SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 27, 2018

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

739/17

CA 16-02369

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

STEVEN A. CALVANESO, PETITIONER-RESPONDENT,

V ORDER

ALLSTATE LIFE INSURANCE COMPANY OF NEW YORK,
ALLSTATE ASSIGNMENT COMPANY, RESPONDENTS,
AND MEGAN L. STEFFENHAGEN, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

GROSS SHUMAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 17, 2016. The order, among other things, directed respondents Allstate Life Insurance Company of New York and Allstate Assignment Company to pay petitioner a sum of $62,890.42 from the proceeds of two Single Premium Immediate Certain Annuity payments owed to respondent Megan L. Steffenhagen.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 11, 2018, and filed in the Erie County Clerk's Office on April 18, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

1303

CA 17-00160

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

DAVID PHILLIPS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO HEART GROUP, LLP AND RICHARD JENNINGS, M.D., DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (THERESA M. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA ROSSI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 30, 2016. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries caused by defendants' alleged negligence in, inter alia, prescribing the drug Pradaxa in combination with plaintiff's contemporaneous use of nonsteroidal anti-inflammatory drugs (NSAIDs), failing to monitor plaintiff for the development of gastric bleeding, and failing to recognize and treat plaintiff's development of a life-threatening gastric ulcer caused by the combination of Pradaxa and NSAIDs. Supreme Court granted defendants' motion pursuant to CPLR 3211 (a) (5) and dismissed the complaint on the ground that the action was time-barred by CPLR 214-a. We reverse.

On January 10, 2011, defendant Richard Jennings, M.D., plaintiff's cardiologist, prescribed Pradaxa as part of a treatment plan for plaintiff's atrial fibrillation and other cardiac issues. Defendants' treatment records establish that on that occasion, and at each and every subsequent office visit over a period of nearly two years, defendants confirmed and noted that plaintiff's medication regimen included the simultaneous use of Pradaxa and NSAIDs. On January 2, 2013, plaintiff presented to defendants for treatment that defendants described as "urgent cardiology followup" based upon plaintiff's complaints of, inter alia, shortness of breath. Defendants treated plaintiff, noted his ongoing use of Pradaxa and NSAIDs, but made no changes in his medication regimen. Specifically,

defendants' entry in plaintiff's chart for the January 2, 2013 visit states: "He does use nonsteroidals routinely." Defendants scheduled a follow-up visit for plaintiff for April 3, 2013. On January 16, 2013, plaintiff underwent emergency hospitalization and was treated for severe blood loss due to an acute upper gastrointestinal tract bleed.

A medical malpractice claim generally accrues on the date of the alleged wrongful act, omission or failure and is governed by a 2½ year statute of limitations (*see* CPLR 214-a; *Davis v City of New York*, 38 NY2d 257, 259 [1975]). Plaintiff commenced this action on July 2, 2015. Defendants moved to dismiss the complaint on the ground that the action was time-barred because it accrued on January 10, 2011, the date of the initial prescription of Pradaxa, which was more than 2½ years prior to the commencement of the action (*see* CPLR 214-a). Plaintiff opposed the motion on the ground that the action accrued on the date of the January 2, 2013 office visit, which was within 2½ years of commencement, and as an alternative ground he asserted that the continuous treatment doctrine tolled the statute of limitations until January 2, 2013. The court granted the motion, determining that the continuous treatment doctrine did not apply, the medical malpractice cause of action accrued on the date of the first prescription for Pradaxa, and the commencement of the action more than 2½ years later was untimely.

Initially, we conclude that plaintiff's claims that defendants were negligent on January 2, 2013 in failing to monitor plaintiff's use of Pradaxa in combination with NSAIDs and in failing to diagnose and treat the alleged existence of gastric bleeding at that particular visit are not time-barred. It is well settled that a physician has a duty to monitor a patient's use of medications prescribed by the physician (*see Cooper v Bronx Cross County Med. Group*, 259 AD2d 410, 411 [1st Dept 1999]). Thus, the claims based on allegations of negligent treatment during the January 2, 2013 office visit have an independent viability regardless of whether any prior alleged negligence is time-barred.

We further agree with plaintiff that the record establishes that defendants provided continuous treatment to plaintiff for a condition, i.e., atrial fibrillation, until January 2, 2013; the alleged wrongful acts or omissions were related to that condition; and such treatment "gave rise to the . . . act, omission or failure" complained of (CPLR 214-a; *see Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]). Indeed, the record establishes that the alleged wrongful acts or omissions themselves ran continuously until January 2, 2013. We therefore reject defendants' contention that the statute of limitations began to run at the time of the first prescription of Pradaxa on January 10, 2011. We conclude that the court erred in granting the motion inasmuch as this action was timely commenced within 2½ years of the cessation of defendants' continuous treatment of plaintiff's atrial fibrillation condition (*see* CPLR 214-a; *see generally Nykorchuck*, 78 NY2d at 258-259). To the extent that the decision of this Court in *Patten v Hamburg OB/GYN Group, P.C.* (50 AD3d 1624 [4th Dept 2008]) conflicts with our decision herein, it should no

longer be followed.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

1333

CA 17-00433

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

BOARD OF EDUCATION OF PALMYRA-MACEDON CENTRAL SCHOOL DISTRICT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FLOWER CITY GLASS CO., INC., FLOWER CITY GLASS ASSOCIATES, LLC, FLOWER CITY GLASS CO. OF NEW YORK, LLC, FLOWER CITY GLASS, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT. (APPEAL NO. 1.)

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Matthew A. Rosenbaum, J.), entered July 14, 2016. The order, insofar as appealed from, granted that part of petitioner's application seeking a determination that the summons and complaint filed on September 11, 2015 was timely pursuant to CPLR 204 (b).

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

Memorandum: Petitioner-plaintiff, Board of Education of the Palmyra-Macedon Central School District (District), contracted with respondent-defendant Flower City Glass Co., Inc. (Flower City) to perform certain work on a school building. After the work had been completed, the District noticed that the wall panels installed pursuant to the contract were defective. Thus, the District served Flower City and respondents-defendants Flower City Glass Associates, LLC, Flower City Glass Co. of New York, LLC, and Flower City Glass (collectively, Flower City defendants) with a demand for arbitration. When the Flower City defendants refused to arbitrate, the District filed a summons and complaint on September 11, 2015 (complaint) against, inter alia, the Flower City defendants. The District also filed an application seeking to compel the Flower City defendants to arbitrate or, in the alternative, seeking a determination that the complaint was timely pursuant to CPLR 204 (b). In appeal No. 1, the Flower City defendants appeal from an order insofar as it granted the District's alternative relief. In determining that the complaint was

timely, Supreme Court concluded that the District's demand for arbitration was timely and was not made in bad faith, and thus that the arbitration-related toll of CPLR 204 (b) applied.

In appeal No. 2, the Flower City defendants appeal from an order insofar as it denied their motion to dismiss with respect to the first cause of action, for breach of contract, against them.

With respect to appeal No. 1, we note that the Flower City defendants admitted service of the District's application to compel arbitration and the supporting papers. The Flower City defendants also did not object to the court's hearing and deciding the District's application, and they opposed the application on the merits. We therefore reject their contention that, because the complaint was not served within the 120 days provided for in CPLR 306-b, the court lacked jurisdiction to adjudicate the District's application.

We agree with the Flower City defendants, however, that the court's determinations that the demand for arbitration was not made in bad faith, and that the action was timely commenced pursuant to CPLR 204 (b), were improper advisory opinions (*see Simon v Nortrax N.E., LLC*, 44 AD3d 1027, 1027 [2d Dept 2007]). We therefore reverse the order in appeal No. 1 insofar as appealed from and deny the application in its entirety.

With respect to appeal No. 2, we conclude that the court properly denied that part of the Flower City defendants' motion to dismiss with respect to the first cause of action, and we therefore affirm. CPLR 204 (b) provides that "[w]here it shall have been determined that a party is not obligated to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is not a part of the time within which an action upon such claim must be commenced." The Flower City defendants contend that the demand for arbitration, served on September 30, 2014, was untimely because the claim for defects in material or labor accrued upon the completion of the physical work, which they unilaterally determined to be August 19, 2008. Thus, according to the Flower City defendants, the demand for arbitration was filed beyond the six-year statute of limitations (*see* CPLR 213 [2]; *State of New York v Lundin*, 60 NY2d 987, 989 [1983]). We reject that contention. The parties do not dispute that a cause of action for defective construction and design accrues upon actual physical completion of the work (*see City Sch. Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538 [1995]; *Sears, Roebuck & Co. v Enco Assoc.*, 43 NY2d 389, 394 [1977]). Actual physical completion of the work is "when the contract in question was substantially completed" (*Town of Poughkeepsie v Espie*, 41 AD3d 701, 706 [2d Dept 2007], *lv dismissed* 9 NY3d 1003 [2007], *lv denied* 15 NY3d 715 [2010]; *see New York Cent. Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638, 1639 [4th Dept 2011]).

Additionally, "parties may . . . provide in their contract when the period of limitations will commence, and such a provision will govern in the absence of duress, fraud or misrepresentation" (*Matter*

of Oriskany Cent. Sch. Dist. [Booth Architects], 206 AD2d 896, 897 [4th Dept 1994], *affd* 85 NY2d 995 [1995]). Here, the parties agreed in their contract that the determination of when the work was substantially completed would be determined by the project architect, who in this case issued a "Certificate of Substantial Completion" on October 1, 2008. Thus, the unilateral determination of the Flower City defendants of when the "physical work" was complete is irrelevant.

Furthermore, the contract provided that, "[a]s to acts or failures to act occurring prior to the relevant date of Substantial Completion, . . . any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion." Thus, pursuant to the contract, the parties agreed that substantial completion as determined by the project architect was the accrual event. We thus conclude that the breach of contract cause of action accrued on the date of substantial completion, which the architect determined to be October 1, 2008 (*see Putrelo Constr. Co. v Town of Marcy*, 105 AD3d 1406, 1407 [4th Dept 2013]).

We also reject the contention of the Flower City defendants that they met their burden of proof on their motion by establishing that the District made the demand for arbitration in bad faith (*see Joseph Francese, Inc. v Enlarged City Sch. Dist. of Troy*, 95 NY2d 59, 63 [2000]). We therefore conclude that the CPLR 204 (b) toll applied from the time the demand for arbitration was served, on September 30, 2014, until the final determination of nonarbitrability by the court on June 5, 2016. In addition, for the same reasons that the claim for arbitration did not accrue until the architect certified "Substantial Completion" of the work on October 1, 2008, we conclude that the breach of contract cause of action did not accrue until October 1, 2008. Applying the CPLR 204 (b) toll, we further conclude that the District timely commenced the breach of contract cause of action in appeal No. 2 on September 11, 2015.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

1334

CA 17-00434

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

BOARD OF EDUCATION OF PALMYRA-MACEDON CENTRAL SCHOOL DISTRICT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FLOWER CITY GLASS CO., INC., FLOWER CITY GLASS ASSOCIATES, LLC, FLOWER CITY GLASS CO. OF NEW YORK, LLC, FLOWER CITY GLASS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 2.)

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Matthew A. Rosenbaum, J.), entered December 5, 2016. The order, among other things, denied in part the motion of defendants-appellants to dismiss plaintiff's complaint.

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

Same memorandum as in *Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v Flower City Glass Co., Inc.* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

1337/17

CA 17-00197

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

VICENTE HERNANDEZ AND MAYELA HERNANDEZ,
PLAINTIFFS-RESPONDENTS,

V ORDER

AUBURN REAL ESTATE CO., INC., AND PARSONS MCKENNA
CONSTRUCTION CO., INC., DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VAN DUSER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 13, 2016. The order granted the motion of plaintiffs for partial summary judgment on liability pursuant to Labor Law § 240 (1) and denied the cross motions of defendants for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 21, 2018, and filed in the Cayuga County Clerk's Office on April 3, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

1487

CA 17-00409

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THOMAS MATHEW, M.D., AND MARK E. BLAKER, M.D.,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

SLOCUM-DICKSON MEDICAL GROUP, PLLC,
DEFENDANT-RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BARCLAY DAMON, LLP, SYRACUSE (CHRISTOPHER J. HARRIGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 4, 2016. The judgment, among other things, declared that plaintiffs are obligated to pay liquidated damages to defendant and denied that part of the motion of defendant seeking attorney's fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking attorney's fees and costs from plaintiff Thomas Mathew, M.D. and as modified, the judgment is affirmed without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: Plaintiffs are physicians practicing as specialists in the field of cardiology, and defendant is a large group medical practice that employs physicians practicing in multiple specialties and subspecialties. After plaintiffs unilaterally terminated their respective longstanding employment agreements with defendant, they commenced this action seeking, inter alia, judgment declaring that the noncompetition covenants in the employment agreements are invalid or otherwise unenforceable. In its answer, defendant, inter alia, asserted a counterclaim alleging breach of the employment agreements and seeking liquidated damages pursuant to a provision in each agreement. Following an evidentiary hearing regarding plaintiffs' request for injunctive relief, plaintiffs conceded that the covenants were enforceable with respect to duration and geographic restrictions, and they stated that, notwithstanding the covenants, they intended to work for defendant's competitor in the cardiology field, which was located well within the 25-mile radius set forth in the covenants. The parties stipulated that plaintiffs would post an undertaking in the amount of $712,000 as security for any liquidated damages that

defendant may be awarded as a result of plaintiffs' breach of the covenants. Thereafter, plaintiffs amended their complaint to seek only a declaration that the liquidated damages clause in the agreements was unenforceable, and they sought damages in the form of compensation allegedly owed to them pursuant to the employment agreements. Defendant served an amended answer with counterclaims.

Defendant moved for partial summary judgment seeking a declaration that the liquidated damages clause in each agreement was enforceable, an order requiring that plaintiffs pay the full amount of the undertaking as liquidated damages, and an award of attorney's fees and costs against plaintiff Thomas Mathew, M.D. (Mathew) pursuant to his employment agreement. Supreme Court granted defendant's motion in part and declared that the liquidated damages clauses in the agreements are enforceable. The court denied those parts of the motion seeking payment of liquidated damages and seeking attorney's fees and costs pursuant to Mathew's employment agreement. Plaintiffs appeal and defendant cross-appeals, and we modify the judgment by granting that part of defendant's motion seeking attorney's fees and costs pursuant to Mathew's employment agreement.

We begin by observing that there is no dispute that in-house referral is an integral part of defendant's business model. There is also no dispute that neither plaintiff had any patients when he became employed by defendant, and that plaintiffs were treating approximately 12,000 of defendant's cardiology patients when they terminated their employment relationships with defendant in 2013. Plaintiff Mark E. Blaker, M.D. (Blaker) began employment with defendant in 1984, and his employment agreement provides, inter alia, that "[t]he Employer will be required to expend substantial time, energy and sums of money to establish a practice for the Employee, and to provide necessary secretarial and nursing assistance." The formula for liquidated damages set forth in the Blaker employment agreement provides that, upon a breach of the covenant, the "Employee agrees to forfeit 50 percent of his previous year's individual productivity or the sum of $50,000.00, whichever is greater."

Mathew began employment with defendant in 2001, and his employment agreement provides, inter alia, that "[t]he Employer has already expended, or in the future will expend, substantial time, good will, energy, and sums of money to establish a practice for the Employee, and to provide the assistance necessary to develop and sustain such practice." The formula for liquidated damages set forth in Mathew's employment agreement provides for "the amount of Fifty Thousand Dollars ($50,000.00) or fifty percent (50%) of the Employee's salary during the twelve (12) months immediately preceding [a] breach, whichever is greater."

Contrary to plaintiffs' contention on their appeal, we conclude that the court properly determined that defendant met its initial burden of establishing that the liquidated damages clauses are enforceable because they represent a " 'reasonable measure of the anticipated probable harm' " (*BDO Seidman v Hirshberg*, 93 NY2d 382, 396 [1999]), and plaintiffs failed to raise an issue of fact. We note

that plaintiffs do not dispute that the potential damages flowing from a breach of the restrictive covenant were not readily ascertainable at the time the parties entered into the employment agreements (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). Indeed, the fact that these types of damages are difficult to measure provides the foundation for a liquidated damages clause (*see Martin L. Ryan, P.C. v Orris*, 95 AD2d 879, 881 [3d Dept 1983]). We reject plaintiffs' contention that the liquidated damages clause is not a reasonable measure of the anticipated probable harm on the ground that there is no evidence of harm sustained by defendant's cardiology department. Plaintiffs fail to account for potential damages caused by the loss of intra-organizational referrals, the loss of good will caused by the departure of critical members of its professional staff, the investment made by defendant in the development of plaintiffs' practices and the cost associated with the recruitment of replacement physicians and the development of those new practices. During the evidentiary hearing on the issue of injunctive relief, Blaker admitted that there would be no reason to work for defendant if "you had to generate your own business," and that it is a "tough sell" to recruit a cardiologist to relocate to defendant's geographic location to practice. Moreover, plaintiffs' contention that they were solely responsible for the development of their own practices is belied by the record. Specifically, plaintiffs were defendant's employees, and thus all of their acts in the scope of such employment were required to be in furtherance and in the best interest of their *employer's* business (*see generally Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 89 [1st Dept 1984], *appeal dismissed* 63 NY2d 675 [1984]).

We reject plaintiffs' further contention that the liquidated damages clauses are invalid because defendant failed to submit any evidence of specific revenue loss for defendant's cardiology department resulting from plaintiffs' breach of the employment agreements. "Once [defendant's] burden of proving the validity of the liquidated damages clause was met, it was not necessary for [defendant] to prove any actual damages" (*Martin L. Ryan, P.C.*, 95 AD2d at 881).

We reject defendant's contention on its cross appeal that the court erred in denying that part of its motion seeking payment of the full amount of the undertaking as liquidated damages because the parties stipulated to that amount of liquidated damages. The record establishes that the parties stipulated only to the amount of an undertaking, and not to the actual amount of liquidated damages to be awarded under the terms of each agreement.

We agree with defendant, however, that the court erred in denying that part of its motion seeking summary judgment on its claim for attorney's fees and costs pursuant to Mathew's employment agreement. Contrary to plaintiffs' contention, the attorney fee clause of the employment agreement is not duplicative of the liquidated damages clause. One of the express purposes of the liquidated damages clause is "avoiding the costs, expenses, and uncertainties of litigation over the *amount of actual damages* that will be suffered by the Employer in the event of breach" [emphasis added]). Here, defendant seeks

attorney's fees and costs incurred in enforcing the restrictive covenant and the liquidated damages clause, which is distinct from any attorney's fees and costs that would be incurred in litigation over the amount of actual damages. Inasmuch as defendant established that it is entitled to recover liquidated damages as a result of Mathew's breach of the restrictive covenant, defendant is also entitled to an award of reasonable attorney's fees and costs pursuant to the terms of Mathew's employment agreement (*see generally Markham Gardens, L.P. v 511 9th, LLC*, 143 AD3d 949, 953 [2d Dept 2016]). We therefore remit the matter to Supreme Court to determine, following a hearing if necessary, the amount of the attorney's fees and costs to be awarded to defendant pursuant to the employment agreement with Mathew.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

24

KA 15-01822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEWIS SWIFT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered February 11, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter 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: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in admitting in evidence certain text messages and a conversation between the victim and a witness. The witness testified that the victim had called and texted her, indicating in each communication that he thought defendant had set him up, and to look to defendant if anything happened to the victim. Contrary to the People's contention, we conclude that defendant preserved his contention for our review, and we agree with defendant that the text messages and testimony in question constituted hearsay (*see generally People v Buie*, 86 NY2d 501, 505 [1995]). Nevertheless, even assuming, arguendo, that the court erred in admitting the communications in evidence under the present sense impression and excited utterance exceptions to the hearsay rule (*cf. People v Jones*, 28 NY3d 1037, 1039 [2016]; *People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *People v Brown*, 80 NY2d 729, 731-734 [1993]), we conclude that any such error is harmless (*see Hernandez*, 28 NY3d at 1058; *People v Spencer*, 96 AD3d 1552, 1553 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012], *reconsideration denied* 20 NY3d 989 [2012]).

Defendant contends that the evidence is legally insufficient to support his conviction of manslaughter because the People failed to establish, among other things, that he acted with the requisite intent to cause serious physical injury to another person, and that the

victim's death from hypothermia was reasonably foreseeable. He further contends that the evidence is legally insufficient to support the conviction of the weapon charge because there is no evidence that he possessed a weapon. We conclude that defendant failed to preserve the majority of those contentions for our review inasmuch as his general motion for a trial order of dismissal was not " 'specifically directed' at" those alleged shortcomings in the evidence (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People with respect to defendant's preserved and unpreserved contentions (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Pratcher*, 134 AD3d 1522, 1524-1525 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the verdict convicting him of manslaughter is against the weight of the evidence because the victim's death from hypothermia was not a reasonably foreseeable result of the beating that he received, and thus defendant should not be held responsible for the victim's death. That contention is unavailing. With respect to an allegedly intervening cause of death, "[i]t is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense" (*People v Kane*, 213 NY 260, 270 [1915]; *see People v Griffin*, 80 NY2d 723, 726-727 [1993], *cert denied* 510 US 821 [1993]; *see generally People v Davis*, 28 NY3d 294, 301-302 [2016]). Here, the victim's injuries left him unable to see because both of his eyes were swollen shut and one was ruptured, he was confused and likely concussed due to head trauma, and he sustained several broken facial and skull bones. The jury could have concluded that defendant ordered the codefendants to attack the victim, that he took part in the ensuing assault, and that he and the codefendants removed most of the victim's clothing and left him outside while the wind chill was below 40 degrees. Thus, "defendant may not avoid responsibility by arguing that other causes contributed since his acts [and those of the codefendants that he requested] were also factors in the victim's demise" (*People v Cicchetti*, 44 NY2d 803, 804 [1978]; *see People v Kibbe*, 35 NY2d 407, 413 [1974], *rearg denied* 37 NY2d 741 [1975]). Consequently, we conclude that the verdict is not against the weight of the evidence, both with respect to that contention and defendant's remaining contentions concerning the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

64

CA 17-01126

PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

JACKIE S. COLLINS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KATIE A. DAVIRRO, DEFENDANT-APPELLANT,
AND ORLEANS/NIAGARA BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, DEFENDANT.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 13, 2017. The order, inter alia, denied the pre-answer motion of defendant Katie A. Davirro to dismiss the complaint against her.

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

Memorandum: Katie A. Davirro (defendant) appeals from an order that, inter alia, denied her pre-answer motion to dismiss the complaint against her on the ground that the action was not commenced against her within the one-year and 90-day statute of limitations period set forth in General Municipal Law § 50-i (1) (c). Plaintiff commenced this action against defendant seeking damages for injuries that she allegedly sustained as the result of a motor vehicle collision between a vehicle operated by plaintiff and a vehicle owned and operated by defendant. Defendant's employer, defendant Orleans/Niagara Board of Cooperative Educational Services (BOCES), was added as a defendant after the entry of the order appealed from. We affirm.

In reviewing this pre-answer motion to dismiss pursuant to CPLR 3211, we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Furthermore, "[o]n a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Island ADC,*

Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 [2d Dept 2008]; *see Loscalzo v 507-509 President St. Tenants Assn. Hous. Dev. Fund Corp.*, 153 AD3d 614, 615 [2d Dept 2017], *lv denied* 30 NY3d 905 [2017]).

Here, defendant alleged that the complaint against her was time-barred because she was acting within the scope of her employment, and thus the limitations period set forth in the General Municipal Law is applicable. Defendant is correct that, if she was acting in the performance of her duties and within the scope of her employment when she committed the alleged tort, BOCES must indemnify her for damages arising therefrom (*see* Education Law § 3023; *see generally Clark v City of Ithaca*, 235 AD2d 746, 747 [3d Dept 1997]). Furthermore, if BOCES must indemnify defendant, then BOCES "is the real party in interest and General Municipal Law § 50-i (1) (c) applies to the . . . cause of action against" defendant (*Ruggiero v Phillips*, 292 AD2d 41, 44 [4th Dept 2002]). Nevertheless, "[w]hether an employee was acting within the scope of his or her employment is generally a question of fact for the jury" (*Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678, 679 [2d Dept 2013]) and, contrary to defendant's contention, the evidence that she submitted in support of her motion failed to establish as a matter of law that she was acting within the scope of her employment when the collision occurred.

Contrary to defendant's further contention, there is a triable question of fact whether she is barred by the doctrine of equitable estoppel from raising a statute of limitations defense (*see generally Richey v Hamm*, 78 AD3d 1600, 1603 [4th Dept 2010]). Under that doctrine, "a defendant is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action' " (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007], quoting *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]; *see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]), and the plaintiff's reliance on the fraud, misrepresentations or deception was reasonable (*see Putter*, 7 NY3d at 552-553). "Although there are exceptions, 'the question of whether a defendant should be equitably estopped is generally a question of fact' " (*Local No. 4, Intl. Assn. of Heat & Frost & Asbestos Workers v Buffalo Wholesale Supply Co., Inc.*, 49 AD3d 1276, 1278 [4th Dept 2008], quoting *Putter*, 7 NY3d at 553). Here, we conclude that "[p]laintiff set forth sufficient factual allegations of defendant['s] affirmative acts of deception to raise a triable issue of fact whether the doctrine of equitable estoppel should apply to toll the [s]tatute of [l]imitations" (*Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938, 940 [4th Dept 1999]; *cf. Lohnas v Luzi* [appeal No. 2], 140 AD3d 1717, 1719 [4th Dept 2016], *affd* 30 NY3d 752 [Feb. 15, 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

66

CA 17-01285

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

SANDRA GRECO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD R. GRANDE, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (ELIZABETH A. BRUCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 20, 2016. The order, inter alia, granted that part of the motion of plaintiff for summary judgment on the issue of negligence and denied the cross motion of defendant for summary judgment on the issue of negligence and for leave to amend his answer.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety and granting that part of the cross motion seeking leave to amend the answer and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when a vehicle driven by defendant, in which she was a passenger, spun out of control on what defendant contends was black ice, hitting a guardrail. Defendant now appeals from an order that, inter alia, granted that part of plaintiff's motion seeking summary judgment on the issue of negligence, and denied defendant's cross motion for summary judgment on the issue of negligence and for leave to amend his answer to include the emergency doctrine as an affirmative defense.

We agree with defendant that Supreme Court erred in granting that part of plaintiff's motion for summary judgment on the issue of negligence, and we therefore modify the order accordingly. "An innocent passenger . . . who, in support of [his or] her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation" (*Johnson v Braun*, 120 AD3d 765, 766 [2d Dept 2014] [internal quotation marks omitted]). Here, plaintiff submitted evidence establishing that defendant lost control of the vehicle. The burden then shifted to defendant, who came forward with the exculpatory explanation that he encountered

black ice on the roadway, which constituted an emergency. When the evidence is viewed in the light most favorable to defendant (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), there is a triable issue of fact whether there was black ice and thus whether an emergency existed at the time of the accident. Contrary to plaintiff's contention, the affidavit of a meteorologist failed to establish as a matter of law that no black ice existed at the time of the accident because the meteorologist's opinion was mere speculation based on general weather conditions that were prevailing in the region (*see Bogdanova v Falcon Meat Mkt.*, 107 AD3d 638, 639 [1st Dept 2013]; *Neidert v Austin S. Edgar, Inc.*, 204 AD2d 1030, 1031 [4th Dept 1994]). We nevertheless reject defendant's further contention that he is entitled to summary judgment on the issue of negligence given the credibility disputes surrounding his account of the accident (*see generally Rew v County of Niagara*, 115 AD3d 1316, 1318 [4th Dept 2014]; *Harrington Group, Inc. v B/G Sales Assoc., Inc.*, 41 AD3d 1161, 1162 [4th Dept 2007]).

Finally, we conclude that the court erred in denying that part of defendant's cross motion for leave to amend the answer to assert an emergency doctrine defense. Motions for leave to amend pleadings should be freely granted in the absence of prejudice, and "[m]ere lateness is not a barrier" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]). The fact that defendant's request was made nine days after the filing of the note of issue does not render the request untimely (*see McFarland v Michel*, 2 AD3d 1297, 1300 [4th Dept 2003]). Indeed, "[w]here no prejudice is shown, the amendment may be allowed during or even after trial" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981], *rearg denied* 55 NY2d 801 [1981] [internal quotation marks omitted]), and here, the record is devoid of any potential prejudice flowing from the proposed amendment. We thus further modify the order by granting that part of the cross motion seeking leave to amend the answer.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

85

CA 16-02322

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

MICHELLE L. CAPIERSEO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW TOMAINO, M.D., AND TOMAINO ORTHOPAEDIC CARE FOR SHOULDER, HAND AND ELBOW, LLC, DEFENDANTS-APPELLANTS.

BROWN, GRUTTADARO, GAUJEAN AND PRATO, LLC, ROCHESTER (DENNIS GRUTTADARO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 22, 2016. The order granted the motion to set aside that part of the jury verdict finding that the postsurgical negligence of defendant Matthew Tomaino, M.D. was not a substantial factor in causing plaintiff's injuries.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the verdict is reinstated in its entirety.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained during surgery to remove a dorsal wrist ganglion cyst. Following the surgery, plaintiff presented with symptoms of injury to two of her index finger extensor tendons, neither of which was the subject of the surgery. The jury returned a verdict finding that Matthew Tomaino, M.D. (defendant) was not negligent in the performance of the surgery but that he was negligent in his postsurgical care of plaintiff. Plaintiff's theory with respect to defendant's postsurgical negligence was that he incorrectly ordered an MRI study of plaintiff's hand instead of the wrist and, as a result, the diagnosis and repair of iatrogenic tendon lacerations was delayed. Plaintiff contended that her injuries and damages caused by the postsurgical negligence consisted of the lengthy period of postsurgical physical therapy that she underwent, which was painful and futile, together with the attendant costs of such physical therapy. However, the jury further found that defendant's postsurgical negligence was not a substantial factor in causing plaintiff's injuries. Plaintiff moved pursuant to CPLR 4404 (a) to set aside that part of the verdict finding that defendant's postsurgical negligence was not a substantial factor in causing plaintiff's injuries, and Supreme Court granted the motion. We

reverse.

Defendants presented competent expert testimony establishing that, notwithstanding that defendant ordered the incorrect MRI study, his postsurgical diagnosis, care and treatment was nonetheless correctly focused on the injured tendons and was within the standard of care for such injuries. Although plaintiff presented expert testimony to the effect that the correct MRI study would have resulted in prompt exploratory surgery and repair, without the need for the lengthy course of physical therapy, that testimony merely framed the "battle of the experts" for the jury's consideration.

Contrary to plaintiff's contention, we conclude that the issues of negligence and proximate cause were not so inextricably interwoven as to make it logically impossible to find one without the other (*see generally Gibson v Singh Towing, Inc.*, 155 AD3d 614, 616 [2d Dept 2017]). Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (*see Kunsman v Baroody*, 60 AD3d 1369, 1370 [4th Dept 2009]; *see also Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [4th Dept 2011]), and we conclude that defendants are entitled to that presumption here.

We also agree with defendants that the verdict was not against the weight of the evidence and that the court therefore erred in granting plaintiff's posttrial motion. It is well settled that a jury verdict will be set aside as against the weight of the evidence only when the evidence at trial so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence (*see Grassi v Ulrich*, 87 NY2d 954, 956 [1996]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Applying that principle here, we conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that, notwithstanding the error in ordering the incorrect MRI, defendant did not cause any postsurgery injuries alleged by plaintiff (*see Schreiber*, 88 AD3d at 1263-1264). We further conclude that the "trial was a prototypical battle of the experts, and the jury's acceptance of defendants' case was a rational and fair interpretation of the evidence" (*Lillis v D'Souza*, 174 AD2d 976, 977 [4th Dept 1991], *lv denied* 78 NY2d 858 [1991]; *see Schultz v Excelsior Orthopaedics, LLP* [appeal No. 2], 129 AD3d 1606, 1607 [4th Dept 2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

122

KA 16-00320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL BOYKINS, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DANIEL BOYKINS, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Wyoming County Court (Michael M. Mohun, J.), dated November 10, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying, without a hearing, his CPL article 440 motion to vacate the 1988 judgment convicting him of murder in the second degree (Penal Law § 125.25 [1]) in connection with the death of a fellow inmate at Attica Correctional Facility (*People v Boykins*, 167 AD2d 871 [4th Dept 1990], *lv denied* 77 NY2d 904 [1991]). Defendant contends that County Court erred in denying his motion because the People violated their *Brady* obligations by failing to disclose a letter written by the then-District Attorney to the Chairman of the Division of Parole detailing a prosecution witness's cooperation and asking that the Parole Board consider the letter as part of the witness's file. According to defendant, that letter establishes that there was an undisclosed cooperation agreement between the witness and the prosecution. We reject defendant's contention.

"To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]; *see People v Garrett*, 23 NY3d 878,

885 [2014], *rearg denied* 23 NY3d 1215 [2015]). Although the People correctly concede that the letter constitutes *Brady* evidence (*see People v Cwikla*, 46 NY2d 434, 441 [1979]), they contend that the letter was actually provided to defendant and that, in any event, it was not material evidence.

"In New York, where a defendant makes a specific request for a document, the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*Fuentes*, 12 NY3d at 263). Here, even assuming, arguendo, that the letter was not provided to the defense and that a specific request for such material was made, we nevertheless conclude that defendant failed to "make a prima facie showing of a reasonable possibility that the nondisclosure of the [letter] contributed to his conviction" (*People v Switts*, 148 AD3d 1610, 1611-1612 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *see generally Fuentes*, 12 NY3d at 263-264).

The witness at issue was extensively questioned on cross-examination with respect to the alleged promises and benefits he had hoped for but did not obtain. Defense counsel questioned the witness about his understanding of an agreement with law enforcement officials as well as an earlier letter that an investigator and an assistant inspector general sent to the Parole Board. There could be no doubt in the jurors' minds that the witness was testifying for self-gain rather than with any altruistic intent. Indeed, the witness acknowledged that he hoped that his testimony would lead to his release on parole.

The fact that an additional letter was written to the Parole Board four months after parole had been denied and over one year before the witness would reappear before the Parole Board does not, in our view, make any difference in this case. The jury knew about the witness's desire to gain certain advantages for his testimony and nevertheless convicted defendant. Moreover, that witness's testimony was corroborated by the testimony of another eyewitness and was buttressed by the testimony of two other individuals to whom defendant made inculpatory statements.

We thus conclude that, " 'although [the letter] may have provided the defense with additional impeachment material, it cannot be said that there is a reasonable possibility that the result at trial would have been different had the information been disclosed' " (*People v Smith*, 138 AD3d 1418, 1420 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *see People v Sheppard*, 107 AD3d 1237, 1240 [3d Dept 2013], *lv denied* 22 NY3d 1203 [2014]; *cf. People v Lewis*, 125 AD3d 1109, 1112 [3d Dept 2015]).

We have reviewed defendant's contentions raised in his pro se supplemental brief and conclude that they lack merit.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

123

KA 16-01467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

REGINALD D. BOYKINS, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Yates County Court (W. Patrick Falvey, J.), dated May 23, 2016. The order denied the motion of defendant pursuant to CPL 440.20 to set aside his sentence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the sentence is set aside and the matter is remitted to Yates County Court for resentencing.

Opinion by DEJOSEPH, J.:

The issue raised in this appeal is whether the 2004 and 2009 Drug Law Reform Acts ([DLRA] L 2004, ch 738; L 2009, ch 56) allow a sentencing court to sentence a defendant convicted of a felony offense defined in Penal Law article 220 or 221, i.e., a controlled substance or marihuana offense, as a persistent felony offender (PFO). We conclude that the DLRA removed County Court's discretion to sentence a defendant convicted of a drug felony as a persistent felony offender.

Facts and Procedural History

Defendant was charged by indictment with two counts of criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]), based on allegations that defendant knowingly and unlawfully possessed cocaine with the intent to sell it on February 18, 2012 and March 14, 2012, and two counts of criminal sale of a controlled substance (CSCS) in the third degree (§ 220.39 [1]), based on allegations that defendant knowingly and unlawfully sold cocaine on the same dates. After a jury trial, defendant was convicted of one count each of CPCS in the third degree and CSCS in the third degree

for the possession and sale of cocaine on February 18, 2012, and was acquitted of the charges arising from conduct occurring on March 14, 2012.

Defendant was thereafter sentenced as a PFO to concurrent, indeterminate terms of incarceration of 15 years to life.

Direct Appeal:

Defendant appealed from the judgment of conviction, contending, inter alia, that he was improperly sentenced as a PFO because the court erred in determining that defendant's "history and character" and the nature and circumstances of his criminal conduct indicated that extended incarceration and life-time supervision would best serve the public interest. We affirmed, concluding that defendant's "sentence is not unduly harsh or severe," and that " '[t]he court properly exercised its discretion when it adjudicated defendant a persistent felony offender and sentenced him accordingly' " (*People v Boykins*, 134 AD3d 1542, 1543 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]).

Postconviction Motions For Resentencing:

In March 2015, defendant, acting pro se, moved pursuant to CPL 440.46 to be resentenced in accordance with the DLRA by vacating his sentence as a PFO and resentencing him as a second felony drug offender. In an order dated May 13, 2015, the court denied his motion for resentencing, converted the motion to a motion to set aside the sentence pursuant to CPL 440.20, and reserved decision on the CPL 440.20 motion. In an order dated September 24, 2015, the court denied the converted motion.

Before the court issued the September 24, 2015 order denying the converted motion, defendant, again acting pro se, moved pursuant to CPL 460.15 for leave to appeal to this Court from the order dated May 13, 2015. This Court dismissed defendant's motion for leave to appeal inasmuch as the only matter determined in the May 13, 2015 order was defendant's CPL 440.46 motion, from which defendant may appeal as of right (*see* CPL 440.46 [3]; L 2004, ch 738, § 23).

Instant Motion:

In March 2016, defendant, by counsel, moved pursuant to CPL 440.20 to vacate his sentence on the ground that he was illegally sentenced as a PFO. Defendant contended that, because the crimes of CPCS in the third degree (Penal Law § 220.16 [1]) and CSCS in the third degree (§ 220.39 [1]) fall within Penal Law article 220, a defendant convicted of those crimes is not subject to sentencing as a PFO. Defendant contended that the 2004 DLRA removed the trial court's discretion to sentence a defendant convicted of controlled substance or marihuana offenses as a PFO. The court denied the motion. Defendant then moved pursuant to CPL 460.15 for leave to appeal, and that motion was granted by a Justice of this Court. This appeal

ensued.

Analysis

Preliminarily, we conclude that, while the issue raised in defendant's March 2016 CPL 440.20 motion could have been raised on direct appeal, defendant is not procedurally barred from asserting that issue at this juncture (*see* CPL 440.20; *People v Jurgins*, 26 NY3d 607, 612 n 2 [2015]). Further, that issue was not raised or determined upon the merits on defendant's direct appeal, rather, his challenge to his sentence was based upon a theory that the court, inter alia, failed to give certain mitigating factors the weight they should have been accorded (*see generally* CPL 440.20 [2]).

Moving now to the merits, Penal Law § 60.04 (1) provides that,

> "*[n]otwithstanding the provisions of any law*, this section shall govern the dispositions authorized when a person is to be sentenced upon a conviction of a felony offense defined in article two hundred twenty or two hundred twenty-one of this chapter or when a person is to be sentenced upon a conviction of such a felony as a multiple felony offender as defined in subdivision five of this section" (emphasis added).

Penal Law § 60.04 (3) provides that "[e]very person convicted of a class B felony *must* be sentenced to imprisonment in accordance with the applicable provisions of section 70.70" (emphasis added). Further, in the subdivision entitled "Multiple felony offender," Penal Law § 60.04 (5) provides that, "[w]here the court imposes a sentence pursuant to subdivision three of section 70.70 of this chapter upon a second felony drug offender, as defined in paragraph (b) of subdivision one of section 70.70 of this chapter, it *must* sentence such offender to imprisonment in accordance with the applicable provisions of section 70.70" (emphasis added).

The sentencing statute referenced in Penal Law § 60.04 (5) defines a "[s]econd felony drug offender" as "a second felony offender as that term is defined in subdivision one of section 70.06 of this article, who stands convicted of any felony, defined in article two hundred twenty or two hundred twenty-one of this chapter other than a class A Felony" (§ 70.70 [1] [b]). Section 70.06, which deals with sentences of imprisonment for second felony offenders, defines such offender as "a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-1 felony, after having previously been subjected to *one or more predicate felony convictions*" (§ 70.06 [1] [a] [emphasis added]). A sentence of imprisonment for a second felony drug offender applies to those second felony drug offenders "whose prior felony conviction was not a *violent* felony" (§ 70.70 [3] [a] [emphasis added]). When a court finds that a defendant is a second felony drug offender who stands convicted of a class B felony, "the court shall impose a determinate sentence of imprisonment"

(§ 70.70 [3] [b]), and "the term shall be at least two years and shall not exceed twelve years" (§ 70.70 [3] [b] [i]).

The plain language of the statutes is clear that, when a defendant is convicted of a drug offense, he or she must be sentenced under the provisions outlined by Penal Law § 60.04, "notwithstanding the provisions of any law." Thus, inasmuch as section 60.04 does not authorize sentencing such a defendant as a PFO, such a defendant cannot be sentenced pursuant to any provisions that do authorize sentencing as a PFO. While there are no definitive rulings on this issue by the Court of Appeals or any of the Appellate Divisions, trial courts have held that a drug offender is ineligible for PFO sentencing (*see e.g. People v Wilson*, 31 Misc 3d 1235[A], 2011 NY Slip Op 51004[U], *5 [Westchester County Ct 2011] ["Under the current law, a persistent felony offender sentence is no longer an option for defendant's crime of criminal possession of a controlled substance in the fourth degree - a class C felony offense"]).

As noted by the Court of Appeals, "when the legislature enacted the . . . DLRA, it sought to ameliorate the excessive punishments meted out to low-level, nonviolent drug offenders under the so-called Rockefeller Drug Laws, and therefore the statute is designed to spread relief as widely as possible, within the bounds of reason, to its intended beneficiaries" (*People v Coleman*, 24 NY3d 114, 122 [2014]). We believe that our interpretation of the DLRA is consistent with the remedial purpose of the DLRA, and we therefore conclude that Penal Law §§ 60.04 and 70.70 operate to preclude a court from sentencing a defendant found guilty of a qualifying drug felony as a PFO. Accordingly, we conclude that defendant's motion to vacate his sentence should be granted, the sentence should be set aside and the matter should be remitted to County Court for resentencing.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

127

CA 17-01336

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

DANTA MARIE QUINTON BOLIN, AS EXECUTRIX OF THE ESTATE OF JOHN ALAN BOLIN, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL C. GOODMAN, M.D., DEFENDANT-RESPONDENT.

MARK D. GORIS, CAZENOVIA, FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered October 5, 2016. The order granted defendant's motion for a directed verdict at the close of plaintiff's proof.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion for a directed verdict is denied, the complaint is reinstated and a new trial is granted.

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages arising from the death of her husband (decedent), who died from cardiac arrhythmia three days after seeing defendant, his primary care physician. The matter proceeded to trial, at which the disputed issues were whether defendant recognized the severity of decedent's condition and, if so, whether he conveyed that severity to decedent before decedent "declined" to go to the hospital. Supreme Court granted defendant's motion for a directed verdict at the close of plaintiff's proof, and we now reverse.

"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 [the] light most favorable to the nonmovant" (*Brenner v Dixon*, 98 AD3d 1246, 1247 [4th Dept 2012] [internal quotation marks omitted]; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Here, accepting plaintiff's evidence as true and affording plaintiff

every favorable inference that may reasonably be drawn from the facts presented at trial, we conclude that there is a rational process by which the jury could have found in plaintiff's favor (*see Brenner*, 98 AD3d at 1248; *cf. Szczerbiak*, 90 NY2d at 556).

Plaintiff presented evidence that decedent was a family man who was well-attuned to his cardiac health, having lost his father to a sudden cardiac incident. When presented with the possibility of a heart-related issue, decedent had no problem going to a hospital emergency room, which he did only a month before his death. On Friday, September 3, 2010, plaintiff presented to defendant complaining that the day before he had been unable to walk the length of his driveway without stopping three times for shortness of breath, a driveway he normally traversed without incident. Decedent also complained that on the morning of his appointment he was sweating profusely and felt pressure in his chest when he attempted to climb a ladder.

Defendant and plaintiff's medical expert both testified that such evidence established that decedent was suffering from unstable angina, i.e., a life-threatening acute coronary condition, which was described as a "ticking package that could blow up at any time." The testimony at trial established that unstable angina, which carried with it an imminent risk of a fatal cardiac episode if left untreated, was "highly treatable" and a "completely preventable death." Plaintiff's expert testified that it would be a breach of the standard of care for any physician to fail to recognize the severity of decedent's condition and, further, to fail to convey the severity of that condition to the patient.

Defendant testified at trial that he recognized the life-threatening condition and conveyed to decedent "that he *should* go to the hospital" (emphasis added). Defendant further testified that he knew that "there needed to be more testing done," but that decedent "adamant[ly]" "refused" to go to the hospital and "didn't give [defendant] a good reason why." Defendant's notes, however, do not reflect any urgency. Indeed, the only notation made by defendant concerning that conversation was, "Discussed admit on Fri of holiday [weekend], declined."

Moreover, despite the fact that defendant claimed to have recognized the severity of decedent's condition, he did not set up any follow-up appointment with a cardiologist for over five days and admitted that he was "surprised" to learn of decedent's death three days after his appointment with decedent. Defendant thereafter consulted with a cardiologist, who "didn't really say very much at that point."

Plaintiff's expert, a board certified internist and cardiologist, testified that the standard of care was to "inform the patient that they have an immediate life-threatening condition . . . [Y]ou can experience sudden death at any point. If you go home, you could die walking into the house. Die in your sleep. Die in your shower. That it is a completely preventable death and that the only reasonable

medical course is to call 911 because that patient could die driving to the hospital." If the patient refuses hospitalization, the doctor must discern the reason why the patient is refusing in an effort to make sure the patient fully understands the severity of his or her condition.

Plaintiff's expert further testified that all the details of that conversation, i.e., the severity of the condition and the reason for the refusal, should be documented. Defendant's note was, in the expert's opinion, not reflective of the level of urgency that should have been conveyed to decedent, which meant that defendant either did not understand the severity of the condition or did not convey the severity of the condition to decedent. If that information was not conveyed to decedent, the expert opined that it was a substantial factor in decedent's death. Finally, the expert opined "within a reasonable degree of medical certainty" that, had decedent gone to the hospital on September 3, 2010, "he would have survived this. He would have been treated."

As with most wrongful death cases, this case is complicated by the death of decedent, the only person who could have directly refuted defendant's factual testimony. The *Noseworthy* doctrine thus provides that in a wrongful death case, such as this, "a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence" (*Noseworthy v City of New York*, 298 NY 76, 80 [1948]; *see Holiday v Huntington Hosp.*, 164 AD2d 424, 427 [2d Dept 1990]). The doctrine "applies only to 'such factual testimony as the decedent might have testified to, had [he or she] lived' " (*Casey v Tan* [appeal No. 2], 255 AD2d 900, 900 [4th Dept 1998]), and the "lesser degree of proof pertains to the weight which the circumstantial evidence may be afforded by the jury, not to the standard of proof the plaintiff must meet" (*Oginski v Rosenberg*, 115 AD2d 463, 463 [2d Dept 1985], *lv dismissed* 75 NY2d 991 [1990]).

Here, the only direct testimony regarding whether defendant recognized the severity of decedent's condition and explained that to him "came from defendant . . . and, implicit in the court's findings is that his testimony was credible. Issues of credibility, however, are for the jury" (*Spano v County of Onondaga*, 135 AD2d 1091, 1092 [4th Dept 1987], *appeal dismissed* 71 NY2d 994 [1988]). We agree with plaintiff that there are issues with respect to defendant's credibility, and those issues should not have been determined by the court. In our view, this is not a case in which there is "absolutely no showing of facts from which negligence may be inferred" (*Mildner v Wagner*, 89 AD2d 638, 638 [3d Dept 1982]), and we thus conclude that the court erred in granting defendant's motion for a directed verdict.

We therefore reverse the order, deny defendant's motion, reinstate the complaint, and grant a new trial.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

146

KA 14-00802

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY B. SMOUSE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered March 11, 2014. The judgment convicted defendant upon a jury verdict of, inter alia, reckless endangerment in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, reckless endangerment in the second degree (Penal Law § 120.20), defendant contends that Supreme Court erred in sustaining the People's gender-based application pursuant to *Batson v Kentucky* (476 US 79 [1986]). We agree.

The initial panel of prospective jurors included 15 men and 6 women. Using challenges for cause, the People successfully challenged one man and one woman, and defendant successfully challenged two men and one woman. Using peremptory challenges, the People challenged five men, and defendant challenged four women. Significantly, defendant challenged two men using peremptory challenges. That left five men on the initial panel of prospective jurors, and they were all placed on the jury. The court then asked the parties to consider the first seven prospective jurors—three men and four women—on the next panel. Using challenges for cause, the People successfully challenged one man, and defendant successfully challenged one man and two women. That left one man and two women, and the People declined to challenge any of them using peremptory challenges.

When the court asked whether defendant wished to exercise any peremptory challenges, defense counsel named one of the two remaining

women. The People made a *Batson* application, arguing: "Every person that has been preempted [sic] has been a woman." Defense counsel argued: "I don't know that that's the case." The court noted that it "didn't keep count," but that it did not recall defendant having challenged a man using a peremptory challenge. The court then prompted defendant to provide a gender-neutral reason for the challenge. Defense counsel explained that the prospective juror was a nurse at a hospital and "would see people coming in who have been potentially victims of domestic violence." The People made no further argument. The court stated that it was "inclined to agree with [the People] that a non-gender reason has not been fairly articulated." For that reason, the court sustained the People's *Batson* application and placed the prospective juror on the jury.

The purpose of the holding in *Batson* is to combat unlawful discrimination in the jury selection process (*see id.* at 85; *People v Smocum*, 99 NY2d 418, 421 [2003]). There is a well-established three-part test that courts employ to resolve applications made pursuant to *Batson* (*see Smocum*, 99 NY2d at 421-422; *People v Mallory*, 121 AD3d 1566, 1566-1567 [4th Dept 2014]). At step one, the party alleging discriminatory use of a peremptory challenge must establish a prima facie case of purposeful discrimination by showing facts and circumstances raising an inference that the other party excused one or more prospective jurors because of his or her race or gender, or other protected characteristic (*see Smocum*, 99 NY2d at 421-422). It is incumbent upon the party alleging discriminatory use of a peremptory challenge "to articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed" (*People v Cuesta*, 103 AD3d 913, 914 [2d Dept 2013], *lv denied* 21 NY3d 942 [2013]; *see People v Childress*, 81 NY2d 263, 268 [1993]). The failure to make a prima facie case requires denial of the *Batson* application (*see People v Rudolph*, 132 AD3d 912, 913 [2d Dept 2015], *lv denied* 27 NY3d 1138 [2016]).

If a prima facie case of discrimination is made at step one, the party seeking to exercise the peremptory challenge must, at step two, come forward with a facially nondiscriminatory explanation for such challenge (*see Smocum*, 99 NY2d at 422). The burden at step two is minimal, and the explanation must be upheld if it is based on something other than the juror's race, gender, or other protected characteristic (*see People v Payne*, 88 NY2d 172, 183 [1996], quoting *Hernandez v New York*, 500 US 352, 360 [1991]). To satisfy its step two burden, the nonmovant need not offer a persuasive or even a plausible explanation but may offer "*any facially neutral reason* for the challenge—even if that reason is ill-founded—so long as the reason does not violate equal protection" (*id.* [internal quotation marks omitted]; *see Purkett v Elem*, 514 US 765, 767-768 [1995]). If the nonmovant cannot meet the step two burden, an equal protection violation has been established (*see Smocum*, 99 NY2d at 422), and the juror must be seated notwithstanding the peremptory challenge (*see People v Kern*, 75 NY2d 638, 657-658 [1990]).

On the other hand, if the step two burden is met, then the

inference of discrimination is overcome, and the court, at step three, must make the "ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*Smocum*, 99 NY2d at 422). The court may make its ultimate determination without further argument from the moving party (*see id.*), but the court must in every case make a determination whether the nonmovant's facially nondiscriminatory explanation is pretextual (*see Payne*, 88 NY2d at 183). It is the moving party that always has the "ultimate burden of persuading the court that the reasons are merely a pretext for intentional discrimination" (*Smocum*, 99 NY2d at 422).

We agree with defendant that the issue whether the People established a prima facie case of discrimination at step one of the *Batson* inquiry is not moot. Whether a *Batson* applicant made out a prima facie case of discrimination is moot only if the court proceeded to step three of the inquiry and " 'has ruled on the ultimate question of intentional discrimination' " (*People v Bridgeforth*, 28 NY3d 567, 575 [2016], quoting *Hernandez*, 500 US at 359). Here, however, the court "stopped at step two and wrongly stated that the proffered reason for the challenge was not [gender] neutral[, and thus] . . . it cannot be said that 'the trial court [had] ruled on the ultimate question of intentional discrimination' " (*Payne*, 88 NY2d at 182 n 1, quoting *Hernandez*, 500 US at 359).

With respect to the merits of defendant's contention concerning the step one inquiry, we agree with him that the People failed to establish a prima facie case of discrimination. The only ground asserted by the People in support of their *Batson* application was that every peremptory challenge exercised by defendant was used to strike a woman from the jury panel. As defendant argued in opposition, the People's assertion was incorrect. In fact, defendant had previously exercised peremptory challenges to excuse two men from the jury panel. Thus, the only fact articulated by the People in support of their *Batson* application is belied by the record. Inasmuch as the People failed to make out a prima facie case of discrimination, the court erred in proceeding to step two of the inquiry and ultimately in seating the juror notwithstanding defendant's peremptory challenge (*cf. Kern*, 75 NY2d at 657-658).

We generally would reverse the judgment and grant a new trial under these circumstances (*see Mallory*, 121 AD3d at 1568). Here, however, defendant was convicted of relatively minor offenses and has already served his sentence, and we therefore reverse the judgment and dismiss the indictment rather than grant a new trial (*cf. People v Allen*, 39 NY2d 916, 917-918 [1976]; *see generally People v Flynn*, 79 NY2d 879, 882 [1992]; *People v Hillard*, 151 AD3d 743, 745 [2d Dept 2017], *lv denied* 30 NY3d 1019 [2017]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

167

CA 17-00324

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

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD L. FIANDACH, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT PRO SE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered October 14, 2016. The order granted the motion of defendant to dismiss the complaint, denied the motion of plaintiff to disqualify counsel for defendant and denied the motion of plaintiff to strike the affidavit of defendant's expert.

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

Memorandum: In November 2011, plaintiff was driving 85 miles per hour down Lake Ontario State Parkway with a blood-alcohol level of 0.15, when his vehicle broadsided another vehicle, killing both persons therein. Plaintiff drove away from the scene at high speed and crashed his vehicle, seriously injuring himself and his passenger. The People sought to charge plaintiff with two counts of aggravated vehicular homicide (Penal Law § 125.14) and other crimes for which he faced consecutive terms of incarceration. While in the hospital, plaintiff retained defendant to represent him for a flat fee of $125,000. In October 2012, plaintiff pleaded guilty to, inter alia, vehicular manslaughter in the first degree (§ 125.13) in exchange for a term of incarceration of 5 to 15 years. Thereafter, plaintiff commenced this action to recover the full amount of the retainer.

Plaintiff contends that Supreme Court erred in granting defendant's motion to dismiss the complaint on the grounds of documentary evidence and failure to state a cause of action (*see* CPLR 3211 [a] [1], [7]). We agree with plaintiff with respect to the second cause of action based upon the alleged unconscionability of the retainer agreement, and we therefore modify the order accordingly. On a motion to dismiss, a court must accept the plaintiff's allegations as true and determine whether they fit into any cognizable legal

theory (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Matter of Machado v Tanoury*, 142 AD3d 1322, 1323 [4th Dept 2016]). Affidavits submitted by a plaintiff may also be considered to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Affidavits submitted by the defendant, however, rarely warrant dismissal of the complaint unless they conclusively establish that plaintiff has no cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

"[C]ourts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients" (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]; *see Matter of Lawrence*, 24 NY3d 320, 336 [2014]). Such an agreement is deemed to be unconscionable if it is "so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]" (*Lawrence*, 11 NY3d at 595 [internal quotation marks omitted]; *see Nalezenec v Blue Cross of W. N.Y.*, 172 AD2d 1004, 1005 [4th Dept 1991]). Procedural unconscionability requires us to examine the formation of the contract for a lack of meaningful choice (*see Lawrence*, 24 NY3d at 337; *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988]). "The most important factor [in determining procedural unconscionability] is whether the client was fully informed upon entering the agreement" (*Lawrence*, 24 NY3d at 337). Substantive unconscionability may be established if the amount of the attorney's fee is "out of all proportion to the value of the professional services rendered" (*id.* at 339; *see generally Gillman*, 73 NY2d at 12).

Accepting as true the allegations in the complaint and the averments in the affidavits submitted in opposition to the motion, we conclude that plaintiff has sufficiently alleged the elements of procedural and substantive unconscionability. As for procedural unconscionability, plaintiff alleged that, before entering into the agreement, he was not informed of the nature of the anticipated charges or the prospects of incarceration, and he was led to believe that defendant would be able to resolve the case without a prison sentence. At the time he entered into the agreement, plaintiff was in the hospital, and defendant was, or was perceived to be, an experienced attorney with unparalleled expertise in defending against cases involving driving while intoxicated. As for substantive unconscionability, plaintiff alleged that defendant's $125,000 fee was at least three times larger than, and thus drastically out of proportion with, fees charged in similar cases. We further conclude that defendant's evidentiary submissions in support of the motion, which included his own affidavit and that of an expert, did not conclusively establish that the agreement was " 'fair, reasonable, and fully known and understood' " by plaintiff (*Lawrence*, 24 NY3d at 336; *see generally Lawrence*, 11 NY3d at 595).

Nevertheless, we reject plaintiff's contention with respect to

the remaining causes of action. The first cause of action, alleging breach of fiduciary duty in charging an excessive fee, was based on the same facts and sought the same relief as the unconscionability cause of action, and thus it was properly dismissed as duplicative (*see generally Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014]). The 3rd, 4th, 5th, 9th, and 11th causes of action were properly dismissed inasmuch as they were either conclusively refuted by the documentary evidence or failed to state a cause of action (*see* CPLR 3211 [a] [1], [7]). We note that plaintiff does not contend on appeal that the court erred in dismissing the 6th, 7th, 8th, and 10th causes of action, and thus he has abandoned any such contention (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Plaintiff further contends that the court abused its discretion in denying his motion to disqualify defendant's attorney. More particularly, plaintiff contends that the attorney and law firm representing defendant must be disqualified because plaintiff previously consulted with another attorney at the law firm. We reject that contention. In opposition to the motion, defendant submitted the affidavits of his attorney, the attorney with whom plaintiff previously consulted, and the managing partner of their law firm. Those affidavits establish that the attorney with whom plaintiff consulted had no recollection and kept no notes of the consultation, did not share with defendant's attorney any information that he learned during the consultation, and would not discuss the present action with defendant's attorney in the future. Furthermore, the affidavits establish that the law firm employs screening procedures consistent with the Rules of Professional Conduct and that defendant's attorney would not be sharing any fees with the attorney with whom plaintiff consulted. Thus, the affidavits establish compliance with rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), and we conclude that the court properly exercised its discretion in denying the motion (*see Landon v Austin*, 129 AD3d 1282, 1284 [3d Dept 2015]; *Jozefik v Jozefik*, 89 AD3d 1489, 1490 [4th Dept 2011]).

Plaintiff next contends that the court erred in denying his motion to strike the affidavit of defendant's expert, who is also an attorney, because plaintiff allegedly mailed confidential information to the expert and thereby became a potential client of the expert. We reject that contention inasmuch as it was raised for the first time in plaintiff's reply papers and thus was properly not considered by the court (*see Schissler v Athens Assoc.*, 19 AD3d 979, 980 [3d Dept 2005]).

Contrary to plaintiff's final contention, we conclude that sanctions against defendant are unwarranted.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

176

KA 15-00972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIYHISE HUDDLESTON, JR., DEFENDANT-APPELLANT.

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

TIYHISE HUDDLESTON, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered February 19, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth 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 criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends in his pro se supplemental brief that County Court erred in refusing to suppress the evidence obtained by the police following the stop of the vehicle in which he was a passenger. We reject that contention.

As defendant correctly concedes, the police properly stopped the vehicle for a violation of Vehicle and Traffic Law § 375 (1) (b) (i) and, regardless of whether the stop was pretextual, it was lawful inasmuch as the police had probable cause to believe that the driver of the vehicle had committed a traffic violation (*see People v Pealer*, 89 AD3d 1504, 1506 [4th Dept 2011], *affd* 20 NY3d 447 [2013], *cert denied* 571 US —, 134 S Ct 105 [2013], *rearg denied* 24 NY3d 993 [2014]).

Following the lawful stop of the vehicle, the police determined that neither the driver nor defendant had a valid driver's license. "At that point, the [police] had a reasonable suspicion either that the vehicle had been operated by an unlicensed driver, or that the vehicle was soon going to be operated by an unlicensed driver, and thus its . . . towing was lawful" (*People v Witt*, 129 AD3d 1449, 1450

[4th Dept 2015], *lv denied* 26 NY3d 937 [2015]; *see People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *People v Cochran*, 22 AD3d 677, 677 [2d Dept 2005], *lv denied* 6 NY3d 753 [2005]). Contrary to defendant's contention, given the terms of the police department's written policy that was received in evidence at the suppression hearing and the testimony of one of the police officers that the decision to tow the vehicle was made in accordance with that policy, which we note was in conformance with applicable law (*see generally Witt*, 129 AD3d at 1450; *Wilburn*, 50 AD3d at 1618), we conclude that the officers' decision to tow the vehicle was lawful (*see People v Tardi*, 28 NY3d 1077, 1078-1079 [2016]; *People v Gabriel*, 155 AD3d 1438, 1440-1441 [3d Dept 2017]). Moreover, "[t]he record does not support defendant's contention that the [corresponding] inventory search was a mere pretext to uncover incriminating evidence; rather, the testimony established that the [officers'] 'intention for the search was to inventory the items in the vehicle' " (*People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017], quoting *People v Padilla*, 21 NY3d 268, 273 [2013], *cert denied* 571 US —, 134 S Ct 325 [2013]).

Defendant further contends in his pro se supplemental brief that suppression is warranted because an officer's trial testimony established for the first time that defendant was subjected to an illegal pat frisk, which unreasonably prolonged his detention and revealed no evidence of criminality. That contention is not properly before us. " 'Where, as here, the defendant fails to move to reopen a suppression hearing, he or she may not rely upon the trial testimony to challenge the suppression ruling' " (*People v Mosca*, 294 AD2d 938, 939 [4th Dept 2002], *lv denied* 99 NY2d 538 [2002]; *see People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *rearg denied* 55 NY2d 1038 [1982], *cert denied* 456 US 1010 [1982]). Defendant's contention that the police otherwise unreasonably prolonged the traffic stop is not preserved for our review because he did not raise his contention before the suppression court (*see* CPL 470.05 [2]). In any event, we conclude that defendant's contention lacks merit inasmuch as there is no evidence that the police " 'inordinately prolong[ed] the detention beyond what was reasonable under the circumstances' " (*People v Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016]; *see People v Rainey*, 49 AD3d 1337, 1339 [4th Dept 2008], *lv denied* 10 NY3d 963 [2008]; *cf. People v Banks*, 85 NY2d 558, 562-563 [1995], *cert denied* 516 US 868 [1995]; *People v Porter*, 136 AD3d 1344, 1345 [4th Dept 2016]).

We reject defendant's contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel. We conclude that defendant did not meet his burden of establishing "that his attorney 'failed to provide meaningful representation' that compromised 'his right to a fair trial' " (*People v Pavone*, 26 NY3d 629, 647 [2015]). To the extent that defendant's claims of ineffective assistance of counsel in his main brief involve matters outside the record, they must be raised by way of a motion pursuant to CPL article 440 (*see People v Lopez-Mendoza*, 155 AD3d 526, 526-527 [1st Dept 2017]; *People v Murray*, 154 AD3d 881, 882-883 [2d

Dept 2017], *lv denied* 30 NY3d 1118 [2018]).

Defendant failed to preserve for our review his contention in his main brief that the court in sentencing him penalized him for exercising his right to a trial, "inasmuch as [he] failed to raise that contention at sentencing" (*People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]; *see People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]). In any event, that contention lacks merit. " 'Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Martinez*, 26 NY3d 196, 200 [2015]). Here, contrary to defendant's contention, "[t]here is no evidence that defendant was given the lengthier sentence solely as a punishment for exercising his right to a trial" (*People v Aikey*, 94 AD3d 1485, 1486 [4th Dept 2012], *lv denied* 19 NY3d 956 [2012] [internal quotation marks omitted]; *see Pope*, 141 AD3d at 1112). Finally, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

180

KA 14-02099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC WOODY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CRAIG P. SCHLANGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 17, 2014. The judgment convicted defendant, upon his plea of guilty, of murder 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 murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), defendant contends that Supreme Court erred in denying his motion to suppress identification testimony on the ground that the photo array used in the identification procedure was unduly suggestive. The record reflects that the court did not make a determination regarding the suggestive nature of the array and instead went on to determine that the witness had an independent basis for identifying defendant. Thus, defendant forfeited his contention regarding suggestiveness by pleading guilty before the court issued a ruling on that contention (*see People v Harris*, 143 AD3d 911, 912 [2d Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *People v Newkirk*, 133 AD3d 1364, 1365 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]).

Furthermore, even if defendant's contention that the photo array was unduly suggestive was implicitly rejected by the court (*see People v Gates*, 152 AD3d 1222, 1223 [4th Dept 2017]; *People v Hampton*, 113 AD3d 1131, 1132 [2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1062 [2014], *cert denied* — US —, 135 S Ct 2389 [2015]), and thus defendant's contention that the court should have granted his suppression motion based thereon survives his guilty plea (*see* CPL 710.70 [2]), we reject that contention. "[W]hen an identification is the product of a suggestive pretrial identification procedure, a witness will nonetheless be permitted to identify a defendant in court

if that identification is based upon an independent source" (*People v Campbell*, 200 AD2d 624, 625 [2d Dept 1994], *lv denied* 83 NY2d 869 [1994]; *see People v Carson*, 122 AD3d 1391, 1391 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]). Here, after conducting a hearing and reviewing the appropriate factors (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Lopez*, 85 AD3d 1641, 1641 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]), the court properly determined that the People established the existence of an independent source by the requisite clear and convincing evidence (*see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]).

The sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

182

KA 17-01382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROY LANE, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 12, 2016. The judgment convicted defendant, upon a nonjury verdict, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him, following a nonjury trial, of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence. As defendant correctly concedes, his challenge to the sufficiency of the evidence is not preserved for our review because he failed to renew his motion for a trial order of dismissal after he presented evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Raymond*, 60 AD3d 1388, 1388-1389 [4th Dept 2009], *lv denied* 12 NY3d 919 [2009]). In any event, we conclude that both contentions lack merit.

Defendant challenges the sufficiency and weight of the evidence on the ground that neither his admissions in statements to the police nor the child victim's unsworn testimony was corroborated, as required by CPL 60.20 (3) and 60.50. Defendant's challenges to the sufficiency of the corroboration are unpreserved for our review (*see People v Tyra*, 84 AD3d 1758, 1759 [4th Dept 2011], *lv denied* 17 NY3d 822 [2011]; *People v Juara*, 279 AD2d 479, 480 [2d Dept 2001], *lv denied* 96 NY2d 831 [2001]), and lack merit inasmuch as defendant's admissions and the victim's unsworn testimony cross-corroborated each other (*see People v Bitting*, 224 AD2d 1012, 1012 [4th Dept 1996], *lv denied* 88 NY2d 845 [1996]; *People v Hamelinck*, 222 AD2d 1024, 1024 [4th Dept 1995], *lv denied* 87 NY2d 921 [1996]; *see generally People v Groff*, 71

NY2d 101, 109-110 [1987]). Moreover, although "prompt outcry evidence alone may not suffice to corroborate the testimony of an unsworn witness, it may be considered by the [factfinder] on the issue of corroboration under CPL 60.20" where, as here, there is other corroborative evidence (*People v Cordero*, 257 AD2d 372, 377 [1st Dept 1999], *lv denied* 93 NY2d 968 [1999]).

To the extent that defendant also contends that County Court erred in allowing the victim to give unsworn testimony, that contention is not preserved for our review and lacks merit. "[T]he record establishes that the victim 'possesse[d] sufficient intelligence and capacity to justify' her unsworn testimony" (*Raymond*, 60 AD3d at 1388, quoting CPL 60.20 [2]; *see People v DelPrince*, 70 AD3d 1350, 1350 [4th Dept 2010], *lv denied* 14 NY3d 840 [2010]).

The victim's unsworn testimony and defendant's admissions in his statements to the police are legally sufficient to establish that defendant rubbed the victim's groin and inserted a finger into her vagina, and "[t]he inference that defendant was seeking sexual gratification is clearly appropriate where, as here, a nonrelative touches the intimate parts of a child" (*People v Owens*, 149 AD3d 1561, 1563 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). We reject defendant's contention that he did not understand the import of his signed statements to the police inasmuch as "the record does not support a finding that he was 'unable to understand the meaning of his statements' " (*People v Carbonaro*, 134 AD3d 1543, 1548 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016], quoting *People v Schompert*, 19 NY2d 300, 305 [1967], *cert denied* 389 US 874 [1967]).

We thus conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495; *cf. People v Wallace*, 306 AD2d 802, 803 [4th Dept 2003]).

"Defendant failed to preserve for our review his contention that his waiver of the right to a jury trial is invalid on the ground that the record fails to establish either that he signed the written waiver in open court . . . , or that the waiver was knowing, intelligent, and voluntary" (*People v Ashkar*, 130 AD3d 1568, 1569 [4th Dept 2015], *lv denied* 26 NY3d 1142 [2016]; *see People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In any event, that contention lacks merit inasmuch as defendant " 'waived his right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that [his] waiver was knowing, voluntary, and intelligent' " (*Hailey*, 128 AD3d at 1416).

Defendant further contends that he was denied effective assistance of counsel based on numerous alleged failures of defense

counsel. To the extent that defendant contends that defense counsel was ineffective in failing to investigate the charges and defendant's psychiatric history and in failing to call an expert witness, that contention is "based on matters outside the record on appeal, [and] must be raised by way of a motion pursuant to CPL article 440" (*People v West*, 118 AD3d 1450, 1451 [4th Dept 2014], *lv denied* 24 NY3d 1048 [2014]). With respect to the remaining instances of alleged ineffective assistance, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

187

CA 17-01266

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

NEW YORK LAND DEVELOPMENT CORP.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GUY BROOKS BENNETT, DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSSETTIE ROSSETTIE & MARTINO LLP, CORNING (GABRIEL V. ROSSETTIE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered November 23, 2016. The judgment, among other things, declared that defendant's property is subject to a permanent easement appurtenant in favor of plaintiff's property.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the declaration is vacated and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant's property known as Steuben County Tax Parcel 055.00-01-013.000 is not subject to a permanent easement appurtenant in favor of plaintiff's property known as Steuben County Tax Parcel 069.00-01-010.000.

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that property owned by defendant is subject to a permanent easement appurtenant in favor of adjacent property owned by plaintiff. Defendant now appeals from a judgment, issued after a nonjury trial, in which Supreme Court declared that such an easement burdened defendant's property. We reverse the judgment and issue a declaration in favor of defendant.

Here, the evidence at trial established that, shortly before defendant purchased his parcel, a document was filed in the County Clerk's Office providing that defendant's predecessor in interest granted plaintiff's predecessor in interest the right to access plaintiff's property over defendant's parcel. The document further provided that plaintiff's predecessor in interest was responsible for maintaining the access road that crossed defendant's parcel. That document reflected that it was signed by both predecessors more than

nine years before it was filed. Filed with the document was a notarized statement from a person who witnessed the signing of the document, and who averred that both predecessors intended that plaintiff's predecessor have access to plaintiff's parcel over defendant's land "along a logging road that had fallen into disrepair." That witness also indicated that it was her impression that the access would be permanent. Before plaintiff purchased its parcel, defendant had erected a gate that blocked the access road.

The evidence at trial further established that plaintiff purchased its parcel with knowledge that the gate existed. In addition, plaintiff bought the property at an auction, and the aerial photographs of the parcel that were displayed at the auction were marked to indicate that it was not clear whether there was access through defendant's parcel. After plaintiff purchased the property, defendant declined to permit plaintiff to use the access road.

The law is well settled that " '[a]n easement appurtenant is created when such easement is (1) conveyed in writing, (2) subscribed by the person creating the easement and (3) burdens the servient estate for the benefit of the dominant estate' " (*Franklin Park Plaza, LLC v V & J Natl. Enters., LLC*, 57 AD3d 1450, 1451 [4th Dept 2008]). Although no specific words are required to express the permanency of an easement (*see Pomygalski v Eagle Lake Farms*, 192 AD2d 810, 811-812 [3d Dept 1993], *lv denied* 82 NY2d 656 [1993]; *Evans v Taraszkiewicz*, 125 AD2d 884, 886 [3d Dept 1986]), to "create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license . . . The writing must establish unequivocally the grantor's intent to give *for all time to come* a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement" (*Willow Tex v Dimacopoulos*, 68 NY2d 963, 965 [1986]; *see State of New York v Johnson*, 45 AD3d 1016, 1018 [3d Dept 2007]; *see also Franklin Park Plaza, LLC*, 57 AD3d at 1451).

Here, the document signed by the parties' predecessors in interest contains no words of permanency, nor any indication that it is meant to bind the grantor's successors in interest. Thus, we conclude that plaintiff failed to establish that the parties' predecessors intended to create an easement (*cf. Webster v Ragona*, 7 AD3d 850, 854 [3d Dept 2004]).

We reject plaintiff's contention that the deposition testimony of the witness to the signing of the document, which was admitted in evidence at trial by stipulation of the parties, established that the parties' predecessors intended to create a permanent easement. That witness's " 'conclusory, unsubstantiated assertions' are insufficient to establish plaintiff's entitlement to the relief sought" (*Towner*

Living Trust v Lottermoser, 56 AD3d 1275, 1276 [4th Dept 2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

188

CA 17-00067

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

CELESTE GADBOW-MARENIC, PLAINTIFF-RESPONDENT,

V ORDER

THOMAS K. MARENIC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS K. MARENIC, DEFENDANT-APPELLANT PRO SE.

JOHN W. DILLON, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 21, 2016 in a divorce action. The amended order, among other things, equitably distributed the marital assets.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on March 13, 2018 and by the attorney for the plaintiff on March 23, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

189

CA 17-00068

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

CELESTE GADBOW-MARENIC, PLAINTIFF-RESPONDENT,

V ORDER

THOMAS K. MARENIC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS K. MARENIC, DEFENDANT-APPELLANT PRO SE.

JOHN W. DILLON, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Erin P. Gall, J.), entered June 27, 2016 in a divorce action. The judgment, among other things, dissolved the marriage between the parties.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on March 13, 2018 and by the attorney for the plaintiff on March 23, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

190

CA 17-00069

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

CELESTE GADBOW-MARENIC, PLAINTIFF-RESPONDENT,

V ORDER

THOMAS K. MARENIC, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS K. MARENIC, DEFENDANT-APPELLANT PRO SE.

JOHN W. DILLON, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered July 28, 2016 in a divorce action. The order directed defendant to pay $13,326.25 in attorney's fees to plaintiff's attorney.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on March 13, 2018 and by the attorney for the plaintiff on March 23, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

193

CA 17-01369

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

SAMUEL M. GIANCARLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS J. KUREK, M.D., WENDY P. OUELLETTE, C.R.N.A., MAPLE-GATE ANESTHESIOLOGISTS, P.C., DEFENDANTS-APPELLANTS, AARON B. HOFFMAN, M.D., UNIVERSITY AT BUFFALO SURGEONS, INC., NATHAN JOHNSON, M.D., UNIVERSITY AT BUFFALO OTOLARYNGOLOGY, INC., AND KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, DEFENDANTS-RESPONDENTS.

RICOTTA & VISCO, BUFFALO (BRYAN J. DANIELS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered May 26, 2017. The order, inter alia, denied the motion of defendants Carlos J. Kurek, M.D., Wendy P. Ouellette, C.R.N.A. and Maple-Gate Anesthesiologists, P.C., for summary judgment.

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

Memorandum: In this medical malpractice action, Carlos J. Kurek, M.D., Wendy P. Ouellette, C.R.N.A., and Maple-Gate Anesthesiologists, P.C. (defendants) appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint and cross claims against them. We affirm. Plaintiff commenced this action seeking damages for injuries that he allegedly sustained as a result of, among other things, defendants' negligent care and treatment, including, inter alia, ordering and/or administering Toradol to plaintiff after he underwent a laparoscopic sleeve gastrectomy. After that surgery, plaintiff developed complications, including internal bleeding and a perforation in his stomach lining near the surgical staple line, which led to two additional surgeries and an extended hospital stay.

We reject defendants' contention that Supreme Court erred in denying their motion. In support of their motion, defendants submitted, among other things, the deposition of plaintiff's surgeon, defendant Aaron B. Hoffman, M.D., who testified that Toradol was

contraindicated in laparoscopic sleeve gastrectomies because it can lead to complications including bleeding and gastrointestinal perforation. Hoffman opined that the timing and location of plaintiff's complications supported the conclusion that Toradol contributed to plaintiff's bleeding and perforation. Thus, we conclude that defendants failed to meet their initial burden of establishing that the use of Toradol was within the applicable standard of care "or that any alleged departure [from the applicable standard of care] did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]), inasmuch as their own submissions raise issues of fact whether they deviated from the applicable standard of care and whether that deviation was a proximate cause of plaintiff's injuries (*see Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]; *see generally Wilk v James*, 107 AD3d 1480, 1484 [4th Dept 2013]). Defendants' submissions also raise issues of fact whether Toradol was not intended by the manufacturer for use in major abdominal surgeries (*see generally Abrams v Bute*, 138 AD3d 179, 186 [2d Dept 2016], *lv denied* 28 NY3d 910 [2016]), and whether, prior to plaintiff's laparoscopic sleeve gastrectomy, defendants were aware of Hoffman's concerns about the use of Toradol during that procedure.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

197

KA 15-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN R. ALEXANDER, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered April 14, 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 [1] [b]), defendant contends that the prosecutor's justification instruction to the grand jury rendered the proceeding defective and thus that County Court erred in refusing to dismiss the indictment (*see generally* CPL 210.20 [1] [c]). Although the People correctly concede that the instruction was erroneous, we nevertheless conclude that dismissal is not required because the error did not impair the integrity of the grand jury proceeding with respect to the sole count of the indictment to which defendant ultimately pleaded guilty.

"A grand jury proceeding is defective . . . when[, inter alia, it] fails to conform to the requirements of [CPL] article [190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]). Consistent with the general rule that "each count in an indictment is to be treated as if it were a separate indictment" (*People v Ardito*, 86 AD2d 144, 163 [1st Dept 1982], *affd for reasons stated* 58 NY2d 842 [1983]), impairment and prejudice must be evaluated on a count-by-count basis (*see People v Keller*, 214 AD2d 825, 825-826 [3d Dept 1995]; *see generally People v Montanez*, 90 NY2d 690, 693 [1997]). Although some errors affect the entire grand jury presentation and require dismissal of all counts of an indictment (*see People v Connolly*, 63 AD3d 1703, 1704-1705 [4th

Dept 2009]), other errors are more limited and affect only certain counts (*see Keller*, 214 AD2d at 825-826).

Here, defendant pleaded guilty to criminal possession of a weapon in the second degree under count two of the indictment in full satisfaction of all seven counts thereof. The remaining six counts were dismissed by operation of law (*see* CPL 220.30 [2]), and further prosecution thereon is barred (*see* CPL 40.20 [1]; 40.30 [1] [a]). Thus, to secure relief in this appeal, defendant must demonstrate that the erroneous justification instruction impaired the integrity of the grand jury proceeding and potentially prejudiced him with respect to count two (*see Keller*, 214 AD2d at 825-826; *see generally People v Welch*, 2 AD3d 1354, 1356 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]). Any impairment or potential prejudice with respect to the other counts is academic because those counts "were ultimately dismissed" (*People v Chilson*, 285 AD2d 733, 734 [3d Dept 2001], *lv denied* 97 NY2d 640 [2001], *reconsideration denied* 97 NY2d 752 [2002]; *see People v Mehmood*, 112 AD3d 850, 855 [2d Dept 2013]).

Defendant failed to establish that the erroneous justification instruction either impaired the integrity of the grand jury proceeding or potentially prejudiced him with respect to count two inasmuch as the statutory defense of justification is inapplicable to the crime of criminal possession of a weapon, in any degree (*see People v Pons*, 68 NY2d 264, 265-268 [1986]; *People v Almodovar*, 62 NY2d 126, 130-131 [1984]). Defendant's contrary assertion, i.e., that a correct justification instruction could have negated the "intent to use unlawfully" element of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1]), was explicitly rejected by the Court of Appeals in *Pons* (*see id.* at 266-268). Defendant's claim of spillover prejudice, i.e., his supposition that the grand jury would not have indicted him on count two had it been properly instructed on the justification defense applicable to other counts, is wholly speculative and does not satisfy his "burden to demonstrate . . . the existence of defects impairing the integrity of the [g]rand [j]ury proceeding and giving rise to a possibility of prejudice" (*Welch*, 2 AD3d at 1356 [internal quotation marks omitted]). Moreover, defendant's claim of spillover prejudice assumes that the grand jury ignored its sworn obligation to find sufficient evidence of his "intent" to use a weapon unlawfully before returning an indictment for criminal possession of a weapon in the second degree (§ 265.03 [1]), an element that cannot be negated with a defense of justification. As the Court of Appeals observed in *Pons*, "intent to use and use of force are not the same, and justification, by the very words of the statute (Penal Law § 35.15), is limited to the latter" (*id.* at 267). Thus, the faulty justification instruction did not impair the integrity of the grand jury proceeding or potentially prejudice defendant with respect to count two (*see People v Roach*, 147 AD3d 1423, 1423-1424 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Flores*, 219 AD2d 40, 45 [1st Dept 1996]).

We note that the certificate of conviction incorrectly reflects that defendant was charged in count seven of the indictment under

Penal Law § 120.10 (1), and it must therefore be amended to reflect that he was charged under § 120.10 (4). Contrary to defendant's contention, no further correction of the certificate is required. Finally, we do not address defendant's remaining contentions because defense counsel withdrew them at oral argument of this appeal.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

211

CA 17-00307

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

IN THE MATTER OF WILLIAM JAQUISH AND VIRGINIA JAQUISH, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF GERMAN FLATTS AND TOWN OF GERMAN FLATTS, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICES OF DUNNING & KRUPA, PLLC, ILION (AUDREY BARON DUNNING OF COUNSEL), FOR PETITIONERS-APPELLANTS.

YOUNG/SOMMER, LLC, ALBANY (MICHAEL J. MOORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated judgment, order and injunction) of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered November 4, 2016 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town Board of the Town of German Flatts (Board) denying their application for a floodplain development permit (FDP) for a mobile home park located in respondent Town of German Flatts (Town). The Board denied the application on the ground that, inter alia, petitioners did not submit, as required by the Town's Flood Damage Prevention Law, a proper "technical evaluation" for the modifications made by petitioners to a stone wall erosion control structure on the east bank of Fulmer Creek, which was originally constructed by the Town in 2007-2008.

In appeal No. 1, petitioners appeal from a judgment that, inter alia, dismissed the petition. In appeal No. 2, petitioners appeal and respondents cross-appeal from an order that, inter alia, denied both petitioners' motion for leave to reargue and/or renew the petition and respondents' cross motion for costs, attorneys' fees and monetary sanctions. We note as a preliminary matter that, inasmuch as the parties have failed to raise in their briefs any issues concerning the order in appeal No. 2, they have abandoned any challenges with respect thereto (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011];

see generally Erie Materials, Inc. v Central City Roofing Co., Inc., 132 AD3d 1309, 1311 [4th Dept 2015]). We therefore dismiss the appeal and cross appeal from the order in appeal No. 2.

With respect to appeal No. 1, we note that, pursuant to the notices to vacate the premises that petitioners served on all tenants of the mobile home park on or before October 31, 2017, such tenants no longer have any interest in the subject real property (*see* Real Property Law § 228). We therefore conclude that petitioners' contention that the judgment must be vacated because of respondents' failure to join necessary parties, i.e., the tenants, has been rendered moot (*see generally Matter of Yaeger v Town of Lockport Planning Bd.*, 62 AD3d 1250, 1251 [4th Dept 2009]).

Contrary to petitioners' further contention, we conclude that the denial of petitioners' application for an FDP was not arbitrary or capricious, in violation of lawful procedure, or an abuse of discretion (*see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]).

Petitioners' contention that respondents' conduct constituted an unconstitutional taking of petitioners' property is not properly before us inasmuch as it is raised for the first time on appeal (*see Brown v Brown*, 34 AD2d 727, 727 [4th Dept 1970]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

212

CA 17-00790

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

IN THE MATTER OF WILLIAM JAQUISH AND VIRGINIA JAQUISH, PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF GERMAN FLATTS AND TOWN OF GERMAN FLATTS, RESPONDENTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

LAW OFFICES OF DUNNING & KRUPA, PLLC, ILION (AUDREY BARON DUNNING OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

YOUNG/SOMMER, LLC, ALBANY (MICHAEL J. MOORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered March 20, 2017. The order, among other things, denied petitioners' motion for leave to reargue and/or renew the petition.

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

Same memorandum as in *Matter of Jaquish v Town Board of Town of German Flatts* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

214

CA 17-01270

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

IN THE MATTER OF SCOTT E. WOODWORTH AND
LYNN M. WOODWORTH, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GROVELAND AND ZONING BOARD OF APPEALS
OF TOWN OF GROVELAND, RESPONDENTS-RESPONDENTS.

THE WOODWORTH LAW FIRM, ROCHESTER (RYAN C. WOODWORTH OF COUNSEL), FOR PETITIONERS-APPELLANTS.

DIMATTEO & ROACH, ATTORNEYS AT LAW, WARSAW (DAVID M. ROACH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), dated December 9, 2016 in a CPLR article 78 proceeding. The judgment dismissed the amended petition.

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

Memorandum: Petitioners, the owners of a single-family home located in respondent Town of Groveland, planned to build an addition to their home and applied for a variance from the front setback requirements set forth in Town of Groveland Zoning Law § 27 (F) (1). Following a public hearing at which numerous adjoining property owners objected to the variance, respondent Zoning Board of Appeals of the Town of Groveland (ZBA) denied petitioners' application. Petitioners thereafter modified the plans for the addition and again applied for a front setback variance, and the ZBA again denied petitioners' application. Petitioners commenced a CPLR article 78 proceeding challenging the ZBA's decision, and Supreme Court remitted the matter to the ZBA for reconsideration upon concluding, inter alia, that the ZBA's decision lacked information sufficient to enable the court to determine whether it was supported by a rational basis.

On remittal, the ZBA held a work session on the application on April 11, 2016 and issued a written decision denying the application. The decision was filed with the Town Clerk on April 12, 2016, and the draft hearing minutes were filed on April 18, 2016. Petitioners commenced the instant CPLR article 78 proceeding on May 21, 2016 challenging the ZBA's determination.

Contrary to petitioners' contention, the court properly dismissed

the amended petition as time-barred, as asserted by respondents in their answer. The 30-day statute of limitations for this proceeding began to run on April 12, 2016, when the ZBA's decision was filed in the Town Clerk's office, and thus the limitations period expired before petitioners commenced this proceeding (*see* Town Law § 267-c [1]). We reject petitioners' contention that the statute of limitations began to run on April 18, 2016, when the ZBA filed the draft hearing minutes (*see generally Matter of Gilmore v Planning Bd. of Town of Ogden*, 16 AD3d 1074, 1075 [4th Dept 2005]). We further reject petitioners' contention that respondents are equitably estopped from asserting the statute of limitations as a defense (*see generally Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Finally, we have considered petitioners' remaining contentions and conclude that they do not warrant reversal or modification of the judgment.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

215

CA 17-00869

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

GOLF GLEN PLAZA NILES, IL. LIMITED PARTNERSHIP,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMCOID USA, LLC, ET AL., DEFENDANTS,
AND DAVID DE PIRRO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (NICHOLAS DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered August 3, 2016. The order denied the motion of defendant David De Pirro to vacate a default judgment.

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

Memorandum: David De Pirro (defendant) executed a lease guaranty (Guaranty) in which he agreed to guarantee "all the covenants, terms, and conditions" of a lease agreement for commercial real estate executed by plaintiff, the lessor, and defendant Amcoid USA, LLC, the lessee (Amcoid). The Guaranty and the lease agreement were signed on the same day. The lease agreement contained a forum selection clause whereby plaintiff and Amcoid agreed that any controversy between them, pursuant to the lease or otherwise, would be determined in the county and state in which plaintiff's principal office was located, i.e., Monroe County, New York. The lease agreement was later assigned by Amcoid to defendant The Hot Jalapeno, Inc., which later assigned all of its rights and obligations under the lease agreement to defendants Peter Hwang and Kyong Hwang. Defendant signed both assignments in his capacity as "Guarantor." Each assignment provided that any dispute with respect thereto "shall be adjudicated in a court within the jurisdiction located within Monroe County, New York and the parties irrevocably consent to the personal jurisdiction and venue of such court."

In September 2013, plaintiff commenced this action in Monroe County seeking, inter alia, unpaid rent based on allegations that defendants had defaulted under the lease agreement and that all of the

defendants are jointly and severally liable for the unpaid rent. Defendant, a resident of the State of Illinois, was personally served with the summons and complaint in Illinois. In January 2014, a default judgment was entered against defendant. Plaintiff subsequently commenced an action in an Illinois court seeking to enforce the default judgment. Defendant unsuccessfully attempted to vacate the default judgment in the Illinois court, and then he moved in Supreme Court in New York for an order vacating the default judgment and dismissing the complaint against him on the ground of lack of personal jurisdiction, and in the alternative he sought to vacate the default judgment on the ground that his default was excusable. In appeal No. 1, defendant appeals from an order that denied his motion. In appeal No. 2, he appeals from an order that denied his motion for leave to renew his prior motion. We affirm the order in appeal No. 1. Inasmuch as defendant has not raised any contentions with respect to the order in appeal No. 2, we dismiss the appeal therefrom as abandoned (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]; *Puccini v Owens-Illinois Glass Co.*, 146 AD2d 758, 759-760 [2d Dept 1989]).

In appeal No. 1, defendant contends that the court erred in denying his motion seeking to vacate the default judgment and dismissal of the complaint against him based on the lack of personal jurisdiction. We reject that contention. The court had jurisdiction over defendant inasmuch as the Guaranty signed by defendant incorporated the terms of the lease agreement, including the forum selection clause. Thus, by assuming the obligations in the lease agreement, defendant consented to personal jurisdiction in New York for litigation with respect to the lease (*see Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 123 AD3d 1101, 1102 [2d Dept 2014]; *see also Greene's Ready Mixed Concrete Co. v Fillmore Pac. Assoc. Ltd. Partnership*, 808 F Supp 307, 310 [SD NY 1992]). Furthermore, even if the Guaranty is not sufficient to establish that defendant consented to personal jurisdiction in New York, the assignments that were signed by defendant also contained a forum selection clause designating courts located within Monroe County, New York as the forum for adjudicating any dispute with respect thereto. Although defendant contends that the signatures on the assignments were forgeries, mere bald assertions of forgery are insufficient to resolve that issue in his favor (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]).

Contrary to defendant's further contention, the court properly denied as untimely the request in his motion to vacate the default judgment and allow him to proceed on the merits on the ground that he had a reasonable excuse for the default and has a meritorious defense (*see* CPLR 5015 [a] [1]). Moreover, even if defendant had timely moved to vacate the default on that ground, we conclude that defendant's assertion that he erroneously assumed that his wife's cousin and her attorney would respond to the complaint on his behalf does not constitute a reasonable excuse (*see generally Yao Ping Tang v Grand Estate, LLC*, 77 AD3d 822, 822-823 [2d Dept 2010]; *Moore v Claudio*, 224 AD2d 502, 503 [2d Dept 1996]). Further, defendant's unsubstantiated claim that the signatures on the assignments were forged fails to

establish that he has a meritorious defense (*cf. Professional Offshore Opportunity Fund, Ltd. v Braider*, 121 AD3d 766, 768 [2d Dept 2014]; *see generally Banco Popular N. Am.*, 1 NY3d at 384).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

216

CA 17-01311

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

GOLF GLEN PLAZA NILES, IL. LIMITED PARTNERSHIP,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMCOID USA, LLC, ET AL., DEFENDANTS,
AND DAVID DE PIRRO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (NICHOLAS DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 15, 2017. The order denied the motion of defendant David De Pirro for leave to renew a prior motion.

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

Same memorandum as in *Golf Glen Plaza Niles, Il. Ltd. Partnership v Amcoid USA, LLC* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

223

KA 16-00130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CISHAHAYO ALBERT, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 7, 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 an *Alford* plea of rape in the third degree (Penal Law § 130.25 [3]). Defendant contends that County Court erred in accepting his *Alford* plea because the record does not contain the requisite strong evidence of guilt, establish that the plea was the product of a voluntary and rational choice, or demonstrate his true understanding of the nature of the *Alford* plea and its consequences. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve those contentions for our review (*see People v Dixon*, 147 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]; *People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). Defendant further contends that preservation is not required because the plea was not knowingly, voluntarily and intelligently entered inasmuch as he made statements during the plea proceeding that were inconsistent with guilt and the court failed to conduct the requisite "further inquiry" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We conclude that preservation is required because the "record indicated strong evidence of guilt and the court was not required to do more than it did to ensure that defendant voluntarily entered the plea" (*People v Couser*, 28 NY3d 368, 379 [2016]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Dixon*, 147 AD3d at 1519). Defendant also failed to preserve for our review his further contention that he was denied his due process right to an interpreter by virtue of the

interpreter's alleged translation errors (*see* CPL 470.05 [2]; *People v Melendez*, 8 NY3d 886, 887 [2007]; *People v Duenas*, 120 AD2d 978, 978-979 [4th Dept 1986]; *see also People v Wong*, 256 AD2d 724, 724-725 [3d Dept 1998], *lv denied* 93 NY2d 903 [1999]), and we likewise 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]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

224

KA 17-01655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER K. KENNARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered August 23, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]). We previously reversed the judgment convicting defendant of, inter alia, six counts of rape in the second degree (§ 130.30 [1]) and granted defendant a new trial (*People v Kennard*, 134 AD3d 1519 [4th Dept 2015]). The judgment now on appeal is the result of the new trial.

Contrary to defendant's contention, the inculpatory responses she gave to a police officer who was completing a prisoner data report were admissible and not subject to suppression even though they were made after defendant unequivocally invoked her right to counsel and not included on the CPL 710.30 notice. The Court of Appeals has held that answers to routine booking questions, i.e., pedigree questions, "fall outside the protection of *Miranda* if they are 'reasonably related to the police's administrative concerns' " (*People v Rodney*, 85 NY2d 289, 292 [1995], quoting *Pennsylvania v Muniz*, 496 US 582, 601-602 [1990]). Inasmuch as responses to pedigree questions "are not suppressible even when obtained in violation of *Miranda*, defendant lacks a constitutional basis upon which to challenge the voluntariness of [her] statement[s] and[,] where there is no question of voluntariness, the People are not required to serve defendant with [a CPL 710.30] notice" concerning those statements (*id.* at 293).

Here, the questions, some of which were related to the charges for which defendant was being arrested, were "neither 'a disguised attempt at [an] investigatory interrogation' " (*People v Raucci*, 109 AD3d 109, 120 [3d Dept 2013], *lv denied* 22 NY3d 1158 [2014]), "nor [inquiries] that the police '*should have known* [were] reasonably likely to elicit . . . incriminating response[s]' " (*id.*, quoting *Rhode Island v Innis*, 446 US 291, 302 [1980]; *cf. People v Buza*, 144 AD3d 1495, 1496-1497 [4th Dept 2016]; *People v Slade*, 133 AD3d 1203, 1206-1207 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

The questions related to defendant's age and date of birth were taken straight from the prisoner data report and "were not designed to inculpate defendant" (*People v Jackson*, 237 AD2d 179, 180 [1st Dept 1997], *lv denied* 89 NY2d 1095 [1997]; *see People v Alhadi*, 151 AD2d 873, 874-875 [3d Dept 1989], *lv denied* 74 NY2d 804 [1989]; *People v White*, 149 AD2d 939, 939 [4th Dept 1989], *lv denied* 74 NY2d 821 [1989]). The same is true of the questions related to defendant's maiden name (*see People v McCloud*, 50 AD3d 379, 379-380 [1st Dept 2008], *lv denied* 11 NY3d 738 [2008]; *see also People v Zarbhanelian*, 96 AD3d 511, 511 [1st Dept 2012], *lv denied* 19 NY3d 1106 [2012]; *People v Alleyne*, 34 AD3d 367, 368 [1st Dept 2006], *lv denied* 8 NY3d 918 [2007], *cert denied* 552 US 878 [2007]), and "whether [s]he had any scars[or] tat[t]oos" (*People v Richard*, 232 AD2d 872, 874 [3d Dept 1996], *lv denied* 89 NY2d 1099 [1997]).

Defendant further contends that County Court limited her right to present a defense when it precluded defense witnesses from rebutting testimony suggesting that defendant had engaged in grooming behavior by giving the victim multiple gifts. We reject that contention. It is well settled that "[c]haracter evidence is strictly limited to testimony concerning the [party's] reputation in the community . . . , and thus a character witness may not testify to specific acts in order to establish" a particular character trait (*People v Jimmeson*, 101 AD3d 1678, 1679 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013] [internal quotation marks omitted]; *see People v Berge*, 103 AD2d 1041, 1041-1042 [4th Dept 1984]; *see generally People v Van Gaasbeck*, 189 NY 408, 421 [1907]).

Here, the court properly precluded defense witnesses from testifying about specific times that defendant had given gifts to other people and limited their testimony to defendant's general reputation for generosity. Defendant contends that the court improperly interjected itself into the proceedings by sua sponte limiting the testimony without any objection by the prosecutor and that the evidence was admissible as habit evidence. Those contentions are raised for the first time on appeal, and thus they are not preserved for our review (*see People v Chavis*, 59 AD3d 240, 240 [1st Dept 2009], *lv denied* 12 NY3d 913 [2009]; *People v Infante*, 217 AD2d 440, 440 [1st Dept 1995], *lv denied* 87 NY2d 847 [1995]; *see also People v Simmons*, 39 AD3d 235, 236 [1st Dept 2007], *lv denied* 9 NY3d 851 [2007]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject defendant's contention that the sentence following the retrial is presumptively vindictive because the sentence imposed on the rape count is greater than the sentence imposed on that same count following the first trial. Where, as here, "a defendant receives a greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness" (*People v Young*, 94 NY2d 171, 179 [1999], *rearg denied* 94 NY2d 876 [2000]). We conclude that the record "does not support defendant's contention that there is a reasonable likelihood that the enhanced sentence was the result of vindictiveness" (*People v Bludson*, 15 AD3d 912, 913 [4th Dept 2005], *lv denied* 4 NY3d 827 [2005], *reconsideration denied* 5 NY3d 785 [2005]; *cf. People v Rogers*, 56 AD3d 1173, 1174-1175 [4th Dept 2008], *lv denied* 12 NY3d 787 [2009]). Finally, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

230

OP 17-01262

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

IN THE MATTER OF SANDRA DOORLEY, MONROE COUNTY DISTRICT ATTORNEY, PETITIONER,

V MEMORANDUM AND ORDER

MELCHOR E. CASTRO, ACTING MONROE COUNTY COURT JUDGE, AND MARQUISE WALKER, CRIMINAL DEFENDANT, RESPONDENTS.

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

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT MARQUISE WALKER, CRIMINAL DEFENDANT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit respondent Melchor E. Castro, Acting Monroe County Court Judge, from enforcing a disclosure order.

It is hereby ORDERED that the amended petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> It is ADJUDGED that respondent Melchor E. Castro, Acting Monroe County Court Judge, is prohibited from enforcing the order dated July 31, 2017, as amended for clerical errors on August 1, 2017, under Monroe County indictment No. 2017-0305.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to prohibit Melchor E. Castro, Acting Monroe County Court Judge (respondent), from enforcing an order directing petitioner to permit the attorney for respondent Marquise Walker, a criminal defendant (hereafter, defendant), to inspect a video recording of an interview of a child victim conducted by an advocate from the Bivona Child Advocacy Center (Bivona) in Rochester for the purpose of determining whether it constitutes exculpatory evidence. We agree with petitioner that respondent acted in excess of his authorized powers in ordering disclosure to defendant's attorney. Although respondent could have viewed the video recording in camera in order to make a determination whether it contained exculpatory evidence, he declined to do so.

Defendant was indicted on charges of predatory sexual assault against a child (Penal Law § 130.96) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [a]) with respect to a then three-year-old child. In discovery material provided to defendant, there was a police report indicating that the alleged victim had been interviewed by a Bivona advocate and that the interview had been video recorded. Defendant's attorney orally requested disclosure of the video recording, and petitioner opposed the request. Respondent orally ordered petitioner to disclose the video recording before a pretrial hearing in the criminal matter, despite the fact that neither the child nor the Bivona advocate would testify at the pretrial hearing. Petitioner filed a petition seeking to prohibit respondent from enforcing that oral order and sought a stay of enforcement.

Before any determination was made on the request for a stay, respondent issued a written order acknowledging that the video recording did not constitute *Rosario* material and that he thus lacked any authority to order its disclosure on that ground (*see* CPL 240.45 [1]). Instead, respondent concluded that the video recording could potentially contain exculpatory evidence, which petitioner would be obligated to disclose under *Brady v Maryland* (373 US 83, 87-88 [1963]; *see* CPL 240.20 [1] [h]; *People v Santorelli*, 95 NY2d 412, 421 [2000]). Respondent determined that neither he nor the "untrained prosecutor" could make the determination whether the person interviewing the child "employ[ed] suggestive interrogation techniques." Rather, "only defense counsel, with full knowledge of the defendant's case[, could] make the proper assessment." As a result, respondent again ordered petitioner to permit defendant's attorney to inspect the video recording.

Petitioner filed an amended petition seeking to prohibit enforcement of both the oral order and the written order. One day after respondent issued his written order, he issued an amended order correcting typographical errors and making no substantive changes. We thus conclude that it is of no moment that the amended petition seeks to prohibit enforcement of the original order instead of the amended order (*see e.g. Moody v Sorokina*, 56 AD3d 1246, 1247 [4th Dept 2008]; *Hillman v Eick*, 8 AD3d 989, 990 [4th Dept 2004]; *Kabelac v Harding*, 127 AD2d 1011, 1011-1012 [4th Dept 1987], *appeal dismissed* 70 NY2d 746 [1987]; *see generally Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

"The remedy of prohibition generally lies when a court acts without jurisdiction or when a court exceeds its authorized powers in a proceeding over which it has jurisdiction" (*Matter of Phillips v Ramsey*, 42 AD3d 456, 458 [2d Dept 2007]; *see Matter of Pirro v Angiolillo*, 89 NY2d 351, 355 [1996]). It is an "extraordinary remedy [that] lies only where there is a clear legal right to relief" (*Matter of Van Wie v Kirk*, 244 AD2d 13, 24 [4th Dept 1998]).

Discovery in criminal matters is "a creature of legislative policy" (*Matter of Sacket v Bartlett*, 241 AD2d 97, 101 [3d Dept 1998],

lv denied 92 NY2d 806 [1998] [internal quotation marks omitted]). As a result, prohibition may be appropriate "where a court exceeds its statutory authority by ordering the People to make disclosure which they are not required to make pursuant to the governing statutes" (*Phillips*, 42 AD3d at 458; *see Sacket*, 241 AD2d at 101; *Matter of Pirro v LaCava*, 230 AD2d 909, 910 [2d Dept 1996], *lv denied* 89 NY2d 813 [1997]).

Here, respondent properly acknowledged that he lacked any authority to order the early disclosure of the video recording as potential *Rosario* material. Where, as here, the witnesses are not called to testify at a pretrial hearing, *Rosario* material need not be disclosed until "[a]fter the jury has been sworn and before the prosecutor's opening address, or in the case of a single judge trial after commencement and before submission of evidence" (CPL 240.45 [1] [a]; *see* CPL 240.44 [1]). A writ of prohibition would thus be appropriate if a judge were to order early disclosure of *Rosario* material (*see Matter of Briggs v Halloran*, 12 AD3d 1016, 1017 [3d Dept 2004]).

Pursuant to CPL 240.20 (1) (h), the People must disclose and make available to a criminal defendant "[a]nything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States." That requirement includes evidence in the People's possession, custody, and control that is favorable to the defense and material to the defendant's guilt or punishment (*see Brady*, 373 US at 87-88; *Santorelli*, 95 NY2d at 421; *People v Vilardi*, 76 NY2d 67, 73 [1990]). Such material must be disclosed when counsel still has a meaningful opportunity to put it to use (*see People v Cortijo*, 70 NY2d 868, 870 [1987]), such as for "investigat[ing] additional avenues of exculpatory or impeaching evidence" (*People v Wagstaffe*, 120 AD3d 1361, 1364 [2d Dept 2014], *lv denied* 25 NY3d 1173 [2015]).

As a general rule, a prosecutor possesses some discretion in deciding what evidence should be disclosed to the defense (*see People v Consolazio*, 40 NY2d 446, 453 [1976], *cert denied* 433 US 914 [1977]) but, "where a request [for *Brady* material] is made and there is 'some basis' for believing that the prosecutor may be in possession of potentially exculpatory material, 'deference to the prosecutor's discretion must give way, and the duty to determine the merits of the request for disclosure then *devolves on the trial court*' " (*People v Andre W.*, 44 NY2d 179, 184 [1978] [emphasis added]; *see People v Contreras*, 12 NY3d 268, 272 [2009]). Nevertheless, "[d]iscovery which is unavailable pursuant to the statute may not be ordered based on principles of due process because 'there is no general constitutional right to discovery in criminal cases' " (*Pirro*, 230 AD2d at 910, quoting *Matter of Miller v Schwartz*, 72 NY2d 869, 870 [1988], *rearg denied* 72 NY2d 953 [1988]; *see Matter of Brown v Blumenfeld*, 296 AD2d 405, 406 [2d Dept 2002]).

Here, there has been no determination that the video recording contains exculpatory evidence, and thus defendant has no right to

disclosure thereof. Inasmuch as respondent required petitioner to disclose evidence before determining whether defendant is entitled to such disclosure, we conclude that respondent acted in excess of his authority and that a writ of prohibition is the appropriate remedy (*see e.g. Matter of Hoovler v DeRosa*, 143 AD3d 897, 900-901 [2d Dept 2016]; *Brown*, 296 AD2d at 406). We therefore grant the amended petition and grant judgment in favor of petitioner.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

237

CA 17-01764

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

FEDERICO C. GONZALEZ-DOLDAN, M.D.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, INC., MARGARET PAROSKI, GEORGE NARBY, KEVIN J. GIBBONS, JOHN KOELMEL, STEPHANIE SAUNDERS AND DEGRAFF MEMORIAL HOSPITAL, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CYNTHIA GIGANTI LUDWIG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 20, 2017. The order denied in part defendants' motion to dismiss plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, defamation, tortious interference with business relations, and breach of fiduciary duty based on, among other things, plaintiff's suspension and the termination of his clinical privileges at defendant Kaleida Health, Inc. Defendants moved, as relevant to this appeal, to dismiss the complaint based on various grounds set forth in CPLR 3211, and Supreme Court denied the motion in part. We affirm. As a preliminary matter, we note that, since the entry of the order on appeal, plaintiff has voluntarily discontinued the action against defendants John Koelmel and Stephanie Saunders. We further note that plaintiff has also voluntarily discontinued against all defendants his causes of action based on negligent infliction of emotional distress and the Age Discrimination in Employment Act (29 USC § 521 *et seq.*).

Contrary to the contention of the remaining defendants, we conclude that the court providently exercised its discretion in denying the motion with respect to the remainder of the causes of action without prejudice to renew after discovery (*see* CPLR 3211 [d]; *see generally Herzog v Town of Thompson*, 216 AD2d 801, 803 [3d Dept

1995]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

243

KA 16-00887

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL IRIZARRY, ALSO KNOWN AS BEANO,
DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

MICHAEL IRIZARRY, DEFENDANT-APPELLANT PRO SE.

MICHAEL COLARCO, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered April 28, 2016. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the seventh 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 three counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and one count of criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that he was denied a fair trial when County Court allowed him to appear in jail garb during the trial. Defendant did not object to his appearance in jail garb at trial, and he thus failed to preserve his contention for our review (*see People v Palmer*, 142 AD3d 1381, 1383 [4th Dept 2016], *lv denied* 28 NY3d 1074 [2016]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's related contention, defense counsel was not ineffective for failing to raise the issue of defendant's jail garb (*see generally People v Turner*, 5 NY3d 476, 480 [2005]).

The court granted in part defendant's motion for a trial order of dismissal based on the legal insufficiency of the evidence, and we reject defendant's further contention that the "denial of the balance

of the motion to dismiss constituted reversible error" (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We note in particular that defendant was acquitted of the seventh count, charging him with criminal possession of a controlled substance in the third degree based on the execution of the search warrant (Penal Law § 220.16 [1]) and was instead convicted under that count of the lesser included offense that he requested, i.e., criminal possession of a controlled substance in the seventh degree (§ 220.03), a charge that required no showing of the element of intent he had challenged in his motion for a trial order of dismissal. To the extent that defendant challenges the legal sufficiency of the evidence supporting the charge of which he was acquitted, defendant waived that challenge by requesting that the court charge the lesser included offense (*see People v Fancher*, 116 AD3d 1084, 1085 [3d Dept 2014]; *People v Green*, 60 AD3d 1320, 1321 [4th Dept 2009], *lv denied* 12 NY3d 915 [2009]). In any event, "CPL 290.10 'does not contemplate the granting of a trial order dismissing a count of an indictment when legally sufficient evidence exists to support a lesser included offense under that count' " (*People v Vaughan*, 48 AD3d 1069, 1070 [4th Dept 2008], *lv denied* 10 NY3d 845 [2008], *cert denied* 555 US 910 [2008]).

Defendant failed to preserve for our review his contention that the People did not establish an adequate chain of custody with respect to the drugs inasmuch as he did not object to their admission in evidence (*see People v Alexander*, 48 AD3d 1225, 1226 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]). In any event, "[t]he testimony presented at the trial sufficiently established the authenticity of that evidence through reasonable assurances of identity and unchanged condition" (*People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007] [internal quotation marks omitted]; *see People v Julian*, 41 NY2d 340, 342-343 [1977]), "and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]; *see People v Hawkins*, 11 NY3d 484, 494 [2008]).

We reject defendant's contention that the court erred in denying his request for an impeachment charge and in failing to provide limiting instructions with respect to a purported prior inconsistent statement (*cf.* CPL 60.35 [2]). In any event, any such errors are harmless (*see People v Lawrence*, 141 AD3d 1079, 1083 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *People v Jefferies*, 110 AD3d 646, 646-647 [1st Dept 2013], *lv denied* 23 NY3d 1063 [2014]; *cf. People v Montgomery*, 22 AD3d 960, 962-963 [3d Dept 2005]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). We reject defendant's further contention that the sentence is unduly harsh and severe.

We have examined defendant's contentions in his pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

271

KA 14-00053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANACIN L. HYMES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 9, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (two counts), petit larceny, and resisting arrest.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of petit larceny (Penal Law § 155.25), resisting arrest (§ 205.30), and two counts of burglary in the third degree (§ 140.20). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (§§ 110.00, 140.25 [2]).

Contrary to defendant's contention in appeal No. 1, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to support the conviction with respect to the counts of burglary in the third degree and petit larceny (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect thereto (*see Bleakley*, 69 NY2d at 495).

Defendant also challenges the sufficiency of the evidence with respect to the conviction of resisting arrest. We note that Supreme Court denied defendant's motion for a trial order of dismissal with respect to the charges of burglary in the third degree and petit larceny but reserved decision with respect to the resisting arrest charge. The matter was submitted to the jury, which returned a verdict convicting defendant of all charges. The court never ruled on

the remainder of the motion. Thus, we do not address defendant's contention with respect to the resisting arrest charge because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), 'we cannot deem the court's failure to rule on [that part of] the . . . motion as a denial thereof' " (*People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]; *see People v Spratley*, 96 AD3d 1420, 1421 [4th Dept 2012]). We therefore hold the case in appeal No. 1, reserve decision, and remit the matter to Supreme Court for a ruling on the remainder of the motion.

We reject defendant's further contention in appeal No. 1 that the court erred in imposing consecutive sentences with respect to the burglary in the third degree convictions (*see People v Kirkland*, 105 AD3d 1337, 1339 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *see also* Penal Law § 70.25 [2]). We also reject defendant's contention that the sentence is unduly harsh and severe.

In appeal No. 2, defendant contends that his waiver of the right to appeal is invalid and does not preclude his challenge to the severity of his sentence. Contrary to defendant's contention, we conclude that the waiver of the right to appeal is valid inasmuch as "the record demonstrates that it was made knowingly, intelligently and voluntarily" (*People v Lopez*, 6 NY3d 248, 256 [2006]), and that "defendant ha[d] 'a full appreciation of the consequences' of such waiver" (*People v Bradshaw*, 18 NY3d 257, 264 [2011]). Additionally, although the oral colloquy did not mention any challenge to the severity of the sentence, defendant executed and acknowledged on the record a written waiver of the right to appeal, which specifically referenced the fact that he was waiving his right to appeal the "sentence." Based upon the combination of the oral colloquy and the written waiver, we thus conclude that the waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

We reject defendant's further contention in appeal No. 2 that the court erred in denying his request for assignment of new counsel. Defendant failed to make specific factual allegations of "serious complaints about counsel" (*People v Medina*, 44 NY2d 199, 207 [1978]), and thus failed to trigger the court's obligation to make at least a "minimal inquiry" (*People v Sides*, 75 NY2d 822, 825 [1990]), and "discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*People v Porto*, 16 NY3d 93, 100 [2010]).

In light of our determination in appeal No. 1 to affirm the convictions for burglary in the third degree and petit larceny, there is no basis to grant defendant's request to reverse the judgment in appeal No. 2 and vacate his plea of guilty on the ground that his plea was contingent upon the judgment in appeal No. 1 (*see generally People v Roosevelt*, 125 AD3d 1452, 1455 [4th Dept 2015], *lv denied* 25 NY3d

1076 [2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

272

KA 15-00003

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANACIN L. HYMES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 22, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Same memorandum as in *People v Hymes* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

283

CAF 16-01495

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

IN THE MATTER OF TYREE B., JR., AND AMAREE B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINA H., RESPONDENT,
AND TYREE B., RESPONDENT-APPELLANT.

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 18, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondents abused their three-month-old child and derivatively abused their two-year-old child.

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

Memorandum: Respondent father appeals from an order adjudging that respondents abused their three-month-old child and derivatively abused their two-year-old child. We reject the father's contention that the evidence is legally insufficient to support Family Court's findings with respect to the younger child. Petitioner presented the testimony of a physician establishing that the younger child had a fractured humerus and rib, and the explanation offered by respondents for those injuries was inconsistent with the nature and severity of the injuries. Petitioner therefore established a prima facie case of child abuse with respect to the younger child (*see* Family Ct Act § 1046 [a] [ii]), and the father failed to rebut the presumption of parental responsibility (*see Matter of Philip M.*, 82 NY2d 238, 246 [1993]). Contrary to the father's contention, petitioner "was not required to establish whether [respondent] mother or the father actually inflicted the injuries, or whether they did so together . . . [, and] the [father's] denial of fault and [the mother's] attempt to blame [the older child] for the injuries [were] insufficient to rebut [petitioner's] prima facie evidence of . . . abuse" (*Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 518 [1st Dept 2015]; *see Matter of Jacinta J.*, 140 AD2d 990, 991-992 [4th Dept 1988]).

The father also contends that the court erred in admitting the entire case file in evidence because the case file contained some hearsay. We reject that contention. Here, unlike in *Matter of Leon RR* (48 NY2d 117, 120 [1979]), the court received the case file conditionally, subject to the father's hearsay objections (*see Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]). We note in any event that any error in admitting the case file in evidence is harmless because "the result reached herein would have been the same even had such record[s], or portions thereof, been excluded . . . Moreover, [t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1478 [4th Dept 2017] [internal quotation marks omitted]; *see Merle C.C.*, 222 AD2d at 1062).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

284

CAF 17-00263

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

IN THE MATTER OF BRADY SCHULTZ,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DARLA BERKE, TIMOTHY BERKE,
RESPONDENTS-APPELLANTS-RESPONDENTS,
AND JEANETTE BERKE, RESPONDENT-RESPONDENT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CHELSEA L. PALMISANO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal and cross appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered November 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the amended petition insofar as it sought a change in custody and granted the alternative request for increased visitation with the child only to the extent of allowing petitioner certain additional holiday visitation with the child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is reinstated in its entirety and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondents Darla Berke and Timothy Berke (grandparents) appeal and petitioner father cross-appeals from an order that, among other things, dismissed the amended petition insofar as it sought a change in custody, and granted the father's alternative request to increase visitation with his daughter only to the extent of allowing him six hours of unsupervised visitation with his daughter "on Christmas in years when Christmas does not fall on a Sunday," i.e., his regular visitation day. We reverse the order, reinstate the amended petition in its entirety, and remit the matter to Family Court for a determination, following a hearing, whether it is in the child's best interests either to award primary physical custody of the child to the father or to award the father increased visitation with the child.

The father and respondent mother, Jeanette Berke, are the biological parents of the child. In 2013, after the father had filed several petitions for visitation and custody, the mother, the grandparents and the father entered into a consent order pursuant to which the mother and the grandparents had joint legal custody of the child, the grandparents had primary physical residence, and the father would have increasing periods of visitation. In 2015, after a lengthy period without any increase in visitation, the father petitioned for custody of the child and subsequently amended his petition to seek the alternative relief of increased visitation with the child, "including overnights, and holidays." The mother and the grandparents opposed both the petition and the amended petition, but did not file any cross petitions.

Before the matter proceeded to trial, the court "thr[e]w[] out the custody part of the [amended] petition" and "dismiss[ed] the claim for custody," concluding that "custody [was] not the issue" because there was no "allegation adequate [sic] regarding circumstances to require [the court] to address whether primary physical residence should be moved from [the grandparents] to the dad." Trial commenced on issues of visitation only.

At the outset, we agree with the father on his cross appeal that the court erred in dismissing before trial his amended petition insofar as it sought custody of his daughter. "[W]here, as here, a parent seeks to regain custody from a nonparent . . . [,] it is well established that, unless a finding of extraordinary circumstances was made in a prior order, the parent is not required to prove a change in circumstances as a threshold matter . . . A prior consent order, standing alone, does not constitute a judicial finding [or an admission] of surrender, abandonment, unfitness, neglect or other extraordinary circumstances . . . As the [father] consented to the prior custody order and there was no prior finding therein of extraordinary circumstances, [he] was not required to demonstrate a change in circumstances in the first instance" (*Matter of Christy T. v Diana T.*, 156 AD3d 1159, 1160 [3d Dept 2017] [internal quotation marks omitted]).

We further conclude that the court erred in dismissing the amended petition insofar as it sought custody of the child without first finding that extraordinary circumstances existed (*see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006]; *see also Matter of Guinta v Doxtator*, 20 AD3d 47, 53 [4th Dept 2005]; *see generally Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998]). Here, as in *Katherine D.*, we need not remit the matter for a new hearing on extraordinary circumstances "because the record is adequate to enable us to apply the extraordinary circumstances test" (32 AD3d at 1351; *see Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101 [4th Dept 2006], *lv denied* 7 NY3d 711 [2006]; *cf. Matter of Howard v McLoughlin*, 64 AD3d 1147, 1148 [4th Dept 2009]). As the father correctly conceded in his surreply brief and at oral argument of this appeal, extraordinary circumstances exist under Domestic Relations Law § 72 (2) inasmuch as there has been "a 24-month separation of the [father] and child, which

is identified as 'prolonged,' . . . the [father] voluntar[ily] relinquish[ed] . . . care and control of the child during such period, and . . . the [child] reside[d] . . . in the grandparents' household" (*Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015]; *see* § 72 [2] [a], [b]).

Despite the existence of extraordinary circumstances, we nevertheless conclude that the amended petition must be reinstated in its entirety and the matter remitted to Family Court for a hearing to determine whether an award of primary physical custody to the father is in the child's best interests (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 549-551 [1976]). Based on the court's erroneous dismissal of the petition insofar as it sought custody, the father was precluded from presenting evidence in support of his request for that relief, and we thus conclude that the record is insufficient to enable us to make a determination on that issue (*cf. Katherine D.*, 32 AD3d at 1351).

With respect to issues concerning visitation, we conclude that the grandparents' contention on their appeal that the court should have modified the prior order to eliminate all unsupervised visitation by the father is unpreserved for our review inasmuch as they "did not request such relief during the hearing" or otherwise indicate that such relief was requested (*Matter of Grant v Terry*, 104 AD3d 854, 854 [2d Dept 2013]; *see Matter of Kayley E. [James F.]*, 134 AD3d 1195, 1196-1197 [3d Dept 2015]; *cf. Matter of Heasley v Morse*, 144 AD3d 1405, 1406 n 1 [3d Dept 2016]). In any event, we note that the father had unsupervised visitation for an extended period of time without incident.

With respect to the father's alternative request for increased visitation, including overnight visitation with the child, we agree with the father on his cross appeal that the court's determination to deny that request in part was not based on a sound and substantial basis in the record inasmuch as the court's written decision is riddled with misstatements and incorrect assertions of fact (*see e.g. Matter of Gilman v Gilman*, 128 AD3d 1387, 1388 [4th Dept 2015]; *Matter of Irons v Schneller*, 258 AD2d 652, 652 [2d Dept 1999]; *Matter of Severo E. v Lizzette C.*, 157 AD2d 726, 727 [2d Dept 1990]). For instance, the court repeatedly misstated the age of the mother when the parties began their relationship and, as the Attorney for the Child correctly concedes, the court misapprehended the contents of and the father's purpose for introducing a video recording of a Skype conversation that the mother had with the father.

Also, the court mistakenly believed that the video depicted the mother engaging in embarrassing sexual behavior, and stated in sum and substance that the father's offer of proof was outrageous and made a difficult decision easier to make. The court's misapprehension could have been cured had it viewed the video in camera as repeatedly requested by the father's attorney. As the father's attorney explained, to the extent that the mother made comments on the video favorable to the father, the video constituted relevant impeachment evidence in light of the mother's trial testimony. "Inasmuch as th[e]

erroneous finding[s were] central to the court's decision" to deny in part the father's request for increased visitation, the court's determination cannot stand (*Gilman*, 128 AD3d at 1388).

"Having revived the [father's] petition, we are mindful of the fact that we possess the power to conduct an independent review of an adequately developed record" (*Matter of Dumond v Ingraham*, 129 AD3d 1131, 1133 [3d Dept 2015]). We are unable to do so on this record, however, inasmuch as the court precluded the father from presenting relevant evidence with respect to the issue of visitation. We therefore further direct the court on remittal to determine following the hearing whether, if a change in custody is denied, an increase in visitation is nevertheless in the best interests of the child.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

286

CA 17-01601

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

DAVID W. WEITZEL, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE THRUWAY AUTHORITY AND CANAL CORPORATION AND NEW YORK STATE DEPARTMENT OF TRANSPORTATION, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 121569.)

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered January 26, 2017. The order denied claimant's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries that he sustained as the result of a fall while he was sandblasting paint from the underside of the Route 179 overpass over the New York State Thruway. Defendants had engaged claimant's employer to sandblast and repaint the overpass. In order to perform the work, a truck known as a V-Deck was parked underneath the overpass. The truck had wings that fold out to provide a platform for the blasters, and aluminum scaffolding was erected on the wings of the truck. The scaffolding had no guardrail. Claimant was, however, provided with safety equipment, including a safety harness with a six-foot lanyard. While blasting one evening, plaintiff fell 15 feet to the pavement. His safety harness was not tied off.

Claimant contends that the Court of Claims erred in denying his motion for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim. More particularly, he contends that the lack of guardrails alone warrants an award of summary judgment in his favor. We reject that contention. "All contractors and owners . . . who contract for but do not direct or control the work[] in the . . . repairing, altering, painting, [or]

cleaning . . . of a building or structure shall furnish . . . for the performance of such labor . . . devices which shall be so constructed, placed and operated as to give [employees] proper protection" (*id.*). The statute imposes absolute liability on the contractor or owner, and such "liability is contingent on a statutory violation and proximate cause" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). If the claimant establishes both of those elements, contributory negligence cannot defeat his or her claim (*see id.*; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1402 [4th Dept 2015]). The defendant may, however, defeat the claimant's entitlement to summary judgment by raising an issue of fact whether the claimant's own conduct was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Fazekas*, 132 AD3d at 1403).

We conclude that claimant failed to meet his initial burden on the motion because his own evidentiary submissions create an issue of fact whether his conduct was the sole proximate cause of the accident (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Contrary to claimant's contention, the decision of the Court of Appeals in *Bland v Manocherian* (66 NY2d 452 [1985]) does not require the presence of guardrails on scaffolding where another adequate safety device is made available (*see id.* at 461-462). In his deposition testimony, claimant acknowledged that he had a safety harness with a six-foot lanyard, that he had previously used it on the same job, and that he "probably" could have tied it off to the cross-bracing prior to his fall. Indeed, claimant correctly concedes on this appeal that there is an issue of fact whether adequate tie-off points were available. Furthermore, claimant testified that, if he had tied his six-foot lanyard off to the cross-bracing, he "wouldn't have fallen" 15 feet to the pavement. Thus, based on claimant's deposition testimony, a trier of fact could find that the safety harness was an adequate safety device, claimant knew that he was supposed to wear it while blasting, he removed it for no good reason, and he would not have been injured if he had not removed it (*see Cahill*, 4 NY3d at 40). "Those factual findings would lead to the conclusion that defendant[s have] no liability under Labor Law § 240 (1)," and the court therefore properly denied claimant's motion (*id.*).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

304

CA 17-01761

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

IN THE MATTER OF MARGARET SULLIVAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
ORCHARD PARK CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER, II, OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (NICHOLAS I. VOZZO OF COUNSEL), FOR RESPONDENT-RESPONDENT ORCHARD PARK CENTRAL SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 7, 2016 in a proceeding pursuant to Executive Law § 298. The order denied the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 challenging the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that respondent Orchard Park Central School District (District) engaged in unlawful discriminatory practices against petitioner based upon her age, disability and gender, or that the District retaliated against petitioner when she complained of those alleged unlawful discriminatory practices. Supreme Court properly confirmed the determination. "Where, as here, SDHR 'renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis' " (*Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [4th Dept 2016]). " 'Probable cause exists only when, after giving full credence to complainant's version of the events, there is some evidence of unlawful discrimination' " (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]).

We conclude that SDHR's determination of no probable cause was not arbitrary or capricious, and it had a rational basis. Here, accepting petitioner's version of the events, we conclude that there

is no evidence of unlawful discrimination based upon age or gender arising from the District's involuntary transfer of petitioner from the high school to an elementary school. However personally objectionable the transfer was to petitioner, it did not constitute an adverse employment action (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004]). In any event, even if the transfer was an adverse employment action, we further conclude that a rational basis supports SDHR's conclusion that the transfer did not occur under circumstances giving rise to an inference of discrimination based on age or gender (*see Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 113 [1st Dept 1998]).

A rational basis also supports SDHR's determination that there was no probable cause to believe that the District failed to provide assistance or reasonable accommodations for petitioner's alleged disabilities, inasmuch as petitioner failed even to allege that she requested assistance that the District refused to provide, or proposed reasonable accommodations that the District refused to make (*see Koester v New York Blood Ctr.*, 55 AD3d 447, 448 [1st Dept 2008]; *Pimental v Citibank, N.A.*, 29 AD3d 141, 148-149 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). Finally, petitioner failed to identify any adverse employment action taken by the District in response to her complaints of alleged discrimination, and thus a rational basis supports SDHR's conclusion that there was no probable cause to believe that the District engaged in unlawful retaliation (*see generally Calhoun v County of Herkimer*, 114 AD3d 1304, 1306 [4th Dept 2014]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

306

CA 17-01740

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

SARAH E. LAVECK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHAD G. LAVECK, DEFENDANT-RESPONDENT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

EDWARD W. RILEY, BROCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered April 24, 2017. The order, inter alia, denied the motion of plaintiff to modify the existing custody arrangement.

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

Memorandum: In this postjudgment matrimonial proceeding, plaintiff mother moved for an order directing, inter alia, that the parties' parenting schedule, as established by their property settlement and separation agreement (Agreement), which was incorporated but not merged into the judgment of divorce, be modified by awarding the mother primary physical residence of the children. Contrary to the mother's contention, although the Agreement provided for an annual review of the parties' parenting schedule, it did not provide for an annual review of the children's primary physical residence. We thus conclude that Supreme Court properly denied that part of the mother's motion seeking to modify the children's primary physical residence upon determining that the mother had failed to establish the requisite significant change in circumstances.

"It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce 'is a contract subject to the principles of contract construction and interpretation' " (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015], quoting *Matter of Meccico v Meccico*, 76 NY2d 822, 823–824 [1990], *rearg denied* 76 NY2d 889 [1990]). " '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain

meaning of its terms,' . . . [and] courts may consider extrinsic or parol evidence of the parties' intent only if the contract is ambiguous" (*Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015], quoting *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *see Sears v Sears*, 138 AD3d 1401, 1401 [4th Dept 2016]). "Whether an agreement is ambiguous is a question of law for the court to resolve . . . In making that determination, the proper inquiry is 'whether the agreement on its face is reasonably susceptible of more than one interpretation' " (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1514 [4th Dept 2017], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *see Colella*, 129 AD3d at 1651).

We conclude that the Agreement is unambiguous and does not provide for an annual review of the children's primary physical residence. In pertinent part, the Agreement provides that "[p]rimary physical residence of the children *shall* be with the Father and the parties *shall divide the time with the children* as set forth on **Schedule A**. Commencing August 2016 and each August thereafter, the parties shall meet and determine the *residency schedule* for the next 12 months, based upon the circumstances of the children and parents at the time" (emphasis added). That provision clearly and unambiguously awards defendant father primary physical residence and thereafter discusses how the parties will divide their time with the children. The division of time is to be set by a residency "schedule," and that "schedule" is subject to annual modification based on the children's and parents' circumstances at that time. That provision does not provide for or permit annual modification of the children's primary physical residence. As a result, any change to the children's primary physical residence is based on standard rules of modification of custody and requires the mother, who is seeking to change an existing custody arrangement based upon stipulation, first to establish a significant change in circumstances "since the time of the stipulation" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005] [internal quotation marks omitted]; *see Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017]). Here, the mother failed to demonstrate the requisite change in circumstances warranting an inquiry into whether the best interests of the children would be served by a modification of the existing custody arrangement (*see Gizzi v Gizzi*, 136 AD3d 1405, 1406 [4th Dept 2016]).

The mother additionally contends that the court erred in failing to hold a hearing before ordering a particular residency schedule for the period "through August 2017." Inasmuch as those provisions of the court's order have expired by their terms and have been superseded by the residency schedule established for the period from August 2017 through August 2018, the mother's contention is moot, and the mother raises no issue that falls within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

311

CA 17-01726

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

CHRISTINE CHAMBERLAIN AND TODD CHAMBERLAIN,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

THE CHURCH OF THE HOLY FAMILY AND IMMACULATE
HEART CENTRAL SCHOOLS,
DEFENDANTS-APPELLANTS-RESPONDENTS.

THE CHURCH OF THE HOLY FAMILY AND IMMACULATE
HEART CENTRAL SCHOOLS, THIRD-PARTY
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

SWBG-WHOLESALE, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

FISCHER, BESSETTE, MULDOWNEY & MCARDLE, LLP, MALONE (ROBERT R. LAWYER, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS-RESPONDENTS.

CONWAY & KIRBY, PLLC, DELMAR (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

SHANTZ & BELKIN, LATHAM, NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (KIMBERLY E. KENEALY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeals from an order of the Supreme Court, Jefferson County (Charles C. Merrell, J.), entered May 9, 2017. The order granted in part and denied in part the motion of defendants-third-party plaintiffs for summary judgment, granted that part of the motion of third-party defendant for summary judgment dismissing defendants-third-party plaintiffs' contribution cause of action and denied that part of the motion of third-party defendant for summary judgment dismissing defendants-third-party plaintiffs' indemnification cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of third-party defendant in its entirety and reinstating the third-party cause of action for contribution and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Christine Chamberlain (plaintiff) when she slipped and fell on ice and snow in a paved area outside property leased by defendant-third-party plaintiff Immaculate Heart Central Schools (School) from defendant-third-party plaintiff The Church of the Holy Family (Church; collectively, defendants). Defendants then commenced a third-party action against third-party defendant, SWBG-Wholesale, Inc. (SWBG), which had entered into a contract with the Church to plow the paved areas at the School.

On the day of her accident, plaintiff arrived at the School and drove her vehicle through a parking lot to an access road closer to the School. Although a wall had once separated the access road and the parking lot, it is undisputed that, years earlier, the Church had removed the wall and paved the area between the access road and the parking lot. Inasmuch as the access road was at a higher elevation than the parking lot, the newly paved area was at an incline. Plaintiff parked her vehicle near a snowbank, which was at the top of the incline and had been created by SWBG when it plowed the parking lot and access road. Plaintiff exited her vehicle and, after retrieving items from the rear of the vehicle, she slipped and fell, striking her head on the pavement. In their amended complaint, as amplified by their second supplemental bill of particulars, plaintiffs alleged, inter alia, that plaintiff slipped on ice that had accumulated as a result of the incline and the snowbank. Plaintiffs asserted that all three conditions, i.e., the ice, the incline and the snowbank, constituted dangerous conditions that separately or cumulatively caused plaintiff's fall. They further alleged, inter alia, that defendants created or had actual and/or constructive notice of the dangerous conditions.

Defendants moved for summary judgment dismissing the amended complaint and, thereafter, SWBG moved for summary judgment dismissing the amended third-party complaint. Supreme Court granted each motion in part, dismissing the negligence causes of action insofar as they are based on claims of "actual notice of a dangerous condition and notice of a recurrent dangerous condition," and dismissing the third-party cause of action for contribution. Defendants appeal, and plaintiffs and SWBG cross-appeal. We now modify the order by denying SWBG's motion in its entirety and reinstating the third-party cause of action for contribution.

Contrary to defendants' contention, the court properly denied that part of their motion concerning creation of the allegedly dangerous conditions. Defendants asserted that they did not create any dangerous conditions and that, in any event, their alleged negligence was not a proximate cause of plaintiff's fall. "[T]he evidence submitted by defendant[s] in support of [that part of their] motion was insufficient to establish as a matter of law that [they] did not create or cause the allegedly dangerous condition[s] . . . or that [their] alleged negligence was not a proximate cause of plaintiff's injuries" (*Laymon v Allen*, 81 AD3d 1298, 1299 [4th Dept 2011]). Defendants' own submissions raised triable issues of fact whether they created the allegedly dangerous conditions and whether

those conditions were a proximate cause of plaintiff's fall.

In support of their motion, defendants submitted, inter alia, plaintiff's deposition testimony. Although plaintiff testified that she did not recall where she fell and that, at the time of her fall, she had not yet begun to walk down the incline in the pavement, defendants also submitted deposition testimony from School employees who had observed plaintiff immediately after her fall. Those employees placed plaintiff in the immediate vicinity of the snowbank and the incline, both of which were surrounded by thick ice. Indeed, one employee testified that she observed plaintiff's body on the incline just beyond the snowbank after the fall. Defendants thus failed to establish as a matter of law that plaintiff's fall "was unrelated to the [incline] of the parking lot [or to the snowbank]," which plaintiffs alleged were created by defendants (*Geloso v Castle Enters.*, 266 AD2d 849, 849 [4th Dept 1999]). In any event, plaintiffs submitted evidence raising a triable issue of fact whether the ice upon which plaintiff allegedly slipped had accumulated as a result of either the incline or the snowbank (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further conclude that the court properly denied that part of defendants' motion seeking dismissal of the negligence causes of action insofar as they are based on claims of constructive notice. "To constitute constructive notice, a defect must be visible and apparent[,] and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendants "failed to establish as a matter of law that the [dangerous] condition[s were] not visible and apparent or that [they] had not existed for a sufficient length of time before the accident to permit [defendants] or [their] employees to discover and remedy [them]" (*St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016] [internal quotation marks omitted]; *see Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1506 [4th Dept 2015]).

In any event, even assuming, arguendo, that defendants met their initial burden of establishing either that the ice that had formed allegedly as a result of the incline and the snowbank was not visible and apparent or that it had "formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy [it]" (*Rogers v Niagara Falls Bridge Commn.*, 79 AD3d 1637, 1638 [4th Dept 2010] [internal quotation marks omitted]), we conclude that plaintiffs raised triable issues of fact sufficient to defeat that part of defendants' motion concerning constructive notice (*see generally Zuckerman*, 49 NY2d at 562). Contrary to defendants' contention, the affidavit of plaintiffs' meteorologist was neither speculative nor conclusory, and adequately set forth foundational facts and recited the manner in which she came to her conclusions (*see Rogers*, 79 AD3d at 1638; *cf. Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1300 [4th Dept 2014]).

On their cross appeal, plaintiffs contend that the court erred in granting those parts of defendants' motion seeking dismissal of the

causes of action for negligence insofar as they are based on claims of actual notice and notice of a recurrent dangerous condition, i.e., the repeated formation of ice as a result of the incline and the snowbank. We reject those contentions.

Defendants established that they did not have actual notice of any dangerous condition by submitting evidence that they did not receive any complaints concerning the condition of the parking lot and access road and were not otherwise aware of any ice or other slippery substance in that location prior to plaintiff's accident (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257 [4th Dept 2012]). Plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

With respect to plaintiffs' claims of a recurrent condition, we note that " '[a] defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition' " (*Rachlin v Michaels Arts & Crafts*, 118 AD3d 1391, 1393 [4th Dept 2014]; *see Chrisler v Spencer*, 31 AD3d 1124, 1125 [4th Dept 2006]). Defendants' submissions established that they had no actual knowledge of any recurring dangerous condition (*cf. Phillips v Henry B's, Inc.*, 85 AD3d 1665, 1666 [4th Dept 2011]; *Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761-1762 [4th Dept 2010]), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). "Although plaintiffs submitted defendant[s'] incident reports involving defendant[s'] [employees] falling in the parking lot on prior occasions, none of the reports identified a specific location in the parking lot, and they are therefore insufficient to raise an issue of fact with respect to constructive notice of an alleged recurrent condition" (*DeJesus v CEC Entertainment, Inc.*, 138 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 906 [2016]; *see Abbattista v King's Grant Master Assn., Inc.*, 39 AD3d 439, 442 [2d Dept 2007]).

With respect to the third-party action, we agree with defendants that the court erred in granting SWBG's motion insofar as it sought dismissal of the contribution cause of action. It is undisputed that SWBG entered into a contract with the Church to provide snowplowing services, which included salting or sanding the plowed areas at the discretion of SWBG. There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, 'launche[s] a force or instrument of harm' . . . (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). In their verified bill of particulars, defendants relied solely on the first situation.

With respect to the first situation, although SWBG piled the snow

in the area of the incline, SWBG established that it did so only at the Church's direction. Even assuming, arguendo, that such evidence is sufficient to establish that SWBG did not launch a force or instrument of harm, we conclude that defendants raised a triable issue of fact whether SWBG piled the snow at that location on its own initiative and thus whether SWBG launched a force or instrument of harm, i.e., created or exacerbated a dangerous condition (*see Meyers-Kraft v Keem*, 64 AD3d 1172, 1173-1174 [4th Dept 2009]; *Rak v Country Fair, Inc.*, 38 AD3d 1240, 1241 [4th Dept 2007]).

To the extent that defendants contend for the first time on appeal that there are triable issues of fact under the second and third *Espinal* situations, those contentions are not properly before us (*see Bruno v Price Enters.*, 299 AD2d 846, 847 [4th Dept 2002]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Finally, we reject SWBG's contention on its cross appeal that the court erred in denying that part of its motion seeking dismissal of the indemnification cause of action. "If in fact an injury can be attributable solely to negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner" (*Murphy v M.B. Real Estate Dev. Corp.*, 280 AD2d 457, 457-458 [2d Dept 2001]). Even assuming, arguendo, that SWBG met its initial burden with respect to that principle (*see Bermingham v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 94 AD3d 1424, 1425 [4th Dept 2012]; *see also Proulx v Entergy Nuclear Indian Point 2, LLC*, 98 AD3d 492, 493 [2d Dept 2012]; *Roach v AVR Realty Co., LLC*, 41 AD3d 821, 824 [2d Dept 2007]), we conclude that defendants raised triable issues of fact whether plaintiff fell as a result of a dangerous condition that was "attributable solely to negligent performance or nonperformance of an act solely within the province of [SWBG]" (*Murphy*, 280 AD2d at 457-458).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

314

CA 17-00725

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

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD L. FIANDACH, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT PRO SE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered December 2, 2016. The order granted the motion of defendant to vacate an income execution, vacated the income execution, precluded plaintiff from pursuing enforcement proceedings, determined the conduct of plaintiff to be frivolous, and awarded costs and attorney's fees to defendant.

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

Memorandum: Plaintiff, a pro se prison inmate, was previously represented by defendant, an attorney, in connection with charges of aggravated vehicular homicide (Penal Law § 125.14). After pleading guilty to reduced charges in exchange for an indeterminate prison term of 5 to 15 years, plaintiff commenced this action to recover the full amount of the $125,000 retainer. While the action was pending, plaintiff served on the Monroe County Sheriff an income execution falsely stating that a default judgment had been entered against defendant in the amount of $136,500. Thereafter, the Sheriff delivered to defendant's law firm a letter demanding payment of $150,480.92 within 30 days. Plaintiff appeals from an order that, inter alia, granted defendant's motion seeking, among other relief, to vacate the income execution on the ground that there was no default judgment against him.

Contrary to plaintiff's initial contention, defendant was not in default in the action because plaintiff never effectuated proper service upon him. Plaintiff attempted personal service pursuant to CPLR 308 (2) by delivering a copy of the summons and complaint to a person of suitable age and discretion at defendant's workplace and by mailing a copy to his workplace. Plaintiff did not, however, file proof of service in the Monroe County Clerk's Office within 20 days of the delivery or mailing (*see* CPLR 308 [2]), and he never applied to

the court for leave to file a late proof of service (*see generally Discover Bank v Eschwege*, 71 AD3d 1413, 1414 [4th Dept 2010]). As a result, plaintiff's subsequent late filing of the proof of service was a nullity (*see Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 750-751 [2d Dept 2014], *lv dismissed* 24 NY3d 990 [2014]). Personal service of the summons was not deemed to have occurred until March 14, 2016, when defendant's attorney filed a notice of appearance (*see* CPLR 320 [b]). Defendant had 20 days from that date to serve an answer or a motion to dismiss (*see* CPLR 3012 [a]), to avoid being in default (*see* CPLR 3215 [a]). Defendant's motion to dismiss the complaint pursuant to CPLR 3211 was made 18 days later, and thus he never defaulted in the action (*see generally DiPietro v Seth Rotter, P.C.*, 267 AD2d 1, 2 [1st Dept 1999]).

We reject plaintiff's contention that Supreme Court abused its discretion in finding his conduct to be frivolous and thus in awarding defendant costs and attorney's fees in connection with the motion to vacate the income execution. The court has the discretion to award any party "costs . . . and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1 [a]), including conduct "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1 [c] [2]). Among the factors to be considered is whether plaintiff continued his conduct when it became apparent that it was frivolous, or when such was brought to his attention (*see* 22 NYCRR 130-1.1 [c]*; Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 11 [1st Dept 2017]). It is well established that a party's abuse of the judicial process is frivolous conduct supporting an award of costs or the imposition of sanctions (*see Bell v State of New York*, 96 NY2d 811, 812 [2001]; *Drummond v Drummond*, 305 AD2d 450, 451-452 [2d Dept 2003], *lv denied* 1 NY3d 504 [2003]), and an award of costs and attorney's fees in connection with a motion is appropriate where the relief sought in the motion is to vacate a frivolous income execution (*see Cunningham v Cunningham*, 169 AD2d 451, 451 [1st Dept 1991]).

Here, the court properly exercised its discretion in finding that service of the income execution was made for the purpose of harassing defendant and thus constituted frivolous conduct. There was no arguably legitimate basis for the income execution because defendant was not in default and no default judgment had been entered against him. Significantly, defendant's attorney brought the issue of deficient personal service to plaintiff's attention in his affidavit in support of the motion to dismiss the complaint. Plaintiff opposed that motion on its merits, submitted numerous affidavits in opposition, and even made motions of his own, including a motion to disqualify defendant's attorney (*see Divito v Fiandach* [appeal No. 1], — AD3d —, — [Apr. 27, 2018] [4th Dept 2018]). Months later, with the various motions pending and without a default judgment having been entered, plaintiff served the income execution.

We also reject plaintiff's various procedural challenges. The record belies his contention that the court erred in making the award sua sponte without affording him an opportunity to be heard (*see* 22

NYCRR 130-1.1 [d]). Defendant's motion explicitly sought an award of costs and attorney's fees resulting from plaintiff's frivolous conduct, and plaintiff had an opportunity to respond to that motion. Furthermore, contrary to plaintiff's contention, the court issued a written decision explicitly "setting forth the conduct on which the award . . . [was] based, [and] the reasons why the court found the conduct to be frivolous" (22 NYCRR 130-1.2). The decision also adequately explained why the amount of the award was appropriate (*see generally Liang v Wei Ji*, 155 AD3d 1018, 1020 [2d Dept 2017]). We conclude that it is self-evident that the cost of vacating an income execution based upon false representations concerning a nonexistent default judgment should be shouldered by the party responsible for preparing and serving it.

Finally, we decline to disturb that part of the order requiring leave of court for any future filings by plaintiff in this action. It is well established that the court has "inherent authority" to preserve the integrity of the judicial process (*Matter of County of Broome [New York State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO]*, 80 AD3d 1047, 1049 [3d Dept 2011]; *see Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 46 [1st Dept 2001]), and we conclude that the court acted appropriately in taking reasonable measures to curtail plaintiff's abuse of process.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

322

KA 10-01822

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN T. GRANT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 20, 2010. The judgment convicted defendant, upon a jury verdict, of arson in the first degree and arson in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of arson in the first degree (Penal Law § 150.20 [1]) and arson in the second degree (§ 150.15). In appeal No. 2, defendant appeals from an order denying his pro se motion seeking to vacate the judgment in appeal No. 1 pursuant to CPL 440.10 and, in appeal No. 3, defendant appeals from an order denying a similar motion pursuant to CPL 440.10 made by defense counsel. We note at the outset that we dismiss the appeal from the order in appeal No. 2 because defendant raises no contentions with respect thereto (*see People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

With respect to appeal No. 1, defendant failed to preserve for our review his contention that he was denied a fair trial as a result of prosecutorial misconduct (*see People v Balenger*, 70 AD3d 1318, 1318 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]). In any event, that contention lacks merit inasmuch as any improper comments made by the prosecutor on summation were isolated and not so egregious that defendant was deprived of a fair trial (*see generally People v Romero*, 7 NY3d 911, 912 [2006]). Contrary to defendant's further contention, "neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel" (*Balenger*,

70 AD3d at 1318). Rather, " 'the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation' " (*People v Benevento*, 91 NY2d 708, 712 [1998]). Defendant further contends that Supreme Court erred in permitting, over his objection, the presence of uniformed firefighters in the courtroom on the first day of trial. Inasmuch as the record fails to establish the number of uniformed firefighters present on that day, there is no basis for us to conclude that defendant was denied his right to a fair trial by the court's ruling or that the court abused its discretion in determining that no curative action was warranted (*see generally People v Nguyen*, 156 AD3d 1461, 1462 [4th Dept 2017]). We reject defendant's contention that the sentence is unduly harsh and severe. We have considered defendant's remaining contentions in appeal No. 1 and conclude that none warrants reversal or modification of the judgment.

With respect to appeal No. 3, defendant contends that the court erred in summarily denying that part of his CPL 440.10 motion to vacate the judgment insofar as he was convicted of arson in the second degree. We agree. The motion was based on the affidavit of a prosecution witness who recanted her trial testimony that defendant admitted to her that he started a certain house fire. That testimony formed the basis for defendant's conviction of arson in the second degree. Notably, the witness averred that, "Before the trial[,] the police investigator told me if I testified on [defendant's] behalf they would take my daughter away. I am still concerned about this." The People did not submit an opposing affidavit from any of the police officers involved in the case. The court denied the motion without a hearing upon finding that the witness's recantation was unreliable.

We conclude based on the totality of the circumstances that the court erred in denying that part of the motion with respect to the conviction of arson in the second degree without first holding a hearing (*see People v Jenkins*, 84 AD3d 1403, 1407 [2d Dept 2011], *lv denied* 19 NY3d 1026 [2012]; *see generally People v Martinez*, 126 AD3d 1350, 1351 [4th Dept 2015]). The witness's "trial testimony, if false, was extremely prejudicial to defendant inasmuch as, without that testimony, there would have been no basis for the jury to convict defendant" for setting the fire at issue in the arson in the second degree count (*Martinez*, 126 AD3d at 1351; *see generally People v Lane*, 100 AD3d 1540, 1541 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]). We therefore reverse the order in appeal No. 3 insofar as appealed from, vacate that part of the order denying the motion with respect to the conviction of arson in the second degree and remit the matter to Supreme Court to conduct a hearing pursuant to CPL 440.30 (5) on that part of the motion.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

323

KA 13-01626

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN T. GRANT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered July 2, 2013. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Grant* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

324

KA 14-02070

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN T. GRANT, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered October 23, 2014. The order, insofar as appealed from, denied that part of the motion of defendant pursuant to CPL 440.10 seeking to vacate that part of a July 20, 2010 judgment convicting him of arson in the second degree.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of the order denying the posttrial motion with respect to the conviction of arson in the second degree is vacated and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5) on that part of the motion.

Same memorandum as in *People v Grant* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

327

CA 17-01674

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN E. GUSTAFSON, PAM L. GUSTAFSON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, ELMSFORD (JORDAN J. MANFRO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered November 29, 2016. The order granted the motion of defendants Steven E. Gustafson and Pam L. Gustafson to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendants Steven E. Gustafson and Pam L. Gustafson is reinstated.

Memorandum: Plaintiff commenced this mortgage foreclosure action in April 2016, alleging that Steven E. Gustafson and Pam L. Gustafson (defendants) defaulted in the payment of their mortgage in May 2009 and in each subsequent month thereafter. In moving to dismiss the complaint against them, defendants contended that the action is barred by the six-year statute of limitations (*see* CPLR 213 [4]; *see also* CPLR 3211 [a] [5]), and Supreme Court granted the motion. We reverse.

We agree with plaintiff that defendants failed to meet their initial burden of establishing that the action is time-barred. Where, as here, a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the six-year statute of limitations begins to run on the date that each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2010]; *see also United States of Am. v Quaintance*, 244 AD2d 915, 915-916 [4th Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). If, however, the mortgage holder accelerates the entire debt by a demand, the six-

year statute of limitations begins to run on the entire debt (*see Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *see also EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]).

Here, defendants' own submissions in support of the motion establish that, although another entity purported to accelerate defendants' entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]; *see also Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982-983 [2d Dept 2012]). Although this mortgage foreclosure action therefore is not time-barred, we note that, "in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [and 90-day] period immediately preceding its commencement of this action" (*EMC Mtge. Corp.*, 49 AD3d at 593; *see* RPAPL 1304; CPLR 204 [a]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

336

CA 17-00989

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

DOUGLAS W. OWEN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 123416.)
(APPEAL NO. 1.)

DAVID A. LONGERETTA, UTICA, FOR CLAIMANT-APPELLANT.

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

Appeal from a decision of the Court of Claims (Francis T. Collins, J.), entered June 22, 2016. The decision dismissed the claim.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5512 [a]; *Montanaro v Weichert*, 145 AD3d 1563, 1563 [4th Dept 2016]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

337

CA 17-01817

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

DOUGLAS W. OWEN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 123416.)
(APPEAL NO. 2.)

DAVID A. LONGERETTA, UTICA, FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Francis T. Collins, J.), entered July 12, 2016. The judgment dismissed the claim.

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

Memorandum: On August 18, 2013, at approximately 12:40 a.m., claimant was arrested by a New York State Trooper (Trooper) at a sobriety checkpoint for several minor violations of the Vehicle and Traffic Law and on suspicion of driving while intoxicated (DWI). A hospital blood draw taken two hours later revealed that claimant had a blood alcohol content of 0.00%. Claimant commenced this action alleging, inter alia, false imprisonment/arrest, malicious prosecution, and negligent supervision and training. Following a trial, the Court of Claims dismissed the claim. We affirm.

Contrary to claimant's contention, the court properly dismissed his claims for false imprisonment/arrest and malicious prosecution. Those claims required claimant to establish as a necessary element that the Trooper did not have probable cause to arrest him for DWI (*see De Lourdes Torres v Jones*, 26 NY3d 742, 761 [2016]; *Mahoney v State of New York*, 147 AD3d 1289, 1291 [3d Dept 2017]), and claimant failed to establish that element. Here, the Trooper testified that he initially asked claimant to pull over to allow other cars to pass because he needed time to write a ticket for the traffic violation of a missing registration sticker and to test claimant's window tint. The Trooper observed that claimant had bloodshot eyes, slurred speech, and a flushed face. The Trooper's supervising officer also testified that he observed claimant with watery eyes and smelled alcohol. He further testified that claimant deliberately paused three to four

seconds after each question he was asked and refused to make eye contact. Viewing the above evidence in the light most favorable to sustain the judgment and giving due deference to the court's determinations in this nonjury trial regarding witness credibility (*see A&M Global Mgmt. Corp. v Northtown Urology Assocs., P.C.*, 115 AD3d 1283, 1286 [4th Dept 2014]), we conclude that the court properly determined that claimant's arrest for DWI was supported by probable cause.

Contrary to claimant's further contention, the court did not err in dismissing his claim for negligent supervision and training. A claim that defendant, as an employer, was "negligent in failing 'to properly interview, hire, train, supervise, and monitor' its employees . . . 'does not lie where, as here, the employee is acting within the scope of his or her employment, thereby rendering the employer liable for damages caused by the employee's negligence under the [alternative] theory of respondeat superior' " (*Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143 [4th Dept 2008]). Inasmuch as the Trooper and his supervising officer were acting within the scope of their employment, which claimant does not dispute, the claim of negligent training and supervision must fail (*see Ruiz v Cope*, 119 AD3d 1333, 1335 [4th Dept 2014]; *Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

338

CA 17-01408

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

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, STEPHANIE A. MINER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR OF CITY OF SYRACUSE, FRANK L. FOWLER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF SYRACUSE, SERGEANT MICHAEL MOUREY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS EMPLOYEE IN CHARGE OF MEDICAL SECTION OF CITY OF SYRACUSE POLICE DEPARTMENT, ET AL., DEFENDANTS-RESPONDENTS.

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered October 7, 2016. The order vacated a temporary restraining order and denied the application of plaintiff to waive the requirement of an undertaking for a preliminary injunction.

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

Memorandum: Plaintiff, a disabled and retired police officer, sustained a spinal cord injury in 2003 and was awarded benefits pursuant to General Municipal Law § 207-c. From March 2013 to March 2016, defendant City of Syracuse (City) paid Dignity Plus, Inc. (Dignity), a home healthcare agency, to provide assistance to plaintiff in his home. Through Dignity, home health aides provided care to plaintiff daily. Although nurses also assisted plaintiff as necessary, neither registered nurses nor licensed practical nurses were assigned to care for plaintiff in his home 24 hours per day. In late February 2016, Dignity notified the City that plaintiff was in need of a heightened level of care that would approximately double the cost of plaintiff's services from Dignity. Dignity notified the City that it intended to terminate plaintiff's services on March 20, 2016 unless the City agreed to the increased level of care and cost. The City and Dignity were unable to reach a new agreement, and plaintiff brought this action alleging, inter alia, that the City wrongfully denied the payment of and obstructed him from receiving certain medical care.

By order to show cause, plaintiff sought relief in the form of a temporary restraining order (TRO) and a preliminary injunction. Supreme Court scheduled a hearing on plaintiff's application for a preliminary injunction and granted the TRO, ostensibly requiring the City "to continue to pay and provide [plaintiff] with 24-hour skilled nursing care at home." At the conclusion of the hearing on the preliminary injunction, plaintiff made an oral motion alleging that defendants had failed to provide him with the nursing services required by the TRO and requesting "that the defendants [therefore] be found in contempt." After the hearing, the court granted the preliminary injunction on the condition that plaintiff post an undertaking pursuant to CPLR 6312 and stated that defendants were entitled to a hearing on the oral motion alleging contempt. Thereafter, plaintiff filed another order to show cause seeking, inter alia, a waiver of the undertaking and, in accordance with the prior oral motion alleging contempt, a finding that defendants had willfully disobeyed the TRO. The City and other defendants cross-moved seeking leave to reargue plaintiff's prior application for a preliminary injunction, denial of that application upon reargument and vacatur of the TRO to the extent necessary. The court thereafter issued an order denying the relief sought in plaintiff's second order to show cause and granting that part of the cross motion seeking vacatur of the TRO. We affirm.

Plaintiff contends that the court erred in denying that part of his application seeking a waiver of the undertaking pursuant to CPLR 6312 (b). We reject that contention. CPLR 6312 (b) directs a court to fix an undertaking in an amount that will compensate a defendant for damages incurred by reason of the granting of a preliminary injunction in the event that it is finally determined that a plaintiff was not entitled to the injunction. Plaintiff, as the party herein who sought a preliminary injunction, was clearly and unequivocally required to post an undertaking (*see* CPLR 6312 [b]; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 224 [4th Dept 2009]; *see also Rust v Turgeon*, 295 AD2d 962, 963 [4th Dept 2002]; *Wasus v Young Sun Oh*, 86 AD2d 753, 753 [4th Dept 1982]). Contrary to plaintiff's contention, the court had "no power to dispense with the undertaking required by CPLR 6312 (b)" (*Ziankoski v Simmons*, 140 AD2d 1007, 1007 [4th Dept 1988]; *see Duane Sales v Hayes*, 87 AD2d 730, 730-731 [3d Dept 1982]; *compare* CPLR 6312 [b] *with* 6313 [c]).

We reject plaintiff's further contention that the court erred in applying state law rather than federal law in considering whether to waive the undertaking. Inasmuch as plaintiff expressly requested injunctive relief under CPLR article 63 based on the alleged failure of the City to act in accordance with the General Municipal Law, we conclude that the court properly applied CPLR 6312 (b). We further conclude that the court did not improvidently exercise its discretion in fixing the amount of the undertaking (*see 84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702, 703 [2d Dept 2012]).

Plaintiff further contends that the court erred in denying that part of his application seeking a finding of contempt based on

defendants' willful disobedience of the TRO. We conclude that the court properly determined that there was no unequivocal mandate upon which a finding of contempt could be based, and we therefore reject plaintiff's contention. In order "[t]o sustain a finding of . . . civil . . . contempt based on an alleged violation of a court order[,] it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]; *see* Judiciary Law § 753; *see also Village of Warsaw v Almeter*, 63 AD3d 1622, 1622 [4th Dept 2009]; *Matter of Aida C.*, 44 AD3d 110, 116 [4th Dept 2007]). Here, the TRO required the City to "continue to pay and provide [plaintiff] with 24-hour skilled nursing care at home." Inasmuch as the City had never previously paid for or provided plaintiff with 24-hour skilled nursing care in his home, that language was unclear and equivocal, and it therefore could not serve as the basis for a finding of contempt.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

373

KA 15-01424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOWSHEED M. MORALES, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 15, 2015. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape in the third degree, criminal mischief in the fourth degree, harassment in the second degree, criminal contempt in the first degree (two counts), criminal contempt in the second degree (12 counts) and criminal solicitation in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant of harassment in the second degree and dismissing count five of the indictment, and by reducing the sentence imposed for rape in the first degree to a determinate term of incarceration of eight years and a period of postrelease supervision of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]), rape in the third degree (§ 130.25 [3]), and harassment in the second degree (§ 240.26 [1]). The charges arose from defendant's alleged conduct during an intimate relationship with the complainant in early 2014.

In late February of that year, defendant and the complainant had an argument at the complainant's house. The argument became physical. Defendant slapped the complainant, pulled her hair, and snapped her phone in half. He was arrested and briefly jailed, and a six-month, stay-away order of protection was issued. When defendant was released, he and the complainant resumed their relationship despite the order of protection. On April 23, defendant and the complainant had another argument, during the course of which he sent her angry and threatening text messages. The argument subsequently became physical, and defendant punched the complainant in the stomach. The police were

called, and defendant was returned to jail. In late April and May, while defendant was in jail, he wrote the complainant several lengthy letters, and the two of them engaged in recorded telephone conversations. In those conversations, the complainant told defendant that he would look "hot" in jail clothes, told him that she had sent him photos of herself in lingerie, and made lewd and extremely graphic remarks suggesting that she desired his company. The complainant also made threatening remarks about defendant's ex-girlfriend, and taunted defendant. "[Y]our fate lives in my hands," she said. "I was going to drop the charges until I found out that you were in bed with another girl while I was at work," she said. "[I]f I did let you out, it's because I feel the need to be with you. I'm not letting you out so you can be with another girl."

In one of the letters that defendant sent to the complainant, he expressed concern about information that he had received from his mother. Defendant had learned that the complainant and his ex-girlfriend had been exchanging hostile messages. In one of those messages, the complainant told the ex-girlfriend that defendant had raped her and that she was going to accuse him of such. Defendant's mother had allegedly seen the messages. Defendant wrote: "I don't want to believe her [because] I remember you promised me that you wouldn't tell anyone that." The complainant's accusation resulted in rape charges against defendant.

The grand jury proceeding took place over two days. The prosecutor sought to indict defendant on counts of, inter alia, rape in the first degree, rape in the third degree, and aggravated family offenses. To establish the counts charging aggravated family offenses, the prosecutor introduced a certificate of conviction involving a prior charge of sexual misconduct against defendant. An officer of the Geneva Police Department testified that defendant had previously been convicted of sexual misconduct, and the prosecutor instructed the jury that it could consider that conviction only as the predicate conviction required to establish an aggravated family offense, not as evidence of defendant's propensity to commit the crimes charged.

On the second day of the grand jury proceeding, the complainant testified that, on February 17, she and defendant were arguing in her bedroom, and she told him to leave. Defendant dialed 911 on his cell phone and told the complainant to call the police, but she refused. He then undressed her and exposed his penis, but she told him "no" and "smacked him a couple times." Defendant then held her down and sexually penetrated her without her consent. Afterwards, as they were getting ready for work, defendant expressed concern that the complainant would likely tell someone about the incident. She answered that she would not. While they were still in the bedroom, the police came to the front door in response to the 911 call. The complainant told the police that the call was an accident. At the conclusion of the proceeding, the grand jury handed down an indictment charging defendant on all counts presented by the prosecutor.

Thereafter, defendant moved, inter alia, to dismiss the

indictment on the grounds that the indictment was not supported by legally sufficient evidence and that the grand jury proceedings were defective. In support of the motion, defendant noted that he had never been convicted of sexual misconduct. Defendant contended that the prosecutor therefore failed to demonstrate that he had been convicted of a predicate offense required to establish an aggravated family offense, and he also contended that the introduction of false evidence of a nonexistent prior sex crime prejudiced the ultimate decision of the grand jury. The prosecutor conceded that defendant had never been convicted of sexual misconduct, but he opposed dismissal of the indictment. County Court reduced those counts charging defendant with aggravated family offenses to the underlying misdemeanors, but it refused to dismiss the indictment.

The matter proceeded to trial. The complainant's testimony was consistent with her testimony before the grand jury. In addition, she testified that she did not tell anyone about the alleged rape, including defendant's ex-girlfriend, and she further testified that she did not get into a "feud" on social media with the ex-girlfriend. On cross-examination by defense counsel, the complainant testified that she and defendant "loved" each other but fought often. She admitted that, in the telephone calls between herself and defendant while he was in jail, she made the lewd and manipulative remarks noted above, but she denied telling defendant's ex-girlfriend that she was going to accuse defendant of rape.

Before the defense put on its case, defense counsel sought to question defendant's ex-girlfriend about her conversations with the complainant via text message and social media. The court ruled that, although the testimony was hearsay, it was admissible as evidence of prior inconsistent statements. The ex-girlfriend then testified that the complainant wrote to her: "I'm going to be accusing [defendant] of rape so that no other females would want him." The prosecutor then cross-examined the ex-girlfriend using screenshots of conversations conducted over social media. The complainant wrote: "I don't care. I don't want to hear. I dumped him. I got over it . . . I don't have time for BS, especially BS that has to do with that stupid fuck . . . I know he's in jail. I put him there . . . He fucked everyone." When asked if defendant had actually raped her, the complainant wrote: "I just don't want to think about him."

Defendant contends that the court erred in charging the jury that prior inconsistent statements are not proof of what happened and can be used only to evaluate the truthfulness or accuracy of the testimony. Defendant also contends that the court erred in charging the jury, in response to a jury note, that its verdict with respect to rape in the first degree was not determinative of its verdict with respect to rape in the third degree, without also charging that its verdict with respect to rape in the third degree was not determinative of its verdict with respect to rape in the first degree. Defendant failed to preserve those contentions for our review inasmuch as he did not object to either charge on the grounds that he now raises on appeal (*see People v Chavez*, 75 AD2d 888, 889 [4th Dept 2000], *lv denied* 5 NY2d 962 [2000]; *cf. People v Walker*, 26 NY3d 170, 172-173

[2015]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that he was denied effective assistance of counsel, but we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [his] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Keschner*, 25 NY3d 704, 722-724 [2015]).

Contrary to defendant's contention, the court properly refused to dismiss the indictment on the ground that the grand jury proceeding was defective. An indictment may be dismissed where the "proceeding . . . fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see* CPL 210.20 [1] [c]). Dismissal under CPL 210.35 (5) is limited to instances of prosecutorial misconduct, fraud, or errors that potentially prejudice the grand jury's ultimate decision (*see People v Huston*, 88 NY2d 400, 409 [1996]; *People v Elioff*, 110 AD3d 1477, 1477 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013]). Upon our review of the record of the proceeding, we conclude that the prosecutor did not engage in fraudulent conduct or "conduct so egregious as to impair the integrity of the grand jury proceeding[]" (*Elioff*, 110 AD3d at 1478). Although the prosecutor should have been able to read and comprehend the certificate of conviction, the record does not establish that he knowingly or deliberately presented false evidence to the grand jury (*see People v Bean*, 66 AD3d 1386, 1386 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]) and, moreover, there is no dispute that the evidence before the grand jury was sufficient to support the indictment as reduced by the court (*see generally Elioff*, 110 AD3d at 1477-1478). Furthermore, the prosecutor gave an appropriate instruction that limited the grand jury's consideration of the challenged evidence (*see People v Davis*, 83 AD3d 1210, 1212 [3d Dept 2011], *lv denied* 17 NY3d 794 [2011], *reconsideration denied* 17 NY3d 815 [2011]), and the grand jury is presumed to have followed that instruction (*see People v Farley*, 107 AD3d 1295, 1295 [3d Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *People v Di Fondi*, 275 AD2d 1018, 1018 [4th Dept 2000], *lv denied* 95 NY2d 933 [2000]).

We agree with defendant, however, that the jury may have convicted him of harassment in the second degree based on an unindicted theory. Preliminarily, we note that defendant "was not required to preserve his contention for our review because he has a fundamental and nonwaivable right to be tried only on the crimes charged" (*People v Sanford*, 148 AD3d 1580, 1582 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017] [internal quotation marks omitted]). It is well settled that, "[w]here the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment . . . and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory" (*People v Graves*, 136 AD3d 1347, 1348 [4th Dept

2016], *lv denied* 27 NY3d 1069 [2016]; *see Sanford*, 148 AD3d at 1582). Here, the indictment charged defendant with harassment in the second degree on the ground that, on February 28, 2014, he slapped the complainant with the intent to harass, annoy, or alarm her. Nevertheless, the court instructed the jury that it could find him guilty if he shoved her or subjected her to other forms of physical contact. The evidence at trial could have established either theory. Therefore, that part of the judgment convicting defendant of harassment in the second degree must be reversed (*see Graves*, 136 AD3d at 1349), and we modify the judgment accordingly. Inasmuch as harassment in the second degree is a mere violation and defendant has already served the sentence imposed on it, we dismiss that count rather than grant a new trial thereon (*see People v Flynn*, 79 NY2d 879, 882 [1992]; *People v Hillard*, 151 AD3d 743, 744-745 [2d Dept 2017], *lv denied* 30 NY3d 1019 [2017]).

We also agree with defendant that the sentence imposed for rape in the first degree is unduly harsh and severe. The alleged incident occurred in the context of an intimate relationship that lasted several months between two otherwise consenting adults who were close in age. The complainant had the opportunity to report the incident to the police immediately after it happened but chose not to do so. In the recorded conversations between defendant and the complainant, which occurred two to three months after the incident, the complainant repeatedly expressed satisfaction with her relationship, and a willingness to use the criminal justice system to gain the upper hand in it. We note that defendant's history of contacts with the criminal justice system is not extensive, and thus it does not weigh heavily against him.

The record does not indicate that the sentencing court considered any of the above substantial mitigating factors in imposing the sentence. To the contrary, the court expressed only that it wished to impose a sentence for rape in the first degree in excess of the offers made during the plea bargaining process. Indeed, the sentence of 18 years of incarceration is double that of the most recent plea offer. It is well established that a defendant may not be punished for exercising his constitutional right to a trial (*see generally Bordenkircher v Hayes*, 434 US 357, 363 [1978], *reh denied* 435 US 918 [1978]). Although a sentence after trial usually will be harsher than a sentence accompanying a prior plea offer (*see People v Pena*, 50 NY2d 400, 411-412 [1980], *rearg denied* 51 NY2d 770 [1980], *cert denied* 449 US 1087 [1981]), a defendant's refusal to plead guilty does not absolve the court of its responsibility to consider appropriate sentencing factors (*cf. People v Matthews*, 101 AD3d 1363, 1366 [3d Dept 2012], *lv denied* 20 NY3d 1101 [2013]; *People v Blond*, 96 AD3d 1149, 1153-1154 [3d Dept 2012], *lv denied* 19 NY3d 1101 [2012], *reconsideration denied* 20 NY3d 985 [2012]). Under the circumstances, we conclude that a determinate term of incarceration of eight years and a period of postrelease supervision of 10 years is appropriate,

and we therefore further modify the judgment accordingly.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

374

CAF 17-00678

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

IN THE MATTER OF CLEAVON CLARK, III,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONICA D. KITTLES, RESPONDENT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MAROUN G. AJAKA, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered March 2, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent mother appeals from a "superseding custody order" that modified a prior order of joint custody by, inter alia, awarding petitioner father sole custody and primary physical residence of the parties' son, and reducing the mother's parenting time with the child to six hours per week. As an initial matter, we reject the mother's contention that Family Court erred in refusing to consider her motion to dismiss the father's modification petition. Although the court "has discretion to overlook late or defective service of a motion where the nonmoving party is not prejudiced" (*Matter of Noble v Paris*, 143 AD3d 1288, 1288 [4th Dept 2016], *lv denied* 29 NY3d 904 [2017] [internal quotation marks omitted]), the court is not required to do so (*see generally Kolnacki v State of New York*, 8 NY3d 277, 279 [2007], *rearg denied* 8 NY3d 994 [2007]; *Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1681 [4th Dept 2015]). Where, as here, the mother had several months within which to make a proper motion on notice but failed to do so (*see* § 165 [a]; CPLR 2214), we conclude that the court did not abuse its discretion in refusing to entertain the oral motion of the mother's attorney immediately prior to the commencement of the trial.

We reject the mother's further contention that the father failed to meet his initial burden of establishing a change in circumstances. Specifically, the father established the mother's unwillingness to communicate with the father and the paternal grandmother concerning the child, as well as the mother's virtual absence from the child's life for almost five months. In our view, those facts constitute "a sufficient change in circumstances to warrant an inquiry into the best interests of the child[ ]" (*Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1359 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]; *see Matter of Emmanuel SS. v Thera SS.*, 152 AD3d 900, 901 [3d Dept 2017], *lv denied* 30 NY3d 905 [2017]).

Contrary to the mother's contention that the court erred in awarding sole custody of the child to the father, we conclude that the court's determination is based on a "careful weighing of [the] appropriate factors . . . and . . . has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011 [4th Dept 2009]), and we therefore see no reason to disturb it (*see Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]).

Finally, we have examined the remaining contention of the mother and the Attorney for the Child, and we conclude that it does not require modification of the order.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

384

CA 17-01827

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

HEATHER ENOS-GROFF AND BRIAN GROFF,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LAURA M. SCHUMACHER, DANIEL SCHUMACHER, JOHN SCHUMACHER, SCHUM-ACRES & ASSOC., INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered April 17, 2017. The order granted the motion of defendants Laura M. Schumacher, Daniel Schumacher, John Schumacher and Schum-Acres & Assoc., Inc., for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants-respondents.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Heather Enos-Groff (plaintiff) when she fell from a horse during a horseback riding lesson conducted by Laura M. Schumacher (defendant). We agree with plaintiffs that Supreme Court erred in granting the motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them on the ground that plaintiff assumed the risk of horseback riding. We note that, in opposition to the motion, plaintiffs submitted, inter alia, the affidavit of an expert with more than 20 years of experience in training horseback riding instructors. The expert opined that defendant unreasonably increased the risks of horseback riding by numerous acts and omissions, including selecting an inappropriate horse for a novice rider such as plaintiff; providing an unsafe riding space that had ground poles; and failing, prior to bringing the horse to a trot, to ensure that plaintiff knew how to control the horse's speed and dismount in the event of an emergency. Thus, even assuming, arguendo, that defendants met their burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v*

City of New York, 49 NY2d 557, 562 [1980]), we conclude that plaintiffs raised an issue of fact whether defendants unreasonably increased the risks of horseback riding (*see Vanderbrook v Emerald Springs Ranch*, 109 AD3d 1113, 1115 [4th Dept 2013]; *Fenty v Seven Meadows Farms, Inc.*, 108 AD3d 588, 588 [2d Dept 2013]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

387

KA 16-00295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE L. GREEN, ALSO KNOWN AS NICOLE GREEN,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, BARCLAY DAMON LLP (BRIDGET C. STEELE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 1, 2015. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver forecloses defendant's challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

397

CA 17-01246

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

KENNETH PREASTER AND KATHRYN PREASTER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

JOSEPH E. FAHEY, CORPORATION COUNSEL, SYRACUSE (TODD LONG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 10, 2017. The order, among other things, granted defendant's motion to dismiss plaintiffs' "second amended complaint."

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

Memorandum: Plaintiffs commenced this action seeking damages arising from a fire on their property. According to plaintiffs, defendant's failure to repair a fire hydrant increased the damages they sustained when their house caught on fire. Plaintiffs appeal from an order that, inter alia, granted defendant's motion to dismiss the "second amended complaint" and denied plaintiffs' cross motion and "second motion" for leave to amend the second amended complaint. We affirm.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *see Moore v Del-Rich Props., Inc.*, 151 AD3d 1817, 1818-1819 [4th Dept 2017]). A municipality performs a purely proprietary role when its "activities essentially substitute for or supplement 'traditionally private enterprises' " (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999]). "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Applewhite*, 21 NY3d at 425 [internal quotation marks omitted]). It is well settled that where, as here, "the alleged negligence stems from municipal efforts to protect the safety of the public by 'aggregating and supplying water

for the extinguishment of fires,' it is engaged in a government function entitled to immunity" (*Billera v Merritt Constr., Inc.*, 139 AD3d 52, 57 [3d Dept 2016]). Contrary to plaintiffs' further contention, "repairs to fire hydrants are made[] for the public good and not especially for . . . any particular class of persons. Such being the case, [defendant] cannot be held liable here based upon its failure to . . . repair the hydrant" (*Timmons v Harvey*, 85 AD2d 840, 840 [3d Dept 1981]; *see Rood Utils. v City of Auburn*, 233 AD2d 873, 874 [4th Dept 1996]).

Plaintiffs further contend that, although, as a general rule, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide . . . fire protection" (*Etienne v New York City Police Dept.*, 37 AD3d 647, 649 [2d Dept 2007]), this case falls within the "narrow class of cases in which [the courts] have recognized an exception to this general rule and have upheld tort claims based upon a 'special relationship' between the municipality and the claimant" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987], quoting *De Long v County of Erie*, 60 NY2d 296, 304 [1983]). We reject that contention. The elements of that special relationship include "an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured" (*Cuffy*, 69 NY2d at 260), and here plaintiffs failed to allege any promises or actions by defendant indicating an affirmative duty to act on their behalf. Plaintiffs thus failed to allege a special relationship that would support a claim for negligence against this municipal defendant.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

402

CA 16-01091

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

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

V MEMORANDUM AND ORDER

SCOTT W., RESPONDENT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Douglas A. Randall, A.J.), dated May 24, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Petitioner commenced this proceeding pursuant to Mental Hygiene Law article 10, alleging that respondent is a sex offender requiring civil management. After a jury trial, the jury found that respondent is a detained sex offender suffering from a mental abnormality (*see* §§ 10.03 [i]; 10.07 [d]). Supreme Court then held a dispositional hearing and found that respondent is a dangerous sex offender requiring confinement and committed him to a secure treatment facility (*see* § 10.07 [f]). Respondent now appeals, and we affirm.

Contrary to respondent's contention, he was not denied a fair trial by certain evidentiary rulings of the court, which were the result of the failure of respondent's expert witness to update her written report after her review of additional material and a further interview with respondent (*see Matter of State of New York v Robert M.*, 133 AD3d 670, 671-672 [2d Dept 2015], *lv denied* 26 NY3d 917 [2016]; *see generally* Mental Hygiene Law § 10.06 [e]). In any event, we conclude that any error is harmless (*see generally Matter of State of New York v Robert F.*, 25 NY3d 448, 454 [2015]; *Matter of State of New York v Charada T.*, 23 NY3d 355, 362 [2014]).

We reject respondent's contention that the evidence is not legally sufficient to establish that he has a mental abnormality.

Petitioner's two expert witnesses and respondent's expert witness all testified that respondent suffers from sexual sadism disorder. Petitioner's expert witnesses further testified that respondent's deviant thoughts predispose him to commit sex offenses, and his pattern of offending after incarceration and release, as well as his inadequate progress in treatment in addressing his deviance and fantasies, shows that he has serious difficulty controlling his behavior. We therefore conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent has "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [respondent] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03 [i]; *see Matter of Akgun v State of New York*, 148 AD3d 1613, 1613-1614 [4th Dept 2017]; *Matter of State of New York v Bushey*, 142 AD3d 1375, 1376 [4th Dept 2016]; *see generally Matter of State of New York v Dennis K.*, 27 NY3d 718, 734-735 [2016], *cert denied* — US —, 137 S Ct 579 [2016]). We further conclude that the verdict is not against the weight of the evidence (*see Akgun*, 148 AD3d at 1614; *Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473-1474 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]).

We further reject respondent's contention that the evidence is not legally sufficient to establish that he requires confinement. Petitioner's experts opined that respondent is a dangerous sex offender requiring confinement based on, inter alia, his high scores on risk assessment instruments and his insufficient progress in sex offender treatment. We conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of Sincere M. v State of New York*, 156 AD3d 1427, 1427 [4th Dept 2017]; *Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]). We further conclude that the court's determination is not against the weight of the evidence (*see Parrott*, 125 AD3d at 1439).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW
Appellate Division, Fourth Judicial Departm

407

KA 15-01324

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMOR

WALTER BROWN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County C
Miller, J.), rendered August 1, 2014. The judgment
defendant, upon his plea of guilty, of criminal poss
in the second degree.

It is hereby ORDERED that the judgment so appea
unanimously affirmed.

Memorandum: On appeal from a judgment convicti
plea of guilty of criminal possession of a weapon in
(Penal Law § 265.03 [3]), defendant contends that hi
right to appeal is not valid, and he challenges the
sentence. Although we agree with defendant that the
right to appeal is invalid because the perfunctory i
County Court was "insufficient to establish that the
the defendant in an adequate colloquy to ensure that
right to appeal was a knowing and voluntary choice'
296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d
People v Hamilton, 49 AD3d 1163, 1164 [4th Dept 2008
nevertheless conclude that the sentence is not undul

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

411

KA 13-01431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROSS, ALSO KNOWN AS MICHAEL L. ROSS,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered June 14, 2013. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, strangulation in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), strangulation in the second degree (§ 121.12) and assault in the second degree (§ 120.05 [12]). The conviction arises out of defendant's assault of the victim, then 96 years old, at her home. Defendant was acquainted with the victim because she had cared for him and his siblings in the late 1960s and early 1970s, when defendant was a child.

We reject defendant's contention that County Court denied him the right to present a defense when it limited discovery of confidential records concerning the victim's alleged abuse of other children in her care. "[T]hough access must be afforded to otherwise confidential data relevant and material to the determination of guilt or innocence," the records sought here were relevant only for impeachment of the victim's general credibility (*People v Gissendanner*, 48 NY2d 543, 548 [1979]). Under the circumstances of this case, we conclude that the court's ruling on defendant's discovery request was a proper exercise of its discretion (*see id.*). Contrary to defendant's further contention, we conclude that the court properly exercised its discretion in limiting defendant's cross-examination of the victim concerning her alleged abuse of other

children in her care to such incidents where defendant could establish, as a foundation, that he was aware of the alleged abuse. We agree with the court that, absent such a foundation, inquiry into the victim's abuse of other children was irrelevant to defendant's guilt or innocence and was relevant only for the purpose of impeaching the victim's credibility (*see People v Ragland*, 240 AD2d 598, 598 [2d Dept 1997], *lv denied* 91 NY2d 929 [1998]).

The court also properly exercised its discretion in granting the People's request to conduct a conditional examination of the victim (*see* CPL 660.50 [1]). Based upon the testimony of the victim's physician at the hearing conducted pursuant to CPL 670.20 (1), moreover, the court properly determined that the victim was unavailable to testify at trial due to "illness and incapacity" and that the victim's conditional examination testimony could therefore be admitted in evidence at trial (CPL 670.10 [1]; *see generally People v DeJesus*, 110 AD3d 1480, 1481 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]).

Finally, we reject defendant's contentions that the persistent violent felony offender statute is unconstitutional (*see People v Bell*, 15 NY3d 935, 936 [2010], *cert denied* 563 US 979 [2011]), and that his sentence is unduly harsh and severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

418

CAF 17-01822

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

IN THE MATTER OF EDWARD A. JONES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KAREN L. JONES, RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD,
APPELLANT.

TANYA J. CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 19, 2017 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, granted the petition of petitioner seeking modification of his child support obligation.

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

Memorandum: The Attorney for the Child (AFC) appeals from an order that granted the petition of petitioner father seeking modification of his child support obligation by relieving him of his obligation to support his daughter, the eldest of the three children of the father and respondent mother. We agree with the AFC that the evidence at the hearing was insufficient to establish that the father should be relieved of that obligation based upon the mother's conduct. Visitation with the father was subject to the wishes of the daughter (*see generally Hiross v Hiross*, 224 AD2d 662, 663 [2d Dept 1996]; *Matter of Wikoff v Whitney*, 179 AD2d 924, 926 [3d Dept 1992]), and the mother and daughter both testified unequivocally that the daughter refused to have anything to do with the father by her own choice and for her own reasons (*see McCloskey v McCloskey*, 111 AD3d 1120, 1121-1122 [3d Dept 2013]; *Matter of Crouse v Crouse*, 53 AD3d 750, 752 [3d Dept 2008]).

While the evidence fails to establish that the mother deliberately interfered with visitation or otherwise contributed to the breakdown in the father-daughter relationship, we conclude that Family Court nevertheless properly relieved the father of his obligation to support the daughter on the ground that the daughter, by her conduct, forfeited her right to support (*see Matter of Jurgielewicz v Johnston*, 114 AD3d 945, 946-947 [2d Dept 2014]; *Basi v*

Basi, 136 AD2d 945, 946 [4th Dept 1988], *lv dismissed* 72 NY2d 952 [1988]). A parent is responsible for the support of his or her child until age 21 (*see* Family Ct Act § 413 [1] [a]; *Matter of Gold v Fisher*, 59 AD3d 443, 444 [2d Dept 2009]), but "a child of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support" (*Matter of Saunders v Aiello*, 59 AD3d 1090, 1091 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of Roe v Doe*, 29 NY2d 188, 193 [1971]). The daughter, who was 17 when the proceeding was commenced and 18 when it was concluded, was of employable age (*see Saunders*, 59 AD3d at 1091; *Basi*, 136 AD2d at 946-947). Contrary to the AFC's contention, the record does not support the conclusion that the daughter was justified in refusing all contact with the father based upon his conduct (*see Matter of Chamberlin v Chamberlin*, 240 AD2d 908, 910 [3d Dept 1997]; *cf. Matter of Barlow v Barlow*, 112 AD3d 817, 818 [2d Dept 2013]). The father made consistent efforts to establish a relationship with the daughter by participating in counseling, inviting her to family functions, and giving her cards and gifts, but those efforts were rebuffed (*see Jurgielewicz*, 114 AD3d at 946-947). Neither the conflicting evidence concerning an incident when the daughter was eight or nine, nor the daughter's vague complaints about the father's personality, is sufficient to establish that the father caused the breakdown of the relationship (*see Matter of Rubino v Morgan*, 224 AD2d 903, 903 [3d Dept 1996]).

The AFC contends for the first time on appeal that a reduction of the father's child support obligation would render the mother and the daughter public charges and therefore failed to preserve her contention for our review (*see Matter of Crosby v Hickey*, 289 AD2d 1013, 1014 [4th Dept 2001]). In any event, that contention is without merit.

Finally, we reject the AFC's contention that the admission in evidence of petitioner's exhibits 8 and 9 constitutes reversible error. Rather, "[a]ny error is harmless inasmuch as the court placed minimal, if any, reliance on those [exhibits], and the evidence is otherwise sufficient to support the court's determination" (*Matter of Higgins v Higgins*, 128 AD3d 1396, 1397 [4th Dept 2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

431

TP 17-01553

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

IN THE MATTER OF FRANK D'ANTUONO, PETITIONER,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT.

FRANK D'ANTUONO, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered August 22, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]), 104.11 (7 NYCRR 270.2 [B] [5] [ii]) and 104.13 (7 NYCRR 270.2 [B] [5] [iv]), and vacating the recommended loss of good time, and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those rules, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking review of a determination, following a tier III hearing on two separate misbehavior reports, that petitioner violated various inmate rules. Addressing first the determination with respect to the second misbehavior report, we conclude that there is substantial evidence to support the determination that petitioner violated the inmate rules charged therein (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

We agree with petitioner, however, that the determination with respect to the first misbehavior report, finding him guilty of violating inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]) and 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]) is not supported by substantial evidence. The videotape of the incident underlying those charges establishes that petitioner was defending himself from an

unprovoked, surprise attack from another inmate (*see Matter of Varela v Coughlin*, 199 AD2d 1007, 1007-1008 [4th Dept 1993]). Contrary to respondent's contention, we conclude that the videotape further establishes that petitioner's conduct did not exceed what was necessary to defend himself (*cf. Matter of O'Sullivan v Fischer*, 87 AD3d 1229, 1230 [3d Dept 2011]).

We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated the inmate rules charged in the first misbehavior report, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those inmate rules. There is no need to remit the matter to respondent for reconsideration of those parts of the penalty that have been served by petitioner (*see Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375 [4th Dept 2012]). The Hearing Officer, however, also recommended loss of good time, and the record does not reflect the relationship between the violations and that recommendation. We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation in light of our decision with respect to inmate rules 100.13, 104.11 and 104.13 (*see Matter of Williams v Annucci*, 133 AD3d 1362, 1363-1364 [4th Dept 2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

432

KA 16-01260

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VALVANO YAZZIE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered June 8, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). The two pleas were entered in a single plea proceeding. With respect to both appeals, defendant contends that the waiver of the right to appeal is not valid. We reject that contention and conclude that Supreme 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 Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016] [internal quotation marks omitted]). The valid waiver of the right to appeal forecloses our review of defendant's contention that the sentence in each appeal is unduly harsh and severe (*see generally People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

433

KA 16-01259

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VALVANO YAZZIE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered June 8, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Same memorandum as in *People v Yazzie* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

434

KA 16-01945

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES L. MILLS, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 3, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree and grand larceny in the fourth degree.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

435

KA 15-01191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROSS MCKINNEY, DEFENDANT-APPELLANT.

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

ROSS MCKINNEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 20, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

436

KA 17-00456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES W. RYDZESKI, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered February 5, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

438

KA 16-01900

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GARY GRAHAM, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated April 13, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

439

KAH 16-01343

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DARRYL GRATE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHELLE ARTUS, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, AND TINA MARIE STANFORD,
CHAIR, NEW YORK STATE BOARD OF PAROLE,
RESPONDENTS-RESPONDENTS.

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

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

Appeal from a judgment of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered September 29, 2015 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus, contending that he is entitled to immediate release from custody because respondents breached an implied agreement guaranteeing his release to parole if he participated in mandated programs while incarcerated. Supreme Court properly dismissed the petition. As in *People ex rel. Germenis v Cunningham* (73 AD3d 1297 [3d Dept 2010]), petitioner premises his contention on a document entitled "Program Refusal Notice," also known as form 3617. That document notified prisoners that, inter alia, a "refusal to participate in recommended programming may result in the denial of [p]arole." Like the petitioner in *Germenis*, petitioner herein contends that the quoted language "amounted to a contractual obligation to release him on parole in the event that he participated in recommended programming" (*id.* at 1298). We agree with the Third Department that "[t]he document in question discloses no basis upon which to conclude that it created a contractual obligation" and, as a result, we conclude that the court properly dismissed the petition (*id.*; *see People ex rel. MacKenzie v Cunningham*, 78 AD3d 1434, 1434 [3d Dept 2010]; *People ex rel. St. Pierre v Cunningham*, 73 AD3d 1310,

1310-1311 [3d Dept 2010]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

440

CAF 16-00952

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

IN THE MATTER OF JASON B., LAURA B., SARA B., AND MIRANDA B.

YATES COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

GERALD B., RESPONDENT, AND PHYLLIS B., RESPONDENT-APPELLANT.

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

TYSON BLUE, MACEDON, FOR PETITIONER-RESPONDENT.

JOSEPH S. DRESSNER, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

MARYBETH D. BARNET, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 18, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights on the ground of mental illness. We affirm.

We note at the outset that the mother contends that Family Court committed reversible error in relying on the testimony of the psychologist who examined her because his opinion was based in part on inadmissible hearsay. The mother failed to object to the testimony of that psychologist on that ground, however, and thus failed to preserve her contention for our review (*see Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1319 [4th Dept 2016]). Contrary to the mother's further contention, we conclude that petitioner established "by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for her children" (*Matter of Jarred R.*, 236 AD2d 888, 888 [4th Dept 1997]; *see* Social Services Law § 384-b [3] [g] [i]; [4] [c]). The psychologist who examined the mother testified that the mother suffered from personality disorder that rendered her

unable to parent the children effectively, and that the children would be in danger of being neglected if they were returned to her care at the present time or in the foreseeable future (*see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

441

CAF 16-02012

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

IN THE MATTER OF JENESSA L.M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAWN C.P., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JAMIE L. CODJOVI, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 26, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that said appeal insofar as it concerns the finding of neglect is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this Family Court Act article 10 proceeding, respondent mother appeals from an order adjudging, inter alia, that she neglected the subject child. The mother's challenge to the finding of neglect " 'is not reviewable on appeal because it was premised on [the mother's] admission of neglect and thereby made in an order entered on consent of the parties' " (*Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 941 [2015]). Furthermore, the mother "never moved to vacate the finding of neglect or to withdraw her consent to the order, and thus her contention that her consent was not knowing, intelligent, and voluntary is not properly before us" (*Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th Dept 2017]). We have considered the mother's remaining contention and conclude that it is without merit.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

445

CA 17-02103

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

DARELYN CLAUSE, AS ADMINISTRATRIX OF THE ESTATE OF KYLE C. ATKINS, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY MEDICAL CENTER, ET AL., DEFENDANTS, WILLIAM J. FLYNN, JR., M.D., AND JAMES K. FARRY, M.D., DEFENDANTS-RESPONDENTS.

JARROD W. SMITH, ESQ., P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 19, 2017. The order denied the motion of plaintiff for an extension of time to perfect service of process on defendants William J. Flynn, Jr., M.D., and James K. Farry, M.D.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

453

CA 17-02126

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

TOWER BROADCASTING, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EQUINOX BROADCASTING CORP., DEFENDANT-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (DANIEL R. NORTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (ROBERT H. MCKERTICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 21, 2017. The order denied the motion of defendant to dismiss the complaint and the motion of defendant for a change of venue.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that it owns a broadcast tower located on real property owned by defendant and has a right to remove the tower from that property. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), contending that plaintiff failed to state a cause of action. In the alternative, defendant separately moved to transfer the venue of the action from Monroe County to Chemung County. We conclude that Supreme Court properly denied both motions.

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, — NY3d —, —, 2018 NY Slip Op 01149, *4 [2018] [internal quotation marks omitted]). Here, the complaint, with its attached exhibits, adequately sets forth causes of action for a declaratory judgment, breach of contract, quantum meruit and unjust enrichment, and defendant's contentions to the contrary raise issues of fact and do not warrant relief under CPLR 3211 (a) (7).

We further conclude that the court properly denied the motion to change the venue of the action. Pursuant to CPLR 501, a "written

agreement fixing [the] place of trial, made before an action is commenced, shall be enforced upon a motion for change of [the] place of trial." Here, the two written agreements that form the basis of plaintiff's causes of action fix the place of trial as Monroe County. We reject defendant's contention that plaintiff cannot enforce the forum selection provision of the amended settlement agreement entered into between defendant and plaintiff's predecessor in interest. Plaintiff, as the assignee of its predecessor in interest, may enforce the forum selection provisions of that contract inasmuch as an assignee stands in the shoes of the assignor and is thus subject to all the benefits and burdens of the assignor (*see e.g. Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 223 [1st Dept 2006]; *CV Holdings, LLC v Bernard Tech., Inc.*, 14 AD3d 854, 854-855 [3d Dept 2005]; *GMAC Commercial Credit, LLC v Dillard Dept. Stores, Inc.*, 198 FRD 402, 406-407 [SD NY 2001]; *see generally Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]). Moreover, because plaintiff alleges that it owns the tower as the result of the asset purchase agreement executed by plaintiff and its predecessor in interest, the forum selection provision in that agreement may also be enforced.

Defendant contends that Chemung County is the "proper" forum on the ground that the tower and the real property upon which it is situated are both located in Chemung County (CPLR 510 [1]; *see* CPLR 507, 508). We reject that contention. First, this action concerns a broadcasting tower, which is a trade fixture and therefore retains its character as personal property (*see Orange County-Poughkeepsie MSA Ltd. Partnership v Bonte*, 301 AD2d 583, 583-584 [2d Dept 2003]). Thus, CPLR 507, which concerns actions involving real property, is inapplicable.

Second, although CPLR 508 provides that the "place of trial of an action to recover a chattel *may* be in the county in which any part of the subject of the action is situated at the time of the commencement of the action" (emphasis added), that section is permissive and not mandatory. Thus, it does not preclude an action in another venue, particularly where, as here, there is a written agreement fixing the place of trial in that other venue.

Contrary to defendant's further contention, it failed to establish any reason to believe that an impartial trial could not be held in Monroe County or that the convenience of material witnesses and the ends of justice would be promoted by a change of venue (*see* CPLR 510 [2], [3]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

454

CA 16-02329

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

KIMBERLY CHIAPPERINI, AS REPRESENTATIVE OF THE ESTATE OF MICHAEL CHIAPPERINI, DECEASED, JOSEPH HOFSTETTER, MARIAN KACZOWKA AND JANINA KACZOWKA, AS REPRESENTATIVES OF THE ESTATE OF TOMASZ KACZOWKA, DECEASED, THEODORE SCARDINO AND KAREN SCARDINO, PLAINTIFFS-APPELLANTS,

V ORDER

GANDER MOUNTAIN COMPANY, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PISCIOTTI MALSCH, P.C., WHITE PLAINS (JEFFREY MALSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered October 4, 2016. The order, among other things, awarded defendant Gander Mountain Company, Inc. a protective order for certain "trace data."

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 22, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

456

KA 17-00947

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARQUIS J. GRIFFIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered March 9, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

458

KA 14-02277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAKISHA D. WASHINGTON, ALSO KNOWN AS LAKISHA D. CRIBB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 2, 2014. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree and vehicular assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [4]) and vehicular assault in the second degree (§ 120.03 [1]). Contrary to defendant's contention, the record establishes that she knowingly, intelligently, and voluntarily waived her right to appeal (*see People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

459

KA 16-01689

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHAD R. CROWLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered August 10, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

460

KA 15-01195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS MCLAURIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered April 23, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress cocaine on the ground that the search of his anal cavity was not authorized. We affirm. On September 18, 2013, members of the Onondaga County Sheriff's Office obtained a warrant to search defendant's Syracuse residence and all persons present after an investigation revealed that defendant was selling cocaine at and around the premises. Shortly before the warrant was executed by the police that day, a detective observed defendant exit his residence and pull away in a gold minivan. The minivan rolled through a stop sign at a nearby intersection, and the detective initiated a traffic stop. Upon approaching the vehicle, the detective identified the driver and sole occupant of the vehicle as defendant, whom he recognized as the same person who had previously sold crack cocaine during three controlled buys that were conducted by the police in August and earlier in September 2013. The detective noticed that defendant was squirming around in the driver's seat, and he directed defendant to exit the vehicle. When defendant failed to comply with the directive, the detective opened defendant's door and took him into custody. At that time, the detective observed a white rock-like substance on the driver's seat and the floor beneath the driver's seat. The detective field tested the substance, which revealed the presence of cocaine.

Defendant was arrested, and the police executed the search warrant at his residence, which resulted in the seizure of various types of drug paraphernalia with white powdery residue that the police believed to be cocaine. Defendant was "very verbal" with the police during the execution of the search warrant, and the detective noticed that he was "constantly shifting as if he had something down his pants." Defendant refused to be searched, and he began to complain of shortness of breath and pain in his abdomen. An ambulance was summoned to transport defendant to the hospital for evaluation. While inside the ambulance, defendant agreed to be searched but then refused to allow the search to include his pants, underwear, or the area of his groin or buttocks. He "would intentionally move his buttocks away from view and would clench his buttocks and stiffen up his body so as not allow the visual search of his person." Based on his observations of defendant, the detective suspected that defendant had secreted cocaine in or on his body, and he therefore applied for another search warrant (second warrant) so that he could search defendant for cocaine. In his second warrant application, the detective set forth the above facts and specifically alleged, inter alia, that there was reasonable cause to believe that cocaine "may be found in or upon . . . a black male, known as Curtis L. McLaurin," giving defendant's date of birth and approximate height and weight. After the second warrant was issued, the detective delivered it to the hospital where defendant was being evaluated. The staff at the hospital performed an X-ray examination of defendant's body, which allowed for a visual cavity inspection, and confirmed the presence of an object inside defendant's anal cavity. A doctor thereafter removed 13 grams of cocaine from defendant's rectum.

Contrary to defendant's contention, the court properly refused to suppress the cocaine that was removed from his anal cavity. The specific facts set forth in the application for the second warrant supported the detective's articulated suspicion that defendant had secreted cocaine *in or upon* his person. The facts provided probable cause to believe that drugs were hidden inside defendant's body, and the second warrant, which specifically directed a search of defendant for cocaine, was properly obtained prior to any physical intrusion (*see Schmerber v California*, 384 US 757, 770 [1966]; *see also People v Mothersell*, 14 NY3d 358, 367 [2010]; *People v Hall*, 10 NY3d 303, 311 [2008], *cert denied* 555 US 938 [2008]).

Contrary to defendant's further contention, we conclude that the descriptions contained in the second warrant and the underlying warrant application were sufficiently particular and definite "to enable the searcher to identify the persons, places or things that the [court] ha[d] previously determined should be searched or seized" (*People v Nieves*, 36 NY2d 396, 401 [1975]; *see generally Brigham City, Utah v Stuart*, 547 US 398, 403 [2006]; *Bell v Wolfish*, 441 US 520, 558 [1979]). It was reasonable for the suppression court to determine, "from the standpoint of common sense" (*Nieves*, 36 NY2d at 401), given the nature of the evidence sought to be seized, i.e., cocaine, and the description of the area requested to be searched, i.e., "in or upon . . . Curtis L. McLaurin . . . ," that the second warrant authorized the search of defendant's rectum and the removal of the cocaine therefrom

(*see generally People v Robinson*, 68 NY2d 541, 551-552 [1986]; *People v Hanlon*, 36 NY2d 549, 559 [1975]; *People v Rodriguez*, 181 AD2d 1049, 1049-1050 [4th Dept 1992]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

461

KA 15-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUNO M. CAPORUSSO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered February 25, 2015. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's sole contention on appeal, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

463

KA 16-00638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAY A. QUINONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 18, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, robbery in the second degree and kidnapping 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, inter alia, robbery in the first degree (Penal Law § 160.15 [3]). Contrary to the contention of defendant, County Court did not abuse its discretion in denying his request for youthful offender status. "The decision 'whether to grant or deny youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Williams*, 204 AD2d 1002, 1002 [4th Dept 1994], *lv denied* 83 NY2d 973 [1994]). In light of, among other things, the serious and premeditated nature of the crimes, as well as the preplea investigation report recommending that defendant not be adjudicated a youthful offender, we conclude that the court did not abuse its discretion in denying defendant's request. We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Miller*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

464

KA 15-01931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAZ E. ROBINSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered October 20, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Although the risk assessment instrument prepared by the Board of Examiners of Sex Offenders classified defendant as a presumptive level two risk, County Court granted the People's request for an upward departure to a level three risk based on defendant's alleged diagnosis of schizophrenia. That was error. Even if defendant in fact suffers from schizophrenia, "the record is devoid of evidence that the alleged mental illness is causally related to any risk of reoffense" (*People v Diaz*, 100 AD3d 1491, 1491 [4th Dept 2012], *lv denied* 20 NY3d 858 [2013] [internal quotation marks omitted]; *see People v Burgos*, 39 AD3d 520, 520-521 [2d Dept 2007]; *People v Zehner*, 24 AD3d 826, 827 [3d Dept 2005]; *cf. People v Collins*, 104 AD3d 1220, 1221 [4th Dept 2013], *lv denied* 21 NY3d 855 [2013]; *People v Andrychuk*, 38 AD3d 1242, 1243 [4th Dept 2007], *lv denied* 8 NY3d 816 [2007]). Contrary to the People's contention, the fact that defendant exhibits many symptoms of schizophrenia does not supply the necessary clear and convincing evidence that the disorder is causally related to an increased risk of future sex offending (*see generally Zehner*, 24 AD3d at 827, citing § 168-l [5] [a] [i]). We therefore modify the order by determining that defendant is a level two risk.

Finally, defendant's contention that the court erred in assessing certain risk factor points is academic because, even without the 30 points at issue, defendant would still qualify as a level two risk (*see People v Colon*, 146 AD3d 822, 823 [2d Dept 2017], *lv denied* 29 NY3d 904 [2017]; *People v Riddick*, 139 AD3d 1121, 1122 [3d Dept 2016]; *People v Vasquez*, 37 AD3d 193, 193 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

468

CA 17-00855

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

DURHAM COMMERCIAL CAPITAL CORP.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WADSWORTH GOLF CONSTRUCTION COMPANY OF THE MIDWEST, INC., ALSO KNOWN AS WADSWORTH GOLF CONSTRUCTION COMPANY, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 7, 2017. The order, among other things, granted defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of contract, alleging that nonparty Yousse Irrigation, Inc. (Yousse), had assigned plaintiff its rights to payment of its accounts receivable, and that defendant failed to pay the full amount due under one such assigned account. Plaintiff sought to recover from defendant the remaining amount that defendant allegedly owed on that account. Plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint. We affirm.

Contrary to plaintiff's contention, Supreme Court properly granted the motion. Defendant met its initial burden of establishing that it paid the full amount it owed on the account at issue. Specifically, defendant's evidence in support of the motion established that it had entered a contract with the Chickasaw Nation Department of Commerce (Nation) for construction work to be performed on a golf course, and that the Nation reserved the right under that contract to pay material suppliers directly on all subcontracts in order to preserve the Nation's tax exemption regarding those payments. Defendant, in turn, entered a subcontract with Yousse that contained a corresponding provision allowing the Nation to pay Yousse's material suppliers directly. Yousse performed the work pursuant to that subcontract and sent defendant an invoice for the work it had

performed. Before defendant paid that invoice, Yousse obtained a loan from plaintiff, which Yousse agreed to repay by assigning its rights to repayment under its accounts receivable, including those pursuant to the subcontract with defendant, to plaintiff. After the Nation exercised its option to pay Yousse's material suppliers directly, Yousse submitted an amended invoice to defendant, which did not include a request for payment for the materials. Finally, the Nation paid defendant the amount due on that amended invoice, and defendant then paid the amount due under the amended invoice to plaintiff.

Thus, defendant's evidence in support of the motion established that plaintiff had no right to seek payment from defendant for the amounts that the Nation had already paid to Yousse's material suppliers. There is no dispute that plaintiff was the assignee of Yousse's rights under the subcontract, and it is well settled that an "assignee . . . stands in [the] shoes [of the assignor] . . . The assignment grants [the assignee] the same rights and interests with regard to the . . . claim to which [the assignor] had been entitled with all of its infirmities, equities, and defenses . . . [The assignee]'s rights [are] derivative and an assignee never stands in any better position than his assignor" (*Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440 [1st Dept 2008] [internal quotation marks omitted]; *see* UCC 9-404 [a] [1]; *Caprara v Charles Ct. Assoc.*, 216 AD2d 722, 723 [3d Dept 1995]). Defendant established as a matter of law that Yousse was not entitled to payment of any additional money under its subcontract, and plaintiff failed to raise a triable issue of fact whether it had acquired by the assignment the right to payment from defendant of any additional money (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff further contends that the court erred in granting the motion inasmuch as it raised a triable issue of fact whether it had entered into an enforceable agreement with defendant, in which defendant agreed to pay plaintiff the amount reflected in the original invoice. We reject that contention. The record establishes that defendant merely acquiesced in the assignment of Yousse's rights to plaintiff, but defendant did not make an independent promise that it would pay the full amount of the original invoice to plaintiff. Significantly, there was no consideration for defendant's alleged agreement to pay plaintiff pursuant to the original invoice other than Yousse's performance of its duties under the subcontract. Those duties had already been performed when Yousse assigned its rights under the subcontract to plaintiff, and thus the duties constituted only past consideration with respect to the assignment. It is well settled that "[t]he lack of consideration for a note is a bona fide defense to payment thereof[, and g]enerally, past consideration is no consideration and cannot support an agreement because 'the detriment did not induce the promise' " (*Samet v Binson*, 122 AD3d 710, 711 [2d Dept 2014]; *see Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017]; *see generally* General Obligations Law § 5-1105).

Similarly, plaintiff failed to raise a triable issue of fact whether defendant is bound by the doctrine of promissory estoppel to pay the full amount of the original invoice. Promissory estoppel is

applicable only where there is "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Vassenelli v City of Syracuse*, 138 AD3d 1471, 1475 [4th Dept 2016] [internal quotation marks omitted]; *see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 20-21 [2d Dept 2008]; *Chemical Bank v City of Jamestown*, 122 AD2d 530, 531 [4th Dept 1986], *lv denied* 68 NY2d 608 [1986]). Here, defendant's evidence in support of the motion established that plaintiff loaned money to Yousse before obtaining defendant's promise to pay the invoice, and defendant thereby established that plaintiff did not rely on that promise in deciding to make the loan. Inasmuch as plaintiff failed to submit evidence that, in deciding to make the loan, it detrimentally relied on a promise by defendant to pay the full amount of the original invoice, plaintiff failed to raise a triable issue of fact whether defendant was bound to pay the full amount of the original invoice based on promissory estoppel.

Plaintiff's remaining contentions are academic in light of our determination.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

469

CA 17-00204

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

IN THE MATTER OF THE ACCOUNTING BY DONALD K. CZEIZINGER, AS ADMINISTRATOR OF THE ESTATE OF FREDERICK D. CZEIZINGER, DECEASED,
PETITIONER-RESPONDENT.

---------- ORDER

TINA CHAMBLISS-PARTEE, OBJECTANT-APPELLANT;

ROBERT F. BALDWIN, JR., GUARDIAN AD LITEM OF FREDERICK DONALD CZEIZINGER, DECEASED,
RESPONDENT.

TINA CHAMBLISS-PARTEE, OBJECTANT-APPELLANT PRO SE.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered December 20, 2016. The order settled a record on appeal.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

470

CA 17-01455

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

IN THE MATTER OF ANDREW R. KOMAREK,
PETITIONER-APPELLANT,

V ORDER

PLANNING BOARD OF TOWN OF MIDDLESEX, TOWN
BOARD OF MIDDLESEX AND TOWN OF MIDDLESEX,
RESPONDENTS-RESPONDENTS.

MORGENSTERN DEVOESICK PLLC, PITTSFORD (VIVEK J. THIAGARAJAN OF COUNSEL), FOR PETITIONER-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered December 1, 2016 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the petition.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

472

CA 17-00917

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

ELIZABETH THORNTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-APPELLANT.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (SPENCER L. ASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), dated January 26, 2017. The order, among other things, denied defendant's motion to set aside the jury verdict.

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

Memorandum: Defendant appeals from an order that, among other things, denied that part of its motion seeking to set aside the jury verdict and to direct judgment in its favor pursuant to CPLR 4404 (a). Inasmuch as the order is subsumed in the subsequently entered judgment, the appeal properly lies from the judgment (*see* CPLR 5501 [a] [1]; *Giorgione v Gibaud*, 147 AD3d 1448, 1448 [4th Dept 2017]), but no appeal was taken therefrom. Although we may exercise our discretion to treat the notice of appeal as valid and deem the appeal as one taken from the judgment instead of the order (*see* CPLR 5520 [c]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]), we decline to do so here.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

474

CA 17-00949

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

RANDALL M. HINTON, PLAINTIFF-APPELLANT,

V ORDER

VILLAGE OF PULASKI, DEFENDANT-RESPONDENT.

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

LYNCH LAW OFFICE, PLLC, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered August 16, 2016. The order granted defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

475

CA 17-00594

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

IN THE MATTER OF JOHN DISTAOLA,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 9, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

476

CA 17-00723

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

IN THE MATTER OF CESAR AGUAYO,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 9, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

477

KA 16-00449

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM TYES, DEFENDANT-APPELLANT.

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

WILLIAM TYES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 16, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention in his main brief, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Sanders*, 25 NY3d 337, 341-342 [2015]). The valid waiver of the right to appeal encompasses defendant's challenges in his main and pro se supplemental briefs to County Court's suppression ruling (*see id.* at 342), and the challenge in his main brief to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant further contends in his pro se supplemental brief that he was denied effective assistance of counsel based upon conversations with defense counsel, including one in which defense counsel allegedly misrepresented the promised maximum sentence. Defendant's contention "survives his plea and valid waiver of the right to appeal only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). To

the extent that defendant's contention is based upon matters outside the record, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Blackwell*, 129 AD3d 1690, 1691-1692 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *People v Merritt*, 115 AD3d 1250, 1251 [4th Dept 2014], *lv denied* 30 NY3d 1021 [2017]; *People v Graham*, 77 AD3d 1439, 1440 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010]). Insofar as defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

To the extent that defendant contends in his pro se supplemental brief that the court failed to make an appropriate inquiry into his request for substitution of counsel several months before the plea proceeding, his contention " 'is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea' " (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]). In any event, "defendant abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*Guantero*, 100 AD3d at 1387; *see Morris*, 94 AD3d at 1451).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

478

KA 16-00559

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHELE A. CASE, ALSO KNOWN AS MICHELE CASE, ALSO KNOWN AS MICHELLE A. CASE, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 22, 2014. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for a hearing to determine the amount of restitution.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]). We previously reversed the judgment convicting her of the same crime (*People v Case*, 114 AD3d 1308 [4th Dept 2014]), and the judgment now on appeal is the result of the retrial.

Defendant contends for the first time on appeal that County Court erred in relying on the doctrine of law of the case when it refused to consider the *Sandoval* issues de novo following our reversal of the earlier judgment and thus failed to preserve that contention for our review (*see People v Combo*, 291 AD2d 887, 887 [4th Dept 2002], *lv denied* 98 NY2d 650 [2002]; *see also People v Johnson*, 101 AD3d 1044, 1044 [2d Dept 2012], *lv denied* 20 NY3d 1100 [2013]). In any event, that contention lacks merit because the record establishes that the court recognized its authority to make a different determination but, in exercising its discretion, adhered to its prior ruling.

We reject defendant's contention that she was denied effective assistance of counsel based on defense counsel's failure to object to the *Sandoval* ruling, wherein the court permitted the prosecutor to question defendant, if she chose to testify, on larceny charges

underlying an indictment that had been dismissed as untimely. Where, as here, an indictment is dismissed for reasons other than on the merits, the subject matter of the indictment may be used for impeachment purposes under *Sandoval* (*see People v Matthews*, 68 NY2d 118, 123 [1986]; *People v Brightley*, 56 AD3d 314, 315 [1st Dept 2008], *lv denied* 12 NY3d 756 [2009]; *People v Guerra*, 35 AD3d 323, 323 [1st Dept 2006], *lv denied* 9 NY3d 844 [2007]), and it is well settled that acts of larceny are relevant inquiries under *Sandoval* because they "involve 'acts of individual dishonesty' . . . and . . . 'are particularly relevant to the issue of credibility' " (*People v Walker*, 66 AD3d 1331, 1332 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]). We thus conclude that defense counsel was not ineffective in failing to make an objection that had little or no chance of success (*see People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant failed to preserve for our review her contention that the prosecutor improperly cross-examined her on her offer to settle claims made against her by the complainant in a civil action (*see generally* CPL 470.05 [2]; *People v Nater*, 280 AD2d 273, 274 [1st Dept 2001], *lv denied* 96 NY2d 832 [2001]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant likewise failed to preserve for our review her contention that the prosecutor improperly commented during summation on defendant's refusal to take a polygraph (*see People v Sanford*, 148 AD3d 1580, 1583 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). In any event, that comment would not require reversal. Defense counsel elicited testimony that defendant initially accepted a request to take a polygraph and, shortly thereafter, defense counsel elicited further testimony that, when defendant was presented with the opportunity to take the polygraph, she refused to do so. In summation, the prosecutor made one reference to that refusal, contending that the refusal could be considered by the jury as evidence of defendant's consciousness of guilt. Even assuming, arguendo, that the prosecutor's reference to the testimony elicited by defense counsel at trial was erroneous, we agree with the People that the single reference to that testimony was not so egregious as to deny defendant a fair trial (*see People v Michaud*, 248 AD2d 823, 824 [3d Dept 1998], *lv denied* 91 NY2d 1010 [1998]; *cf. People v Uriah*, 261 AD2d 848, 848-849 [4th Dept 1999]; *see also People v Hogan*, 259 AD2d 1025, 1026 [4th Dept 1999], *lv denied* 93 NY2d 926 [1999]).

Contrary to defendant's contention, we further conclude that defense counsel was not ineffective in eliciting such testimony or in failing to object to the prosecutor's comment on summation. Defendant has failed to demonstrate the absence of a strategic or legitimate explanation for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Contrary to defendant's contention, this case is distinguishable from *Wynters v Poole* (464 F Supp 2d 167 [WD NY 2006]), wherein defense counsel was deemed ineffective for failing to object to the " 'trifecta' of improper remarks" made by the prosecutor concerning the defendant's refusal to

take a polygraph, request for counsel and invocation of the Fifth Amendment right to remain silent (*id.* at 179). Here, defendant "has not established that counsel's strategy 'was inconsistent with the actions of a reasonably competent attorney' " (*People v Howie*, 149 AD3d 1497, 1500 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017], quoting *People v Henderson*, 27 NY3d 509, 514 [2016]). Rather, upon viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we agree with defendant that the court erred in denying her request for a restitution hearing. It is well settled that where, as here, a defendant requests a restitution hearing, Penal Law § 60.27 (2) requires that one be provided, "irrespective of the level of evidence in the record" (*People v Ippolito*, 89 AD3d 1369, 1370 [4th Dept 2011], *affd* 20 NY3d 615 [2013] [internal quotation marks omitted]; *see People v Connolly*, 27 NY3d 355, 359 [2016]). Once we reversed the prior judgment and granted defendant a new trial, she was "restored to the status obtaining before the initial trial" (*Matter of Lee v County Ct. of Erie County*, 27 NY2d 432, 443 [1971], *cert denied* 404 US 823 [1971]) and, as a result, it is irrelevant that a hearing was held following the first trial. We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

480

KA 15-00913

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMOND WASHINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

DESMOND WASHINGTON, DEFENDANT-APPELLANT PRO SE.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered December 9, 2014. The judgment convicted defendant, upon a nonjury trial, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a nonjury trial of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [1]).

Defendant's challenge in appeal No. 1 to the legal sufficiency of the evidence with respect to the credibility of the People's witnesses is unpreserved for our review because defendant did not raise that ground in support of his motion for a trial order of dismissal (*see People v Beard*, 100 AD3d 1508, 1509 [4th Dept 2012]). Viewing the evidence in light of the elements of the crime in the nonjury trial in appeal No. 1 (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence based on his challenge to the credibility of two of the People's witnesses (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[I]ssues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the [factfinder]" (*People v Witherspoon*,

66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]; *see People v Smith*, 145 AD3d 1628, 1629 [4th Dept 2016]). "Testimony will be deemed incredible as a matter of law only where it is 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]), and here the testimony of those two witnesses was not incredible as a matter of law.

Defendant further contends in appeal No. 1 that County Court, in sentencing him to two consecutive nine-year terms of incarceration, penalized him for exercising his right to a jury trial. We reject that contention. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to [a] trial' " (*People v Chappelle*, 14 AD3d 728, 729 [3d Dept 2005], *lv denied* 5 NY3d 786 [2005]; *see People v Murphy*, 68 AD3d 1730, 1731 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010]). Indeed, " '[g]iven that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Martinez*, 26 NY3d 196, 200 [2015]). We conclude that "the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Shaw*, 124 AD2d 686, 686 [2d Dept 1986], *lv denied* 69 NY2d 750 [1987]; *see People v Brown*, 67 AD3d 1427, 1427-1428 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]). We conclude, however, that the sentence is unduly harsh and severe under the circumstances (*see* CPL 470.15 [6] [b]), and we therefore modify the judgment in appeal No. 1 as a matter of discretion in the interest of justice by directing that the sentences imposed shall run concurrently.

Defendant failed to preserve for our review his challenge to the court's suppression ruling in appeal No. 2 inasmuch as he failed to "[make] his position with respect to the [challenged] ruling . . . known to the court" (CPL 470.05 [2]; *see generally People v Martin*, 50 NY2d 1029, 1031 [1980]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We have reviewed defendant's contentions in appeal Nos. 1 and 2 in his pro se supplemental briefs and conclude that none requires reversal or further modification.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

481

KA 13-00469

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN D. POHL, DEFENDANT-APPELLANT.

FRANK M. BOGULSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered July 12, 2012. The judgment convicted defendant upon a jury verdict of, inter alia, aggravated criminal contempt (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of aggravated criminal contempt (Penal Law § 215.52 [1]) arising from his violation of two orders of protection. With respect to three of those four counts, defendant contends that the conviction is not supported by legally sufficient evidence that he caused physical injury to the complainant for whose protection the orders of protection were issued. That contention is not preserved for our review because defendant failed to raise it in his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, it lacks merit. With respect to count two, the complainant's testimony that defendant choked her into unconsciousness is legally sufficient to establish that he caused her physical injury (*see People v Ryder*, 146 AD3d 1022, 1025 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *see also People v Suyoung Yun*, 140 AD3d 402, 403 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]). With respect to count nine, her testimony that defendant punched and kicked her already broken ribs while screaming that he would be "more than happy" to break her ribs further, and that her ribs caused her so much pain the following night that she could not sleep, is legally sufficient to establish that he caused her physical injury (*see generally People v Chiddick*, 8 NY3d 445, 447-448 [2007]). With respect to count 12, her testimony that defendant punched her in the face until she lost consciousness is legally sufficient to establish that he caused her physical injury (*see People v Wise*, 99 AD3d 584, 584-585 [1st Dept 2012], *lv denied* 21 NY3d 1011 [2013]).

Viewing the evidence in light of the elements of the crime of aggravated criminal contempt as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to those three counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that Supreme Court committed reversible error when it failed to conduct an inquiry pursuant to *People v Gomberg* (38 NY2d 307 [1975]) upon learning that defense counsel had represented the complainant in a prior case. Defendant "failed to meet his burden of establishing that 'the conduct of his defense was in fact affected by the operation of the conflict of interest' " (*People v Smart*, 96 NY2d 793, 795 [2001]; *see People v Pandajis*, 147 AD3d 1469, 1470 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). Here, defense counsel's prior representation of the complainant involved an entirely different incident that bore no relation to this case.

" 'By failing to move to dismiss the indictment within the five-day statutory period on the ground that he was denied his right to testify before the grand jury, defendant . . . waived his right to testify before the grand jury and his contention that the indictment should have been dismissed based on the denial of his right to testify before the grand jury lacks merit' " (*People v Hirsh*, 106 AD3d 1546, 1547 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *see People v Cherry*, 149 AD3d 1346, 1346 [3d Dept 2017], *lv denied* 29 NY3d 1124 [2017]). Furthermore, defendant failed to preserve for our review his contention that the indictment should be dismissed on speedy trial grounds (*see People v Tirado*, 109 AD3d 688, 690 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013], *reconsideration denied* 22 NY3d 1091 [2014], *cert denied* — US —, 135 S Ct 183 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court lawfully sentenced him consecutively on counts seven and nine inasmuch as defendant committed the conduct charged in those counts through "separate and distinct acts" (*People v Brahney*, 29 NY3d 10, 15 [2017], *rearg denied* 29 NY3d 1046 [2017]). Indeed, the complainant left the house, went to the hospital, and returned from the hospital during the period of time between the commission of those acts. Finally, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

482

KA 16-00750

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. PERKINS, ALSO KNOWN AS GOTTI,
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 27, 2016. The judgment convicted defendant upon a nonjury verdict of, inter alia, murder in the second degree (two counts) and attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1]) and one count of attempted murder in the second degree (§§ 110.00, 125.25 [1]). The conviction arose from an incident involving an exchange of gunfire during which defendant shot at a vehicle occupied by a female driver and three male passengers, two of whom suffered fatal wounds. Defendant contends that the evidence is legally insufficient to establish his identity as the shooter and his intent to cause death. We reject that contention. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient to sustain the conviction of murder and attempted murder. Based upon the trial evidence, including the testimony of the driver, the surviving passenger, and an uninvolved eyewitness, as well as defendant's admission during his own testimony supporting his justification defense that he possessed a handgun and fired at the vehicle, we conclude that the evidence is legally sufficient to establish defendant's identity as the shooter (*see People v Carr*, 99 AD3d 1173, 1174 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]; *People v Lemma*, 273 AD2d 180, 180 [1st Dept 2000], *lv denied* 95 NY2d 906 [2000], *reconsideration denied* 96 NY2d 736 [2001]). Further, it is well

established that "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]). The trial evidence established that, although they previously had a friendly relationship, the surviving passenger had punched defendant and broken his jaw months prior to the shooting incident, and they had encountered each other earlier on the night of the incident at a gathering during which defendant made arguably threatening gestures toward the surviving passenger. The evidence further established that the vehicle occupied by the driver, the surviving passenger, and the two rear passengers later pulled up to an intersection where defendant was conducting a drug transaction with another individual, at which point defendant approached with a handgun and fired 13 rounds into the vehicle, thereby killing the two rear passengers. Thus, "although defendant testified that he fired in self[-]defense [in response to gunfire from one of the rear passengers] and shot with his eyes closed, 'there is [a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by [County Court] on the basis of the evidence at trial,' i.e., that defendant intended to kill" the surviving passenger and two rear passengers (*id.; see People v Alls*, 195 AD2d 952, 952-953 [4th Dept 1993], *lv denied* 82 NY2d 890 [1993]).

We reject defendant's further contention that the verdict is against the weight of the evidence with respect to the murder and attempted murder conviction because the People failed to disprove his justification defense (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although a different result would not have been unreasonable based on the evidence presented, upon " 'weigh[ing] the relative probative force of [the] conflicting testimony and the relative strength of [the] conflicting inferences that may be drawn from the testimony,' " we conclude that the court's verdict is not against the weight of the evidence (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's testimony that, contrary to the accounts of the People's witnesses, the vehicle pulled up to the intersection, an antagonistic verbal exchange occurred, one of the rear passengers began firing his handgun at defendant and defendant returned fire in self-defense "presented a credibility issue for the [court] to resolve" (*Alls*, 195 AD2d at 953), and the court, "as the finder of fact, 'was entitled to discredit the testimony of defendant' that [one of the rear passengers] was the initial aggressor" (*People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). Although defendant identifies reasons to question the veracity of the testimony of the driver and the surviving passenger that defendant was the initial aggressor (*see People v Every*, 146 AD3d 1157, 1161-1162 [3d Dept 2017], *affd* 29 NY3d 1103 [2017]), "the testimony of the People's witnesses was not incredible as a matter of law, i.e., it was not impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]). We conclude that "the court was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the [court]

failed to give the evidence the weight it should be accorded" (*Contreras*, 154 AD3d at 1321 [internal quotation marks omitted]; *see Alls*, 195 AD2d at 953; *see generally People v Richardson*, 155 AD2d 488, 489 [2d Dept 1989]).

Defendant also contends that he was denied effective assistance of counsel at the suppression hearing. We reject that contention. The court properly concluded that defendant's statement to the police during booking after he invoked his right to counsel was not the product of " 'subtle maneuvering' " by the police designed to elicit a statement from him (*People v Rivers*, 56 NY2d 476, 480 [1982], *rearg denied* 57 NY2d 775 [1982]; *see People v Johnson*, 132 AD3d 1295, 1297-1298 [4th Dept 2015], *lv denied* 27 NY3d 1134 [2016]; *People v James*, 110 AD2d 1079, 1079 [4th Dept 1985]). Thus, defense counsel was not ineffective in failing to make a closing argument at the suppression hearing on that ground inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Finally, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

483

KA 16-00155

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON A. BARNHART, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), entered November 12, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: On appeal from a judgment that, upon his admission that he violated the terms and conditions of probation, revoked the sentence of probation imposed upon his conviction of criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]), and sentenced him to a term of imprisonment, defendant contends that County Court erred in imposing an enhanced sentence based on his conduct after his admission and before sentencing. Defendant's contention is not preserved for our review because he "neither objected to the enhanced sentence[] nor moved to withdraw [his admission] on that ground" (*People v Zelter* [appeal No. 1], 6 AD3d 1103, 1103 [4th Dept 2004], *lv denied* 3 NY3d 683 [2004]; *see People v Dumbleton*, 150 AD3d 1688, 1688-1689 [4th Dept 2017], *lv denied* 29 NY3d 1091 [2017]). 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]).

Contrary to defendant's remaining contention, the enhanced sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

485

KA 15-01409

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMOND WASHINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

DESMOND WASHINGTON, DEFENDANT-APPELLANT PRO SE.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT P. MCGRAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered May 6, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Washington* ([appeal No. 1] — AD3d — [Apr. 27, 2018] [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

486

KA 16-02248

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST LOTT, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (David W. Foley, A.J.), entered September 28, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing 10 points for the recency of a prior felony conviction. We reject that contention. "Pursuant to the commentary to the risk assessment guidelines, 10 points should be assessed under that risk factor 'if an offender has a prior felony or sex crime [conviction] within three years of the instant offense' " (*People v Weathersby*, 61 AD3d 1382, 1382 [4th Dept 2009], *lv denied* 13 NY3d 701 [2009], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 14 [2006]). The three-year period is measured from the date of the prior conviction without regard to any time during which the offender was incarcerated (*see People v Dunn*, 82 AD3d 856, 857 [2d Dept 2011], *lv denied* 17 NY3d 704 [2011]; *Weathersby*, 61 AD3d at 1382). A defendant is "convicted" of an offense upon "the entry of a plea of guilty" (CPL 1.20 [13]). Here, defendant was convicted upon his plea of guilty of a felony, absconded, and, less than five months later, committed the instant designated sex offense. Thus, we conclude that the court properly assessed 10 points for the recency of the prior felony conviction because the People proved by clear and convincing evidence that the time between that conviction and the commission of the instant offense was less than three years (*see Weathersby*, 61 AD3d at 1382-1383).

Defendant failed to preserve for our review his constitutional challenges to SORA because those challenges are raised for the first time on appeal (*see People v Frank*, 37 AD3d 1043, 1044 [4th Dept 2007], *lv denied* 9 NY3d 803 [2007], *rearg denied* 9 NY3d 977 [2007]). Contrary to defendant's further contention, he was not denied effective assistance of counsel based on his attorney's failure to raise his constitutional challenges at the SORA hearing. An attorney's single alleged error in failing to raise an argument does not constitute ineffective assistance of counsel unless that error is " 'clear-cut and completely dispositive' . . . , and not one based on a complex analysis" (*People v Calderon*, 66 AD3d 314, 320 [1st Dept 2009], *lv denied* 13 NY3d 858 [2009], quoting *People v Turner*, 5 NY3d 476, 481 [2005]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

491

CA 17-02051

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

KYLE MONTERRO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIRK K. KLEIN AND ERIE COUNTY WATER AUTHORITY,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 27, 2017. The order granted that part of the motion of defendants for summary judgment with respect to the 90/180-day category of serious injury and denied the cross motion of plaintiff for partial summary judgment on the issues of negligence and serious injury.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained when the vehicle that he was operating collided with a vehicle operated by defendant Kirk K. Klein and owned by defendant Erie County Water Authority, Klein's employer. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the categories alleged by him, i.e., the permanent consequential and significant limitation of use categories, and the 90/180-day category (*see* Insurance Law § 5102 [d]). Plaintiff cross-moved for summary judgment on the issues of negligence and serious injury. Supreme Court denied plaintiff's cross motion and granted that part of defendants' motion with respect to the 90/180-day category. Defendants appeal, and we affirm.

Contrary to defendants' contention, the court properly denied those parts of their motion with respect to the remaining two categories of serious injury inasmuch as they failed to make " 'a prima facie showing that plaintiff's alleged injuries did not satisfy [the] serious injury threshold' . . . , and we therefore do not consider plaintiff's submissions in opposition to the motion" (*Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468 [4th Dept 2015]). Indeed,

we conclude that defendants' own submissions raise triable issues of fact whether plaintiff's alleged limitations and injuries are "significant" or "consequential," and "preexisting and unrelated to the accident" (*id.* [internal quotation marks omitted]). Notably, while the physician who examined plaintiff on behalf of defendants set forth range of motion limitations and considered those findings to be insignificant, "he failed to explain the basis for his calculations, such as the basis for his opinion as to what constitutes a 'normal' cervical range of motion" (*McIntyre v Salluzzo*, — AD3d —, —, 2018 NY Slip Op 02065, *1 [4th Dept 2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

492

CA 17-01947

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

SHELDON L. MCGRIFF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LESLIE A. MALLORY AND WILLIE MALLORY,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, BUFFALO (LEAH A. COSTANZO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 23, 2017. The order, insofar as appealed from, denied that part of the motion of plaintiff for the cost of alternate service.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law with costs, the motion is granted in part and judgment is granted in favor of plaintiff in the amount of $110.53.

Memorandum: Plaintiff commenced this negligence action by serving defendants by mail pursuant to CPLR 312-a (a) and thereafter utilized "an alternative method" of service of process when "the acknowledgment of receipt" was not returned by defendants or the other persons set forth in CPLR 312-a (b) within the requisite 30-day period. Plaintiff moved for, inter alia, an immediate judgment in the amount of $110.53, i.e., the amount expended by plaintiff in serving defendants by the alternative method of service of process (*see* CPLR 312-a [f]). We agree with plaintiff that Supreme Court erred in denying that part of plaintiff's motion (*see Murphy-Tarver v Lester*, 23 AD3d 993, 993 [4th Dept 2005]). Here, plaintiff submitted prima facie evidence that his attorney mailed the requisite documents to defendants pursuant to CPLR 312-a (a), and defendants failed to raise an issue of fact with respect to that service.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

493

CA 17-01932

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

BEVERLY A. RANNEY AND JOSEPH N. PIERRO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TONAWANDA CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

GRECO TRAPP, PLLC, BUFFALO (CHRIS TRAPP OF COUNSEL), FOR DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered February 2, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Following defendant's completion of a capital improvement project that included the construction of a multimillion dollar sports stadium on a parcel of land adjacent to plaintiffs' residential properties, plaintiffs commenced this action alleging that defendant's use of its land constitutes a private nuisance and seeking an award of damages. We reject defendant's contention that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

The elements of a cause of action for private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct" (*Matteliano v Skitkzi*, 85 AD3d 1552, 1553 [4th Dept 2011], *lv denied* 17 NY3d 714 [2011] [internal quotation marks omitted]; *see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977]). The issue whether a defendant's use of land constitutes a private nuisance generally turns on questions of fact that include the degree of interference and the reasonableness of the use under the circumstances (*see Schaefer v Dehauski*, 50 AD3d 1502, 1503 [4th Dept 2008]; *see also Schillaci v Sarris*, 122 AD3d 1085, 1087 [3d Dept 2014]). Evidence of noise and other disturbances has been found sufficient to preclude an award of summary judgment dismissing a

cause of action for private nuisance (*see e.g. Berenger v 261 W. LLC*, 93 AD3d 175, 182-183 [1st Dept 2012]; *Broxmeyer v United Capital Corp.*, 79 AD3d 780, 783 [2d Dept 2010]).

We conclude that defendant's own submissions raised issues of fact precluding summary judgment (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendant submitted plaintiffs' deposition testimony, which established that the stadium has lights and a loudspeaker that they find disturbing. When there are events at the stadium, the lights and loudspeaker are used late into the evening, sometimes until 11:00 p.m. The lights shine directly into the home of one of the plaintiffs. In addition, spectators at those events make a disturbing amount of noise, and also stand near plaintiffs' property lines drinking alcohol and throwing trash onto plaintiffs' properties. We further conclude, in any event, that plaintiffs raised issues of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiffs submitted the deposition testimony of defendant's superintendent, who testified that defendant had intended to plant trees along the property lines to mitigate any interference with plaintiffs' use of the property but had abandoned that plan. The superintendent also acknowledged that he understood why plaintiffs had concerns about defendant's use of the property.

We reject defendant's further contention that it established the affirmative defense of laches. It is well established that laches is an equitable defense and "is inapplicable to actions at law" (*Makarchuk v Makarchuk*, 59 AD3d 1094, 1095 [4th Dept 2009]; *see Premier Capital, Inc. v DeHaan*, 122 AD3d 1414, 1415 [4th Dept 2014], *lv denied* 24 NY3d 1102 [2015]). This action is one at law inasmuch as the complaint alleges private nuisance and seeks only an award of money damages (*see Pittsford Canalside Props., LLC v Pittsford Vil. Green*, 154 AD3d 1303, 1303-1305 [4th Dept 2017]; *cf. Marlowe v Elmwood, Inc.*, 34 AD3d 970, 971-972 [3d Dept 2006], *lv denied* 8 NY3d 804 [2007]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

494

CA 17-02147

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

CREEDON M. CLAUSE AND LISA CLAUSE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GLOBE METALLURGICAL, INC., DEFENDANT-RESPONDENT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 23, 2017. The order denied plaintiffs' motion for partial summary judgment on the issue of liability on their claims pursuant to Labor Law §§ 200 and 240 (1) and their common-law negligence cause of action.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Creedon M. Clause (plaintiff) when a 600- to 800-pound copper contact shoe, which was being removed by defendant's employees from an industrial furnace at defendant's facility, fell a few feet from its position atop a shaft attached to a forklift and struck the metal platform upon which plaintiff was working, propelling him upward and then back onto the platform. Supreme Court denied plaintiffs' motion for partial summary judgment on the issue of liability on their claims pursuant to Labor Law §§ 200 and 240 (1) and their common-law negligence cause of action. We affirm.

As the proponents of the motion for partial summary judgment, plaintiffs were required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiffs failed to meet that burden with respect to the Labor Law § 240 (1) claim. Contrary to plaintiffs' contention, defendant did not admit in its answer that plaintiff was engaged in protected activity under Labor Law § 240 (1). While activities such as repairing or altering a building or structure constitute protected activities under Labor Law

§ 240 (1), " '[i]t is well settled that the statute does not apply to routine maintenance in a non-construction, non-renovation context' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Here, defendant merely admitted that it entered into a contract with plaintiff's employer for the performance at defendant's facility of certain undefined "construction work," which is not an enumerated activity (*see* § 240 [1]), and defendant's further denial of the material allegations of each claim is consistent with its submissions in opposition to plaintiffs' motion setting forth evidence that the work may have constituted routine maintenance that is not protected under the statute (*see generally Armand Cerrone, Inc. v Sicoli & Massaro*, 192 AD2d 1063, 1063 [4th Dept 1993]). Plaintiffs conceded at oral argument of this appeal that, if the admission in the answer did not establish that he was engaged in a protected activity, then there were issues of fact precluding summary judgment with respect to whether the work fell within the scope of the statute. We thus do not address the parties' further contentions on that issue.

Plaintiffs further contend that, even if there is an issue of fact whether Labor Law § 240 (1) applies, the submissions establish as a matter of law that defendant's violation of the statute was a proximate cause of plaintiff's injuries, and we should grant their motion to that extent and limit the liability phase of the trial solely to the issue whether plaintiff was engaged in a protected activity (*see* CPLR 3212 [g]; *Bissell v Town of Amherst*, 6 AD3d 1229, 1230 [4th Dept 2004]). Inasmuch as plaintiffs seek such relief for the first time on appeal, we do not consider their contention (*see Viera v WFJ Realty Corp.*, 140 AD3d 737, 739 [2d Dept 2016]; *Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 1067 [4th Dept 2010]; *cf. Bissell*, 6 AD3d at 1230; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Finally, we conclude that the court properly denied those parts of plaintiffs' motion with respect to the Labor Law § 200 claim and common-law negligence cause of action (*see generally Puricelli v Northstar Constr., Inc.*, 15 AD3d 856, 856-857 [4th Dept 2005]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

495

CA 17-01680

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

DAVID C. BUCHWALD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

1307 PORTERVILLE ROAD, LLC, DEFENDANT-RESPONDENT.

GROSS SHUMAN P.C., BUFFALO (KATHERINE M. LIEBNER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 27, 2017. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he fell from the hayloft of a barn located on property owned by defendant. Plaintiff was employed by Fox Run Horse Farms, LLC (Fox Run), which leased the property from defendant and operated a horse farm business on the property. Defendant moved for summary judgment dismissing the complaint, contending, inter alia, that defendant and Fox Run were alter egos and, as a result, plaintiff's action against defendant was barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). Supreme Court granted the motion on that ground, and we now affirm.

"As a general rule, when . . . employee[s are] injured in the course of [their] employment, [their] sole remedy against [their] employer lies in [their] entitlement to a recovery under the Workers' Compensation Law" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980], *rearg denied* 52 NY2d 829 [1980]; *see* §§ 11, 29 [6]), and " '[t]he protection against lawsuits brought by injured workers . . . also extends to entities which are alter egos of the entity which employs the plaintiff' " (*Ciapa v Misso*, 103 AD3d 1157, 1159 [4th Dept 2013]; *see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1525 [4th Dept 2016]).

" 'A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities

controls the other or that the two operate as *a single integrated entity*' " (*Cleary*, 145 AD3d at 1525 [emphasis added]; *see Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2d Dept 2013]). Factors relevant to the determination of that issue include whether the two entities share a common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers or are owned by the same person.

Additional factors include whether the alter ego has any employees, whether the alter ego leases property pursuant to a written lease or pays rent to the plaintiff's employer, and whether one entity pays the bills for the other even if those bills are for the benefit of the nonpaying entity (*see e.g. Quizhpe*, 103 AD3d at 619; *Thomas v Dunkirk Resort Props., LLC*, 101 AD3d 1721, 1722 [4th Dept 2012]; *Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 459 [1st Dept 2012]; *Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529, 529 [1st Dept 2011]; *Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 1262-1263 [3d Dept 2010]; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2d Dept 2010]; *Mertz v Seibel Realty*, 265 AD2d 925, 925-926 [4th Dept 1999]; *Richardson v Benoit's Elec.*, 254 AD2d 798, 799 [4th Dept 1998]).

Here, we conclude that defendant established as a matter of law that it was the alter ego of Fox Run. Defendant and Fox Run were single-member-owned LLCs that were created on the same day "for a single purpose[,] to operate a horse stable business" (*see Carty*, 83 AD3d at 529; *Cappella v Suresky at Hatfield Lane, LLC*, 24 Misc 3d 1225[A], 2007 NY Slip Op 52609[U], *3 [Sup Ct, Orange County 2007], *affd* 55 AD3d 522 [2d Dept 2008]; *cf. Wernig v Parents & Bros. Two*, 195 AD2d 944, 945 [3d Dept 1993]; *but see Richardson*, 254 AD2d at 799). Both defendant and Fox Run had the same individual owner (*see Di Rie v Automotive Realty Corp.*, 199 AD2d 98, 98 [1st Dept 1993]), reported their taxes on the same tax return (*cf. Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 841 [2d Dept 2017]; *Thomas*, 101 AD3d at 1722; *Shelley v Flow Intl. Corp.*, 283 AD2d 958, 960 [4th Dept 2001], *lv dismissed* 96 NY2d 937 [2001]), and shared the same insurance policy (*see Carty*, 83 AD3d at 529; *Cappella*, 2007 NY Slip Op 52609[U], *3; *cf. Salcedo*, 146 AD3d at 841; *Wernig*, 195 AD2d at 945). Defendant had "[n]o separate set of [financial] books" and "no separate accounting or tax reporting" (*see Cappella*, 2007 NY Slip Op 52609[U], *3; *cf. Thomas*, 101 AD3d at 1722; *Lee*, 77 AD3d at 1262-1263; *Wernig*, 195 AD2d at 945-946).

In addition, defendant had no employees (*see Cappella*, 2007 NY Slip Op 52609[U], *3) and "was formed solely for the purpose of owning the premises upon which plaintiff's employer . . . operate[d]" its horse farm (*id.*). Fox Run leased property from no one other than defendant, there was no written lease agreement, and Fox Run did not pay any rent to defendant (*see id.*). Finally, Fox Run's owner paid defendant's property taxes as well as the operating expenses of the property (*see id.; see also Carty*, 83 AD3d at 529).

Those facts establish that "defendant, which ha[d] no employees,

[was] controlled by the individual that control[led] plaintiff's employer" (*Di Rie*, 199 AD2d at 98), and that the two entities "functioned as one company" (*Carty*, 83 AD3d at 529; *see Quizhpe*, 103 AD3d at 619; *cf. Batts v IBEX Constr., LLC*, 112 AD3d 765, 767 [2d Dept 2013]). Plaintiff, in opposition to the motion, failed to raise a triable issue of fact (*see Quizhpe*, 103 AD3d at 619, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We thus conclude that the court properly granted defendant's motion for summary judgment dismissing the complaint.

We see no need to address defendant's alternative theory in support of affirmance.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

496

CA 17-00595

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF WILLIAM MCKETHAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WILLIAM MCKETHAN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 31, 2017 in a CPLR article 78 proceeding. The judgment granted the motion of respondent to dismiss the petition.

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

Memorandum: In 2013, respondent withheld three pieces of mail sent to petitioner, an inmate at respondent's correctional facility. Petitioner previously commenced a CPLR article 78 proceeding challenging respondent's determination to withhold that mail, and we determined that Supreme Court (Fandrich, A.J.) properly dismissed the petition based on petitioner's failure to exhaust his administrative remedies but that the dismissal should have been without prejudice (*Matter of McKethan v Stallone*, 134 AD3d 1561, 1562 [4th Dept 2015]). One week after this Court's decision, in January 2016, petitioner filed a grievance with the Inmate Grievance Resolution Committee raising the same issues associated with the 2013 mail withholding, which was denied as untimely. After an unsuccessful administrative appeal, petitioner commenced this CPLR article 78 proceeding. Supreme Court (Leone, A.J.) properly granted respondent's motion to dismiss the petition on the ground that the grievance was time-barred.

Contrary to petitioner's contention, this Court's prior decision did not "implicitly authorize[]" him to file a "later grievance for the purposes of exhausting his administrative remedies, so he could bring a new CPLR article 78 proceeding at the conclusion of the grievance procedure." A petition dismissed for failure to exhaust administrative remedies is appropriately dismissed without prejudice to permit the petitioner to exhaust those remedies if they are not time-barred, to permit judicial review of an adverse determination if

the administrative remedies are still available and are pursued (*see generally McKethan*, 134 AD3d at 1562). Here, there is no dispute that petitioner's 2016 grievance concerning the 2013 incident was filed well beyond the 21-day time limitation set forth in 7 NYCRR 701.5 (a) (1).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

498

CA 17-00593

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF THEODORE HAYNES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 6, 2017 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted, the determination finding that petitioner violated inmate rules 100.11 (7 NYCRR 270.2 [B] [1] [ii]), 104.11 (7 NYCRR 270.2 [B] [5] [ii]), 104.13 (7 NYCRR 270.2 [B] [5] [iv]), 106.10 (7 NYCRR 270.2 [B] [7] [i]), 107.10 (7 NYCRR 270.2 [B] [8] [i]), and 113.10 (7 NYCRR 270.2 [B] [14] [i]) is annulled, and respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. We agree with petitioner that Supreme Court erred in dismissing his petition. As respondent correctly concedes, the Hearing Officer erroneously refused to consider evidence of petitioner's mental condition. "When an inmate's mental state or intellectual capacity is at issue, a hearing officer shall consider evidence regarding the inmate's mental condition or intellectual capacity at the time of the incident and at the time of the hearing in accordance with this section" (7 NYCRR 254.6 [b]). An inmate's mental state is deemed to be at issue where, as here, "the hearing was delayed or adjourned, after an extension of time was obtained . . . , because the inmate became an inpatient" at the Central New York Psychiatric Center (7 NYCRR 254.6 [b] [1] [viii]). Because nearly three years have passed since the incident, "underscor[ing] the difficulty of insuring a due process hearing to

[petitioner] at this time," and petitioner has already served the period of confinement in the special housing unit that was imposed as part of the penalty, remittal for a new hearing is unwarranted (*Matter of Justice v Smith*, 69 AD2d 1018, 1018 [4th Dept 1979]). We therefore grant the petition by annulling the determination finding that he violated the inmate rules, and we direct respondent to expunge from his institutional record all references to those violations.

In light of our determination, we need not consider petitioner's remaining contentions.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

500

TP 17-01902

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

IN THE MATTER OF PATRICK PUGH, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND DONALD VENETOZZI, SHU DIRECTOR, WENDE CORRECTIONAL FACILITY, RESPONDENTS.

PATRICK PUGH, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered October 27, 2017) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

503

KA 17-00736

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN S. FREY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 30, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 criminal sexual act in the third degree (Penal Law § 130.40 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Jones*, 149 AD3d 1590, 1590 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

504

KA 15-00704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRIMAINE D. WILSON, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 4, 2015. 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: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that Supreme Court should have granted that part of defendant's omnibus motion seeking recusal on the ground that the justice presiding over the case had represented defendant in a prior criminal matter. Defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]), and the valid waiver encompasses his contention (*see People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]). We note in any event that, contrary to defendant's contention, there is no per se recusal requirement based on a court's prior representation of a defendant (*see People v Glynn*, 21 NY3d 614, 618-619 [2013]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

505

KA 16-02285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH WILLIAMS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 8, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The record establishes that Supreme Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Davis*, 129 AD3d 1613, 1613 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015] [internal quotation marks omitted]), and that "[t]he 'plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Williams*, 132 AD3d 1291, 1291 [4th Dept 2015], *lv denied* 26 NY3d 1151 [2016]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). The court also advised defendant of the maximum sentence that could be imposed (*see People v Lococo*, 92 NY2d 825, 827 [1998]), and the record establishes that defendant understood that he was waiving his right to appeal both the conviction and the sentence (*see People v Wallace*, 141 AD3d 1115, 1115 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Although defendant's release to parole supervision does not render his challenge to the severity of the sentence moot because he "remains under the control of the Parole Board until his sentence has terminated" (*People v Sebring*, 111 AD3d 1346, 1347 [4th Dept 2013], *lv*

denied 22 NY3d 1159 [2014] [internal quotation marks omitted]), we conclude that the valid waiver of the right to appeal encompasses " 'the right to invoke [this Court's] interest-of-justice jurisdiction to reduce the sentence' " (*People v Keiser*, 38 AD3d 1254, 1254 [4th Dept 2007], *lv denied* 9 NY3d 877 [2007], *reconsideration denied* 9 NY3d 991 [2007], quoting *Lopez*, 6 NY3d at 255).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

507

CAF 16-01562

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

IN THE MATTER OF JENNIFER WINDSPIRIT,
PETITIONER-APPELLANT,

V ORDER

CARMEN A. CORNELL, RESPONDENT-RESPONDENT.

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

HEIDI S. CONNOLLY, SKANEATELES, FOR RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

509

CAF 17-00923

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

IN THE MATTER OF CARLA A. MILLER,
PETITIONER-APPELLANT,

V ORDER

LAWRENCE C. MILLER, RESPONDENT-RESPONDENT.

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

JOSEPH P. MILLER, CUBA, FOR RESPONDENT-RESPONDENT.

CAROLYN R. KELLOGG, WELLSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered March 21, 2017 in a proceeding pursuant to Family Court Act article 6. The order directed that the parties continue to have joint custody.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

510

CAF 17-01996

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

IN THE MATTER OF MICHELLE L. BASS,
PETITIONER-RESPONDENT,

V ORDER

JUSTIN S. BASS, RESPONDENT-APPELLANT.

IN THE MATTER OF JUSTIN S. BASS,
PETITIONER-APPELLANT,

V

MICHELLE L. BASS, RESPONDENT-RESPONDENT.

LUCILLE M. RIGNANESE, ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

MANNE LAW OFFICE, HERKIMER (MICHELLE K. FASSETT OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

LUCILLE M. RIGNANESE, ROME, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeals from a corrected judgment of the Family Court, Herkimer County (John J. Brennan, J.), entered August 9, 2017 in a proceeding pursuant to Family Court Act article 6. The corrected judgment, among other things, ordered that Michelle Bass have sole physical custody of one of the subject children.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

511

CAF 17-02015

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

IN THE MATTER OF MICHELLE L. BASS,
PETITIONER-RESPONDENT,

V ORDER

JUSTIN S. BASS, RESPONDENT-APPELLANT.

IN THE MATTER OF JUSTIN S. BASS,
PETITIONER-APPELLANT,

V

MICHELLE L. BASS, RESPONDENT-RESPONDENT.

LUCILLE M. RIGNANESE, ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 2.)

MANNE LAW OFFICE, HERKIMER (MICHELLE K. FASSETT OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

LUCILLE M. RIGNANESE, ROME, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeals from a judgment of the Family Court, Herkimer County (John J. Brennan, J.), entered July 27, 2017 in a proceeding pursuant to Family Court Act article 6. The judgment, among other things, ordered that Michelle Bass have sole physical custody of one of the subject children.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

513

CAF 16-01563

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

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

V ORDER

JENNIFER A. WINDSPIRIT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission to relocate with the subject children to the State of Florida.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

514

CAF 16-01564

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

IN THE MATTER OF JENNIFER A. WINDSPIRIT,
PETITIONER-APPELLANT,

V ORDER

DANIEL F. WINDSPIRIT, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Matter of Avery v Avery*, 55 AD3d 1095, 1095-1096 [3d Dept 2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

515

CAF 16-01692

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

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

V ORDER

JENNIFER A. WINDSPIRIT, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 13, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission to relocate with the subject children to the State of Florida.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

522

CA 17-02074

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

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, AS TRUSTEE FOR NORMANDY MORTGAGE LOAN TRUST, SERIES 2015-1, PLAINTIFF-RESPONDENT,

V ORDER

KATHY L. BRUNNER AND THOMAS E. BRUNNER, ALSO KNOWN AS THOMAS BRUNNER, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

WESTERN NEW YORK LAW CENTER INC., BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STIM & WARMUTH, P.C., FARMINGVILLE (GLENN P. WARMUTH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 21, 2017. The amended order, among other things, granted plaintiff's motion for summary judgment.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

525

KA 16-00619

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICKEY R. BOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree (two counts) and criminal use of drug paraphernalia in the second degree (three counts).

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

527

KA 15-01104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HARVERT STEPHENS, ALSO KNOWN AS HAVERT STEPHENS,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), entered April 28, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

528

KA 15-01105

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAVERT STEPHENS, ALSO KNOWN AS HARVERT STEPHENS,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered April 28, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count two of the indictment and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant's contention, the sentence imposed on the criminal sale count is not unduly harsh or severe. We note, however, that County Court failed to pronounce orally a period of postrelease supervision on the criminal possession count. We therefore modify the judgment by vacating the sentence imposed on count two, and we remit the matter to County Court for resentencing thereon (*see People v Sparber*, 10 NY3d 457, 469-470 [2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

529

KA 16-01122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH NEELY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 20, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree and sexual misconduct.

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 rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and sexual misconduct (§ 130.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Woods*, 126 AD3d 1543, 1543 [4th Dept 2015], *lv denied* 27 NY3d 970 [2016]). Defendant further contends that the valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence inasmuch as Supreme Court failed to advise him that he could be sentenced consecutively for his crimes. We reject that contention. The court could not have imposed the determinate sentence for attempted rape in the first degree to run consecutively to the definite sentence for sexual misconduct (*see* § 70.35; *see generally People v Abuhamra*, 107 AD3d 1630, 1631 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

533

KA 15-01936

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUBEN R. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 23, 2015. The judgment convicted defendant, upon his plea of guilty, of falsifying business records in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, 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 falsifying business records in the first degree (Penal Law § 175.10). Defendant contends that his plea was involuntary because it was induced by County Court's promise, subsequently unfulfilled, that he would be admitted into a shock incarceration program. To the extent that defendant was required to preserve that contention for our review but failed to do so (*see People v Williams*, 27 NY3d 212, 224 [2016]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

The record establishes that the court believed it had the authority to grant defendant admission into a shock incarceration program and that it made such admission a condition of defendant's guilty plea. At sentencing, the court acted in accordance with its perceived authority and the plea agreement by imposing a term of incarceration of 1½ to 3 years "with shock camp." There is no dispute that defendant was not admitted into a shock incarceration program.

We agree with defendant that the court had no authority to assure him of admission into a shock incarceration program or to impose such

as part of the sentence (*see People ex rel. Dickerson v Unger*, 62 AD3d 1262, 1263 [4th Dept 2009], *lv denied* 12 NY3d 716 [2009]). Inasmuch as the record establishes that defendant, in accepting the plea, relied on a promise of the court that could not, as a matter of law, be honored, defendant is entitled to vacatur of his guilty plea (*see People v Muhammad*, 132 AD3d 1068, 1069 [3d Dept 2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

535

CAF 17-00120

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

IN THE MATTER OF JOHN F. GREENE, IV,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BROOKE D. KRANOCK, RESPONDENT-APPELLANT.

JOSEPH P. MILLER, CUBA, FOR RESPONDENT-APPELLANT.

MARK A. FOTI, ROCHESTER, FOR PETITIONER-RESPONDENT.

CAROLYN R. KELLOGG, WELLSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered November 10, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical placement of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted the petition of petitioner father seeking to modify the existing custody order by awarding him primary physical placement of the subject child. Contrary to the mother's contention, the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody arrangement is in the best interests of the child (*see generally Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]). Although Family Court did not make an express finding of a change in circumstances, "we have the authority to 'review the record to ascertain whether the requisite change in circumstances existed' " (*Matter of Allen v Boswell*, 149 AD3d 1528, 1528 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). We conclude that there was a change in circumstances based on the undisputed evidence at the hearing of domestic violence in the mother's household (*see id.* at 1528-1529; *Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]), the mother's frequent changes of residence (*see Matter of Siler v Wright*, 64 AD3d 926, 928-929 [3d Dept 2009]; *Matter of Green v Perry*, 18 AD3d 923, 924 [3d Dept 2005]), and the child's repeated changes of school (*see Matter of Stanton v Kelso*, 148 AD3d 1809, 1810 [4th Dept 2017]). Contrary to the mother's further contention, there is a sound and substantial basis in the record for the court's determination that

awarding the father primary physical placement of the child is in the child's best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

541

CA 17-02115

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

OSI RESTAURANT PARTNERS, LLC, OUTBACK STEAKHOUSE OF FLORIDA, LLC, CARRABBA'S ITALIAN GRILL, LLC, BONEFISH GRILL, LLC, BONEFISH GRILL OF FLORIDA, LLC, AND OUTBACK/FLEMING'S LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

IPT, LLC, DOING BUSINESS AS FM FACILITY MAINTENANCE, DEFENDANT-APPELLANT.

LOCKE LORD, LLP, HARTFORD, CONNECTICUT (DONALD E. FRECHETTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 25, 2017. The order, insofar as appealed from, denied defendant's motion to dismiss all claims against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 5, 2018, and filed in the Onondaga County Clerk's Office on February 5, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

546

CA 17-02122

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

IN THE MATTER OF ARBITRATION BETWEEN TOWN OF TONAWANDA, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, L. EDWARD ALLEN, PRESIDENT, TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, AND MARK KOCHER, TREASURER, TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, RESPONDENTS-APPELLANTS.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA, BUFFALO (SEAN P. BEITER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 5, 2017 in a proceeding pursuant to CPLR article 75. The order granted the petition to vacate an arbitration award and denied respondents' cross motion to confirm that award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied, the cross motion is granted, and the award is confirmed.

Memorandum: Petitioner commenced this proceeding to vacate or modify an arbitration award, and respondents filed an "answer and cross motion" to confirm the award. We agree with respondents that Supreme Court erred in granting the petition and vacating the award. The award does not violate a strong public policy, is not irrational, and does not " 'clearly exceed[] 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]; *see Matter of Lucas [City of Buffalo]*, 93 AD3d 1160, 1163-1164 [4th Dept 2012]). We note in particular that the award is not irrational inasmuch as the arbitrator offered at least "a barely colorable justification for the outcome reached" (*Matter of Monroe County Sheriff's Off. [Monroe County Deputy Sheriffs' Assn., Inc.]*, 79 AD3d 1797, 1799 [4th Dept 2010] [internal quotation marks omitted]). Contrary to petitioner's alternative contention, the award cannot be modified "without affecting the merits of the decision upon the issues submitted" (CPLR 7511 [c] [2]), and thus we see no basis

for such modification. We therefore reverse the order, deny the petition, grant the cross motion, and confirm the award.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

547

KA 15-00982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON D. WRIGHT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered April 6, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his sentence is unduly harsh and severe. We agree with the People that defendant knowingly, voluntarily and intelligently waived his right to appeal. 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 Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *see People v Lopez*, 6 NY3d 248, 256 [2006]), and the oral waiver was buttressed by a written waiver executed by defendant and defense counsel (*see People v Gaines*, — AD3d —, —, 2018 NY Slip Op 01740, *1 [4th Dept 2018]). We conclude that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

548

KA 16-02288

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK K. WISNIEWSKI, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 17, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant's contention that County Court erred in failing to conduct an audibility hearing and to render a decision thereon does not survive his guilty plea (*see People v Gillett*, 105 AD3d 1444, 1444 [4th Dept 2013]). By pleading guilty, defendant forfeited review of the merits of his contention regarding the audibility of certain evidence (*see People v Dunkins*, 231 AD2d 587, 588 [2d Dept 1996], *lv denied* 89 NY2d 863 [1996]; *see also People v Alvarado*, 103 AD3d 1101, 1101 [4th Dept 2013], *lv denied* 21 NY3d 910 [2013]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

549

KA 16-00929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN WILLIAMS, ALSO KNOWN AS MAURICE WILLIAMS,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), entered August 21, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

550

KA 17-00839

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH LLOYD, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 28, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of grand larceny in the third degree (Penal Law § 155.35 [1]) and scheme to defraud in the first degree (§ 190.65 [1] [b]) and sentencing him to consecutive indeterminate terms of imprisonment. We agree with defendant that his waiver of the right to appeal, which was entered when he pleaded guilty to the underlying offenses, "does not encompass his challenge to the severity of the sentence imposed following his violations of probation" (*People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

We also agree with defendant that the sentence imposed by County Court is unduly harsh and severe. The sole basis for the declaration of delinquency was defendant's failure to pay restitution to the victims of his crimes, and the declaration was filed approximately four months after defendant was placed on probation. Defendant admitted to the violation and, by the time of sentencing, he had paid $2,500 of the $17,775 he owed in restitution. The court nevertheless revoked probation and sentenced defendant to the maximum term of imprisonment for each offense with the sentences running consecutively, for an aggregate sentence of 3⅓ to 10 years.

Inasmuch as defendant's crimes are nonviolent and he had no prior criminal record aside from a misdemeanor charge to which he pleaded guilty the day before his plea in this case, we modify the judgment as a matter of discretion in the interest of justice by directing that the sentences run concurrently, thus reducing the aggregate sentence to 2⅓ to 7 years (*see* CPL 470.15 [6] [b]; *People v Maracle*, 97 AD3d 1165, 1166 [4th Dept 2012]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

551

KA 16-00878

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN A. HEIDEMAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered March 2, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of precursors of methamphetamine.

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 precursors of methamphetamine (Penal Law § 220.72). Defendant's valid waiver of the right to appeal "forecloses appellate review of [County Court's] discretionary decision to deny [him] youthful offender status" (*People v Pacherille*, 25 NY3d 1021, 1024 [2015]). Contrary to defendant's contention, the court "was not required to explain that the waiver of the right to appeal would specifically encompass the court's discretionary determination on youthful offender status" (*People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

554

KA 16-00128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TORRIE JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 7, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05), defendant contends that his waiver of the right to appeal is invalid. We reject that contention inasmuch as "[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal" (*People v Farrara*, 145 AD3d 1527, 1527 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's contention, County Court "was not required to explain that the waiver of the right to appeal would specifically encompass the court's discretionary determination on youthful offender status" (*People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]; *see generally People v Kemp*, 94 NY2d 831, 833 [1999]). Thus, defendant's "valid waiver of the right to appeal . . . forecloses appellate review of [the] sentencing court's discretionary decision to deny youthful offender status" (*People v Pacherille*, 25 NY3d 1021, 1024 [2015]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

559

CAF 16-02375

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

IN THE MATTER OF GABRIEL A. HUMBERT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KRISTA A. HUMBERT, RESPONDENT-RESPONDENT.

PIETER G. WEINRIEB, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

PEKAREK LAW GROUP, P.C., WELLSVILLE (EDWARD PEKAREK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 11, 2016 in a proceeding pursuant to Family Court Act article 4. The order reversed and vacated the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding seeking to terminate his child support obligation pursuant to a judgment of divorce. After a hearing, the Support Magistrate granted the petition in part by eliminating the child support because it was unjust and/or inappropriate to continue the basic child support obligation; ordered the father to continue providing health insurance coverage for the children; and ordered the father to pay his pro rata share of any unreimbursed health care expenses. Respondent mother filed objections, and the father now appeals from an order in which Family Court "reversed and vacated" the order of the Support Magistrate and reinstated the terms of the judgment of divorce with respect to support.

Family Court Act § 439 (e) provides in relevant part that, after receiving objections and the rebuttal, if any, to the determination of a support magistrate, "the judge . . . shall (i) remand one or more issues of fact to the support magistrate, (ii) make, with or without holding a new hearing, his or her own findings of fact and order, or (iii) deny the objections" (*see Matter of Mandile v Deshotel*, 136 AD3d 1379, 1380 [4th Dept 2016]; *Matter of Kingsley v Kingsley*, 4 AD3d 784, 785 [4th Dept 2004]). Here, the court simply "reversed and vacated" the order of the Support Magistrate without making any findings of fact to support that determination. We therefore reverse the order and remit the matter to Family Court to review the mother's objections

to the Support Magistrate's determination in accordance with Family Court Act § 439 (e).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

568

TP 17-01992

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

IN THE MATTER OF DEBORAH G. SADALLAH, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Niagara County [Daniel Furlong, J.], entered October 24, 2017) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking her driver's license for 30 days. The determination was based on the finding that petitioner violated Vehicle and Traffic Law § 1146 (a) by failing to exercise due care to avoid colliding with a pedestrian, who died as a result of the collision.

Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Chu v Fiala*, 117 AD3d 585, 585-586 [1st Dept 2014]). Initially, we reject petitioner's contention that she was deprived of her right to due process by the admission of hearsay evidence at the hearing (*see Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]; *Matter of Linton v State of N.Y. Dept. of Motor Vehs. Appeals Bd.*, 92 AD3d 1205, 1206 [4th Dept 2012]; *Matter of Scaccia v Martinez*, 9 AD3d 882, 883-884 [4th Dept 2004]). It is well settled that " '[h]earsay evidence is admissible in administrative hearings' . . . , 'and if sufficiently relevant and probative may constitute substantial evidence' " (*Matter of Mastrodonato v New York State Dept. of Motor Vehicles*, 27 AD3d 1121, 1122 [4th Dept 2006]; *see Gray*, 73 NY2d at 742-743). Here, the testimony of the witnesses who observed the collision and the hearsay statement of the other witness are sufficient to establish that

petitioner "violated Vehicle and Traffic Law § 1146 by failing to exercise due care to avoid striking a pedestrian" (*Matter of Montagnino v Fiala*, 106 AD3d 1090, 1091 [2d Dept 2013]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]).

Contrary to the further contention of petitioner, the penalty of a 30-day revocation of her license is not "so disproportionate to the offense . . . as to be shocking to one's sense of fairness" (*Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 [2004] [internal quotation marks omitted]; *see Matter of Gerber v New York State Dept. of Motor Vehs.*, 129 AD3d 959, 961-962 [2d Dept 2015]; *Montagnino*, 106 AD3d at 1091; *Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361-1362 [4th Dept 2006]). We reject petitioner's further contention that she did not receive adequate notice of the purpose of the hearing or the allegations against her (*see Matter of Pratt v Melton*, 72 AD2d 887, 887-888 [3d Dept 1979], *affd for reasons stated* 51 NY2d 837 [1980]; *Matter of Gregson v Hults*, 23 AD2d 911, 911-912 [3d Dept 1965], *affd* 16 NY2d 936 [1965]; *Matter of Giudice v Adduci*, 176 AD2d 1175, 1176 [3d Dept 1991]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

571

KA 16-01618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH D. WILLIAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered April 11, 2016. The judgment convicted defendant, upon his plea of guilty, of failure to register and/or verify status as a sex offender.

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 failure to register and/or verify his status as a sex offender (Correction Law §§ 168-f [4]; 168-t). We reject defendant's contention that his waiver of the right to appeal is invalid. The record establishes that County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]). Contrary to defendant's further contention, "the oral waiver of the right to appeal was 'buttressed by [his] written waiver of [the right to] appeal, which explicitly enumerated the rights that were to be relinquished and [in which defendant] acknowledged that [he] had discussed the consequences of the waiver with counsel' " (*People v Gaines*, — AD3d —, —, 2018 NY Slip Op 01740, *1 [4th Dept 2018]). The waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

572

KA 15-00945

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER D. TOWNSEND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 4, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

575

KA 14-01963

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY L. ELLINGTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 16, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his request to instruct the jury on the defense of temporary innocent possession of the handgun. We reject that contention. In order to establish entitlement to such a charge, " 'there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the weapon [was not] used in a dangerous manner' " (*People v Banks*, 76 NY2d 799, 801 [1990], quoting *People v Williams*, 50 NY2d 1043, 1045 [1980]; *see People v Holes*, 118 AD3d 1466, 1467 [4th Dept 2014]). Viewing the evidence in the light most favorable to defendant (*see People v Farnsworth*, 65 NY2d 734, 735 [1985]; *People v Sinkler*, 112 AD3d 1359, 1360 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]), we conclude that " 'there was no reasonable view of the evidence upon which the jury could have found that the defendant's possession was innocent' " (*People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]). Rather, defendant's conduct was "utterly at odds with any claim of innocent possession" (*People v McCoy*, 46 AD3d 1348, 1350 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008] [internal quotation marks omitted]; *see People v Hicks*, 110 AD3d 1488, 1488 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *People v Smith*, 63 AD3d 1655, 1655 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009]; *People v Sheehan*, 41 AD3d

335, 335 [1st Dept 2007], *lv denied* 9 NY3d 993 [2007]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

576

KA 16-00662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. HOFFMAN, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated December 3, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, the 10 points assessed under risk factor 15, for an inappropriate living situation, are supported by clear and convincing evidence because the presentence report establishes that defendant resided with his 19-year-old stepdaughter and her child (*see People v Di John*, 48 AD3d 1302, 1303 [4th Dept 2008]).

As the People correctly concede, County Court erred in assessing 30 points under risk factor 5, for the age of the victim. Defendant pleaded guilty in 2014 to, inter alia, five counts of sexual abuse in the first degree (Penal Law § 130.65 [1]) involving a victim who was 13 or 14 years old. Thus, defendant should have been assessed only 20 points under risk factor 5 (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 2, 11 [2006]). Instead, the court assessed 30 points against defendant based on a 2002 determination by Family Court that he had sexually abused the same victim when she was approximately four years old. That was error.

Although a court making a SORA determination "is not limited to considering defendant's current conviction" (*People v Sincerbeaux*, 27

NY3d 683, 688-689 [2016]; *see People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]), we note that the purpose of risk factor 5 is to assess points based on matters involving the "Current Offense[s]," i.e., "on the basis of all of the crimes that were part of the instant disposition" (Risk Assessment Guidelines and Commentary at 5). The People's concession of this issue on appeal is based on the fact that there is no clear and convincing evidence that the conduct underlying the 2002 determination constitutes part of the current offenses. Reducing the points assessed for risk factor 5 from 30 points to 20 points results in a total of 70 points on the risk assessment instrument. Defendant is therefore a level one risk, and we modify the order accordingly.

The People contend that the court should have granted an upward departure to a level three risk based on the prior events underlying the 2002 determination of sexual abuse. That contention is not properly before us, however, in the absence of a cross appeal by the People (*see People v Aldrich*, 56 AD3d 1228, 1229 [4th Dept 2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

577

KA 16-01119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN C. ROSSBOROUGH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (ZACHARY S. MAURER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Defendant correctly concedes that he failed to preserve for our review his contention that County Court erred in ordering him to pay a 10% surcharge in connection with the collection of restitution. Defendant did not object to the surcharge or otherwise raise the issue, despite having had an opportunity to do so (*see People v Kosty*, 122 AD3d 1408, 1409 [4th Dept 2014], *lv denied* 24 NY3d 1220 [2015]; *People v Kirkland*, 105 AD3d 1337, 1338-1339 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *cf. People v Goodenow*, 149 AD3d 1560, 1560-1561 [4th Dept 2017]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Camp*, 134 AD3d 1470, 1471 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]; *cf. People v Parker*, 137 AD3d 1625, 1626-1627 [4th Dept 2016]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

584

CA 17-01959

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

BARRY J. HASSETT, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

BUFFALO CHOP HOUSE, INC., D.V. BROWN AND ASSOCIATES, INC., AND BUFFALO DEVELOPMENT CORPORATION, DEFENDANTS-RESPONDENTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 29, 2017. The order denied the motion of plaintiff and the cross motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 13, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

588

CA 17-01120

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

LIZZIE CYRUS AND ABRAHAM CYRUS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WAL-MART STORES EAST, LP, DEFENDANT-RESPONDENT.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN HUTCHINSON LLP, ROCHESTER (T. ANDREW BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 24, 2017. The judgment awarded defendant costs and disbursements upon a jury verdict finding no liability.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that were sustained by plaintiff Lizzie Cyrus when she slipped and fell in one of defendant's stores. On appeal from a judgment entered upon a jury verdict in favor of defendant, plaintiffs correctly concede that they failed to preserve for our review their contention that the verdict is against the weight of the evidence inasmuch as "there is no indication in the record that [they] made a posttrial motion to set aside the verdict pursuant to CPLR 4404 (a)" (*Likos v Niagara Frontier Tr. Metro Sys., Inc.*, 149 AD3d 1474, 1476 [4th Dept 2017]). We decline plaintiffs' request to exercise our power to address that contention in the interest of justice (*see generally Merrill v Albany Med. Ctr. Hosp.*, 71 NY2d 990, 991 [1988]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

594

KA 16-00747

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN TCHIYUKA, ALSO KNOWN AS "BREEZY",
DEFENDANT-APPELLANT.

HUG LAW, PLLC, ALBANY (MATTHEW C. HUG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 10, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the seventh 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 controlled substance in the seventh degree (Penal Law § 220.03), defendant contends that his *Alford* plea should be vacated because the plea was not voluntarily, intelligently or knowingly entered, and the People did not explain the strengths of their case on the record. To the extent that defendant's contention involves the voluntariness of his plea, the contention survives his valid waiver of the right to appeal (*see People v Miller*, 87 AD3d 1303, 1303-1304 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]; *People v Dash*, 74 AD3d 1859, 1859-1860 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]).

We nevertheless conclude that defendant's contention is not preserved for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see Miller*, 87 AD3d at 1303-1304; *People v Hodge*, 23 AD3d 1062, 1063 [4th Dept 2005]), and the plea allocution does not engender significant doubt regarding defendant's guilt or otherwise call into question the voluntariness of the plea to bring this case within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Townley*, 286 AD2d 885, 885 [4th Dept 2001]).

In any event, defendant's challenge to the plea lacks merit.

"Despite his denials of guilt, defendant stated clearly on the record that he wanted to enter a guilty plea to avoid the possibility of a more severe sentence in the event that the case proceeded to trial. Defendant's statements demonstrate that his decision to enter a guilty plea despite his purported innocence was 'the product of a voluntary and rational choice,' and thus the *Alford* plea was proper" (*Miller*, 87 AD3d at 1304; *see Hodge*, 23 AD3d at 1063). Moreover, contrary to defendant's contention, County Court ensured that there was strong evidence of his guilt of the offense to which he pleaded guilty (*see People v Hinkle*, 56 AD3d 1210, 1210 [4th Dept 2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

595

KA 17-00301

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS TURNER, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, SPECIAL PROSECUTOR, BATAVIA, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (KAREN FISHER MCGEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered February 24, 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: On appeal from a judgment convicting him following a jury trial 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]), defendant contends that his conviction of both crimes is not supported by legally sufficient evidence with respect to the element of possession. We reject that contention. At trial, a correction officer testified that, as he approached defendant and another inmate, both of whom were face down on the ground per his orders, he observed a pink object in defendant's curled, left hand. Defendant released the object from his hand when he complied with the correction officer's order to put his hands behind his back. The object was a State-issued toothbrush that had been shortened and melted into a point. We conclude that the above evidence, viewed in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), is legally sufficient to establish that defendant possessed dangerous contraband within the meaning of section 205.25 (2) and possessed a weapon within the meaning of section 265.02 (1) (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to the element of possession for each crime (*see generally Bleakley*, 69 NY2d

at 495). "Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded" (*People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017]; *see generally Bleakley*, 69 NY2d at 495).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

598

KA 17-01093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE CARDINALE, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (AMANDA L. CASSELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered April 4, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.) after a conviction arising from his possession of child pornography on his computer. The Board of Examiners of Sex Offenders determined that defendant is presumptively a level one risk, and found that there was no clear and convincing evidence to warrant an upward departure from that risk level. At the request of the People, County Court recalculated defendant's presumptive risk level, assigning points for risk factor 7 because defendant's relationship with the victim was that of a stranger, thereby bringing defendant to a risk factor score of 80, which is a level two risk. Although not requested by the People, the court sua sponte ordered an upward departure to a level three risk. That was error.

"It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of 'an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines' " (*People v Symonds*, 147 AD3d 1325, 1325-1326 [4th Dept 2017], *lv denied* 29 NY3d 909 [2017]). We agree with defendant that the upward departure is not supported by the requisite clear and convincing evidence (*see People v Hayward*, 52 AD3d 1243, 1244 [4th

Dept 2008]), and we therefore modify the order accordingly.

Contrary to defendant's further contention, he was properly classified as a level two risk after the assessment of points for risk factor 7 (*see People v Johnson*, 11 NY3d 416, 420-421 [2008]). We have examined defendant's remaining contention and conclude that it is without merit.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

601

KA 17-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADIFAH WILKES, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 15, 2017. The judgment convicted defendant, upon her 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 her upon her plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that her plea was not knowingly, voluntarily or intelligently entered because the factual allocution negated an essential element of the crime to which she pleaded guilty. Defendant "failed to preserve that contention for our review by moving to withdraw [the] plea or to vacate the judgment of conviction" (*People v Cloyd*, 78 AD3d 1669, 1670 [4th Dept 2010], *lv denied* 16 NY3d 857 [2011]; *see People v Trinidad*, 23 AD3d 1060, 1061 [4th Dept 2005], *lv denied* 6 NY3d 760 [2005]). Contrary to defendant's contention, this case does not fall within the "rare exception to the preservation rule" (*Trinidad*, 23 AD3d at 1061; *see People v Lopez*, 71 NY2d 662, 666 [1988]). Although defendant initially stated that the gun was unloaded at the time she pointed it at the victim, she subsequently acknowledged that she possessed both the gun and the ammunition (*see* § 265.00 [15]; *see generally People v Wilson*, 252 AD2d 241, 245 [4th Dept 1998]), and thus her factual allocution did not negate an essential element of the crime. In any event, we note that County Court conducted "further inquiry to ensure that defendant understood the nature of the charge and that the plea was intelligently entered" (*People v Glasper*, 46 AD3d 1401, 1402 [4th

Dept 2007], *lv denied* 10 NY3d 863 [2008]).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

602

KA 16-01230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHANNA ROMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 29, 2010. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting her upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant, a noncitizen, contends that her felony guilty plea was not knowingly, voluntarily, and intelligently entered because County Court failed to advise her of the potential deportation consequences of such a plea, as required by *People v Peque* (22 NY3d 168 [2013], *cert denied* — US —, 135 S Ct 90 [2014]). As a preliminary matter, we note that defendant's challenge to the voluntariness of her plea survives her waiver of the right to appeal (*see People v Burtes*, 151 AD3d 1806, 1807 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). Furthermore, contrary to the People's contention, preservation was not required inasmuch as the record bears no indication that defendant knew about the possibility of deportation (*see Peque*, 22 NY3d at 183; *cf. People v Chelley*, 120 AD3d 987, 988 [4th Dept 2014]). With respect to defendant's substantive contention, the People correctly concede that the court did not properly advise defendant of the deportation consequences of her plea. We therefore hold the case, reserve decision and remit the matter to County Court to afford defendant an opportunity to move to vacate her plea based upon a showing that "there is a 'reasonable probability' that she would not have pleaded guilty had she known that she faced the risk of being deported as a result of the plea" (*People v Puskar*, 149 AD3d 1548, 1548 [4th Dept 2017], quoting *Peque*, 22 NY3d at 176).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

607

CA 17-01933

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

TINA KNAPP AND MICHAEL KNAPP,
PLAINTIFFS-APPELLANTS,

V ORDER

FINGER LAKES NY, INC., DOING BUSINESS AS
DIVERSIFIED CONTRACTING CO., AND JOEL S.
SMITH, DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 18, 2017. The order, insofar as appealed from, denied those parts of the motion of plaintiffs for summary judgment with respect to their breach of contract cause of action, seeking dismissal of the counterclaim and with respect to damages relating to the Lien Law cause of action.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

608

CA 17-01757

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

IN THE MATTER OF PAUL E. SUCHER,
PETITIONER-RESPONDENT,

V ORDER

TOWN OF ONTARIO, ONTARIO TOWN BOARD, ROBERT J. KELSCH, FORMER SUPERVISOR OF TOWN OF ONTARIO, JOHN J. SMITH, SUPERVISOR OF TOWN OF ONTARIO, MICHAEL MELINO, ONTARIO TOWN COUNCILMAN, JASON RUFFELL, ONTARIO TOWN COUNCILMAN, FRANK ROBUSTO, ONTARIO TOWN COUNCILMAN, AND JOSEPH CATALANO, ONTARIO TOWN COUNCILMAN, RESPONDENTS-APPELLANTS.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD T. WILLIAMS, II, OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered December 12, 2016 in a proceeding pursuant to CPLR article 78. The judgment granted the amended petition in part.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 13, 2018, and filed in the Wayne County Clerk's Office on February 23, 2018,

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

611

CA 17-01913

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

HELEN L. HELD-CUMMINGS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK L. OSMUNDSON, DEFENDANT-APPELLANT.

MARK L. OSMUNDSON, DEFENDANT-APPELLANT PRO SE.

MARK WOLBER, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated June 1, 2017. The order denied the pro se motion of defendant seeking a transcript of the parties' divorce trial.

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

Memorandum: In this postjudgment matrimonial proceeding, defendant appeals from an order denying his pro se motion seeking a transcript of the parties' divorce trial, which took place more than 20 years earlier. Defendant explained that he wanted a copy of the transcript so that he could move to vacate the judgment of divorce, entered April 11, 1996. According to defendant, he intended to use the transcript to establish in a separate motion that plaintiff, his ex-wife, committed perjury at trial when she testified to alleged acts of cruel and inhuman treatment committed by defendant. Because defendant's motion requested a copy of the transcript "free of charge," Supreme Court interpreted the motion as one requesting poor person relief. The court denied the motion on the grounds, among others, that defendant did not make the motion on notice to the Office of the Jefferson County Attorney and failed to establish that he was indigent.

On appeal, defendant contends that he was not in fact seeking poor person relief and that he is willing and able to pay for the transcript. If that is the case, however, defendant does not need a court order to obtain the transcript. Judiciary Law § 300 provides that "[a] stenographer shall, upon the payment of his fees allowed by law therefor, furnish a certified transcript of the whole or any part of his minutes, in any case reported by him, to any party to the action requiring the same." Similarly, section 302 (1) reads: "Every stenographer in a court of record must, upon request, furnish, with all reasonable diligence, to . . . a party, or his attorney in a civil cause, a copy, written out at length from his stenographic notes, of

the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring the same, of the fees allowed by law."

Thus, there was no need for a motion if defendant was willing and able to pay for the transcript. Because defendant brought a motion and asked for a free transcript, however, the court understandably interpreted the motion as requesting poor person relief. Inasmuch as defendant did not allege that he was indigent, we conclude that the court properly denied the motion.

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

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

629

CA 17-00471

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF GLENN T., CONSECUTIVE NO. 18134, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

KEVIN D. WILSON, DEPUTY DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered December 30, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's commitment in a secure treatment facility.

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

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1671/99) KA 99-00484. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN MOORE, ALSO KNOWN AS FRANKIE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (87/02) KA 00-02959. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EVERTON HIBBERT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., DEJOSEPH, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1472/04) KA 02-00850. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SAULTERS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (537/16) KA 14-01970. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD H. MOORE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (758/16) KA 13-01913. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICARDO CARRASQUILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (337/17) KA 15-01852. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD HOUGH, SR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (758/17) KA 14-01239. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN J. COFFEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, NEMOYER, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (805/17) CA 16-02066. -- IN THE MATTER OF THE APPLICATION OF JON Z. AND VICTOR Z. FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY AND/OR PERSON OF MARGARET Z., AN ALLEGED INCAPACITATED PERSON. JON Z., PETITIONER-APPELLANT; THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT. -- Motion to vacate denied. PRESENT: WHALEN, P.J., SMITH, CARNI, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1056/17) CA 16-01856. -- IN THE MATTER OF THE APPLICATION OF CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, PETITIONER-RESPONDENT, PURSUANT TO ARTICLE 4 OF THE EMINENT DOMAIN PROCEDURE LAW, TO ACQUIRE TITLE TO CERTAIN REAL PROPERTY GENERALLY IDENTIFIED AS 100-08 ONONDAGA STREET

EAST & WARREN STREET IN THE CITY OF SYRACUSE, NEW YORK AND MORE PARTICULARLY IDENTIFIED AS SBL NO. 101.-09-01.0. AMADEUS DEVELOPMENT, INC., CLAIMANT-RESPONDENT, FINANCITECH, LTD., CLAIMANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1058/17) KA 15-00214. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANTE TAYLOR, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1095/17) CA 17-00527. -- IN THE MATTER OF VIOLET REALTY, INC., DOING BUSINESS AS MAIN PLACE LIBERTY GROUP, PETITIONER-PLAINTIFF-APPELLANT, V COUNTY OF ERIE, MARK C. POLONCARZ, JOHN LOFFREDO, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1205/17) KA 11-00995. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWNDELL EVERSON, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1206/17) KA 15-01899. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWNDELL EVERSON, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1272/17) KA 16-00562. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER SWICK, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1273/17) KA 16-00563. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER SWICK, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1345/17) CA 16-02320. -- DELPHI HEALTHCARE PLLC, DELPHI HOSPITALIST SERVICES LLC, WORKFIT MEDICAL, LLC, WORKFIT STAFFING LLC, AND HEALTHCARE SUPPORT SERVICES, LLC, PLAINTIFFS-RESPONDENTS, V PETRELLA PHILLIPS LLP AND THOMAS A. PETRELLA, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, AND NEMOYER, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1395/17) CA 16-02092. -- IN THE MATTER OF THOMAS FRECK, PETITIONER-PLAINTIFF-APPELLANT-RESPONDENT, V TOWN OF PORTER, TOWN OF PORTER

ZONING BOARD OF APPEALS, TOWN OF PORTER PLANNING BOARD, ET AL., RESPONDENTS-DEFENDANTS-RESPONDENTS, THOMAS FLECKENSTEIN, INDIVIDUALLY AND AS TRUSTEE OF THE JUDITH A. FLECKENSTEIN LIVING TRUST, JUDITH A. FLECKENSTEIN, INDIVIDUALLY AND AS TRUSTEE OF THE JUDITH A. FLECKENSTEIN LIVING TRUST, AND NIAGARA AQUACULTURE, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1444/17) CA 17-00503. -- KIMBERLY RUSSELL, PLAINTIFF-RESPONDENT, V HONRI V. HUNT AND DORIEN GARRETT, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1445/17) CA 17-01156. -- ROBERT SCHAEFER AND KIMBERLY SCHAEFER, PLAINTIFFS-APPELLANTS, V CHAUTAUQUA ESCAPES ASSOCIATION, INC., BOARD OF DIRECTORS OF CHAUTAUQUA ESCAPES ASSOCIATION, INC., AND CAMP CHAUTAUQUA, INC., DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (1472/17) CA 17-00988. -- VILLAGE OF HERKIMER, PLAINTIFF-APPELLANT, VILLAGE OF ILION, ET AL., PLAINTIFFS, V COUNTY OF HERKIMER, INDIVIDUALLY, AND AS ADMINISTRATOR OF HERKIMER COUNTY SELF-INSURANCE PLAN, DEFENDANT-RESPONDENT, PMA MANAGEMENT CORP., ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (15/18) CA 17-01346. -- IN THE MATTER OF LAURA VIEIRA-SUAREZ, PETITIONER-APPELLANT, V SYRACUSE CITY SCHOOL DISTRICT, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (87/18) CA 17-01454. -- VICTOR GUZMAN, JR., AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN, MARISSA FOURNIER AND MARISSA FOURNIER, INDIVIDUALLY, PLAINTIFFS-APPELLANTS, V NORTH SYRACUSE CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (142/18) TP 17-01432. -- IN THE MATTER OF JAMES ADAMS, PETITIONER, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE

DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (160/18) CA 17-00711. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V TOWN OF ORCHARD PARK, ORCHARD PARK POLICE DEPARTMENT, ORCHARD PARK POLICE OFFICER A. KOWALSKI, ORCHARD PARK POLICE OFFICER R. SIMMONS, ORCHARD PARK POLICE OFFICER J. CULLEN, REMY ORFFEO, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND NEMOYER, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (161/18) CA 17-01487. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V TOWN OF ORCHARD PARK, ET AL., DEFENDANTS, AND COUNTY OF ERIE, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND NEMOYER, JJ. (Filed Apr. 27, 2018.)

MOTION NO. (162/18) CA 17-00823. -- KAREN A. TRACY, PLAINTIFF-RESPONDENT, V CITY OF BUFFALO, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND NEMOYER, JJ. (Filed Apr. 27, 2018.)

KA 13-01860. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JULIAN A. JOVAN, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Apr. 27, 2018.)

KA 16-00231. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SARAH JAMES, ALSO KNOWN AS SARAH DINGEMAN, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Apr. 27, 2018.)