17, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress a handgun seized from his person by the police during a traffic stop. We reject that contention. Initially, we reject defendant's contention that the court's factual findings at the suppression hearing are against the weight of the evidence (*see People v Johnson*, 143 AD3d 1284, 1285 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]). "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" and, contrary to defendant's contention, we perceive no basis to disturb the court's determination to credit the testimony of the police officers (*People v Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016] [internal quotation marks omitted]; *see People v Mills*, 93 AD3d 1198, 1199 [4th Dept 2012], *lv denied* 19 NY3d 964 [2012]; *People v Barfield*, 21 AD3d 1396, 1396-1397 [4th Dept 2005], *lv denied* 5 NY3d 881 [2005]).

The evidence at the suppression hearing established that the police "lawfully stopped the vehicle in which defendant was a passenger because it had excessively tinted windows" (*People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013],

*cert denied* ___ US ___, 134 S Ct 262 [2013]), and lawfully directed defendant to exit the vehicle (*see People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]; *People v Henderson*, 26 AD3d 444, 445 [2d Dept 2006], *lv denied* 6 NY3d 895 [2006]). Based upon defendant's movements outside the vehicle, "the officers suspected that defendant was attempting to conceal something . . . , and they reasonably suspected that defendant was armed and posed a threat to their safety because his actions were directed to the area of his waistband, which was concealed from their view" (*Fagan*, 98 AD3d at 1271). Thus, when defendant grabbed the front area of his waistband upon exiting the vehicle, the first officer was justified in directing defendant to place his hands on the roof of the vehicle, in holding onto defendant's belt, and in instructing him to walk toward the rear of the vehicle (*see People v Green*, 80 AD3d 1004, 1005 [3d Dept 2011]; *People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]) and, when defendant refused several instructions to stop pressing his waist against the vehicle while sidestepping along it, the first officer was justified in pulling defendant away from the vehicle by the belt (*see Fagan*, 98 AD3d at 1271). Even assuming, arguendo, that defendant was subjected to a frisk when the second officer touched defendant's hip area and pushed his body away from the vehicle, thereby revealing the handgun in defendant's waistband, we conclude that such an intrusion was justified based upon defendant's refusal to comply with the repeated instructions to move his waist from the vehicle and the metal-on-metal sound heard by the second officer, which was consistent with the sound of a weapon making contact with the vehicle (*see Mack*, 49 AD3d at 1292). We thus conclude that the conduct of the police constituted a "constitutionally justified intrusion designed to protect the safety of the officers" (*People v Robinson*, 278 AD2d 808, 809 [4th Dept 2000], *lv denied* 96 NY2d 787 [2001]), and that the court properly refused to suppress the evidence seized as a result thereof (*see Mack*, 49 AD3d at 1292).

Finally, contrary to defendant's alleged "concession" otherwise, his contention that the police subjected him to an unlawful frisk is preserved for our review (*see People v De Bour*, 40 NY2d 210, 214 [1976]; *People v Riddick*, 70 AD3d 1421, 1423 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]) and, therefore, his assertion that defense counsel was ineffective for failing to preserve that contention is without merit.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1340**

**KA 16-00557**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTUAN M. STANLEY, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 26, 2016. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that County Court's *Sandoval* ruling constituted an abuse of discretion inasmuch as the court allowed the People to cross-examine defendant with respect to, inter alia, a prior conviction of criminal possession of a weapon in the second degree. "Cross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged" (*People v Cosby*, 82 AD3d 63, 68 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]).

Defendant failed to preserve for our review his further contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *People v Simmons*, 133 AD3d 1227, 1228 [4th Dept 2015]). In any event, that contention is without merit (*see generally People v Halm*, 81 NY2d 819, 821 [1993]). Defendant also failed to preserve for our review his contention that the court's pre-summation instruction to the jury was misleading because it failed to differentiate between defendant's role as a witness and his role as pro se counsel inasmuch as defendant failed to make a " 'timely objection or request to charge' " (*People v Justice*, 99 AD3d 1213, 1216 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]). In any event, that contention is also without merit because the court's instruction, read as a whole, did not convey to the jury that

they should disregard defendant's testimony in his capacity as a witness.

Defendant also contends that the court should have adjourned the trial to wait for the arrival of defendant's subpoenaed medical records and that he was thereby denied his right to present a defense. The record establishes that defendant did not request an adjournment on that ground and, indeed, he informed the court that he was willing to proceed with trial without the subpoenaed medical records. Thus, defendant waived his present contention (*see generally People v Ahmed*, 66 NY2d 307, 311 [1985], *rearg denied* 67 NY2d 647 [1986]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1341**

**KA 15-00041**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN R. WALKER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 4, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [b]). Supreme Court properly refused to suppress the victim's showup identification of defendant. Contrary to defendant's contention, "the showup was not rendered unduly suggestive because he was handcuffed" during the procedure (*People v Mack*, 135 AD3d 962, 963 [2d Dept 2016], *lv denied* 27 NY3d 1002 [2016]; *see People v Smith*, 128 AD3d 1434, 1435 [4th Dept 2015], *lv denied* 26 NY3d 1011 [2015]). Moreover, "the fact that [police] advised the [victim] that a suspect fitting the [perpetrator's] description had been stopped did not invalidate the showup, as this information merely conveyed what a witness of ordinary intelligence would have expected under the circumstances" (*People v Franqueira*, 143 AD3d 1164, 1166 [3d Dept 2016] [internal quotation marks omitted]; *see People v Mathis*, 60 AD3d 1144, 1146 [3d Dept 2009], *lv denied* 12 NY3d 927 [2009]; *see generally People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Defendant's contention that the showup identification should have been suppressed because it was not conducted in close temporal proximity to the crime is unpreserved for our review (*see People v Lewis*, 97 AD3d 1097, 1097-1098 [4th Dept 2012], *lv denied* 19

NY3d 1103 [2012]), and we decline to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1343**

**KA 14-01024**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONTE S. TWILLIE, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 3, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of marihuana in the third degree (Penal Law § 221.20). During a traffic stop of defendant's vehicle, a police officer found "two large sandwich bags" of marihuana in a shoe box on the back seat, nine "pill-sized ziplock baggies" of marihuana in a black backpack on the floor of the back seat on the passenger's side, a digital scale between the driver's seat and the center console, and an additional pill-sized bag of marihuana and about $1,500 in cash on defendant's person. The total weight of the marihuana was 8.56 ounces, and the amounts found in different places were not weighed separately. The passenger in the vehicle testified at trial as a defense witness that the marihuana in the backpack was his alone, and that it weighed four to eight ounces.

Defendant contends that the verdict is against the weight of the evidence with respect to whether he constructively possessed the marihuana that was found in the back seat, and therefore whether he possessed more than eight ounces of marihuana (*see* Penal Law § 221.20). We reject that contention. The circumstances of the stop, including defendant's possession of a large sum of cash and the presence and position of the scale in his vehicle, "support[] the conclusion that defendant exercised dominion and control, at least jointly with [the passenger], over the [marihuana in the back seat]" (*People v Diaz*, 100 AD3d 446, 447 [1st Dept 2012], *affd* 24 NY3d 1187

[2015]; *see* § 10.00 [8]; *People v Jones*, 72 AD3d 452, 452 [1st Dept 2010], *lv denied* 15 NY3d 806 [2010]; *People v Gadsden*, 192 AD2d 1103, 1103 [4th Dept 1993], *lv denied* 82 NY2d 718 [1993]). The jury was entitled to discredit the exculpatory testimony of defendant's passenger (*see People v Robinson*, 142 AD3d 1302, 1303-1304 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]; *People v Downs*, 21 AD3d 1414, 1414-1415 [4th Dept 2005], *lv denied* 5 NY3d 882 [2005]), particularly given that he was facing a murder charge at the time of defendant's trial and could be viewed as having "nothing to lose" by admitting to misdemeanor marihuana possession (*People v Feliciano*, 240 AD2d 256, 257 [1st Dept 1997], *lv denied* 90 NY2d 1011 [1997]; *see* § 221.15). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that a different verdict would not have been unreasonable, but that the jury nonetheless "did not fail to give the evidence the weight it should be accorded" (*People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1353**

**CA 17-00291**

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

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CAROL A. SANTILLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. SANTILLO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BILGORE, REICH & KANTOR, LLP, ROCHESTER (THEODORE S. KANTOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered August 10, 2016. The amended order, insofar as appealed from, denied that part of the motion of defendant seeking to vacate the qualified domestic relations order that was entered in February 1996.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part, and the qualified domestic relations order is vacated.

Memorandum: The parties divorced in 1994, and the separation agreement incorporated but not merged into their judgment of divorce provided as relevant to this appeal that plaintiff was entitled to a share of defendant's pension benefits "until her death or remarriage, or [defendant's] death," whichever occurred first. Although plaintiff remarried in August 1995, defendant's attorney executed a qualified domestic relations order (QDRO) that was entered in February 1996. The QDRO did not provide that plaintiff's entitlement to a share of defendant's pension would terminate upon her remarriage. In April 2016, defendant filed his retirement documents with the New York State and Local Retirement System and discovered the existence of the QDRO. Shortly thereafter, he moved for, inter alia, an order vacating the QDRO inasmuch as it is inconsistent with the separation agreement. In appeal No. 1, defendant, as limited by his brief, contends that Supreme Court erred in denying that part of his motion seeking to vacate the QDRO and, in appeal No. 2, he contends that the court erred in denying his motion for, inter alia, leave to renew his prior motion.

In appeal No. 1, we agree with defendant that the court erred in

denying that part of his motion seeking to vacate the QDRO. "A QDRO obtained pursuant to a separation agreement 'can convey only those rights . . . which the parties [agreed to] as a basis for the judgment' " (*Duhamel v Duhamel* [appeal No. 1], 4 AD3d 739, 741 [4th Dept 2004], quoting *McCoy v Feinman*, 99 NY2d 295, 304 [2002]). Thus, it is well established that "a court errs in granting . . . a QDRO more expansive than an underlying written separation agreement" (*McCoy*, 99 NY2d at 304; *see Duhamel*, 4 AD3d at 741), regardless whether the parties or their attorneys approved the QDRO without objecting to the inconsistency (*see Page v Page*, 39 AD3d 1204, 1205 [4th Dept 2007]). Under such circumstances, the court has the authority to vacate or amend the QDRO as appropriate to reflect the provisions of the separation agreement (*see Beiter v Beiter*, 67 AD3d 1415, 1417 [4th Dept 2009]). Here, the QDRO should never have been entered in the first instance because the clear and unambiguous language of the separation agreement provided that plaintiff's rights in defendant's pension benefits had terminated upon her remarriage.

We reject plaintiff's contention that defendant is barred by laches from seeking to vacate the QDRO. "The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party" (*Beiter*, 67 AD3d at 1416 [internal quotation marks omitted]; *see Matter of Sierra Club v Village of Painted Post*, 134 AD3d 1475, 1476 [4th Dept 2015]). Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, we conclude that plaintiff has not demonstrated that she was prejudiced by that delay (*see Sierra Club*, 134 AD3d at 1476; *Beiter*, 67 AD3d at 1416). We therefore reverse the amended order in appeal No. 1 insofar as appealed from and grant that part of defendant's motion seeking to vacate the QDRO.

We conclude that the appeal from the order in appeal No. 2 must be dismissed as moot in light of our determination in appeal No. 1 (*see McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151 [4th Dept 2006]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court

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

**1354**

**CA 17-00292**

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

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CAROL A. SANTILLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. SANTILLO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BILGORE, REICH & KANTOR, LLP, ROCHESTER (THEODORE S. KANTOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered November 7, 2016. The order denied defendant's motion for, inter alia, leave to renew his prior motion to vacate the qualified domestic relations order entered in February 1996.

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

Same memorandum as in *Santillo v Santillo* ([appeal No. 1] ___ AD3d ___ [Nov. 17, 2017]).

Entered: November 17, 2017

Mark W. Bennett
Clerk of the Court