SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 20, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED DECEMBER 20, 2024

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

251/23

CA 22-00060

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF VICTOR O. IBHAWA,
PETITIONER-RESPONDENT,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
DIOCESE OF BUFFALO, RESPONDENTS-APPELLANTS.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT-APPELLANT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (ERIN S. TORCELLO OF COUNSEL), FOR RESPONDENT-APPELLANT DIOCESE OF BUFFALO.

DONNA A. MILLING, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 23, 2021. The order, insofar as appealed from, granted the petition in part. The order was reversed insofar as appealed from by order of this Court entered June 30, 2023 in a memorandum decision (217 AD3d 1500), and the Court of Appeals on November 26, 2024 reversed the order of this Court and remitted the case to this Court (— NY3d —, 2024 NY Slip Op 05872 [2024]).

Now, upon remittitur from the Court of Appeals, it is hereby ORDERED that the matter is remanded to respondent New York State Division of Human Rights for further proceedings in accordance with the opinion in *Matter of Ibhawa v New York State Div. of Human Rights* (— NY3d —, 2024 NY Slip Op 05872 [2024]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

577

KA 23-01056

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V OPINION AND ORDER

PHILLIP DONDORFER, DEFENDANT-RESPONDENT.

VINCENT HEMMING, ACTING DISTRICT ATTORNEY, WARSAW (DANA POOLE OF COUNSEL), FOR APPELLANT.

LEAH R. NOWOTARSKI, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MICHAEL E. MCMAHON, KEW GARDENS (JOHN M. CASTELLANO OF COUNSEL), FOR DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, AMICUS CURIAE.

Appeal from an order of the Wyoming County Court (Michael M. Mohun, J.), dated June 12, 2023. The order granted defendant's renewed motion seeking to dismiss count 1 of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the renewed motion is denied, count 1 of the indictment is reinstated, and the matter is remitted to Wyoming County Court for further proceedings on the indictment.

Opinion by CURRAN, J.:

The sole question raised on this appeal is whether County Court erred in granting defendant's renewed motion to dismiss count 1 of the indictment on, inter alia, the basis that the People failed to properly instruct the grand jury on the definition of the term "impaired" insofar as it pertained to count 1, which charged defendant with felony aggravated driving while intoxicated (DWI) based on driving a vehicle while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs with a child present (Vehicle and Traffic Law § 1192 [2-a] [b]; [4-a]). We answer that question in the affirmative and conclude that the court erred in granting the renewed motion inasmuch as, relying on principles of statutory construction, the People correctly instructed the grand jury that the term "impaired" in the context of Vehicle and Traffic Law § 1192 (4-a) is defined as the defendant's consumption of a combination of drugs and alcohol to the point that it "has actually impaired, to any extent, the physical and mental abilities which [the defendant] is expected to possess in order to operate a vehicle as a

reasonable and prudent driver" (*People v Cruz*, 48 NY2d 419, 427 [1979], *appeal dismissed* 446 US 901 [1980]).

In reaching that conclusion, we also note our respectful disagreement with the Third Department's decision in *People v Caden N.* (189 AD3d 84 [3d Dept 2020], *lv denied* 36 NY3d 1050 [2021]), which defined the term "impaired" in the context of drug consumption in accordance with the heightened standard typically applicable in cases of "intoxication" by alcohol (*see Cruz*, 48 NY2d at 428). Ultimately, we conclude that the term "impaired" should be defined consistently across the Vehicle and Traffic Law—whether in the context of impairment by alcohol or in the context of impairment by drugs or a combination of drugs and alcohol.

I.

Just after midnight, the police stopped a vehicle being driven by defendant because its inspection was expired. Also in the vehicle at that time was defendant's 15-year-old daughter. During the vehicle stop, the police determined that defendant was impaired by drugs and alcohol based on his observed demeanor, his admission to recently using those substances, and his failure to successfully perform several field sobriety tests. That determination was further corroborated by a certified drug recognition officer summoned to the scene to perform an additional field evaluation.

As a result, the People presented two charges for the grand jury's consideration: aggravated DWI predicated on defendant driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs with a child present (Vehicle and Traffic Law § 1192 [2-a] [b]; [4-a]), and uninspected vehicle (§ 306 [b]). With respect to the DWI count, the People relevantly instructed the grand jury on the definition of the term "impaired" as follows:

> "A person's ability to operate a motor vehicle is impaired by the combined use of alcohol and drugs when that combination of alcohol and drugs has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver."

After hearing witness testimony related to the vehicle stop and defendant's arrest, the grand jury indicted defendant on both charged counts. Defendant filed an omnibus motion requesting, in relevant part, that the court dismiss the indictment because the grand jury had not properly been instructed. The court denied defendant's motion to that extent.

As the parties prepared for a nonjury trial, defendant requested that the court, in its trial charge, define the term impairment by a combination of drugs and alcohol, as used in Vehicle and Traffic Law § 1192 (4-a), consistent with the intoxication standard used by the Third Department in *Caden N.* (189 AD3d at 90)—i.e., whether his

consumption of a combination of drugs and alcohol rendered him "*incapable* of employing the physical and mental abilities which he . . . is expected to possess in order to operate a vehicle as a reasonable and prudent driver" (*id.* [internal quotation marks omitted]). Effectively, defendant wanted the court to define "impaired" in this case according to the standard typically used to show "intoxication" by alcohol (*see generally Cruz*, 48 NY2d at 428). The People objected, arguing that the standard requested by defendant applied only to intoxication by alcohol and that the correct definition to use in this context was whether defendant's consumption of a combination of drugs and alcohol "has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver" (*id.* at 427). The court agreed with defendant that the intoxication standard should be used in its charge.

Before the trial commenced, defendant renewed his motion to the extent it sought dismissal of count 1 of the indictment on, inter alia, the bases that there was legally insufficient evidence to support that count on the element of impairment and that the instructions to the grand jury on that count used the incorrect definition of the term "impaired." The court granted defendant's renewed motion, referencing its prior ruling that it would follow the intoxication standard, and concluding that "the use of the lower, 'to any extent' standard [by the People] prevented the grand jury from properly assessing whether legally sufficient evidence existed to establish all of the material elements of [c]ount [1]" of the indictment. The People appeal (*see* CPL 450.20 [1]), and we reverse.

II.

A defendant may move to dismiss an indictment due to defective grand jury proceedings where, inter alia, 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* 210.20 [1] [c]). "With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here, that, '[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it' " (*People v Ball*, 175 AD3d 987, 988 [4th Dept 2019], *affd* 35 NY3d 1009 [2020]). Nonetheless, a grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law," and it is "sufficient if the [prosecutor] provides the [g]rand [j]ury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*People v Calbud, Inc.*, 49 NY2d 389, 394-395 [1980]).

Here, the court granted the renewed motion to dismiss count 1 of the indictment, charging defendant with aggravated DWI. The court concluded that the People incorrectly instructed the grand jury on that count with respect to the definition of the term "impaired." Neither party disputes that, in defining impairment to the grand jury

in the context of the combined influence of drugs and alcohol, the People used the "to any extent" standard set forth by the Court of Appeals in *Cruz* (48 NY2d at 427), and did not use the intoxication standard used by the Third Department to define impairment in *Caden N.* (189 AD3d at 90-91). Thus, whether the court properly granted the renewed motion hinges on which of those two definitions is correct in the context of Vehicle and Traffic Law § 1192 (4-a). For the reasons set forth below, we conclude that the People used the correct definition of impairment, and therefore, the court erred in granting the renewed motion to dismiss count 1 of the indictment.

III.

A.

We begin by considering basic principles of statutory interpretation and conclude, in applying those principles, that the People correctly instructed the grand jury regarding the definition of the term "impaired" as used in Vehicle and Traffic Law § 1192 (4-a). In interpreting a statute, it is "fundamental that a court . . . should attempt to effectuate the intent of the [l]egislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *see People v Roberts*, 31 NY3d 406, 418 [2018]). Of course, "the clearest indicator of legislative intent is the statutory text," and therefore we start with the plain meaning of the language itself (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). "[E]ffect and meaning must, if possible, be given to the entire statute and every part and word thereof" (McKinney's Cons Laws of NY, Book 1, Statutes § 98 [a]; *see People v Talluto*, 39 NY3d 306, 311 [2022]). Further, "[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 97; *see People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). "[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*State of New York v Patricia II.*, 6 NY3d 160, 162 [2006] [internal quotation marks omitted]; *see Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]).

Typically, "[i]n the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning" (*Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479 [2001]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 232). Nevertheless, "[a] different rule applies when statutory language has received a technical or peculiar significance from long habitual construction, or by legislative definition" (*People v Duggins*, 3 NY3d 522, 528 [2004] [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 233). "[W]hen a statute does not define a particular [technical] term, it is presumed that the term should be given its precise and well settled legal meaning in the jurisprudence of the state" (*Duggins*, 3 NY3d at 528 [internal quotation marks omitted]; *see Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]).

Additionally, "[i]t is elementary that where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute" (*People v Bolden*, 81 NY2d 146, 151 [1993] [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 236; *People v Corr*, — NY3d —, 2024 NY Slip Op 03379, *2 [2024]).

Where "the words chosen have a definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning" (*Roberts*, 31 NY3d at 418 [internal quotation marks omitted]; *see People v Robinson*, 95 NY2d 179, 182 [2000]). Indeed, "[c]ourts cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the [l]egislature did not see fit to enact" (*Corr*, — NY3d at —, 2024 NY Slip Op 03379 at *2 [internal quotation marks omitted]; *see People v Hardy*, 35 NY3d 466, 474 [2020]).

B.

In applying the aforementioned general principles, we conclude that the term "impaired" in Vehicle and Traffic Law § 1192 (4-a) should be defined consistently with the definition of that same term in *Cruz*—i.e., whether a defendant's consumption of drugs, or a combination of drugs and alcohol, "has actually impaired, to any extent, the physical and mental abilities which [they are] expected to possess in order to operate a vehicle as a reasonable and prudent driver" (48 NY2d at 427). We conclude that accepting the definition of the term "impaired" advocated by defendant and adopted by the court would run afoul of those general principles and effectively—and impermissibly—rewrite the statute without any legislative involvement.

Vehicle and Traffic Law § 1192 (2-a) (b) provides, in relevant part, that "[n]o person shall operate a motor vehicle in violation of[, inter alia,] subdivision [(4-a)] of this section while a child who is [15] years of age or less is a passenger in such a motor vehicle." In turn, section 1192 (4-a) provides that "[n]o person shall operate a motor vehicle while the person's ability to operate such motor vehicle is *impaired* by the combined influence of drugs or of alcohol and any drug or drugs" (emphasis added). The Vehicle and Traffic Law does not define the term "impaired." Nevertheless, the meaning of that term is readily ascertainable given its "precise and well settled legal meaning in the jurisprudence of the state" (*Duggins*, 3 NY3d at 528 [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 233). We conclude that the longstanding judicial interpretation of the word "impaired" as used in the Vehicle and Traffic Law supports the People's proffered definition of that term in the context of section 1192 (4-a), rather than the one used by the court.

Specifically, the Court of Appeals, in *Cruz*, clearly defined the term "impaired" to mean—in the context of alcohol consumption—that a defendant "has actually impaired, to any extent, the physical and

mental abilities which [they are] expected to possess in order to operate a vehicle as a reasonable and prudent driver" (48 NY2d at 427; *see generally* Vehicle and Traffic Law § 1192 [1]). In defining "impaired" that way, the Court sharply distinguished the term "impaired" from the separate term "intoxication," as used in Vehicle and Traffic Law § 1192 (3), noting that the latter term denoted "a greater degree of impairment which is reached when [a] driver has voluntarily consumed alcohol to the extent that [they are] incapable of employing the physical and mental abilities which [they are] expected to possess in order to operate a vehicle as a reasonable and prudent driver" (*Cruz*, 48 NY2d at 428). The Court concluded that the terms impaired and intoxicated are not interchangeable, which is entirely consistent with the principle that, by using separate terms, the legislature is presumed to have given each word a different meaning. Indeed, to conclude otherwise—i.e., to read impairment by drugs as meaning, effectively, intoxication—would be to render the word impaired superfluous (*see Matter of Tonis v Board of Regents of Univ. of State of N.Y.*, 295 NY 286, 293 [1946]; *see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 231). Consequently, in light of the separate definitions given to the terms "impaired" and "intoxication," by using the term "impaired" in Vehicle and Traffic Law § 1192 (4-a), the legislature clearly did not intend for that term to be defined in accordance with the standard used for the term "intoxication."

The Court of Appeals reemphasized its conclusion in *Cruz*—i.e., that the words "impaired" and "intoxicated" had entirely separate and distinct meanings—in *People v Litto* (8 NY3d 692, 706 [2007]). In that case, the Court concluded that a person could not be convicted of driving while intoxicated while under the influence of a drug inasmuch as "[b]ased on the language, history and scheme of the statute, . . . the [l]egislature . . . intended to use 'intoxication' to refer to a disordered state of mind caused by alcohol, not by drugs" (*id.* at 694). It noted that "[t]he legislative history not only manifests legislative intent to employ the term 'intoxicated' to refer to persons inebriated by alcohol and to prevent them from driving, but also reveals a scheme by which the statute would reach that goal" (*id.* at 705). If inebriation by drugs was contemplated "in the definition of 'intoxication' . . . the [l]egislature would have had no reason to add another misdemeanor" to the Vehicle and Traffic Law—i.e., subsections 1192 (4) or (4-a) (*Litto*, 8 NY3d at 706-707). Rather than altering the Vehicle and Traffic Law to subsume the effects of drug use into the definition of intoxication, "the [l]egislature, after careful study and debate, concluded that a driver could be convicted for *impairment* by drugs" (*id.* at 707 [emphasis added]).

In short, had the legislature intended for impairment by the combined effect of drugs and alcohol to use the same standard as for intoxication by alcohol—as defined in *Cruz*—it easily could have done so (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 74). To the contrary, since the Court of Appeals decided *Cruz* and *Litto*, the legislature has never taken any steps to alter the judicial definitions of the terms "intoxicated" or "impaired," nor has it ever

sought to define impairment by a combination of drugs and alcohol in accordance with the intoxication standard. Thus, there is simply no justification for us to depart from the *Cruz* definition of impairment in favor of the intoxication standard, given the lack of legislative action on the topic and the longstanding judicial construction of the term.

Indeed, it is well settled that "[w]here a word has received a judicial construction it will almost invariably be given the same meaning where it is again used by the [l]egislature in connection with the same subject" (McKinney's Cons Laws of NY, Book 1, Statutes § 75; *see Bossuk v Steinberg*, 58 NY2d 916, 918 [1983]). Thus, when the legislature enacted Vehicle and Traffic Law § 1192 (4-a) using the term "impaired" (*see* L 2006, ch 732, § 2), it was "deemed to have had knowledge of the construction [of the term impaired] which had previously been placed upon it [in *Cruz*], and to have used [that term] in subservience to such judicial meaning" (McKinney's Cons Laws of NY, Book 1, Statutes § 75, Comment; *see Feder v Caliguira*, 8 NY2d 400, 404 [1960]). Of course, the legislature could have altered the definition of the term "impaired" in the context of section 1192 (4-a) had it so desired. It chose not to do so, and therefore, we should not do so either (*see generally Pouch v Prudential Ins. Co. of Am.*, 204 NY 281, 287 [1912]).

C.

In support of the court's statutory interpretation, defendant asserts that we should affirm on the basis that the People's proffered interpretation is absurd and, alternatively, that it runs afoul of the rule of lenity. We reject both of those arguments. For all of the reasons set forth above, we reject defendant's argument that the People's interpretation of the word "impaired" would result in an absurdity (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 145). Indeed, in our view, it is defendant's proffered construction of the term that would result in an absurdity inasmuch as it would violate the aforementioned principles of statutory construction that the legislature is presumed to use different words to mean different things and that a word is presumed to be used in the same sense throughout a statute (*see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 231, 236). Further, the People's construction of "impaired" is not absurd because it is consistent with longstanding case law that draws a sharp distinction between intoxication and impairment and that effectively resolved the interpretive question at issue here (*see Litto*, 8 NY3d at 706-707; *Cruz*, 48 NY2d at 427-428).

Similarly, we conclude that the rule of lenity has no application to this case and does not support an affirmance (*see generally People v Badji*, 36 NY3d 393, 404 [2021]). That rule, which holds that "ambiguity in a criminal statute should be construed in defendant's favor, . . . applies only if, after seizing everything from which aid can be derived . . . [the court] can make no more than a guess as to what [the legislature] intended. To invoke the rule, [the court] must conclude that there is a grievous ambiguity or uncertainty in the statute" (*id.* at 404-405 [internal quotation marks omitted]).

Here, there is no grievous ambiguity in Vehicle and Traffic Law § 1192 (4-a) that warrants application of the rule of lenity to define "impaired" by a combination of drugs and alcohol under the intoxication standard. As discussed above, the term "impaired" has been defined by the "to any extent" standard for almost 50 years, and has clearly and consistently been distinguished from the term "intoxication" for all of that time (*see Litto*, 8 NY3d at 706-707; *Cruz*, 48 NY2d at 427-428). Further, since that time—and despite frequent drafting changes to the relevant provisions of the Vehicle and Traffic Law—the legislature has never altered *Cruz*'s definition of the word impaired, even when it added the provision at issue here. In short, given that background, it is simply not true that, in defining impairment under Vehicle and Traffic Law § 1192 (4-a), we can make no more than a guess as to the legislature's intention (*see Badji*, 36 NY3d at 404-405). Moreover, the existence of one aberrational appellate division decision is not, by itself, a reason to apply the rule of lenity, and defendant offers no authority for such a proposition. Indeed, " '[t]he mere possibility of articulating a narrower construction [of a statutory term] . . . does not by itself make the rule of lenity applicable' " here (*id.* at 404).

IV.

Moving beyond the application of basic principles of statutory interpretation, we respectfully disagree with the interpretation of the term "impaired" by drugs offered by the Third Department in *Caden N.*, and adopted by the court in granting defendant's renewed motion (189 AD3d at 89-91). Indeed, for the reasons outlined above, we conclude that the interpretation of the term "impaired" set forth in *Caden N.* is not supported by the statutory text and is inconsistent with precedent from the Court of Appeals. Additionally, as set forth below, we also respectfully disagree with the rationale of *Caden N.*

A.

Caden N. involved a prosecution for vehicular manslaughter in the first degree under the Penal Law, which requires the People to show that the defendant caused the death of one or more persons while operating a motor vehicle in violation of, inter alia, Vehicle and Traffic Law § 1192 (4-a) (*see* Penal Law §§ 125.12 [1]; 125.13 [4]). In considering the defendant's contention that the conviction was not supported by legally sufficient evidence and that the verdict was against the weight of the evidence, the Third Department in *Caden N.* set forth the relevant statutory terms and, centrally, offered its view on the proper definition of the word "impaired" in the context of drug use (189 AD3d at 89).[1]

[1] Specifically at issue in *Caden N.* was whether the defendant was impaired by drugs under Vehicle and Traffic Law § 1192 (4). This appeal involves whether defendant was impaired by the combined effect of drugs and alcohol under Vehicle and Traffic Law § 1192 (4-a). Ultimately, that is a distinction without a difference for purposes of our analysis.

Although the Third Department noted that "the parties both rel[ied] on the Court of Appeals' definition of 'impairment by alcohol' as set forth in *Cruz* to supply the relevant definition of 'impairment by the use of a drug,' " it nevertheless concluded that said "definition is misplaced in the context" of a vehicular manslaughter prosecution (*id.* at 90). The Third Department noted that the relevant statutory framework operated under the assumption that "the greater a driver's ability to function has been compromised the greater the penalty imposed" (*id.*). Specifically, in considering Penal Law § 125.12 (1), it observed that a person "who operates a motor vehicle and causes the death of another while impaired by alcohol is not subject to a conviction for vehicular manslaughter . . . , whereas one who causes such death while intoxicated by alcohol or impaired by a drug (or a combination of alcohol and drugs) falls within the statute's reach" (*Caden N.*, 189 AD3d at 90).

Consequently, the Third Department concluded that "the degree of impairment necessary to convict a motorist of vehicular manslaughter . . . that was caused while such motorist was under the influence of [a drug] . . . is the same degree of impairment as would be necessary to sustain such a conviction of driving while intoxicated by alcohol" (*id.*). Supporting that conclusion, the Third Department noted that the "statutory scheme imposes equal sanctions upon motorists who cause death while intoxicated by alcohol or while impaired by a drug," and that "[s]uch a distinction between impairment by alcohol and impairment by a drug (or a combination of both) can only be deemed consistent with the legislative scheme if the same standard is applied to each misdemeanor category included in the vehicular manslaughter statute" (*id.*). Ultimately, the Third Department concluded that, under its definition of the term impairment, there was nevertheless legally sufficient evidence to support the conviction and the verdict was not against the weight of the evidence in that regard (*id.* at 94-95).

B.

In reaching its conclusion in *Caden N.* that impairment by drugs should be defined according to the intoxication standard under *Cruz*, the Third Department was clearly concerned about the disparity created by finding a person guilty of vehicular manslaughter due to impairment by drugs but not due to impairment by alcohol. We respectfully disagree with that rationale. In our view, *Caden N.*'s focus on the disparate punishment between a person found guilty of vehicular manslaughter based on impairment by alcohol as opposed to impairment by drugs does not have any bearing on the definition of the word impairment, as that term is used in the relevant statutes. That focus on the disparate punishment conflicts with the clear language of the relevant statutes, and the consistent longstanding judicial interpretation of that language (*see Litto*, 8 NY3d at 706-707; *Cruz*, 48 NY2d at 427-428).

When interpreting a statute, courts "must determine the consistency of the [l]egislature's reaching its goal with the purposes underlying the legislative scheme" (*Litto*, 8 NY3d at 705 [internal quotation marks omitted]). Nonetheless, "the [l]egislature has both

the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 634 [1989]). Here, the disparate punishment, i.e., the inconsistency, identified in *Caden N.* was a goal that the legislature had the right and authority to choose. As the Court of Appeals indicated in *Litto*, the legislature has consistently sought to treat alcohol and drugs differently in the Vehicle and Traffic Law's DWI scheme by differentiating between *intoxication* by alcohol and *impairment* by drugs (8 NY3d at 694, 697-707). By electing to punish a person impaired by drugs who commits vehicular manslaughter the same way that it punishes a person intoxicated by alcohol, the legislature has made a quintessential policy choice, which the courts are not permitted to change. Indeed, accepting the disparity of punishment identified in *Caden N.*, we do not see any reason why the legislature could not rationally choose to punish impairment by drugs the same as intoxication by alcohol. The legislature could rationally conclude that the harm posed by drug impairment is more serious than the harm posed by alcohol impairment, and it is not for this Court to pass on the wisdom of that choice; particularly where, as here, the term "impaired" has a longstanding judicially-defined meaning.

We also do not think that the logic of *Caden N.* can be confined solely to cases involving vehicular manslaughter, despite suggestions to that effect in the decision (189 AD3d at 89). In our view, there is nothing about *Caden N.*'s reading of the statutory text that would distinguish impairment by a combination of drugs and alcohol under Vehicle and Traffic Law § 1192 (4-a) from similar impairment that results in vehicular manslaughter. There is no statutory language—located either in the Penal Law or the Vehicle and Traffic Law—to support the conclusion that the word "impaired" has a different meaning depending on the specific criminal charges being pursued. Absent any such language, we cannot conclude that the word "impaired" has a different meaning only when manslaughter is involved.

Ultimately, as discussed above, the Court of Appeals has continually drawn a sharp distinction between the terms intoxication and impairment, concluding that the former term only applies to alcohol inebriation (*see Litto*, 8 NY3d at 707; *see also Cruz*, 48 NY2d at 427-428). We thus decline to accept *Caden N.*'s adoption of an intoxication standard to define impairment by a combination of drugs and alcohol.

V.

We also disagree with defendant's assertion that the criminal jury instructions (CJI) afford another reason to define "impaired" consistent with the definition in *Caden N.* Defendant is correct that the CJI incorporated *Caden N.*'s definition of the term impaired into its basic instruction (*see* CJI2d[NY] Vehicle and Traffic Law § 1192 [4-a]).

However, although "the model charges [in the CJI] contain the 'preferred phrasing' of legal instructions" (*People v J.L.*, 36 NY3d

112, 122 [2020]), "a trial judge is not obligated to use the standard jury instructions" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008]). Indeed, the explanatory note accompanying the relevant charge specifically noted "that a trial court is not bound to follow the CJI2d instruction," and indicated that it had incorporated the *Caden N.* definition into its general instruction "until an appellate court decides otherwise" (CJI2d[NY] Vehicle and Traffic Law § 1192 [4-a], Explanatory Note). In light of the above statutory analysis, and our disagreement with *Caden N.*'s reasoning, the CJI's instruction does not bear on the resolution of this case.

VI.

Accordingly, the order should be reversed, the renewed motion denied, and count 1 of the indictment reinstated, and the matter should be remitted to County Court for further proceedings on the indictment.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

629

CA 23-01675

PRESENT: WHALEN, P.J., CURRAN, NOWAK, AND KEANE, JJ.

TOWN OF MONTEZUMA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHEILA P. SMITH, DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 29, 2023. The order, insofar as appealed from, granted the motion of plaintiff insofar as it sought summary judgment granting an injunction and assessing a fine.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied insofar as it sought an injunction and a fine.

Memorandum: Plaintiff commenced this action seeking, inter alia, injunctive relief against defendant, the owner of a junkyard. Plaintiff moved for summary judgment enjoining defendant from operating her junkyard until she applies for and is granted a license to operate a junkyard pursuant to General Municipal Law § 136, assessing a fine of $100 per week from October 23, 2020, through October 23, 2022, for a total of $10,400, and dismissing defendant's counterclaims. Defendant opposed the motion, contending, inter alia, that General Municipal Law § 136 is not applicable. Defendant appeals, as limited by her brief, from those parts of an order that granted plaintiff's motion insofar as it sought the injunction and fine. We reverse the order insofar as appealed from.

"It is well settled that regulation of junk dealers is a valid exercise of the police power of the State" (*Matter of Bologno v O'Connell*, 7 NY2d 155, 158 [1959]). On appeal, the parties dispute whether General Municipal Law § 136 applies to junkyards located within plaintiff. That statute provides that it "shall not be construed to . . . supersede . . . ordinances or local laws for the control of junk yards . . . and shall not be deemed to apply to any municipality which has any ordinance or local law or regulation to license or regulate junk yards" (General Municipal Law § 136 [12]).

We agree with defendant that General Municipal Law § 136 is inapplicable to plaintiff's regulation of her junkyard inasmuch as plaintiff has a local "zoning ordinance[] . . . for the control of junk yards . . . in effect" (General Municipal Law § 136 [12]). Plaintiff's Zoning Ordinance, among other things, defines the term "Junkyard," establishes Zoning Districts, including, as relevant here, an "Agricultural/Residential District" and an "Industrial Zoning District," provides that a junkyard is allowed only in an Industrial Zoning District and only with a Special Use Permit, and governs the application for and issuance of Special Use Permits. Plaintiff therefore effectively implemented an "ordinance or local law or regulation to license *or regulate* junk yards" (General Municipal Law § 136 [12] [emphasis added]). It is of no moment that plaintiff's Zoning Ordinance did not include a specific policy for issuing a license for junkyards; the Ordinance prohibited junkyards, except in an Industrial Zoning District, and, within that, only through a Special Use Permit. By dictating in which zoning district a junkyard may legally operate and establishing requirements for junkyards, the Ordinance regulated junkyards within the meaning of General Municipal Law § 136 (12).

In light of our determination, we need not consider defendant's remaining contentions.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

640

KA 21-00890

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT VAUGHAN, DEFENDANT-APPELLANT.

ROSENBERG LAW FIRM, BROOKLYN (JONATHAN ROSENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 2, 2021. 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: Defendant appeals 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]). The conviction arises from an altercation following a motor vehicle accident. Defendant and the victim were occupants of the respective vehicles that were involved in the accident and, during the ensuing altercation, the victim, who was the driver of one of the vehicles, sustained a fatal stab wound to his chest.

Defendant contends that the verdict is against the weight of the evidence. We reject that 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 a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that County Court erred in denying his request for a missing witness charge with respect to the passenger in the victim's vehicle. A party requesting a missing witness charge must establish that the uncalled witness is "believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call [the witness] to testify"

(*People v Gonzalez*, 68 NY2d 424, 427 [1986]; *see People v Savinon*, 100 NY2d 192, 196-197 [2003]; *People v Macana*, 84 NY2d 173, 177 [1994]). Once a defendant seeking such a charge satisfies that initial burden, the burden shifts to the People to account for the witness's absence or otherwise show that a missing witness charge would be inappropriate (*see People v Vasquez*, 76 NY2d 722, 724 [1990]; *Gonzalez*, 68 NY2d at 428). Here, we conclude that defendant satisfied his initial burden but that, in response, the People met their burden by establishing that the witness was not available and that his testimony would have been cumulative (*see People v Sturgis*, 154 AD2d 906, 907 [4th Dept 1989], *lv denied* 75 NY2d 776 [1989]; *see also People v Hernandez*, 43 AD3d 1412, 1412-1413 [4th Dept 2007], *lv denied* 9 NY3d 1034 [2008]; *People v Richards*, 275 AD2d 886, 887 [4th Dept 2000], *lv denied* 96 NY2d 738 [2001]). In any event, we further conclude that any error in denying the missing witness charge is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted of the crimes but for the error (*see People v Fields*, 76 NY2d 761, 763 [1990]; *People v Mabry*, 214 AD3d 1300, 1302 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023], *reconsideration denied* 40 NY3d 1081 [2023]; *cf. People v Brown*, 4 AD3d 790, 791 [4th Dept 2004]).

We reject defendant's contention that the police lacked probable cause to seize his shirt when they noticed him chewing on it during his first police interview and that the court thus erred in refusing to suppress the shirt and the DNA evidence subsequently obtained therefrom. Here, the visual observation of the stains on the shirt by the police "did not constitute an intrusion into a constitutionally protected area" (*People v Thomas*, 188 AD2d 569, 571 [2d Dept 1992], *lv denied* 81 NY2d 1021 [1993]; *see People v Loomis*, 17 AD3d 1019, 1020-1021 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]; *see also People v Johnson*, 133 AD3d 1309, 1310-1311 [4th Dept 2015], *lv denied* 27 NY3d 1000 [2016]). However, "[w]here, as here, the police did not obtain a warrant for the seizure of the blood evidence, 'the police had to satisfy two requirements in order to justify the action taken. First, the police had to have reasonable cause to believe the [stains] constituted evidence, or tended to demonstrate that an offense had been committed, or, that a particular person participated in the commission of an offense . . . Second, there had to have been an exigent circumstance of sufficient magnitude to justify immediate seizure without resort to a warrant' " (*Johnson*, 133 AD3d at 1310-1311). We conclude, initially, that the police had reasonable cause to believe that the stains on defendant's shirt constituted evidence. The suppression hearing testimony established that defendant had just been transported from the scene of a stabbing and that, although defendant told police detectives during the interview that a particular stain was not blood, he was then observed on a video feed, after the detectives left the interview room, trying to chew stains out of his shirt. The testimony similarly established, with respect to the exigency of the circumstances, that when the detectives broached the topic of there being a stain on defendant's shirt, he tried to destroy the stain at his earliest opportunity outside of the presence of the police.

Defendant's challenge to the court's procedure in responding to a jury note is not preserved for our review. Here, the record establishes that defendant, who was proceeding pro se, and the prosecutor were present in court at all relevant times, that they knew the contents of the jury note, that they were provided with a copy of the note, and that defendant had no objection or request with respect to the content of the note or the manner in which the court responded to it (*see People v Kalb*, 91 AD3d 1359, 1359 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]). Defendant's " 'silence at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved' " for this Court's review (*People v Arnold*, 107 AD3d 1526, 1527 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013], quoting *People v Starling*, 85 NY2d 509, 516 [1995]; *see People v Geroyianis*, 96 AD3d 1641, 1643 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012]). We decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's sentence is not unduly harsh or severe.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

648

CA 23-01878

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF SENECA MEADOWS, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF SENECA FALLS, TOWN OF SENECA FALLS
TOWN BOARD, RESPONDENTS-DEFENDANTS,
DIXIE C. LEMMON AND CONCERNED CITIZENS OF
SENECA COUNTY, INC.,
RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF DOUGLAS H. ZAMELIS, COOPERSTOWN (DOUGLAS H. ZAMELIS OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (ERIC M. FERRANTE OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), dated June 8, 2023, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The order and judgment granted the motion of petitioner-plaintiff for partial summary judgment on its first cause of action and declared Town of Seneca Falls Local Law No. 3 of 2016 invalid.

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

Memorandum: Petitioner-plaintiff, Seneca Meadows, Inc. (SMI), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the negative declaration issued by respondent-defendant Town of Seneca Falls Town Board (Board) under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to a proposed local law that would prohibit the construction or operation of a waste management facility within respondent-defendant Town of Seneca Falls. SMI moved for partial summary judgment on its first cause of action, for failure to comply with the requirements of SEQRA. Respondents-defendants Dixie C. Lemmon and Concerned Citizens of Seneca County, Inc. (collectively, respondents) opposed the motion, contending, inter alia, that SMI lacked standing to assert a cause of action under SEQRA. Supreme Court, inter alia, determined that SMI had standing to assert a cause of action under SEQRA and granted the motion. We reverse.

It is well settled that "[t]he purposes of SEQRA . . . are to encourage productive and enjoyable harmony with our environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of ecological systems, natural, human and community resources important to the people of the state" (*Matter of Turner v County of Erie*, 136 AD3d 1297, 1297 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016] [internal quotation marks omitted]; *see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 777 [1991]). To that end, the overriding principles and objectives of SEQRA include the "maintenance of a quality environment for the people of this state" (ECL 8-0103 [1]), and that "every citizen 'has a responsibility to contribute to the preservation and enhancement of the quality of the environment' " (*Society of Plastics Indus.*, 77 NY2d at 777, quoting ECL 8-0103 [2]).

"Despite the responsibility of every citizen to contribute to the preservation and enhancement of the quality of the environment, there is a limit on those who may raise environmental challenges to governmental actions" (*Turner*, 136 AD3d at 1297). Those seeking to raise a SEQRA challenge must establish both "an *environmental* injury that is in some way different from that of the public at large, and . . . that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA" (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726, 727-728 [2d Dept 2013] [emphasis added]; *see Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]; *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 308-309 [2009, Pigott, J., concurring]).

Respondents contend that the court erred in determining that SMI is entitled to a presumption of standing based upon its status as the owner of a solid waste management facility directly impacted by enactment of the local law. We agree. Although "[a] property owner in nearby proximity to premises that are the subject of [an agency] determination may have standing to seek judicial review without pleading and proving special damages, because adverse effect or aggrievement can be inferred from the proximity" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 409-410 [1987]), the "status of neighbor does not . . . automatically provide the entitlement . . . to judicial review in every instance" (*id.* at 414). The petitioner must also establish "that the interest asserted is arguably within the zone of interest to be protected by the statute" (*id.* [internal quotation marks omitted]; *see Matter of East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 84 NY2d 287, 295-296 [1994]; *Society of Plastics Indus.*, 77 NY2d at 772-773).

Here, SMI failed to establish, or even allege, that it had suffered or would suffer an environmental injury. SMI submitted, inter alia, the affidavit of its managing director, who averred only that SMI would suffer economic injuries if the local law was not annulled. Although SMI, as the owner of a solid waste management

facility, is entitled to a presumption that it would, in fact, suffer such economic harm, it failed to establish that it has standing to raise a SEQRA challenge because economic injury does not fall within the zone of interest SEQRA seeks to protect (*see Society of Plastics Indus.*, 77 NY2d at 773-774; *Matter of Peachin v City of Oneonta*, 194 AD3d 1172, 1175 [3d Dept 2021]; *Tilcon N.Y., Inc. v Town of New Windsor*, 172 AD3d 942, 945 [2d Dept 2019]; *see generally Sun-Brite Car Wash*, 69 NY2d at 412). Indeed, unlike the petitioner in *Matter of Har Enters. v Town of Brookhaven* (74 NY2d 524 [1989]), SMI failed to allege even "unspecified 'eventual environmental consequences' " (*id.* at 527) that would result from the adoption of the local law.

Thus, inasmuch as SMI does not have standing to challenge the Board's actions pursuant to SEQRA, the court erred in granting SMI's motion for partial summary judgment on its first cause of action.

All concur except SMITH, J.P., and BANNISTER, J., who dissent and vote to affirm in the following memorandum: Petitioner-plaintiff, Seneca Meadows, Inc. (SMI), owns and operates the only solid waste management facility situated within respondent-defendant Town of Seneca Falls (Town). The Town, in response to the concerns expressed by certain residents about SMI's facility, targeted the facility for closure by enacting the Town of Seneca Falls Local Law No. 3 of 2016, which prohibits the continued operation of solid waste disposal facilities in the Town beyond December 31, 2025, i.e., upon expiration of SMI's current permits. SMI commenced the instant hybrid proceeding and action alleging, in relevant part, that the Town failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA). Supreme Court, after concluding that SMI had standing to challenge the Town's compliance with SEQRA, determined that the Town failed to take the requisite "hard look" at the relevant areas of environmental concern in enacting the local law, and therefore declared the local law invalid. On appeal, the majority now concludes that SMI was required, and failed, to allege an environmental injury to establish standing to challenge the Town's compliance with SEQRA in enacting the local law. In our view, the majority has made an error of law by applying a general standing rule instead of its applicable exception, and we therefore respectfully dissent.

The Court of Appeals' decision in *Matter of Gernatt Asphalt Prods. v Town of Sardinia* (87 NY2d 668 [1996] [*Gernatt*])—which built upon its prior cases including *Matter of Har Enters. v Town of Brookhaven* (74 NY2d 524 [1989] [*Har*])—arguably provides the clearest articulation of the standing requirements for SEQRA purposes that apply to an owner of property that is the subject of a challenged local law. As explained in *Gernatt*, "[g]enerally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute" (87 NY2d at 687). Moving from general standing principles to specific types of property owners, the Court of Appeals proceeded to explain that "[a] *nearby* property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from

proximity" (*id.* [emphasis added]). "The proximity alone permits an inference that the [nearby property owner] challenger possesses an interest different from other members of the community" (*id.*). "Standing to raise a SEQRA claim involves *this* variation"—i.e., the nearby property owner variation—under which "a SEQRA challenger must 'demonstrate that it will suffer an injury that is environmental and not solely economic in nature' " (*id.*, quoting *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990] [emphasis added]). Critically, the Court of Appeals then immediately continued by explaining that there is a distinction between the standing requirements for an owner of property *nearby* and the owner of property that is the *subject of* the local law: "*However*, where the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of rezoning need not allege the likelihood of environmental harm" (*id.*, citing *Har*, 74 NY2d at 529 [emphasis added]).

The difference between our understanding of the law and the majority's understanding appears to stem largely from our divergent readings of *Har*. In the majority's view, the property owner in *Har* had SEQRA standing because it alleged that there would be "unspecified 'eventual environmental consequences' " from the subject town's targeted rezoning of its property from commercial to residential (74 NY2d at 527). In our view, however, the Court of Appeals in *Har* did not tie the property owner's standing to its unspecified allegation of future environmental consequences. To the contrary, in addressing the question "whether an owner of property which is the subject of a zone change must plead specific environmental harm to challenge the sufficiency of an agency's efforts to comply with SEQRA," the Court of Appeals answered that no such allegation was needed: "We hold that where, as here, the very subject of the proposed action . . . is petitioner's property, petitioner is presumptively adversely affected by the violation of SEQRA requirements and that no such specific allegation is necessary" (*id.* at 526).

Even more precisely, *Har* explained that, "[i]n deciding whether an owner has standing to ask a court to review SEQRA compliance, the question is whether it has a significant interest in having the mandates of SEQRA enforced" (*id.* at 529). The Court of Appeals reasoned that "[a]n owner's interest in the project may be so substantial and its connection to it so direct or intimate as to give it standing without the necessity of demonstrating the likelihood of resultant environmental harm. For even though such an owner cannot presently demonstrate an adverse environmental effect, it nevertheless has a legally cognizable interest in being assured that the decision makers, before proceeding, have considered all of the potential environmental consequences, taken the required 'hard look', and made the necessary 'reasoned elaboration' of the basis for their determination" (*id.*). "Under these rules"—i.e., the aforementioned legal principles and without any reference to the property owner's vague factual allegation of future environmental impacts mentioned in passing earlier in the decision—the Court of Appeals "h[e]ld that this property owner has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land"

(*id.*). Stated differently, the property owner had a cognizable interest in SEQRA compliance "by virtue of its status as owner of the property," not by virtue of its fleeting environmental consequences allegation (*id.* at 530).

The Court of Appeals' rule that an owner whose property is the very subject of the proposed governmental action—unlike a "nearby" or "proximate" property owner—need not allege environmental injury to have SEQRA standing is based upon sound public policy to ensure adherence to our State's commitment to environmental protection. It was "evident" to the Court of Appeals that "if any party should be held to have a sufficient interest to object--without having to allege some specific harm--it is an owner of property which is the subject of a contemplated rezoning" (*id.* at 529). That is because, as in *Har* itself, often "only the owner of the affected property has a sufficient incentive to bring a review proceeding" (*id.*). Consequently, "[t]o adopt the [contrary] rule . . . and deny standing--absent an allegation that the owner will suffer some adverse environmental consequence--would insulate decisions such as this from judicial review, a result clearly contrary to the public interest" (*id.*).

To summarize, in the Court of Appeals' own words, "[i]n *Har*, we held that a property owner whose land was targeted for rezoning had a 'legally cognizable interest in being assured that the town satisfied SEQRA' and that the owner consequently had standing to bring a SEQRA challenge, even absent a showing of specific environmental harm" (*Mobil Oil Corp.*, 76 NY2d at 434; *see Gernatt*, 87 NY2d at 687). Stated differently, although the general rule requires that a SEQRA challenger demonstrate that it will suffer an injury that is environmental and not solely economic in nature, there is an exception to that general rule under which "the owner of property that is the subject of rezoning need not allege the likelihood of environmental harm" (*Gernatt*, 87 NY2d at 687; *see Mobil Oil Corp.*, 76 NY2d at 434-435; *Har*, 74 NY2d at 529).

We have articulated and applied the exception on several occasions. In fact, *Gernatt* arrived at the Court of Appeals through the Fourth Department. Although the Court of Appeals reversed our determination on other grounds, it agreed with us that the petitioner there had standing to challenge the zoning ordinance amendments as violative of SEQRA (*see Gernatt*, 87 NY2d at 677, 687-688). In that regard, on the zone of interest requirement for standing, i.e., the second prong of the test, we stated that, even in the absence of a demonstration of likely environmental harm, "the second prong is satisfied where, as here, the owner of property affected by a zoning amendment is the party challenging the SEQRA review of that legislation" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 208 AD2d 139, 149 [4th Dept 1995], *revd on other grounds* 87 NY2d 668 [1996]).

Our determination in *Tupper v City of Syracuse* (71 AD3d 1460 [4th Dept 2010]) provides another illustrative example. There, the City of Syracuse enacted an ordinance requiring that owner-occupied properties

that are sold to an absentee owner have a certificate of suitability, which would not be issued if the property did not meet off-street parking capacity requirements (*id.* at 1461). The plaintiffs, consisting of absentee property owners and an association of property owners in the city's university district, commenced an action seeking to invalidate the ordinance on the ground that the city failed to issue a negative declaration under SEQRA with respect to the environmental impact of the ordinance (*id.* at 1460-1461). In determining that the plaintiffs had standing to commence the action, we first noted that the absentee owners may be impacted by the ordinance insofar as it required that the absentee property owners obtain a certificate of suitability if they had not previously done so and required that they obtain a new certificate of suitability in the event that they made changes to the interior or exterior components of their properties (*id.* at 1461). No other impact was required to confer standing. We concluded in particular that the plaintiffs were "not barred from challenging the SEQRA review based on their failure to allege the likelihood of environmental harm" (*id.*). Quoting *Gernatt* and *Har*, we explained that, "[i]nasmuch as [the] plaintiffs are challeng[ing] . . . the SEQRA review undertaken as part of a zoning [ordinance amendment, they] . . . need not allege the likelihood of environmental harm . . . In those circumstances, the property owner has a legally cognizable interest in being assured that [the] [defendants] satisfied SEQRA before taking action to [amend the zoning ordinance]" (*id.* [internal quotation marks omitted]). In other words, consistent with the exception to the general rule as set forth by the Court of Appeals, the absentee property owners had standing to raise a SEQRA challenge to the enactment based solely on their status as owners of property targeted by the ordinance, even without any allegation of environmental harm (*see id.*; *see also Matter of Up State Tower Co., LLC v Village of Lakewood*, 175 AD3d 972, 972-973 [4th Dept 2019]; *accord Gernatt*, 87 NY2d at 687; *Mobil Oil Corp.*, 76 NY2d at 434; *Har*, 74 NY2d at 526-527, 529).

The practice commentaries also reflect the state of the law as just articulated. One leading treatise on New York environmental law explains simply: "The Court of Appeals has held that the owner of property which is the subject of a zone change *automatically* has standing under SEQRA to challenge the rezoning, without having to plead specific environmental harm" (2 Michael B. Gerrard et al., Environmental Impact Review in New York § 7.07 [Oct. 2024 update] [emphasis added]). That treatise further explains that, while the general rule holds that economic injury alone cannot form the basis for standing to bring a SEQRA challenge, "[t]his rule does not apply, however, to the owner of property whose rezoning is being challenged on SEQRA grounds" (*id.*). Other New York commentators have been even more blunt: "The [C]ourt of [A]ppeals has *eliminated* the 'zone of interest' requirement for a property owner who wishes to bring a SEQRA challenge to the rezoning of its property" (J. Kevin Healy & Philip E. Karmel, Environmental Law and Regulation in New York § 4:42 [9 West's NY Prac Series, Sept. 2024 update] [emphasis added]). National commentators reviewing our law likewise agree that "[t]he courts have also had no difficulty granting standing to property owners whose use of their property is affected by a governmental action, such as a

downzoning or permit denial" (Daniel R. Mandelker et al., NEPA Law and Litigation § 12:8 [Aug. 2024 update]).

Applying the law here, SMI has established standing to challenge the Town's compliance with SEQRA because it is the owner and operator of a solid waste management facility, which is affected by the subject local law that removes solid waste management facilities from the permitted uses within the Town upon the upcoming expiration of SMI's permits (*see Gernatt*, 87 NY2d at 687-688; *Har*, 74 NY2d at 529-530; *Up State Tower Co., LLC*, 175 AD3d at 972-973; *Tupper*, 71 AD3d at 1461).

In our view, none of the cases relied upon by the majority warrant a different conclusion. Those cases are inapposite because, for example, they involve application of the general rule for SEQRA standing where the challenges were to laws or regulations of general applicability that did not target the use of specific property (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 763-781 [1991] [*Society of Plastics*]). Indeed, the Court of Appeals has specifically distinguished the general standing rule requiring environmental injury applicable in *Society of Plastics* from the exception to that general rule for targeted property owners (*see Gernatt*, 87 NY2d at 687). Other cases relied upon by the majority involve matters in which the challengers were nearby, neighboring property owners in proximity to the subject premises (*see e.g. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 409-416 [1987]; *Matter of Peachin v City of Oneonta*, 194 AD3d 1172, 1173-1174 [3d Dept 2021]) or were not even property owners in close proximity to the challenged project (*see Tilcon N.Y., Inc. v Town of New Windsor*, 172 AD3d 942, 943 [2d Dept 2019]; *Matter of Turner v County of Erie*, 136 AD3d 1297, 1297-1299 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]).

Relatedly, to the extent that the majority's citation to *Society of Plastics* suggests reliance on the proposition that SMI does not have standing because it is the equivalent of a "special interest group[ ] or pressure group[ ], motivated by economic self-interests," that is attempting "to misuse SEQRA" to further its own purposes (77 NY2d at 774), we cannot agree with that view. SMI is not an outside special interest group; it is the "property owner whose land was targeted" by the Town's local law (*Mobil Oil Corp.*, 76 NY2d at 434). Under Court of Appeals' precedent, it is "beside the point . . . that the true motive for [SMI's] objection [may be] its desire to proceed with its [continued operation of the solid waste management facility], not its concern with the [T]own's adherence to SEQRA" (*Har*, 74 NY2d at 530). "That [SMI] concededly has an economic interest in the outcome does not negate the standing that it otherwise has by virtue of its status as owner of the property" (*id.*).

We do not read the majority's decision to be adopting the semantic distinction urged by some respondents-defendants that there is a legally significant difference between a local law styled as a zoning law and one enacted pursuant to police power. We agree with the majority's implicit determination that the urged distinction is

legally insignificant. On that point, we note briefly that the government's zoning authority is just a species of its police power (*see Town of Delaware v Leifer*, 34 NY3d 234, 240 [2019]; *Sun-Brite Car Wash*, 69 NY2d at 412; *see also Gernatt*, 87 NY2d at 683-684), and that the targeted property owner exception to the general SEQRA standing rules has been applied in a non-zoning context (*see Matter of Skenesborough Stone v Village of Whitehall*, 229 AD2d 780, 780-781 [3d Dept 1996]). Indeed, the Court of Appeals has commented that the urged distinction between a zoning law and a local law enacted pursuant to police power would not preclude an appropriate party from meeting the requirements to satisfy the standing doctrine to challenge an action under SEQRA (*see Society of Plastics*, 77 NY2d at 778-779). We further suggest that it would invite gamesmanship to allow the government to avoid challenges to its compliance with SEQRA merely by enacting a general ban pursuant to its police powers rather than a more specific zoning law. That is particularly true in a case like this, where the Town could easily have obtained the same result—a ban on solid waste management facilities—by enacting a general ban directed at the sole solid waste management facility within its boundaries or rezoning SMI's property for other use (*compare Gernatt*, 87 NY2d at 687-688).

For all of the foregoing reasons, we conclude that SMI—as the owner of the property targeted by the local law—has standing to challenge the Town's compliance with SEQRA. Inasmuch as we further conclude that the court properly determined that the Town failed to take the requisite "hard look" at the relevant areas of environmental concern in enacting the local law, we would affirm the order and judgment.

Entered: December 20, 2024 Ann Dillon Flynn
Clerk of the Court

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

651

CA 23-02021

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

RICHARD ASHKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LEWIS & LEWIS, P.C., BUFFALO (ADAM DELLEBOVI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Paula L. Feroleto, J.), entered May 24, 2023. The order granted the motion of defendant City of Niagara Falls for summary judgment and dismissed the complaint against it.

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 tripped and fell on a sidewalk slab in defendant City of Niagara Falls (City) that had been raised by the roots of a nearby tree. After discovery, the City moved for summary judgment dismissing the complaint against it based on the contention that it had not received prior written notice of the alleged sidewalk defect. Supreme Court granted the motion, and plaintiff now appeals. We affirm.

It is well established that prior notification laws are a valid exercise of legislative authority (*see Amabile v City of Buffalo*, 93 NY2d 471, 473 [1999]). In the event of an action against a municipality that requires such prior written notice, "[the] locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location" (*id.* at 474). "[U]nless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice, a municipality is excused from liability absent proof of prior written notice or an exception thereto" (*Hart v City of Buffalo*, 218 AD3d 1140, 1148 [4th Dept 2023]).

The City has enacted such a provision (*see* Niagara Falls City Charter § 5.14). To establish entitlement to summary judgment, the City's initial burden is to establish that it lacked prior written notice of the alleged defect (*see Franklin v Learn*, 197 AD3d 982, 983 [4th Dept 2021]). "If the municipality establishes its prima facie entitlement to summary judgment based on the lack of prior written notice, the burden shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating the existence of material issues of fact which require a trial of the action" (*Horst v City of Syracuse*, 191 AD3d 1297, 1298-1299 [4th Dept 2019] [internal quotation marks omitted]; *see Franklin*, 197 AD3d at 983). Here, the City established that it did not receive prior written notice of the defect in question by submitting the deposition testimony and affidavit of the Director of the Department of Public Works for the City, who reviewed the City's logbooks and index cards containing written complaints and did not find any prior written notice of the alleged defect. The burden thus shifted to plaintiff, who did not submit any evidence to raise a triable issue of fact in opposition.

We reject plaintiff's contention that the City had to provide proof that the "Director of Operations and Technical Services" did not receive prior written notice of the alleged defect, in strict compliance with City Charter former § 5.14. In 1990, the Niagara City Council amended the City Charter to change the names of the Department and Director of Operations and Technical Services to the Department and Director of Public Works. Contrary to plaintiff's contention, the amendment to the City Charter did not dissolve the Department of Operations and Technical Services and create a new Department of Public Works, but rather it simply effected name changes. Indeed, as amended, the City Charter expressly stated that "[w]henever in this Charter . . . there is reference to the Department of Operations and Technical Services or Director of Operations and Technical Services said reference shall be deemed a reference to the Department of Public Works or Director of Public Works" (Niagara Falls City Charter § 6.5). We conclude that proof of a lack of prior written notice received by the Director of Public Works is sufficient to establish the City's prima facie entitlement to summary judgment (*see* Niagara Falls City Charter §§ 5.14, 6.5). We likewise reject plaintiff's contention that the City had the initial burden to establish lack of prior written notice going back to at least October 2011, when there is documented proof that the condition existed (*see Grady v Town of Hempstead*, 223 AD3d 885, 886 [2d Dept 2024]; *Sanchez v County of Nassau*, 222 AD3d 685, 687 [2d Dept 2023]; *Hued v City of New York*, 170 AD3d 571, 571 [1st Dept 2019]; *Pallotta v City of New York*, 121 AD3d 656, 657 [2d Dept 2014]).

Finally, we do not consider plaintiff's alternative contention, raised for the first time on appeal, that Second Class Cities Law § 244 is controlling (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

661

CAF 22-02017

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF MAVERICK V.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHANTELLE K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated November 1, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 2 from an order of fact-finding and disposition that, inter alia, determined that she neglected her older child. In appeal No. 1, the mother appeals from an order of fact-finding and disposition that, inter alia, determined that she derivatively neglected her younger child.

We reject the mother's contention in appeal No. 2 that the finding that she neglected her older child is against the weight of the evidence. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). Here, petitioner established by a preponderance of the evidence that the older child was in imminent danger of physical, mental, or emotional impairment based on the testimony of the mother and petitioner's senior caseworker about the mother's history with Child Protective Services, her untreated mental illness, and her threats of physical violence, including one instance

where she allegedly threatened the older child with a knife (*see Matter of Jasmine L. [Montu L.]*, 228 AD3d 1306, 1307 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]). "Actual impairment or injury is not required but, rather, only 'near or impending' injury or impairment is required" (*Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]).

The mother's contention in appeal No. 2 that Family Court erred in considering certain hearsay evidence is not preserved for our review (*see Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]).

Contrary to the mother's contention in appeal No. 1, we further conclude that petitioner established by a preponderance of the evidence that the younger child was derivatively neglected (*see generally* Family Ct Act § 1046 [b] [i]). Proof of neglect of one child shall be admissible on the issue of the neglect of any other child of the respondent parent (*see* § 1046 [a] [i]). "A finding of derivative neglect may be made where the evidence with respect to the child found to be abused or neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Jovon J.*, 51 AD3d 1395, 1396 [4th Dept 2008] [internal quotation marks omitted]). Here, the evidence "demonstrate[d] such an impaired level of parental judgment as to create a substantial risk of harm" to the younger child (*id.* [internal quotation marks omitted]).

We have reviewed the mother's remaining contentions in both appeals and conclude that none warrants modification or reversal of the orders.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

662

CAF 22-02019

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF TYESHAN G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHANTELLE K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated November 3, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Maverick V. (Shantelle K.)* ([appeal No. 1] — AD3d — [Dec. 20, 2024] [4th Dept 2024]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

671

CA 23-01616

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND KEANE, JJ.

STEVEN BRONGO AND MARTA BRONGO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GREECE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered September 8, 2023. The order granted the motion of defendant Town of Greece for summary judgment dismissing the amended complaint against it and denied the cross-motion of plaintiffs seeking leave to amend the bill of particulars.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 200, common-law negligence and derivative causes of action against defendant Town of Greece, and as modified the order is affirmed without costs.

Memorandum: In this Labor Law and common-law negligence action, plaintiffs appeal from an order that granted the motion of defendant Town of Greece (Town) for summary judgment dismissing the amended complaint against it and that denied plaintiffs' cross-motion for leave to amend the bill of particulars to include a violation of 12 NYCRR 23-9.2 (a) as part of their Labor Law § 241 (6) cause of action.

The Town contracted with the employer of plaintiff Steven Brongo (plaintiff) to perform milling and asphalt work on the Town's road. As part of the project, plaintiff operated a water truck used to cool the mill's blades. Plaintiff drove to a fire hydrant located at the Town's Department of Public Works to fill his water tank. However, the hose attached to the hydrant was torn, frayed and lacked a coupler to connect the hose to the truck's fill port. Plaintiff attempted to use the hose to fill the truck through the top, but the force of the water through the hose caused it to whip around, knocking plaintiff off a ladder used to access the top of the truck and causing plaintiff injuries. Plaintiffs thus commenced this action sounding in, inter

alia, common-law negligence and violations of Labor Law §§ 200 and 241 (6).

Contrary to plaintiffs' contention, Supreme Court properly granted that part of the motion with respect to the Labor Law § 241 (6) cause of action inasmuch as the Town met its initial burden with respect thereto and, in response, plaintiffs failed to raise a triable issue of fact (*see Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574-1575 [4th Dept 2014]). Indeed, in opposition to the motion, plaintiffs alleged that defendant violated 12 NYCRR 23-9.2 (a), which "is 'not applicable in the circumstances of this case' " (*id.* at 1575; *see Brown v New York-Presbyt. HealthCare Sys., Inc.*, 123 AD3d 612, 612 [1st Dept 2014]; *cf. Piccolo v St. John's Home for the Aging*, 11 AD3d 884, 886 [4th Dept 2004]).

We agree with plaintiffs, however, that the court erred in granting the motion with respect to the Labor Law § 200 and common-law negligence causes of action, and thus the derivative cause of action, and we therefore modify the order accordingly. The Town failed to address plaintiffs' allegations in the amended complaint and bill of particulars regarding an unsafe premises condition and, therefore, we conclude that it failed to meet its initial burden on the motion (*see Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841-842 [2d Dept 2021]; *see generally Drew v J.A. Carmen Trucking Co., Inc.*, 8 AD3d 1112, 1113 [4th Dept 2004]; *Mineo v Taefi*, 280 AD2d 971, 971 [4th Dept 2001]).

We further agree with plaintiffs that there are triable issues of fact as to proximate cause, specifically regarding whether the equipment that defendant alleges that plaintiff should have used—an undamaged hose with the appropriate coupling to permit attachment to the rear of the water truck—was readily available at the worksite.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

681

CAF 23-01265

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF NOEMI C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GLADYS C.-C., RESPONDENT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (BENJAMIN ELLIOT MANNION OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 29, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to the mother's 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 [the] child" (*Matter of Lil' Brian J.Z. [Jessica J.]*, 221 AD3d 1580, 1581 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024] [internal quotation marks omitted]; *see* Social Services Law § 384-b [4] [c]). Testimony from petitioner's expert witness, a psychologist, established that the mother suffered from mental illness, as defined in Social Services Law § 384-b (6) (a), such that the child "would be in danger of being neglected if [she] were returned to [the mother's] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Evalynn R.B. [Kelli B.]*, 217 AD3d 1430, 1431 [4th Dept 2023]; *Matter of Dylan K.*, 269 AD2d 826, 826-827 [4th Dept 2000], *lv denied*

95 NY2d 766 [2000]).

The mother also contends that reversal is required because petitioner's case consisted almost entirely of inadmissible hearsay. We reject that contention. Even assuming, arguendo, that her contention is fully preserved (*see generally Matter of Raymond H. [Dana C.]*, 186 AD3d 1125, 1126 [4th Dept 2020]) and that Family Court improperly admitted hearsay into evidence at the fact-finding hearing (*see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]), we conclude that any error by the court in admitting the challenged testimony is harmless (*see Matter of Meyah F. [Shelby L.]*, 203 AD3d 1558, 1560 [4th Dept 2022]; *Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

The mother further contends that petitioner's evidence of the mother's mental illness is unreliable because much of the psychological evaluation was conducted in English and without the benefit of a Spanish interpreter. The mother did not object to the testimony or report of the psychologist on that ground, however, and thus failed to preserve that contention for our review (*see Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *see generally Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]). In any event, the record establishes that the psychologist testified repeatedly that there was no indication that the mother's test scores were impacted by a language barrier. Further, the psychologist gave the mother a Spanish-language version of the Minnesota Multiphasic Personality Inventory test (MMPI-2) and, before she began, he "had [the mother] read some of the questions" to ensure that she understood them before she proceeded. In addition, the mother's answers were consistent, which the psychologist testified would not have occurred if the score were "due to confusion or poor reading ability." The psychologist further testified that "it was clear from the way she was responding to [his] questions that [the mother] understood what [he] was asking," and that the mother "was able to express herself coherently and intelligently in English." It is also worth noting that the mother interacted with the child in English during their supervised visit. We conclude that the mother's contention that a language barrier rendered the test results and, therefore, the psychologist's opinion, unreliable is not supported by the record (*see Matter of Olivia G. [Olivar I.-G.]*, 173 AD3d 1688, 1688 [4th Dept 2019]; *Matter of James U. v Catalina V.*, 151 AD3d 1285, 1286-1287 [3d Dept 2017]; *Nadya S.*, 133 AD3d at 1244).

Entered: December 20, 2024 Ann Dillon Flynn
Clerk of the Court

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

683

CA 23-01663

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

JACKLYN BURKETT AND JOHN BURKETT,
PLAINTIFFS-APPELLANTS,

V ORDER

ERIN M. O'TOOLE, DEFENDANT-RESPONDENT.

JAMES ALEXANDER LAW, EAST SYRACUSE (JAMES L. ALEXANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MURA LAW GROUP, PLLC, BUFFALO (BRENDAN S. BYRNE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered September 27, 2023. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

707

CA 23-00898

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, DELCONTE, AND KEANE, JJ.

VIRTUAL POLYMER COMPOUNDS, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AURORA RIDGE DAIRY, LLC,
DEFENDANT-RESPONDENT.

TIVERON LAW, PLLC, AMHERST (EDWARD P. YANKELUNAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 17, 2023. The order and judgment, inter alia, denied the motion of plaintiff for partial summary judgment and granted the motion of defendant for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the third decretal paragraph, granting plaintiff's motion, denying defendant's motion except insofar as it sought summary judgment on the issue of plaintiff's liability on the counterclaim for breach of contract based on plaintiff's failure to properly repair the fiberglass, and reinstating the complaint, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff and defendant entered into a contract pursuant to which plaintiff agreed to perform certain work on defendant's scrubbing system, which was part of a larger system designed to generate electricity from manure that had been converted into methane gas. After plaintiff performed its work, defendant determined that the system was no longer airtight, as required for operation. Despite several attempts to correct the condition, plaintiff was unable to render the system airtight, forcing defendant to hire a different company to perform the repairs at a greater cost. Although defendant had fully paid plaintiff the amount quoted for the contracted work, plaintiff commenced this action seeking payment for additional, unquoted costs associated with the contracted work as well as for additional work it performed that allegedly exceeded the scope of the originally contracted work. Defendant counterclaimed for breach of contract, seeking recovery of consequential damages that

included additional costs it incurred as a result of plaintiff's failure to repair the system to an airtight condition.

Following discovery, plaintiff moved for partial summary judgment dismissing defendant's counterclaim insofar as it sought damages in excess of those provided for in the parties' contract. Defendant opposed the motion and moved for summary judgment on the counterclaim, partial summary judgment on the issue of plaintiff's liability on the counterclaim, or a declaration regarding damages available on the counterclaim.

Supreme Court denied plaintiff's motion and granted defendant's motion, resulting in dismissal of the complaint, determining that plaintiff was liable on the counterclaim and granting defendant's "application for a declaration that it is entitled" to damages beyond the limited damages specified in the contract on the ground that plaintiff repudiated the contract's warranty by failing to repair certain defective work and by seeking additional payment for certain repairs. On this appeal by plaintiff, we now modify the order and judgment.

Plaintiff contends that various questions of fact precluded summary judgment in favor of defendant. In order to establish liability for breach of contract, a party is required to show "the existence of a contract, the [party's] performance under the contract, [and] the [other party's] breach of that contract" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455 [4th Dept 2014] [internal quotation marks omitted]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011]). In this case, neither party disputes the existence of the contract and plaintiff's attempted performance under that contract. We note, however, that the contract does not clearly define the scope of the work to be performed by plaintiff.

It is clear from the evidence submitted by the parties in support of and in opposition to the motions that plaintiff was to perform fiberglass repair work on defendant's scrubbing system and that plaintiff's fiberglass repair was defective. Although plaintiff returned to defendant's property and attempted to remedy the defects in the fiberglass, those defects were never satisfactorily resolved. Inasmuch as plaintiff failed to raise a triable issue of fact with respect to the adequacy of plaintiff's fiberglass repair work, we conclude, contrary to plaintiff's contention, that the court did not err in granting defendant's motion insofar as it sought partial summary judgment on the issue of plaintiff's liability on that part of the counterclaim with respect to the defective fiberglass repair work.

We agree with plaintiff, however, that defendant failed to establish the scope of any other work to be performed under the parties' vague and generic contract and thus failed to establish its entitlement to judgment as a matter of law on those parts of its counterclaim asserting breach of contract related to work other than the defective fiberglass repair. In particular, nothing in the written contract required the system to be airtight, although the

parties offered conflicting testimony about oral discussions on that requirement. We therefore modify the order and judgment by denying that part of defendant's motion seeking partial summary judgment on the issue of plaintiff's liability on the counterclaim except insofar as it relates to the defective fiberglass repair work.

We further conclude that defendant failed to establish its entitlement to summary judgment dismissing the complaint. In light of defendant's failure to establish the scope of the original contract, defendant failed to meet its initial burden on the motion of establishing that plaintiff did not incur expenses or perform work that was not already encompassed by the contract (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore further modify the order and judgment accordingly.

Plaintiff next contends that the court erred in denying its motion and in granting defendant's motion insofar as it sought a declaration that defendant could recover damages beyond those specified in the contract. In particular, plaintiff contends that the "exclusive remedy provision (contained in the 'Warranty Policy') and the . . . provision prohibiting consequential damages (contained in the 'Limitations of Remedies')" are "two separate and distinct contractual provisions" that should be treated differently under our holding in *Cayuga Harvester v Allis-Chalmers Corp.* (95 AD2d 5, 16 [4th Dept 1983]) and that the court thus erred in concluding that defendant could recover damages beyond the remedies outlined in those two provisions.

We agree with plaintiff that the two provisions are separate and distinct and should be treated individually (*see id.*; *see also Laidlaw Transp. v Helena Chem. Co.*, 255 AD2d 869, 870 [4th Dept 1998]; *see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805 n 4 [2014]). Where, as here, the exclusive remedy provision and the limitation of remedies provision are separate and distinct, they are tested under different standards. A *limited warranty remedy*, such as the exclusive remedy provision in the contract, survives "unless it fails of its essential purpose," whereas a *limitation of remedies* provision, such as the provision in the contract prohibiting consequential damages, "is valid unless it is unconscionable" (*Cayuga Harvester*, 95 AD2d at 16 [internal quotation marks omitted]). They are "two discrete ways of attempting to limit recovery for breach of warranty" (*id.* [internal quotation marks omitted]).

Neither party established, as a matter of law, its entitlement to summary judgment with respect to the exclusive remedy provision. There are triable issues of fact whether that provision failed of its essential purpose. Such a provision fails of its essential purpose where "it operates to deprive a party of the substantial value of the bargain" (*Kourtides v Weather Shield Mfg., Inc.*, 132 AD3d 636, 637 [2d Dept 2015]). Generally, "[w]hether an exclusive or limited remedy provision fails of its essential purpose . . . is a question of fact for the jury that is 'necessarily to be resolved upon proof of the circumstances occurring after the contract is formed' " (*Scott v*

Palermo, 233 AD2d 869, 869-870 [4th Dept 1996]; *see Cayuga Harvester*, 95 AD2d at 11; *see also Laidlaw Transp.*, 255 AD2d at 870). We thus agree with plaintiff and conclude that defendant was not entitled to summary judgment limiting the exclusive remedy provision.

Despite our conclusion that there are triable issues of fact whether the exclusive remedy provision fails of its essential purpose, we agree with plaintiff that it was entitled to summary judgment with respect to the enforceability of the limitation of remedies provision, and we therefore further modify the order and judgment accordingly. Where, as here, a contract contains both an exclusive remedy provision and a limitation of remedies provision, "the provision limiting consequential damages will be enforced provided that it is not unconscionable, even where an issue of fact exists concerning the enforceability of the exclusive remedy provision" (*Laidlaw Transp.*, 255 AD2d at 870; *see Scott*, 233 AD2d at 870; *Cayuga Harvester*, 95 AD2d at 15; *see generally Biotronik A.G.*, 22 NY3d at 805 n 4). The determination whether such a provision is unconscionable is a question of law for the court (*see Laidlaw Transp.*, 255 AD2d at 870) and generally requires "a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Divito v Fiandach*, 200 AD3d 1564, 1565 [4th Dept 2021]; *see Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1169-1170 [2d Dept 2012]).

Substantively, plaintiff established that the clause is not unconscionable inasmuch as it simply limited defendant's damages to repair, replacement, or the purchase price (*see Laidlaw Transp.*, 255 AD2d at 870; *Scott*, 233 AD2d at 870; *cf. Soja v Keystone Trozze, LLC*, 106 AD3d 1168, 1169 [3d Dept 2013]). Procedurally, plaintiff established that the sales order and its terms were not unconscionable. Defendant, an experienced commercial farm, "was not placed in a position where [it] lacked a meaningful choice" (*Scott*, 233 AD2d at 870). Defendant was unquestionably a savvy commercial entity inasmuch as it generated the redesign of the scrubbing system and negotiated the work to be performed by plaintiff. Plaintiff thus established, as a matter of law, that the provision precluding consequential damages was not unconscionable, and defendant failed to raise a triable issue of fact in opposition to plaintiff's motion.

We further agree with plaintiff that it established as a matter of law that it did not repudiate the exclusive remedy provision or the limitation of remedies provision of the contract and that defendant failed to raise a triable issue of fact in opposition to plaintiff's motion. A party's repudiation of a contract must be "positive and unequivocal" (*Princess Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017] [internal quotation marks omitted]). In support of its motion, plaintiff submitted evidence that it would repair defective work under the original contract but would charge defendant for any work above and beyond that contract. Although defendant raised a triable issue of fact whether plaintiff was seeking compensation for work already covered by the contract, there is no evidence of an "unequivocal"

repudiation of the contract by plaintiff (*id.* [internal quotation marks omitted]).

Based on our determination that the limitation of remedies provision, precluding consequential damages, is valid and enforceable, we do not reach plaintiff's remaining contention concerning whether consequential damages were contemplated by the parties.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01733

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, DELCONTE, AND KEANE, JJ.

J. FREDERICK SCHOELLKOPF, VI, AS EXECUTOR OF THE ESTATE OF KRISTIN S. BOROWIAK, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. "BUDDY" BOROWIAK, JR., DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (TYLER GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 17, 2022. The order denied the motion of defendant to compel disclosure of certain records.

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

Memorandum: Defendant appeals from an order in which Supreme Court, after conducting an in camera review of pre-accident medical records from two of decedent's treatment providers, denied defendant's motion to compel disclosure of those records. We note at the outset that, in order to permit meaningful appellate review, a record on appeal "must contain all of the relevant papers that were before the [motion c]ourt" (*Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Inasmuch as a " 'court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion' " (*Eaton v Hungerford*, 79 AD3d 1627, 1628 [4th Dept 2010]; *see Barnes v Habuda*, 118 AD3d 1443, 1443 [4th Dept 2014]), meaningful appellate review here would require this Court to consider the same records previously reviewed by the motion court.

The record on appeal does not include the medical records from either of decedent's treatment providers that were the subject of the order on appeal. During motion practice before this Court, defendant requested an adjournment of oral argument on his appeal in order to facilitate, as limited by his motion, the transfer of records from only one of decedent's pre-accident treatment providers (treatment records) directly to this Court. We granted the requested adjournment but, in order to allow for meaningful appellate review, we ordered

plaintiff to provide Supreme Court with a copy of the treatment records that decedent had previously submitted for in camera review. We further ordered the court to settle the record on appeal by "certify[ing] whether they are the same records the court reviewed in camera . . . , and if they are the same records, the court shall submit them to this Court" (*see generally* 22 NYCRR 1000.7 [b]). After plaintiff complied with our order, however, the court issued an order finding that the court was "unable to certify that the copy of those records from the plaintiff, or a copy of those [treatment records from decedent's treatment provider], are the same records this [c]ourt [previously] reviewed in camera." Despite so concluding, the court ordered decedent's treatment provider to submit a copy of the treatment records directly to this Court.

Here, by failing to comply with this Court's directive to settle the record on appeal with respect to the in camera exhibit, the court effectively foreclosed defendant's ability to seek meaningful appellate review of the court's in camera review of the treatment records (*see generally Mergl*, 19 AD3d at 1147). We note that, once the court determined that it could not in good faith certify any set of records for appellate review, the better practice would have been for the court to fashion a remedy that would have afforded defendant an opportunity to obtain that review, such as inviting motion practice that could have led to an appealable order. The court instead affirmatively called into question whether the treatment records currently before this Court match those previously before the motion court. Inasmuch as the record on appeal does not include any of the records reviewed by the court in camera, we are compelled to dismiss.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

733

CA 23-01571

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

FLA MORTGAGE CAPITAL I LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNKNOWN HEIRS AT LAW OF THE ESTATE OF SCOTT R. PAUL, DECEASED, CREGG S. PAUL, LISA BENKE, DENISE PETERSON, AMY DIGBY, JENNIFER COUGHLIN AND ROBERT D. PAUL, DEFENDANTS-APPELLANTS.

THE OKAY LAW FIRM, BUFFALO (MEHMET K. OKAY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FRIEDMAN VARTOLO LLP, GARDEN CITY (STEPHEN J. VARGAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered July 11, 2023. The amended order denied the motion of defendants seeking, among other things, to vacate a judgment of foreclosure and sale.

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

Memorandum: Defendants appeal from an amended order denying their motion seeking, among other things, to vacate a judgment of foreclosure and sale and to cancel the referee's deed executed following the sale of the property at auction, on the ground that the underlying action was time-barred by virtue of the provisions of the Foreclosure Abuse Prevention Act ([FAPA] L 2022, ch 821). Despite the enactment of FAPA prior to entry of the judgment of foreclosure and sale, defendants did not move for leave to renew based on a change in the law (*see* CPLR 2221 [e]) and they failed to take an appeal from the judgment of foreclosure and sale (*see* CPLR 5513 [a]). Moreover, even with actual knowledge and notice of the auction scheduled to occur two months after entry of the judgment, they took no action to prevent the judicial sale and instead made their motion afterward. We affirm.

" 'A foreclosure action is equitable in nature and triggers the equitable powers of the court' " (*Wilczak v City of Niagara Falls*, 174 AD3d 1446, 1448-1449 [4th Dept 2019]). " 'Once equity is invoked, the court's power is as broad as equity and justice require' " (*id.* at 1449). Thus, "[i]n addition to the grounds set forth in [CPLR] 5015 (a), a court may vacate its own judgment [of foreclosure] for sufficient reason and in the interests of substantial justice" as an

exercise of its "inherent discretionary power" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 41 NY3d 560, 568 n 4 [2024]; *Ocwen Loan Servicing, LLC v Maffett*, 225 AD3d 1252, 1253 [4th Dept 2024]; *Wilczak*, 174 AD3d at 1449). Even after a judicial sale to a good faith purchaser, "[a] court may exercise its inherent equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice . . . Although this power should be exercised sparingly and with great caution, a court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve [a party] of oppressive or unfair conduct" (*Guardian Loan Co. v Early*, 47 NY2d 515, 520-521 [1979]; *see Altshuler Shaham Provident Funds, Ltd. v GML Tower LLC*, 129 AD3d 1439, 1442 [4th Dept 2015]). "Generally, such discretion, which is separate and distinct from any statutory authority . . . , is exercised where fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion casts suspicion on the fairness of the sale" (*Altshuler Shaham Provident Funds, Ltd.*, 129 AD3d at 1442 [internal quotation marks omitted]; *see Guardian Loan Co.*, 47 NY2d at 521).

We conclude that Supreme Court did not abuse its discretion in denying defendants' motion (*see generally Woodson*, 100 NY2d at 68; *Guardian Loan Co.*, 47 NY2d at 520-521). First, "[n]one of the grounds set forth in CPLR 5015 (a) for vacatur of a[judgment] applies here" (*Redeye v Progressive Ins. Co.*, 158 AD3d 1208, 1209 [4th Dept 2018]). Second, contrary to defendants' contention, the record lacks sufficient reason to vacate the judgment of foreclosure and sale and to set aside the judicial sale in the exercise of the court's inherent discretionary authority under the circumstances of this case (*see generally Alexander v New York City Tr. Auth.*, 35 AD3d 772, 772 [2d Dept 2006]).

Entered: December 20, 2024 Ann Dillon Flynn
Clerk of the Court

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

735

KA 23-01516

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEYANNA DAVIS, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 22, 2023. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

736

KA 21-00591

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISMAEL MARTINEZ, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 22, 2021. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal possession of a weapon in the second degree and unlawful imprisonment 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 rape in the first degree (Penal Law former § 130.35 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and unlawful imprisonment in the second degree (§ 135.05).

Viewing the evidence in light of the elements of the crime of rape in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*). "The credibility determination is a task within the province of the jury, and its judgment should not be lightly disturbed" (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]). Here, the complainant's testimony was crucial to the determination by the jury, and other evidence corroborated her testimony.

Contrary to defendant's further contention, defense counsel was not ineffective for failing to object to certain testimony referencing

defendant's previous incarceration and parole status. "To prevail on an ineffective assistance claim, a defendant must 'demonstrate the absence of strategic or other legitimate explanations'—i.e., those that would be consistent with the decisions of a 'reasonably competent attorney'—for the alleged deficiencies of counsel" (*People v Maffei*, 35 NY3d 264, 269 [2020]). Here, defense counsel may have had a strategic reason for not objecting to the testimony in question inasmuch as defense counsel may have sought to avoid drawing further attention to that testimony (*see People v Buntley*, 208 AD3d 1630, 1631 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]). We have reviewed defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit.

We also reject defendant's contention that Supreme Court erred in allowing the prosecutor, on redirect examination of the complainant, to read certain portions of her grand jury testimony. "Once defense counsel [introduced] selected portions of the [complainant's grand jury testimony] on cross-examination, the prosecutor was free to [introduce] the balance of the [relevant testimony] in order to give the evidence before the jury its full and accurate context" (*People v Gonzales*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]; *see generally People v Melendez*, 55 NY2d 445, 451-452 [1982]).

We conclude that defendant's sentence is not unduly harsh or severe.

Defendant's remaining contentions are unpreserved for appellate review (*see* CPL 470.05 [2]), 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]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

741

KA 24-00083

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERWIN WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BENJAMIN L. ANDERSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered June 12, 2023. The order, among other things, 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: Defendant appeals from an order determining that he is a level three risk and a sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*).

Defendant contends that Supreme Court erred in denying his request for a downward departure. We reject that contention. Even assuming, arguendo, that defendant satisfied his burden with respect to the first two steps of the three-step analysis required in evaluating a request for a downward departure (*see e.g. People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *cf. People v Harripersaud*, 198 AD3d 542, 542 [1st Dept 2021], *lv denied* 38 NY3d 902 [2022]; *People v Palmer*, 166 AD3d 536, 537 [1st Dept 2018], *lv denied* 32 NY3d 919 [2019]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude, after applying the third step of weighing the aggravating and mitigating factors, that the totality of the circumstances does not warrant a downward departure to level two (*see People v Scott*, 186 AD3d 1052, 1054-1055 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *see also People v Gillotti*, 119 AD3d 1390, 1391 [4th Dept 2014]).

Contrary to defendant's further contention, his counsel was not ineffective for failing to request a downward departure based on defendant's age "because such a request had little or no chance of success" (*People v Felder*, 229 AD3d 1278, 1279 [4th Dept 2024]

[internal quotation marks omitted]). Moreover, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation," we conclude that defendant received effective assistance of counsel (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

743

KA 22-00045

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES ROBBS, ALSO KNOWN AS JIMMY, ALSO KNOWN AS J FROM SCHUELE, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 28, 2021. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction stems from an incident in which the assailant entered an automobile repair garage during a community party and shot the victim multiple times with a handgun, killing him.

We reject defendant's contention that his conviction is not supported by legally sufficient evidence. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Hancock*, 229 AD3d 1229, 1230 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]). Here, the shooting of the victim was captured on high-quality surveillance video that, when slowed down, showed the assailant's face. That video was played for the members of the jury, who were also shown comparison photographs of defendant from the same period of time and a photograph that defendant posted on Facebook in

which he was wearing the same style of burgundy, bell-bottomed pants visible on the shooter in the surveillance video. A witness further testified that she heard several gunshots and then saw an individual holding a handgun emerge from the garage and get into a black pickup truck. The truck seen by the witness, which was also captured in the surveillance video, was tracked down by the police based on that video and the partial license plate number provided by the witness and found to be registered to the mother of defendant's child. When defendant was arrested, he was alone in a residence with the truck parked outside in the driveway and mail addressed to him inside the vehicle. A loaded handgun was recovered from a television stand inside the residence, which was later determined not to be the same firearm used in the shooting. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). For the same reasons, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.* at 349), we conclude that the verdict is not against the weight of the evidence (*see People v Hickey*, 171 AD3d 1465, 1465-1466 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that Supreme Court abused its discretion in allowing testimony from a police detective identifying defendant as the shooter in the surveillance video. As the Court of Appeals recently explained in *People v Mosley* (41 NY3d 640 [2024]), identification testimony from a lay witness may only be admitted "where [1] the witness is sufficiently familiar with the defendant that their testimony would be reliable, and [2] there is reason to believe the jury might require such assistance in making its independent assessment" (*id.* at 642). With respect to the witness's familiarity with the defendant, the court must initially "determine whether 'the witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful' " (*id.* at 648, quoting *United States v Fulton*, 837 F3d 281, 297-298 [3d Cir 2016]). Here, the police detective who identified defendant from the surveillance video testified at the suppression hearing that his contact with defendant consisted of interviewing him twice, driving him to a courthouse on approximately three occasions, and sitting next to him during court proceedings, all of which occurred eight years before the police detective first viewed the surveillance video. We agree with defendant that this limited and temporally remote contact "did not establish that [the detective] was sufficiently familiar with [defendant] to render his identification helpful to the jury" (*id.* at 650) and, thus, it was an abuse of discretion to allow him to so testify. Nonetheless, we conclude that "any error in admitting that testimony was harmless inasmuch as the [remaining] evidence [of defendant's identity as the shooter] was overwhelming and there is no significant probability that the jury would have acquitted defendant if that testimony had been excluded" (*People v Drager*, 229 AD3d 1143, 1146 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]; *see People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027

[2021]).

Defendant further contends that his counsel was ineffective in failing to request a jury instruction on the cross-racial effect in witness identification because defendant and the police detective who identified defendant as the shooter in the surveillance video are of different races. We agree with defendant that, under the circumstances of this case, if defense counsel had requested a cross-racial identification instruction, the court would have been required to provide one (*see People v Boone*, 30 NY3d 521, 535-536 [2017]). Nonetheless, "[a] single error rises to the level of ineffective assistance of counsel only in the rare instance when the error 'involve[s] an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it [is] evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy' " (*People v Nellons*, 187 AD3d 1574, 1575 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021] [internal quotation marks omitted], quoting *People v Keschner*, 25 NY3d 704, 723 [2015]). Here, defense counsel's " 'single error in failing to request such a charge [did] not constitute ineffective representation as it was not so serious as to compromise defendant's right to a fair trial' " (*People v Geddes*, 49 AD3d 1255, 1257 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]; *see People v McCoy*, 169 AD3d 1260, 1265-1266 [3d Dept 2019], *lv denied* 33 NY3d 1033 [2019]).

To the extent that defendant contends that he was penalized for exercising his right to a trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v McCutcheon*, 219 AD3d 1698, 1700 [4th Dept 2023], *lv denied* 40 NY3d 1040 [2023]). In any event, it is without merit (*see People v Roberts*, 213 AD3d 1348, 1350-1351 [4th Dept 2023], *lv denied* 40 NY3d 930 [2023]; *People v Daskiewich*, 196 AD3d 1061, 1064 [4th Dept 2021], *lv denied* 37 NY3d 1145 [2021]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

744

KA 24-00123

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL M. SWANK, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Armen J. Nazarian, J.), rendered October 5, 2023. 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 reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence related to counts 2 and 3 of the indictment are granted, those counts of the indictment are dismissed and the matter is remitted to Oswego County Court for further proceedings on count 1 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) in satisfaction of an indictment that also charged defendant with two counts of criminal possession of a weapon in the fourth degree (§ 265.01 [4]). On appeal, defendant contends, inter alia, that law enforcement officers unlawfully searched his residence without a warrant and that the emergency exception to the warrant requirement does not apply. We agree.

At approximately 2:00 on the morning in question, Cayuga County Sheriff's Deputies responded to a 911 call regarding a disturbance at a dwelling located in Cayuga County. Upon arrival at that address, the deputies were told that, while outside the dwelling, defendant pointed a short or sawed-off shotgun at two people and then discharged the gun in the air. Defendant and his wife thereafter entered the dwelling, where a third person was present. Defendant and his wife eventually left the dwelling, injuring no one. Based on information obtained from the three witnesses, which included the name of defendant, the officers obtained information about defendant's

criminal history as well as his current address in Oswego County.

Cayuga County deputies and members of the New York State Police arrived at defendant's residence at approximately 6:00 a.m., and, upon seeing a vehicle registered to defendant parked in the driveway, they established a perimeter around the residence. Using a loudspeaker, they directed the occupants of the residence to exit. Approximately one hour later, defendant's wife exited the residence, whereupon she informed the police that defendant was armed and still inside the residence. Defendant's daughter exited the residence sometime after the wife.

During a later telephone conversation with the police, defendant denied being present at the residence, but his statements were belied by the fact that officers heard police sirens in the background of his telephone communication. The officers unsuccessfully attempted to fly a drone into the residence for visual access. Eventually, approximately four hours after the stand-off began, defendant exited the residence and surrendered without incident.

Following defendant's arrest, tactical officers conducted a "cursory" or protective sweep of the residence to, in the words of one officer, "confirm that there was nobody else there [who was] going to need potentially additional resources" and to "ensur[e] there were no more occupants or hazardous situations inside the residence." At a suppression hearing, the officers testified that such a sweep was their "normal" procedure where, as here, a person, who is known to be armed, has barricaded themselves inside a residence. The testifying officers admitted, however, that they did not have any reason to suspect that anyone else was in the residence.

While sweeping the rooms inside the residence, the officers observed the barrels of two long guns in a bedroom. Inasmuch as defendant had a prior felony conviction, any possession of, inter alia, a shotgun or rifle was unlawful (*see* Penal Law § 265.01 [4]).

The police thereafter obtained a warrant to search the premises for all types of guns, including long guns, rifles and shotguns, as well as ammunition. During a search pursuant to that warrant, officers seized the two guns from the residence but also saw numerous baggies of cocaine. Knowing that the search warrant did not authorize the seizure of the cocaine, officers obtained a second warrant, permitting them to seize the cocaine from the residence.

Defendant was indicted on various offenses and, as part of his omnibus motion, sought suppression of all tangible items seized from his residence, contending that the initial cursory or protective sweep was an unconstitutional warrantless entry of his residence. In opposition, the People argued that the warrantless entry of the property was justified by either exigent or emergency circumstances. Following a hearing, County Court refused to suppress the evidence, concluding that exigent circumstances and emergency circumstances justified the warrantless entry of the residence. Defendant

ultimately pleaded guilty to the reduced charge of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) in full satisfaction of the indictment.

We agree with defendant's contention that the warrantless entry of his residence was unconstitutional. It is well established that a warrantless entry into a residence is "presumptively unreasonable" (*Payton v New York*, 445 US 573, 586 [1980]). Nevertheless, such entries may be justified by emergency or exigent circumstances. In order to justify a warrantless entry under emergency circumstances, "(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]; *see People v Lee*, 224 AD3d 1372, 1374 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]).

In order to justify a warrantless entry under exigent circumstances, "the following factors should be considered in determining whether exigent circumstances exist: (1) the gravity or violent nature of the offense; (2) whether there is reason to believe the suspect is armed; (3) whether there is a clear showing of probable cause; (4) whether there is strong reason to believe the subject is in the premises being entered; (5) the likelihood the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry" (*People v Burr*, 124 AD2d 5, 8 [4th Dept 1987], *affd* 70 NY2d 354 [1987], *cert denied* 485 US 989 [1988]; *see People v Coles*, 105 AD3d 1360, 1362 [4th Dept 2013]; *see generally Payton*, 445 US at 590).

In reviewing the constitutionality of a warrantless entry onto property, the facts "should be viewed from the perspective of the police in the circumstances with which they were confronted" (*People v Clements*, 37 NY2d 675, 680 [1975], *cert denied* 425 US 911 [1976]), and courts should consider whether the police would have been "derelict in the performance of their dut[ies] as enforcement officers had they done nothing" (*id.*).

Protective or cursory sweeps of property may fall under either the exigent circumstances or the emergency exception to the warrant requirement under certain conditions (*see generally People v Harper*, 100 AD3d 772, 773-774 [2d Dept 2012], *lv denied* 21 NY3d 943 [2013]; *People v Osorio*, 34 AD3d 1271, 1272 [4th Dept 2006], *lv denied* 8 NY3d 883 [2007]; *People v Bost*, 264 AD2d 425, 425 [2d Dept 1999]). Generally, there must be specific, articulable facts to support a reasonable belief that a person is present within the premises who could pose a danger to officers, destroy evidence or be in need of assistance (*see People v Hadlock*, 218 AD3d 925, 928-929 [3d Dept 2023], *lv denied* 40 NY3d 997 [2023]; *People v Sears*, 165 AD3d 1482, 1485 [3d Dept 2018], *lv dismissed* 32 NY3d 1129 [2018]; *Harper*, 100 AD3d at 773-774).

Here, we conclude that there were no emergency or exigent circumstances justifying the warrantless search of the residence. Once defendant's daughter exited the dwelling, the officers knew from defendant's wife that no one else was in the dwelling except defendant. None of the officers at the scene witnessed anything that would lead them to suspect that there was another person in the residence. The "mere possibility" that a person could be inside the premises did not justify the search (*People v Carey*, 81 Misc 3d 1221[A], 2023 NY Slip Op 51419[U], *8 [Sup Ct, Nassau County 2023]). We also note that there was no indication that defendant had shot or injured anyone prior to the officers' arrival at his residence, and at no time had defendant threatened the police or anyone else at the residence. Under the circumstances, there was no legitimate reason for the police not to apply for a search warrant before entering the house.

Based on our determination that the warrantless entry into the premises was unauthorized, we agree with defendant that the guns seized during the execution of the first search warrant must be suppressed because they are the primary evidence obtained as a direct result of the illegality, i.e. "evidence illegally obtained during or as the immediate consequence of the challenged police conduct" (*People v Stith*, 69 NY2d 313, 318 [1987]; *cf. Hadlock*, 218 AD3d at 929-930; *see generally People v Turriago*, 90 NY2d 77, 86-87 [1997], *rearg denied* 90 NY2d 936 [1997]). We therefore reverse the judgment, vacate the plea, grant those parts of the omnibus motion seeking to suppress the guns and dismiss counts 2 and 3 of the indictment, and we remit the matter to County Court for further proceedings on count 1 of the indictment.

We nevertheless reject defendant's contention that the cocaine seized during the execution of the second warrant must be suppressed. The inevitable discovery doctrine for secondary evidence is applicable where that evidence would have been discovered " 'pursuant to some standardized procedures or established routine' " (*Turriago*, 90 NY2d at 87; *see People v Clanton*, 151 AD3d 1576, 1578 [4th Dept 2017]), and that includes situations where, as here, there is "a 'very high degree of probability' that normal police procedures would have uncovered the challenged evidence 'independently of [the] tainted source' " (*Turriago*, 90 NY2d at 86), including during the subsequent execution of valid search warrants (*see People v Brooks*, 152 AD3d 1084, 1087 [3d Dept 2017]; *People v Hardy*, 5 AD3d 792, 793 [2d Dept 2004], *lv denied* 3 NY3d 641 [2004]). Here, the police could have obtained a valid search warrant for the residence, even without the initial warrantless sweep of the property, based on evidence that the victims informed the police that defendant possessed a gun during the initial incident and that defendant's wife, upon exiting the residence, informed the police that defendant was currently armed (*see Hardy*, 5 AD3d at 793; *People v Alberti*, 111 AD2d 860, 861 [2d Dept 1985], *lv denied* 66 NY2d 760 [1985]).

In light of our determination, we do not address defendant's remaining contention.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

758

KA 22-01176

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES WILLIAMS, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered December 15, 2021. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) in connection with the shooting death of the victim.

Defendant contends that he was denied a fair and impartial jury. During voir dire, a prospective juror suggested that she may have known of defendant due to her position as a correction officer. Defendant's request to "strike the entire panel" was denied. In this context, defendant's request constituted a for-cause challenge to each of the prospective jurors that had been assembled for voir dire in the same group (*see People v Doherty*, 37 AD3d 859, 860 [3d Dept 2007], *lv denied* 9 NY3d 843 [2007]; *see generally People v Chavys*, 263 AD2d 964, 964 [4th Dept 1999], *lv denied* 94 NY2d 821 [1999]). In other words, defendant was not attempting to strike the entire panel of prospective jurors on the basis that the selection process was unconstitutional or otherwise improper, but was rather attempting to strike multiple prospective jurors, for cause, that allegedly had been individually prejudiced such that each had "a state of mind that [was] likely to preclude" the rendering of an impartial verdict (CPL 270.20 [1] [b]). Even assuming, arguendo, that County Court erred in refusing to excuse for cause the prospective jurors in question, we conclude that "such an error would not constitute reversible error 'unless . . . defendant

ha[d] exhausted his peremptory challenges at the time or, if he ha[d] not, he peremptorily challenge[d] such prospective juror[s] and his peremptory challenges [were] exhausted before the selection of the jury [was] complete,' " and neither scenario is applicable here (*People v Osman*, 174 AD3d 1477, 1480 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019], quoting CPL 270.20 [2]; *see People v LaValle*, 3 NY3d 88, 102 [2004]; *People v Case*, 197 AD3d 985, 987 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *Doherty*, 37 AD3d at 860).

Defendant contends that the verdict is against the weight of the evidence because, although the evidence established that he was near the scene at the time of the shooting, it did not establish that he entered the apartment in which the shooting occurred. 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 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, "the element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was [the shooter]" (*People v Jackson*, 140 AD3d 1771, 1771 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]), despite the fact that no one witnessed, and no video showed, defendant firing the shots that struck the victim (*see People v Scott*, 198 AD3d 1325, 1326 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]; *People v Clark*, 142 AD3d 1339, 1341 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *see generally People v Malone*, 196 AD3d 1054, 1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation, but we note that he failed to object to any of the comments he now raises on appeal, and thus his contention is not preserved for our review (*see People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]). In any event, defendant's contention is without merit. We conclude that any improper remarks made by the prosecutor did not deny defendant a fair trial (*see id.* at 1666-1667; *see also People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. We note, however, that the uniform sentence and commitment form erroneously states that defendant was sentenced to five years of imprisonment on each count of criminal possession of a weapon in the second degree, and it must therefore be amended to reflect that he was sentenced to seven years of imprisonment on each of those counts.

Finally, we agree with defendant that, as the People correctly concede, the presentence report (PSR) has not been amended as the court directed during sentencing and, therefore, all copies of the PSR must be amended in accordance with the court's directive (*see e.g. People v Lovines*, 208 AD3d 1639, 1639-1640 [4th Dept 2022]; *People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149

[2022]; *People v Barbuto*, 126 AD3d 1501, 1505 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

769

CA 24-00284

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

LILY DALE ASSEMBLY, PLAINTIFF-APPELLANT,

V ORDER

ROBERT REUTHER AND DANIELLE REUTHER,
DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBERT REUTHER, DEFENDANT-RESPONDENT PRO SE.

DANIELLE REUTHER, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered November 15, 2023. The order denied the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorney for plaintiff-appellant and by defendant-respondent Robert Reuther on December 3, 2024,

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

770

CA 23-01234

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF MARGUERITE A. ROSS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE PLANNING BOARD, FOUBU ENVIRONMENTAL SERVICES, LLC, AND NORTHWOOD REAL ESTATE VENTURES, LLC,
RESPONDENTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONER-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF FAYETTEVILLE AND VILLAGE OF FAYETTEVILLE PLANNING BOARD.

BARCLAY DAMON LLP, SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR RESPONDENT-RESPONDENT FOUBU ENVIRONMENTAL SERVICES, LLC.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR RESPONDENT-RESPONDENT NORTHWOOD REAL ESTATE VENTURES, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered July 10, 2023, 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: Petitioner appeals from a judgment dismissing her CPLR article 78 petition seeking to annul the determinations of respondent Village of Fayetteville Planning Board (Board) regarding the proposed redevelopment of a vacant manufacturing facility into a grocery store by respondent Northwood Real Estate Ventures, LLC, on property owned by respondent Foubu Environmental Services, LLC (collectively, developers). Supreme Court properly dismissed the petition.

At the outset, we note that "[t]he authority to approve or deny applications for site development plans is generally vested in local planning boards" (*Matter of Valentine v McLaughlin*, 87 AD3d 1155, 1157

[2d Dept 2011], *lv denied* 18 NY3d 804 [2012], citing Town Law § 274-a [2] [a]). Judicial review is thus limited to the issue "whether the action taken by the [Planning Board] was illegal, arbitrary, or an abuse of discretion" (*Matter of Kempisty v Town of Geddes*, 93 AD3d 1167, 1169 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012], *rearg denied* 21 NY3d 930 [2013] [internal quotation marks omitted]). A planning board's determination should therefore be sustained so long as it "has a rational basis and is supported by substantial evidence" (*Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1420 [4th Dept 2014] [internal quotation marks omitted]). Indeed, "[a] 'reviewing court may not substitute its judgment for that of the . . . [Planning Board], even if there is substantial evidence supporting a contrary determination' " (*Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]).

Petitioner first contends that the Board failed to set forth specific findings of fact when it issued a negative declaration, approved the special use permit, and approved the site plan to improve the property. We reject that contention. "Generally, [f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1219-1220 [4th Dept 2014] [internal quotation marks omitted]). Here, even assuming, arguendo, that the Board did not adequately set forth specific findings of fact, we conclude that the record as a whole—which evinces a protracted review process, during which the developers were repeatedly required to modify and supplement their initial application to satisfy concerns raised by the Board—provides a basis for concluding that there was a rational basis for each of the Board's decisions (*see Dietrich*, 118 AD3d at 1421; *see also Matter of Rex v Zoning Bd. of Appeals of Town of Sennett*, 195 AD3d 1398, 1399 [4th Dept 2021]).

Petitioner further contends that the Board failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA) in issuing a negative declaration. We reject that contention inasmuch as the record establishes that the Board "took the requisite hard look and provided a reasoned elaboration of the basis for [its] determination regarding the potential impacts of the [redevelopment]" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1432 [4th Dept 2021]). Petitioner relatedly contends that the negative declaration was arbitrary and capricious because the Board had issued a positive declaration for an earlier planned redevelopment of the property. We reject that contention because, as the court properly concluded, the proposed project in the present matter is substantially different from the prior plan.

Petitioner next contends that the issuance of the special use permit was arbitrary and capricious. We reject that contention, however, inasmuch as we conclude that the Board made the required findings under section 187-41 (A) (3) of the Fayetteville Zoning Code and that its determination "was not illegal, [had] a rational basis,

and [was] not arbitrary and capricious" (*Matter of George Eastman House, Inc. v Morgan Mgt., LLC*, 130 AD3d 1552, 1553-1554 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015] [internal quotation marks omitted]).

Petitioner additionally contends that the Board violated the Open Meetings Law by failing to post certain documents "on [its] website to the extent practicable at least [24] hours prior to [each meeting during which the records would be discussed]" (Public Officers Law § 103 [e]). Even assuming, arguendo, that there was a technical violation of the Open Meetings Law, we note that petitioner was actively involved throughout the Board's review process and had, in fact, already commenced a lawsuit, and we agree with the court's conclusion that petitioner has "failed to meet [her] 'burden to show good cause warranting judicial relief' " (*Matter of Warren v Planning Bd. of the Town of W. Seneca*, 225 AD3d 1248, 1251 [4th Dept 2024]).

We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

784

CA 23-01310

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

GEORGE C. LEE, PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, JEFFREY CARTER, M.D., TIMOTHY SCHAFFNER, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM LAW FIRM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered July 28, 2023. The order, inter alia, denied the motion of defendants Kaleida Health, doing business as Buffalo General Hospital, Jeffrey Carter, M.D., Kathleen A. Hromatka, M.D. and Timothy Schaffner, M.D. for summary judgment.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

787

CA 24-00117

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

SANDRA JACKSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOODFELLAS PIZZERIA, INC., LAWRENCE S. VILARDO, "ABC" AND "XYZ", DEFENDANTS-RESPONDENTS.

MARK D. GROSSMAN, NIAGARA FALLS, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered June 27, 2023. The order granted the motion of defendants Goodfellas Pizzeria, Inc., and Lawrence S. Vilardo 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 Goodfellas Pizzeria, Inc. and Lawrence S. Vilardo is reinstated.

Memorandum: Plaintiff commenced this personal injury action seeking to recover damages allegedly sustained in a slip and fall on June 8, 2018. Goodfellas Pizzeria, Inc. and Lawrence S. Vilardo (collectively, defendants) moved pursuant to, inter alia, CPLR 3211 (a) (5) to dismiss the complaint against them as time-barred. Supreme Court determined that the complaint was time-barred and granted the motion. Plaintiff now appeals. We reverse.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]).

Here, defendants met their burden of establishing that the limitations period had expired. Pursuant to CPLR 214 (5), a three-year statute of limitations applies to non-specified personal injury causes of action, such as the one here. Plaintiff's cause of action accrued on June 8, 2018, the date of plaintiff's alleged fall, and plaintiff did not commence this action until June 17, 2021 (*see Harden v Weinraub*, 221 AD3d 1460, 1461 [4th Dept 2023]).

In response, however, plaintiff established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" (9 NYCRR 8.202.8). Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*; *see Harden*, 221 AD3d at 1462).

Here, 651 days of the 1,096-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 445 days of the limitation period began to run again, expiring on January 22, 2022. Thus, the action was timely commenced on June 17, 2021 (*see Bane v Lease-N-Save Corp.*, 228 AD3d 1245, 1247 [4th Dept 2024]; *Harden*, 221 AD3d at 1462; *see also Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]; *Matter of Roach v Cornell Univ.*, 207 AD3d 931, 932-933 [3d Dept 2022]; *Brash v Richards*, 195 AD3d 582, 582 [2d Dept 2021]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

796

KA 19-02334

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER T. MORSE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 25, 2018. The judgment convicted defendant upon a guilty plea of manslaughter in the second degree, attempted murder in the second 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 plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and criminal possession of a controlled substance in the third degree (§ 220.16 [1]).

Preliminarily, we note that, as the People correctly concede, defendant's contentions would survive even a valid waiver of the right to appeal (*see People v Taylor*, 144 AD3d 1317, 1318 [3d Dept 2016], *lv denied* 28 NY3d 1151 [2017]; *People v Farnsworth*, 140 AD3d 1538, 1539 [3d Dept 2016]). Consequently, we need not address the validity of the appeal waiver (*see People v Barnes*, 206 AD3d 1713, 1714 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Defendant contends that his plea to criminal possession of a controlled substance in the third degree should be vacated because it was not knowingly, intelligently, and voluntarily entered. Defendant did not raise that contention in his motion to withdraw his guilty plea or move to vacate the judgment of conviction on that ground, and he therefore failed to preserve that contention for our review (*see People v Bailey*, 49 AD3d 1258, 1259 [4th Dept 2008]). Moreover, the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here.

Because we conclude that defendant is not entitled to vacatur of his guilty plea to criminal possession of a controlled substance in the third degree, we reject his related contention that he is entitled to vacatur of his remaining guilty pleas pursuant to *People v Williams* (17 NY3d 834, 836 [2011]).

We reject defendant's further contention challenging County Court's denial of his motion to withdraw his guilty plea to attempted murder in the second degree. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Gumpton*, 81 AD3d 1441, 1442 [4th Dept 2011], *lv denied* 17 NY3d 795 [2011] [internal quotation marks omitted]). Although in support of the motion, defense counsel relied on, inter alia, 911 calls and body-worn camera footage that allegedly cast doubt on defendant's guilt, it is well settled that "defendant [was] not entitled to withdraw his plea merely because he discover[ed] . . . that his calculus misapprehended the quality of the State's case" (*People v Jones*, 44 NY2d 76, 81 [1978], *cert denied* 439 US 846 [1978]). Moreover, "any assertion of innocence by defendant in support of the motion is belied by [his] admission of guilt during the plea colloquy" (*Gumpton*, 81 AD3d at 1442 [internal quotation marks omitted]).

We reject defendant's related contention that the court erred by denying defendant's motion without conducting an evidentiary hearing or conducting a further inquiry into defendant's allegation in post-plea letters to the court that his previous counsel had not shown him the electronically recorded reports of the shooting before defendant entered his guilty plea to attempted murder. We conclude that the court afforded defendant a reasonable opportunity to advance his claims in a motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520, 524-525 [1978]; *People v Tinsley*, 35 NY2d 926, 927 [1974]) and that the court "did not abuse its discretion in discrediting those claims" (*People v Merritt*, 115 AD3d 1250, 1250-1251 [4th Dept 2014], *lv denied* 30 NY3d 1021 [2017], *reconsideration denied* 35 NY3d 1068 [2020]).

Defendant's contention that his previous counsel was ineffective in failing to show him the electronically recorded material is based primarily on matters outside the record and must be raised pursuant to a CPL 440.10 motion (*see generally People v Streeter*, 118 AD3d 1287, 1289 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]).

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

803

CA 24-00159

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

JOSEPH PARKER, AND ALL THOSE SIMILARLY SITUATED WITHIN OSWEGO COUNTY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DON HILTON, IN HIS CAPACITY AS SHERIFF FOR OSWEGO COUNTY, DEFENDANT-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR DEFENDANT-APPELLANT.

LOUIS R. LOMBARDI, PUBLIC DEFENDER, OSWEGO, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered January 22, 2024. The judgment, insofar as appealed from, denied in part the motion of defendant to dismiss the complaint and granted plaintiff judgment declaring that CPL 530.20 (2) (a) applies only to qualifying offenses enumerated in CPL 510.10 (4).

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, the declaration is vacated, and the complaint is dismissed.

Memorandum: Plaintiff, on behalf of himself and all those similarly situated within Oswego County, commenced this declaratory judgment action against defendant Don Hilton, in his capacity as Sheriff for Oswego County (Sheriff). Plaintiff alleged that, following his arraignment on the class E felony of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]) and other charges, City Court issued a securing order that committed him to the custody of the Sheriff on the basis of CPL 530.20 (2) (a) (double predicate provision). The double predicate provision states that a city, town, or village court (hereinafter, local court) may not order release on recognizance or bail when the criminal defendant, like plaintiff, has two previous felony convictions. Plaintiff further alleged that the double predicate provision conflicts with CPL 510.10 (4) (qualifying offense provision), which limits the court's ability to issue a securing order imposing bail or remand to situations in which the criminal defendant stands charged with an enumerated qualifying offense (*see also* CPL 510.10 [3]). Although plaintiff was subsequently released, he sought a declaration that the practice of assigning a local court to arraign a criminal defendant with two

previous felony convictions violates the constitutional rights of the accused because local courts lack the ability to order release or set bail under those circumstances. In the alternative, plaintiff contended that the double predicate provision and the qualifying offense provision must be read harmoniously to allow a local court to issue a securing order of release on recognizance or bail where, as in plaintiff's case, the criminal defendant is charged with a non-qualifying offense.

The Sheriff made a pre-answer motion to dismiss the complaint (denominated petition) for, inter alia, failure to state a cause of action (*see* CPLR 3211 [a] [7]). The Sheriff contended, in relevant part, that plaintiff failed to state a cause of action because there was no justiciable controversy between plaintiff and the Sheriff given that the Sheriff had no authority over arraignment procedures or the terms of securing orders.

Supreme Court determined that plaintiff failed to state a cause of action insofar as he alleged that the practice of arraigning him and similarly situated criminal defendants in local court violated their constitutional rights, and the court thus dismissed the complaint in that respect. The court nonetheless determined that plaintiff stated a viable claim as to the interpretation and application of the double predicate provision in light of the qualifying offense provision enacted as part of bail reform. With respect to the justiciability of that claim, the court acknowledged that "[t]he heart of the dispute is not any action taken by the Sheriff but rather whether the local . . . court must remand a given [criminal] defendant such as [plaintiff] to the custody of the Sheriff under the [d]ouble [p]redicate [provision]." The court reasoned, however, that "[s]uch a remand renders the Sheriff a party adverse to whatever rights [plaintiff] possessed under the [d]ouble [p]redicate [provision] and related bail statutes although this is through no fault of the Sheriff." On the merits, the court adopted the analysis in *People ex rel. Bradley v Baxter* (79 Misc 3d 988 [Sup Ct, Monroe County 2023]), and it thus determined that the double predicate provision must be read in conjunction with the qualifying offense provision. Consequently, the court denied the motion in part and declared that the double predicate provision shall apply only to qualifying offenses enumerated in the qualifying offense provision. The Sheriff appeals, contending that the court should have granted his motion in its entirety because, contrary to the court's determination, no justiciable controversy exists between himself and plaintiff. We agree.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). Consistent therewith, "[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy" (CPLR 3001). "A declaratory judgment action thus requires an actual controversy between genuine

disputants with a stake in the outcome, and may not be used as a vehicle for an advisory opinion" (*Carousel Ctr. Co., LP v Kaufmann's Carousel, Inc.*, 191 AD3d 1481, 1482 [4th Dept 2021] [internal quotation marks omitted]; *see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518 [1986], *cert denied* 479 US 985 [1986]; *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-532 [1977]; *see also* Patrick M. Connors, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C3001:3). Consequently, at the first step in analyzing a pre-answer motion to dismiss a declaratory judgment action for failure to state a cause of action, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether [any party] is entitled to a [particular] declaration" (*Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 154 [4th Dept 2021], *lv dismissed* 38 NY3d 1028 [2022], *lv denied* 42 NY3d 905 [2024] [internal quotation marks omitted]; *see Hallock v State of New York*, 32 NY2d 599, 603 [1973]). To survive such a motion, "[t]he plaintiff's allegations must demonstrate the existence of a bona fide justiciable controversy, defined as a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Salvador v Town of Queensbury*, 162 AD3d 1359, 1360 [3d Dept 2018] [internal quotation marks omitted]; *see Palm v Tuckahoe Union Free School Dist.*, 95 AD3d 1087, 1089 [2d Dept 2012]; *Florence v Krasucki*, 78 AD2d 579, 579 [4th Dept 1980], *lv denied* 52 NY2d 705 [1981]; *see generally New York Pub. Interest Research Group*, 42 NY2d at 529-532). If there is no justiciable controversy, "the CPLR 3211 (a) (7) motion should be granted, the complaint dismissed, and no declaration issued" (*Kerri W.S.*, 202 AD3d at 154).

We conclude that plaintiff's allegations fail to "demonstrate the existence of a bona fide justiciable controversy" inasmuch as there is no "real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Salvador*, 162 AD3d at 1360 [internal quotation marks omitted]). As the court recognized, "[t]he heart of the dispute is not any action taken by the Sheriff but rather whether the local . . . court must remand a given [criminal] defendant such as [plaintiff] to the custody of the Sheriff." Contrary to the court's further reasoning, however, the Sheriff's adherence to a securing order does not render him an adverse party to plaintiff for purposes of an action seeking a declaration that the statutory scheme prohibits a local court from issuing a securing order remanding to jail a criminal defendant who is not charged with a qualifying offense. Indeed, for a justiciable controversy to exist between these parties, the Sheriff "must be in a position to place . . . plaintiff's rights in jeopardy" (*De Veau v Braisted*, 5 AD2d 603, 606 [2d Dept 1958], *affd* 5 NY2d 236 [1959], *affd* 363 US 144 [1960]; *see Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]; *Board of Coop. Educ. Servs., Nassau County v Goldin*, 38 AD2d 267, 272 [2d Dept 1972], *lv denied* 30 NY2d 486 [1972]). Here, however, the Sheriff—as an officer of the court—lacks any discretionary authority over a securing order issued by a court and is mandated to abide by the terms of any such order (*see e.g.* County Law § 650; General Construction Law § 28-a), i.e., the Sheriff

has no authority to affect the remand of a criminal defendant to jail by disregarding a court-issued securing order (*see Salvador*, 162 AD3d at 1361). Plaintiff's real dispute is with the local court that issues a securing order ostensibly in violation of the qualifying offense provision, not with the Sheriff who is bound to obey the securing order. Where, as here, "there is no genuine dispute between the parties, the courts are precluded, as a matter of law, from issuing a declaratory judgment" (*Winkler v Spinnato*, 134 AD2d 66, 81 [2d Dept 1987], *affd* 72 NY2d 402 [1988], *cert denied* 490 US 1005 [1989]).

Plaintiff nonetheless asserts that our conversion in *People ex rel. Bradley v Baxter* (203 AD3d 1576 [4th Dept 2022]) of an original habeas corpus proceeding against another sheriff to a declaratory judgment action necessarily means that we determined that there was a justiciable controversy between the criminal defendant and the sheriff therein. Plaintiff is not correct. Whether there was a justiciable controversy between the criminal defendant and the sheriff was not before us in *Bradley* because that case did not involve a motion to dismiss. Rather, we merely converted the form of the lawsuit from a proceeding for habeas corpus relief to an action for declaratory judgment, at which point we were instantly deprived of subject matter jurisdiction and were compelled to transfer the action to Supreme Court (*see Bradley*, 203 AD3d at 1576). The sheriff in *Bradley* would thereafter have been free to move before Supreme Court to dismiss the declaratory judgment action on any available ground, including for lack of a justiciable controversy, but that issue was not before us in that case. Consequently, our determination in *Bradley* does not, contrary to plaintiff's assertion, compel the conclusion that there is a justiciable controversy between plaintiff and the Sheriff here.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

804

CA 23-02046

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

GENE O. NATI, TRACY NATI, DANIEL HILL AND BRITTANY HILL, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY LINE STONE CO., INC., ALSO KNOWN AS AKRON QUARRY, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

COUCH WHITE, LLP, ALBANY (ALITA J. GIUDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered October 13, 2023. The order denied the motion of defendant County Line Stone Co., Inc. to dismiss the first and third causes of action and to dismiss the second cause of action in part.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the third cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages arising from the destruction of their family home, allegedly due to the groundwater removal and blasting activities of defendant County Line Stone Co., Inc., also known as Akron Quarry (defendant). Plaintiffs' complaint asserts, inter alia, causes of action against defendant for negligence, private nuisance, and public nuisance. Defendant moved pursuant to CPLR 3211 (a) (7) to dismiss plaintiffs' negligence and public nuisance causes of action and to dismiss plaintiffs' private nuisance cause of action to the extent that it is premised on defendant's groundwater removal activities. Defendant appeals from an order that denied its motion.

Defendant contends that Supreme Court erred in denying its motion to the extent that it sought to dismiss the negligence cause of action as duplicative of the private nuisance cause of action. Although a cause of action that is "based on the same facts, alleges the same wrongs, and seeks the same relief as" another cause of action in a

complaint is subject to dismissal on a motion pursuant to CPLR 3211 (a) (7) (*Olney v Town of Barrington*, 180 AD3d 1364, 1365 [4th Dept 2020]; *see Drake v Village of Lima*, 221 AD3d 1481, 1483 [4th Dept 2023]; *Jakes-Johnson v Gottlieb*, 200 AD3d 1679, 1680-1681 [4th Dept 2021]), here, plaintiffs' first and second causes of action are not based on the same facts and do not allege the same wrongs. Plaintiffs' first cause of action alleges that defendant's negligent removal of billions of gallons of groundwater, combined with its blasting activities, caused damage to their property. Plaintiffs' second cause of action alleges that defendant's intentional removal of billions of gallons of groundwater, combined with its blasting activities, substantially and unreasonably interfered with their use and enjoyment of the property. Thus, we conclude that the court properly refused to dismiss the negligence cause of action as duplicative of the intentional private nuisance cause of action (*see Sabalza v Salgado*, 85 AD3d 436, 438 [1st Dept 2011]; *see generally Novak v Sisters of the Heart of Mary*, 210 AD3d 1104, 1106 [2d Dept 2022]; *WFE Ventures, Inc. v GBD Lake Placid, LLC*, 197 AD3d 824, 832 [3d Dept 2021]).

Defendant further contends that the court erred in denying that part of its motion seeking dismissal of plaintiffs' second cause of action insofar as it alleges a private nuisance based on defendant's groundwater removal activities. A defendant "is subject to liability for a private nuisance if [their] conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 [1977], *rearg denied* 42 NY2d 1102 [1977]). "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from [their] conduct . . . , or becomes aware that the conduct is causing substantial interference and nevertheless continues it" (*WFE Ventures, Inc.*, 197 AD3d at 831 [internal quotation marks omitted]).

Here, plaintiffs allege that defendant intentionally engaged in groundwater removal activities that resulted in the condemnation of plaintiffs' family home. In addition, plaintiffs allege that defendant was aware that its activities had caused damage to multiple properties in the vicinity and that it had purchased several of the damaged properties as a result. Thus, "accept[ing] the facts alleged in the . . . complaint as true, accord[ing] plaintiff[s] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory," we conclude that the court did not err in denying that part of defendant's motion seeking dismissal of plaintiffs' second cause of action insofar as it alleges a private nuisance based on defendant's intentional conduct with respect to groundwater removal (*William Metrose Ltd. Bldr./Dev. v Waste Mgt. of N.Y., LLC*, 225 AD3d 1223, 1224 [4th Dept 2024] [internal quotation marks omitted]).

We agree with defendant, however, that the court erred in denying its motion insofar as it sought to dismiss plaintiffs' third cause of action, alleging a public nuisance. "[A] public nuisance consists of a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (*id.* [internal quotation marks omitted]). "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" (*id.* [internal quotation marks omitted]).

To the extent that plaintiffs' public nuisance cause of action is premised on their allegation that defendant's blasting and groundwater removal activities have damaged "multiple other properties along [nearby roads]," plaintiffs failed to allege a special injury that differs in kind rather than degree from that suffered by the community at large, inasmuch as plaintiffs' claimed harm also consists of property damage (*cf. Leo v General Elec. Co.*, 145 AD2d 291, 294 [2d Dept 1989]; *see generally 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 334-335 [1983]; *Davies v S.A. Dunn & Co., LLC*, 200 AD3d 8, 15-16 [3d Dept 2021]). Conversely, to the extent that plaintiffs' public nuisance cause of action rests upon their allegation that defendant's blasting and groundwater removal activities have rendered nearby water wells nonfunctional, we note that plaintiffs failed to allege that they suffered a special injury related to water wells (*cf. Baity v General Elec. Co.*, 86 AD3d 948, 951 [4th Dept 2011]; *Booth v Hanson Aggregates N.Y., Inc.*, 16 AD3d 1137, 1138 [4th Dept 2005]). Therefore, we modify the order by granting that part of the motion seeking to dismiss the third cause of action.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

806

CA 24-00119

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THOMAS P. TOUSANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAMBURG OVERHEAD DOOR, INC., ET AL., DEFENDANTS,
AND JAY M. DOOR SERVICE, DEFENDANT-APPELLANT.

KNYCH & WHRITENOUR, LLC, EAST SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered December 21, 2023. The order, among other things, denied the motion of defendant Jay M. Door Service 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 to recover damages for injuries he sustained when he attempted to manually lower a large commercial garage door on a building owned by his employer, the Town of Parish (Town), using a bucket loader. The door had been installed pursuant to a contract between the Town and defendant Jay M. Door Service (defendant). Defendant appeals from that part of an order that denied its motion for summary judgment dismissing the complaint.

Initially, "viewing the evidence in the light most favorable to plaintiff[ ]" as the nonmoving party (*Mariacher v LPCiminelli, Inc.*, 225 AD3d 1288, 1292 [4th Dept 2024]), we conclude that defendant failed to meet its initial burden of showing that it either had no duty to inspect or supervise the installation work or was not negligent in performing such inspection or supervision (*see generally Ross v Alexander Mitchell & Son, Inc.*, 138 AD3d 1425, 1427 [4th Dept 2016]). Even assuming, arguendo, that defendant met its initial burden, we conclude that plaintiff raised a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), by submitting, inter alia, an affidavit of a professional engineer who opined that the accident was caused by improper installation of the torsion spring system on the garage door.

Defendant further contends that it owed no duty of care to plaintiff, who was not a party to its contract with the Town. We reject that contention. A contract alone generally does not give rise to a duty of care to a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), but, in certain circumstances, including "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm" (*id.* at 140 [internal quotation marks omitted]), such a duty exists (*see Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1353 [2d Dept 2021]; *Ross*, 138 AD3d at 1427). Here, defendant failed to establish as a matter of law that it did not "launch[ ] a force or instrument of harm" (*Espinal*, 98 NY2d at 140 [internal quotation marks omitted]) by negligently performing its duties (*see generally Ross*, 138 AD3d at 1427).

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

807

CA 23-01883

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 EBO TRUST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RANDALL A. HOLMES, ALSO KNOWN AS RANDALL HOLMES, TERRI L. MOSHER, ALSO KNOWN AS TERRI MOSHER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

NEW YORK STATE OFFICE OF ATTORNEY GENERAL, INTERVENOR-RESPONDENT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (MARGARET J. CASCINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (KYLE C. DIDONE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARK S. GRUBE OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered June 6, 2023. The order granted the motion of defendants-respondents 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 against defendants Randall A. Holmes, also known as Randall Holmes, and Terri L. Mosher, also known as Terri Mosher.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order granting, on statute of limitations grounds, the motion of Randall A. Holmes, also known as Randall Holmes, and Terri L. Mosher, also known as Terri Mosher (defendants), seeking to dismiss the complaint pursuant to CPLR 3211 (a) (5). Plaintiff contends that Supreme Court erred in granting the motion inasmuch as defendants failed to establish that the mortgage debt was accelerated by commencement of a prior foreclosure action in 2009, rendering the instant action time-barred. We agree.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5)

on the ground that the statute of limitations has expired, the defendant bears "the initial burden of establishing prima facie that the time in which to sue has expired . . . , and thus [is] required to establish, inter alia, when the plaintiff's cause of action accrued" (*U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020] [internal quotation marks omitted]; *see HSBC Bank USA, N.A. v Corrales*, 224 AD3d 816, 818 [2d Dept 2024]). Once the defendant satisfies that burden, the burden shifts to the plaintiff to raise a question of fact whether the statute of limitations was tolled or otherwise inapplicable or whether the plaintiff actually commenced the action within the applicable period (*see U.S. Bank N.A.*, 186 AD3d at 1039; *U.S. Bank N.A. v Gordon*, 158 AD3d 832, 835 [2d Dept 2018]).

"An action to foreclose a mortgage is subject to a six year statute of limitations" (*Citibank, N.A. v Gifford*, 204 AD3d 1382, 1383 [4th Dept 2022]; *see* CPLR 213 [4]) which begins to run on the full amount due once the debt has been accelerated by a demand (*see Business Loan Ctr. Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *Lavin v Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003], *lv dismissed* 100 NY2d 577 [2003], *lv denied* 2 NY3d 703 [2004]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept 1997]) or by commencement of an action (*see Lavin*, 302 AD2d at 639).

We agree with plaintiff that the court erred in concluding that defendants met their burden of establishing that the debt was accelerated by commencement of a foreclosure action in December 2009. Although defendants submitted an excerpt of the 2009 complaint with their "corrective affidavit," they did so belatedly upon reply, which was insufficient to meet their initial burden on the motion (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188 [4th Dept 2008]). Moreover, any assertions of fact in the "corrective affidavit" were insufficient to establish the acceleration of the debt inasmuch as "an affidavit by an attorney lacking personal knowledge of the facts lacks probative value and should be disregarded" (*Starbo v Ruddy*, 66 AD2d 950, 950 [3d Dept 1978], *lv denied* 47 NY2d 711 [1979]; *see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]). In light of our determination, plaintiff's remaining contentions are academic.

Entered: December 20, 2024 Ann Dillon Flynn
Clerk of the Court

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

809

CA 23-02065

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, AND NOWAK, JJ.

FLOYD C. BACON, JR., AND SHELLY BACON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SHULTS MANAGEMENT GROUP, INC., SHULTS
MANAGEMENT GROUP, INC., DOING BUSINESS AS
ED SHULTS FORD LINCOLN, KESSEL CONSTRUCTION, INC.,
SHULTS REAL ESTATE, LLC, DEFENDANTS-RESPONDENTS,
AHLSTROM-SCHAEFFER ELECTRIC CORPORATION,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

KENNEY SHELTON LIPTAK NOWAK, LLP, NEW YORK CITY (MARK A. COLLESANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

TOWEY LAW PLLC, BUFFALO (BRIAN K. TOWEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (ERIN M. TYREMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT SHULTS REAL ESTATE, LLC.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-RESPONDENT KESSEL CONSTRUCTION, INC.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered November 16, 2023. The order denied the motion of defendant Ahlstrom-Schaeffer Electric Corporation for, inter alia, summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant Ahlstrom-Schaeffer Electric Corporation and dismissing the Labor Law §§ 200 and 241 (6) causes of action against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries Floyd C. Bacon, Jr. (plaintiff) sustained when he tripped and fell at a worksite. Defendant Ahlstrom-Schaeffer Electric Corporation (Ahlstrom) moved pursuant to CPLR 3212 for summary judgment dismissing the amended complaint and cross-claims against it and for sanctions pursuant to CPLR 3126 on the basis of spoliation of evidence. Ahlstrom now appeals from an order that denied its motion.

Plaintiff's accident occurred when he tripped on an electrician's pull string that had one end tied to a door handle at a construction site, with the other end left lying on the ground. The pull string had previously been used to hold the door open by having one end tied to the door handle and the other end tied to a post, but the door was closed at the time of plaintiff's accident. When plaintiff opened the door, the pull string cinched around one of his feet, causing him to fall. Ahlstrom was an electrical subcontractor on the construction project.

Contrary to Ahlstrom's contention, Supreme Court properly denied that part of its motion seeking dismissal of the common-law negligence cause of action against it. "It is well established that a subcontractor 'may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control plaintiff's work or work area' " (*Piche v Synergy Tooling Sys., Inc.*, 134 AD3d 1439, 1440 [4th Dept 2015]; *see Stiegman v Barden & Robeson Corp.* [appeal No. 2], 162 AD3d 1694, 1698 [4th Dept 2018]; *Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1433-1434 [4th Dept 2015]). Here, Ahlstrom failed to meet its initial burden of establishing that it did not create the defective or dangerous condition (*see Burns*, 130 AD3d at 1433-1434; *see also Jesmain v Time Cap Dev. Corp.*, 225 AD3d 1189, 1193 [4th Dept 2024]). "Although [Ahlstrom] is correct that the record does not establish who [placed the pull string on the door], we note that a defendant does not meet its burden by noting gaps in its opponent's proof" (*Piche*, 134 AD3d at 1440 [internal quotation marks omitted]). Inasmuch as Ahlstrom failed to meet its burden, we need not consider the adequacy of the submissions of plaintiffs or the other defendants opposing the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Clifton v Collins*, 202 AD3d 1476, 1478 [4th Dept 2022]).

We agree with Ahlstrom that the court erred in denying that part of its motion seeking dismissal of the Labor Law §§ 200 and 241 (6) causes of action against it, and we therefore modify the order accordingly. Ahlstrom met its initial burden of establishing that it did not have any authority to supervise and control plaintiff's work or the safety of the area involved in the incident (*see Stiegman*, 162 AD3d at 1698; *Burns*, 130 AD3d at 1433). In opposition to the motion, plaintiffs and defendant Kessel Construction, Inc. (Kessel), the general contractor on the construction project, failed to raise a triable issue of fact. With respect to plaintiffs, they abandoned those causes of action against Ahlstrom by not opposing the dismissal of those causes of action and not addressing those causes of action on appeal (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]). With respect to Kessel, its contention regarding the Labor Law § 241 (6) cause of action is raised for the first time on appeal and therefore is not properly before us (*see Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1268 [4th Dept 2019]; *Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 927 [2d Dept 2017]). Kessel further contends that the Labor Law § 200 cause of action should not be dismissed against Ahlstrom because Ahlstrom failed to establish that it did not create the dangerous condition; however, that contention lacks merit.

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *Landahl v City of Buffalo*, 103 AD3d 1129, 1131 [4th Dept 2013]). A subcontractor "without control of plaintiff's work or ongoing control of the area in which he was injured . . . cannot be held liable under Labor Law § 200" (*Burns*, 130 AD3d at 1433; *see Eberhardt v G&J Contr., Inc.*, 188 AD3d 1654, 1654 [4th Dept 2020]; *see also Russin*, 54 NY2d at 316-317).

Contrary to Ahlstrom's further contention, the court did not err in denying that part of its motion seeking dismissal of the common-law and contractual indemnification cross-claims against it inasmuch as there is an issue of fact whether Ahlstrom created the defective condition and was therefore negligent (*see Lostracco v Lewiston-Porter Cent. Sch. Dist.*, 224 AD3d 1248, 1248-1249 [4th Dept 2024]; *McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dept 2023]; *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 429 [1st Dept 2022]).

Finally, we reject Ahlstrom's contention that the court erred in denying that part of its motion seeking sanctions for spoliation of evidence. After the accident, Kessel's site foreman took the pull string off the door handle and discarded it. In its motion, Ahlstrom sought dismissal of the amended complaint and cross-claims against it or, alternatively, an order of preclusion. In order to obtain sanctions for spoliation of evidence, Ahlstrom had the burden of showing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]; *see Storm v Kaleida Health*, 229 AD3d 1239, 1240 [4th Dept 2024]).

Sanctions were not warranted against plaintiffs inasmuch as they did not destroy the evidence. Within minutes of his fall, plaintiff was on the way to the hospital and had no involvement in the disposal of the pull string (*see Bigelow v Dick's Sporting Goods*, 1 AD3d 777, 777-778 [3d Dept 2003]). With respect to sanctions against Kessel, we conclude that Ahlstrom did not meet its burden of establishing that Kessel destroyed the pull string with a culpable state of mind or with the intention of frustrating discovery, and thus the imposition of a sanction against Kessel for spoliation of evidence was not warranted (*see State of New York v Sugar Cr. Stores, Inc.*, 180 AD3d 1336, 1336 [4th Dept 2020]; *Estate of Smalley v Harley-Davidson Motor Co. Group LLC*, 170 AD3d 1549, 1550 [4th Dept 2019]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

811

CA 23-00728

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

MARK S. OSTRANDER AND CYNTHIA L. OSTRANDER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AARON I. MULLEN, ET AL., DEFENDANTS,
AND SCOTT D. MOORE, DEFENDANT-RESPONDENT.

PAUL A. ARGENTIERI, NORTH HORNELL, FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Kevin M. Nasca, J.), entered April 7, 2023. The order, inter alia, granted the motion of defendant Scott D. Moore insofar as it sought to dismiss the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Scott D. Moore insofar as it sought dismissal of the first cause of action against him and reinstating that cause of action against him and as modified the order is affirmed without costs.

Memorandum: In this action sounding in attorney deceit pursuant to Judiciary Law § 487 and intentional infliction of emotional distress, plaintiffs appeal from an order that, inter alia, granted the motion of defendant Scott D. Moore (Moore) insofar as it sought to dismiss the amended complaint against him pursuant to CPLR 3211 (a) (7). This action concerns allegations that Moore, in an attempt to obtain an easement across plaintiffs' property for his nonparty client (client) who is now deceased, used a fraudulent deed in a prior action, withheld discovery tending to show that the deed was fraudulent, and instituted a separate CPLR article 78 proceeding based largely upon the deed.

"On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), [w]e accept the facts as alleged in the complaint as true, accord plaintiff[s] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks omitted]; *see Burns v C.R.B. Holdings, Inc.*, 229 AD3d 1084, 1084-1085 [4th Dept 2024]). " 'Whether a plaintiff can ultimately establish

[their] allegations is not part of the calculus in determining a motion to dismiss' " (*Burns*, 229 AD3d at 1085, quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

We agree with plaintiffs that Supreme Court erred in dismissing the first cause of action against Moore, sounding in violations of Judiciary Law § 487. Judiciary Law § 487 provides, in pertinent part, that "[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." In essence, the statute "imposes liability for the making of false statements with scienter" (*Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 178 [2020]). However, "Judiciary Law § 487 is not a codification of common-law fraud and therefore does not require a showing of justifiable reliance" (*id.*; *see Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Stated another way, "liability under the statute does not depend on whether the court or party to whom the statement is made is actually misled by the attorney's intentional false statement" (*Bill Birds, Inc.*, 35 NY3d at 178); i.e., the statute "focuses on the attorney's intent to deceive, not the deceit's success" (*Amalfitano*, 12 NY3d at 14).

Here, plaintiffs alleged in their amended complaint that, from the time he became the client's attorney, Moore engaged in a pattern of conduct whereby he advocated for the validity of a fraudulent deed, and oversaw the revision of fraudulent surveys based upon that deed. Plaintiffs alleged that Moore was in possession of documents and correspondence establishing that the deed was the fraudulent product of the client and defendant Aaron I. Mullen, an attorney who had previously represented the client, and that Moore failed to disclose those items despite receiving a valid discovery demand for them. Plaintiffs also alleged that Moore instituted a CPLR article 78 proceeding based upon the allegedly fraudulent deed and that he attached the deed to the petition. Plaintiffs further alleged that Moore participated in the client's fraud, and did so intentionally and with knowledge of the client's fraud, to plaintiffs' detriment of more than $100,000 in legal fees and expenses. Accepting the facts as alleged in the amended complaint as true and according plaintiffs the benefit of every possible inference, as we must (*see Nowlin v Schiano*, 170 AD3d 1635, 1635 [4th Dept 2019]), we conclude that plaintiffs' factual allegations with respect to the Judiciary Law § 487 cause of action are sufficient to survive Moore's motion to dismiss, and we therefore modify the order accordingly.

Inasmuch as plaintiffs did not oppose the part of Moore's motion below which sought dismissal of the second cause of action against him, sounding in intentional infliction of emotional distress, plaintiffs' contentions on appeal with respect to that cause of action are not preserved for our review (*see Smisloff v Stott* [appeal No. 2], 133 AD3d 1331, 1331-1332 [4th Dept 2015]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In addition, plaintiffs abandoned any challenge to the dismissal of their third

cause of action by failing to raise any contentions concerning that cause of action in their main brief on appeal (*see Tucker v Kalos Health, Inc.*, 202 AD3d 1505, 1506 [4th Dept 2022]; *see generally Ciesinski*, 202 AD2d at 984).

Plaintiffs' remaining contentions are academic in light of the foregoing.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

812

KA 23-02119

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL F. SANTOS, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a decision of the Jefferson County Court (David A. Renzi, J.), rendered January 4, 2023. The decision determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant purports to appeal from a bench decision of County Court adjudicating him to be a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). The court did not issue a written decision, order, or judgment. Because no appeal lies from a mere decision (*see Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]), we must dismiss the appeal. We also note that the court, in its oral decision, did not set forth its findings of fact and conclusions of law (*see* Correction Law § 168-d [3]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

814

KA 22-00168

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE CURRY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Jack E. Elliott, A.J.), rendered December 14, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and sentencing him to a determinate term of incarceration, followed by a period of postrelease supervision. We affirm.

Defendant contends that County Court lacked jurisdiction to sentence him because the court did not issue a written declaration of delinquency and his probation period had ended by the time the court imposed the sentence. The issuance of a declaration of delinquency is governed by CPL 410.30, which provides that, "[i]f at any time during the period of a sentence of probation . . . the court has reasonable cause to believe that the defendant has violated a condition of the sentence, it may declare the defendant delinquent and file a written declaration of delinquency." The filing of a declaration of delinquency tolls the period of probation, thereby, in effect, extending the sentence originally imposed (*see* Penal Law § 65.15 [2]; *People v Douglas*, 94 NY2d 807, 808 [1999]). Here, it is undisputed that the court did not issue a written declaration of delinquency. Nonetheless, defendant pleaded guilty to violating probation prior to the expiration of his sentence of probation, and we conclude that the court thus had jurisdiction to sentence him after revoking his probation (*cf. People v Montgomery*, 115 AD2d 102, 103 [3d Dept 1985]).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to argue that the court lacked jurisdiction to sentence him after revoking his probation. We reject that contention inasmuch as that argument had little to no chance of success on the merits (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). To the extent that defendant contends that defense counsel was ineffective for failing to negotiate what would constitute defendant's successful completion of the drug treatment court program, that argument involves matters outside the record and cannot be addressed on direct appeal (*see generally People v Simmons*, 221 AD2d 994, 994 [4th Dept 1995], *lv denied* 88 NY2d 885 [1996]).

We reject defendant's contention that the period of postrelease supervision is unduly harsh and severe. We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment. We note, however, that the certificate of disposition must be amended to reflect the fact that defendant was sentenced to three years of postrelease supervision (*see People v Crosby*, 195 AD3d 1602, 1604 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

817

TP 24-00732

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF DEVON TUNSTALL, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, AND MARK J.F. SCHROEDER, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENTS.

ALAN S. HOFFMAN, BUFFALO, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 [Amy C. Martoche, J.], entered May 1, 2024) to review a determination of respondents. 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 respondents' determination, which revoked his driver's license after he refused to submit to a chemical test pursuant to Vehicle and Traffic Law § 1194. Petitioner contends that respondents' determination that he was given the requisite warnings before his refusal (*see* Vehicle and Traffic Law § 1194 [2] [c] [3]; *Matter of Endara-Caicedo v New York State Dept. of Motor Vehicles*, 38 NY3d 20, 22-23 [2022]) is not supported by substantial evidence. We reject that contention and confirm the determination.

Vehicle and Traffic Law § 1194 (2) (a) establishes the procedures for requesting that the operator of a motor vehicle submit to a chemical test. If those procedures are followed and the operator refuses to submit to the chemical test, the operator's license to drive will be temporarily suspended, pending a hearing to determine whether revocation is warranted (§ 1194 [2] [b] [3]). The hearing is limited to the following issues: "(1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of [Vehicle and Traffic Law § 1192]; (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal

language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof" (§ 1194 [2] [c]; *see Endara-Caicedo*, 38 NY3d at 22-23).

Here, petitioner does not dispute that there were reasonable grounds to believe he violated a section of Vehicle and Traffic Law § 1192; that he was lawfully arrested; and that he refused to submit to the chemical test. Nevertheless, petitioner contends that he was not given the requisite warnings inasmuch as he was not warned that "[e]vidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section [1192]" (§ 1194 [2] [f]). Although the administration of that warning is required before evidence of the refusal can be used in a hearing, proceeding, or trial based on a violation of section 1192, it is not a prerequisite to the administrative revocation of a license to drive under section 1194 (2) (c).

In any event, we conclude that there is substantial evidence that the arresting officer warned petitioner that his refusal to submit to a chemical test could be used against him in a criminal proceeding. The arresting officer testified at the hearing that, at the scene of the arrest and at the police station, she warned petitioner that refusal to submit to the chemical test would result in suspension and revocation of his licence and that evidence of his refusal could be used as evidence against him in a trial, proceeding, or hearing resulting from the arrest. She testified that she gave the "same" warnings both times and that she "kn[e]w for a fact that [she] read the complete warning." According to the officer, petitioner refused to submit to the test both times.

Following the officer's testimony, the ALJ viewed the body camera footage of the arrest, which established that the officer did not, at that time, warn petitioner that evidence of his refusal would be admissible in proceedings arising from his violation of Vehicle and Traffic Law § 1192. That called into question the accuracy of both the officer's testimony and her report of refusal (*see* § 1194 [2] [b]), in which she stated that she provided both warnings at the time of the arrest. Nevertheless, the officer testified that she provided both warnings to petitioner at the police station and, upon questioning by the ALJ, she admitted that her prior testimony about the warnings given at the scene of the arrest was incorrect but maintained that she gave both warnings at the police station. She further testified that she "read the warnings off of [her] card" and that she "usually read them right off [her] card word-for-word." In his testimony, petitioner denied that he was read any warnings at the police station.

The ALJ determined that the warning given at the time of the arrest was deficient, but he credited the officer's testimony that she

also provided warnings at the police station and that she gave both warnings at that time, i.e., the warnings under Vehicle and Traffic Law § 1194 (2) (c) (3) and (2) (f).

"Substantial evidence is a minimal standard that requires less than a preponderance of the evidence and demands only that a given inference is reasonable and plausible, not necessarily the most probable . . . Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently . . . , as [i]t is the function of the administrative agency, not the reviewing court, to weigh the evidence or assess the credibility of the witnesses" (*Matter of Roenbeck v New York State Dept. of Motor Vehs.*, 221 AD3d 1013, 1014 [2d Dept 2023] [internal quotation marked omitted]; *see generally Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018]). Where the issue is one of credibility, "we defer to credibility assessments made by the ALJ" (*Matter of Reuss v Schroeder*, 217 AD3d 1083, 1085 [3d Dept 2023]; *see Matter of Soto v New York State Dept. of Motor Vehs.*, 203 AD2d 370, 370 [2d Dept 1994]; *see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Inasmuch as the ALJ credited the officer's testimony that she provided the full warnings at the station and noted that fact on the report of refusal, we conclude that there is substantial evidence to support the determination.

Petitioner further contends that the ALJ did not conduct the hearing impartially and that the ALJ improperly shifted the burden of proof. Inasmuch as petitioner failed to raise those contentions in his petition, they are "not properly before us" (*Matter of Fedor v Ledbetter*, 225 AD3d 1135, 1136 [4th Dept 2024]; *see Matter of Onondaga Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 211 AD3d 1514, 1516 [4th Dept 2022], *lv denied* 40 NY3d 902 [2023]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

820

CA 24-00162

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

PETER F. VERHOEF AND OLGA VERHOEF,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL DEAN, DEFENDANT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered January 11, 2024. The order, insofar as appealed from, granted the cross-motion of defendant insofar as it sought summary judgment dismissing the Labor Law § 240 (1) cause of action and denied the motion of plaintiff for partial summary judgment on that cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross-motion is denied in part, the Labor Law § 240 (1) and the derivative causes of action are reinstated, and plaintiffs' motion is granted.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Peter F. Verhoef (plaintiff). Plaintiff and his coworker were on the roof of the concession stand at defendant's commercial property replacing rubber flashing around plumbing ventilation pipes when plaintiff fell from the roof and landed on a concrete pad. It is undisputed that defendant did not supply plaintiff with any safety devices for the work on the roof. Plaintiffs thus commenced this action for, inter alia, violations of Labor Law § 240 (1). Plaintiffs thereafter moved for summary judgment on liability on the Labor Law § 240 (1) cause of action, and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied the motion and granted the cross-motion finding, as relevant here, that plaintiff was replacing a component damaged by normal wear and tear and thus was not engaged in a protected activity within the meaning of Labor Law § 240 (1) at the time of his fall. Plaintiffs, as limited by their brief, appeal from the resulting order to the extent that it denied the motion and granted the cross-motion with respect to the section 240 (1) cause of action. We reverse the order insofar as appealed from and grant plaintiffs' motion for summary judgment on Labor Law § 240 (1).

At the outset, we agree with plaintiffs that they met their initial burden on the motion. Plaintiffs established "as a matter of law that the injury was caused by the lack of enumerated safety devices, the proper placement and operation of which would have prevented" plaintiff from falling from the roof (*Gizowski v State of New York*, 66 AD3d 1348, 1349 [4th Dept 2009]; *see also Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]). Plaintiffs also demonstrated that plaintiff was engaged in repair work on the roof—a protected activity under Labor Law § 240 (1)—and not simply routine maintenance of a component damaged by wear and tear (*see generally Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]).

"Delineating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and that distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1282 [4th Dept 2015] [internal quotation marks omitted]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Here, the testimony submitted by plaintiffs established, and the court found, that the rubber flashing was malfunctioning and inoperable prior to replacement and that the work being performed by plaintiff at the time of the accident was necessary to restore the proper functioning of the roof. To the extent that defendant asserts that the flashing plaintiff was repairing at the time of his fall was not actively leaking, such a contention is immaterial to whether plaintiff was performing a protected activity, inasmuch as it would be "[in]consistent with the spirit of the [Labor Law] to isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Further, contrary to the court's determination, we agree with plaintiffs that the rubber flashing was not merely a "component" of a ventilation system and instead was an integral part of a proper functioning roof. Here, plaintiff was performing roofing repair to ensure that the roof of the concession stand was no longer leaking—precisely the type of work that we have long held to be protected by Labor Law § 240 (1) (*see generally Baker v Essex Homes of W.N.Y., Inc.*, 55 AD3d 1332, 1332 [4th Dept 2008]; *Fichter v Smith*, 259 AD2d 1023, 1023 [4th Dept 1999], *lv denied in part & dismissed in part* 93 NY2d 994 [1999]).

Plaintiffs therefore established their entitlement to judgment as a matter of law with respect to the Labor Law § 240 (1) cause of action. Defendant's submissions, which contested only whether plaintiff was engaged in a protected activity, failed to raise a triable issue of fact in opposition thereto. For the same reason, we conclude that defendant failed to meet its initial burden on the cross-motion with respect to the Labor Law § 240 (1) cause of action

(*see Calloway v American Park Place, Inc.*, 221 AD3d 1473, 1474 [4th Dept 2023]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

822

OP 23-01765

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF TONY KIRIK, PETITIONER,

V MEMORANDUM AND ORDER

DEBRA A. MARTIN, ACTING JUSTICE OF NEW YORK STATE SUPREME COURT, THOMAS C. WILMOT, SR., THOMAS C. WILMOT, JR., LORETTA WILMOT CONROY, COUNTY OF MONROE, JANE A. HUNTER AND MARY H. PHILLIPS, RESPONDENTS.

TRUST LAW, PLLC, MCLEAN, VIRGINIA, ROSENHOUSE LAW OFFICE, ROCHESTER (GLENN M. FJERMEDAL OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR RESPONDENTS THOMAS C. WILMOT, SR., THOMAS C. WILMOT, JR., AND LORETTA WILMOT CONROY.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR RESPONDENTS JANE A. HUNTER AND MARY H. PHILLIPS.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR RESPONDENT COUNTY OF MONROE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to vacate and set aside an order and a judgment of the Supreme Court, Monroe County (Debra A. Martin, A.J.).

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

Memorandum: Petitioner commenced this original CPLR article 78 proceeding alleging, inter alia, that Debra A. Martin, Acting Justice of New York State Supreme Court (respondent), acted in excess of her authority and jurisdiction when she issued a decision and order (2023 order) in a declaratory judgment action brought by respondents Thomas C. Wilmot, Sr., Thomas C. Wilmot, Jr. and Loretta Wilmot Conroy (collectively, Wilmots) in which respondent, among other things, denied petitioner's cross-motion seeking substantive changes to the judgment (2021 judgment) that respondent previously issued in that action.

The 2021 judgment resulted from a 2019 foreclosure sale involving 145 acres of property owned by respondents Jane A. Hunter and Mary H.

Phillips (née Hunter) (collectively, Hunter sisters). At one time, the Hunter sisters had owned a larger parcel of property. They sold 62 acres of that property to the Wilmots and granted them a right of first refusal (ROFR) on the remaining 145 acres. In 2019, respondent County of Monroe (County) commenced a tax foreclosure action regarding, inter alia, the 145-acre parcel, but did not provide the Wilmots with notice of the tax foreclosure action or subsequent public auction. Ultimately, that property was sold at the public auction to petitioner, and a judgment of foreclosure (2019 judgment) was issued by Supreme Court (Ark, J.). When the Wilmots learned of the purchase, they commenced the declaratory judgment action against petitioner and eventually added the County as a defendant in that action based on a challenge they made to the County's In Rem Tax Foreclosure Act (Code of Monroe County ch 635).

Thereafter, respondent issued the 2021 judgment, declaring that the Wilmots' ROFR did not run with the land and was not an option triggered by the foreclosure sale. Respondent also denied the County's motion seeking to dismiss the action against it "as moot." Respondent further declared that the Wilmots were denied due process during the foreclosure action. Respondent thus invoked her broad equitable powers, set aside the 2019 judgment and vacated the resulting referee's deed conveying the property to petitioner. As a result of her determination, respondent directed that a "new foreclosure sale . . . be held in compliance with all notice protocols." We affirmed the 2021 judgment on appeal (*Wilmot v Kirik*, 210 AD3d 1432 [4th Dept 2022], *appeal dismissed* 39 NY3d 1069 [2023], *reconsideration dismissed & lv denied* 39 NY3d 1181 [2023]).

Following our affirmance, the Wilmots moved to modify, resettle or clarify the 2021 judgment and to add the Hunter sisters, who had resumed ownership of the property as a result of the 2021 judgment, as necessary parties. Petitioner opposed the Wilmots' motion and cross-moved for, inter alia, vacatur of the 2021 judgment. Respondent, in her 2023 order, denied all of the relief requested by the parties, but wrote at length about what had been intended in the 2021 judgment, stating that "[t]he net effect of [respondent's 2021 judgment was] that ownership of the property automatically reverted to the owners," and that respondent's directive in that judgment "to the County to hold a new foreclosure sale '*with all notice protocols*' . . . could only be interpreted to mean starting from the beginning of the foreclosure process dictated by the controlling statute." Respondent further stated that, "[i]nherent in [her 2021] judgment was the likelihood that the outstanding taxes owed would either be paid by the owners or the Wilmots, and their redemption of the property would eliminate the need for a tax foreclosure sale."

Shortly after the 2023 order was issued, that is exactly what happened. The Hunter sisters sold the property in a private sale to the Wilmots, for much more than petitioner had paid at the auction, and the Wilmots redeemed the property, avoiding any potential tax foreclosure sale.

In this original proceeding, petitioner contends, inter alia,

that respondent exceeded her jurisdiction and authority by invalidating the 2019 judgment; by allowing the property to revert to the Hunter sisters; by allowing the Hunter sisters, as nonparties, to participate in the legal proceedings that preceded the 2023 order; and by substantively modifying her own 2021 judgment.

Petitioner also challenges the actions of the County and the Hunter sisters, claiming that they engaged in a "sham tax foreclosure 'redemption.' "

Although we agree with petitioner that this matter is properly before this Court (*see* CPLR 506 [b] [1]; 7803 [2]; *see generally Matter of Smith v Tormey*, 19 NY3d 533, 541 [2012]) and properly includes the Wilmots, the County, and the Hunter sisters as respondents (*see Matter of Green v Bellini*, 12 AD3d 1148, 1149-1150 [4th Dept 2004]; *cf. Matter of Richmond v Cohen*, 168 AD3d 1064, 1064-1065 [2d Dept 2019]; *Matter of Wheeler v Kahn*, 153 AD3d 926, 927 [2d Dept 2017]; *see generally Matter of Schumer v Holtzman*, 60 NY2d 46, 51 [1983]), we nevertheless conclude that the petition should be dismissed.

To the extent that petitioner raises challenges to respondent's 2021 judgment, e.g., by contending that respondent acted in excess of her authority by invalidating the 2019 judgment, those contentions are time-barred and not properly before this Court (*see* CPLR 217 [1]). We therefore do not address those contentions.

Contrary to petitioner's further contention, the 2023 order did not substantially modify the 2021 judgment. The 2021 judgment invalidated the 2019 judgment and vacated the referee's deed to petitioner, directing a new foreclosure sale "*with all notice protocols*" (emphasis added). By necessary implication, the 2021 judgment required title to revert to the original owners, i.e., the Hunter sisters. We conclude that respondent, by specifically recognizing that fact in the 2023 order, did not act in excess of her authority or jurisdiction. Furthermore, the subsequent acts of the titled owners of the property and the Wilmots did not constitute a "sham" foreclosure redemption but were, in fact, lawful acts permitted by the 2021 judgment.

We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

823

OP 24-00645

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF JHK DEVELOPMENT, LLC,
PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF SALINA, TOWN OF SALINA TOWN BOARD
AND UR-BAN VILLAGES PFA, LLC, RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR RESPONDENTS TOWN OF SALINA AND TOWN OF SALINA TOWN BOARD.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent Town of Salina Town Board authorizing the condemnation of property owned by petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent Town of Salina Town Board (Town Board), authorizing the condemnation of approximately .5 acres of property owned by petitioner for the construction of a road accessing a new development being constructed on adjacent property by respondent UR-Ban Villages PFA, LLC (developer). The site of the new development is a long-vacant candle factory (factory site) that the developer is redeveloping into a mixed-use project. Petitioner's property, which is in an office park and is used for the operation of a dermatology practice, is accessible by a parkway that ends in a cul-de-sac that is directly adjacent to the factory site. There is a 20-foot wide drainage easement present on the southern border of petitioner's property, located precisely on the portion sought to be condemned.

One part of the overall redevelopment project of the factory site involves the conversion of an existing building on that site into an indoor soccer and lacrosse center. Because of the additional traffic demands occasioned by the new soccer and lacrosse center, i.e., bottlenecking at the existing points of ingress and egress at the factory site, the developer needs an additional entrance and exit to the site approaching from the north—i.e., from the direction of

petitioner's property. In particular, the developer needs alternative routes to allow first responders access to the new athletic facility. Consequently, respondent Town of Salina (Town), via the Town Board, sought condemnation of part of petitioner's property to allow the developer to construct an access road to the factory site. In essence, the access road would extend the parkway through the cul-de-sac, across a portion of petitioner's property, and into the factory site's parking lot. As a result of the condemnation, petitioner would lose some of its parking spaces.

Following a public hearing, the Town Board issued a negative declaration pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8), classifying the access road project as an unlisted action and determining that it would not have any significant adverse environmental impact. Thereafter, the Town Board adopted a resolution authorizing the acquisition of petitioner's property and published a synopsis of its determinations and findings. We confirm the determination and dismiss the petition.

The power of eminent domain—i.e., "[t]he right to take private property for public use"—"is an inherent and unlimited attribute of sovereignty whose exercise may be governed by the [l]egislature within constitutional limitations and by the [l]egislature within its power delegated to municipalities" (*Matter of Mazzone*, 281 NY 139, 146-147 [1939], *rearg denied* 281 NY 671 [1939]; *see Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1307 [4th Dept 2023], *appeal dismissed* 40 NY3d 1059 [2023], *lv denied* 42 NY3d 904 [2024]). Thus, in the context of an eminent domain proceeding, the courts have recognized "the structural limitations upon our review of what is essentially a legislative prerogative" (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 526 [2009], *rearg denied* 14 NY3d 756 [2010]). Consistent with that limited scope of review, there also is a "longstanding policy of deference to legislative judgments in this field" (*Kelo v New London*, 545 US 469, 480 [2005]; *see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 262 [2010]). Consequently, a reasonable difference of opinion between the judiciary and the legislative body lawfully exercising the State's eminent domain power—in this case the Town Board—is an insufficient predicate for the courts to supplant what is essentially a legislative determination (*see Goldstein*, 13 NY3d at 526). Ultimately, "a court may only substitute its own judgment for that of the legislative body [exercising the eminent domain power] when such judgment is irrational or baseless" (*Kaur*, 15 NY3d at 254; *see Matter of HBC Victor LLC v Town of Victor*, 225 AD3d 1254, 1254-1255 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]).

Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with SEQRA and EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see* EDPL 207

[C]; *Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010]). More specifically, "[t]he burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless" (*Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1271 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]). "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the . . . determination should be confirmed" (*Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 720 [1989] [internal quotation marks omitted]; *see Matter of Bowers Dev., LLC v Oneida County Indus. Dev. Agency*, 40 NY3d 1061, 1063 [2023]; *Butler*, 39 AD3d at 1271-1272).

Initially, we reject petitioner's contention that the Town Board's condemnation of its property will not serve a public use, benefit, or purpose (*see* EDPL 207 [C] [4]). Those terms are "broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Syracuse Univ.*, 71 AD3d at 1433 [internal quotation marks omitted]; *see Matter of Penney Prop. Sub Holdings LLC v Town of Amherst*, 220 AD3d 1169, 1171 [4th Dept 2023], *appeal dismissed* 41 NY3d 969 [2024]), and "include any use, including urban renewal, which contributes to 'the health, safety, general welfare, convenience or prosperity of the community' " (*Matter of Goldstein v New York State Urban Dev. Corp.*, 64 AD3d 168, 181 [2d Dept 2009], *affd* 13 NY3d 511 [2009], *rearg denied* 14 NY3d 756 [2010]; *see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1811 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]). The party challenging a condemnation has the burden of establishing that the taking "does not rationally relate to any conceivable public purpose" (*Matter of HBC Victor LLC v Town of Victor*, 212 AD3d 121, 125 [4th Dept 2022]; *see Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven*, 47 AD3d 267, 272 [2d Dept 2007], *affd* 12 NY3d 735 [2009], *cert denied* 558 US 820 [2009]; *Niagara Falls Redevelopment, LLC*, 218 AD3d at 1308).

Here, petitioner did not meet its burden of establishing that condemning its property for purposes of constructing the access road will not serve a public use, benefit or purpose (*see Niagara Falls Redevelopment, LLC*, 218 AD3d at 1308). The record shows that the proposed redevelopment of the dilapidated factory site serves the public purpose of renewal and that the condemnation is an integral part of that purpose inasmuch as it creates an additional access point to the site and, thereby, fosters the redevelopment thereof. It is well settled that "economic underdevelopment and stagnation are . . . threats to the public sufficient to make their removal cognizable as a public purpose" (*Goldstein*, 13 NY3d at 525 [internal quotation marks omitted]). Ensuring that there is sufficient access to the redeveloped factory site—redevelopment that would alleviate economic underdevelopment and stagnation of the long-vacant area—constitutes "an adequate basis for [the Town Board's] determination to exercise

its legislatively conferred power to acquire real property in order to eliminate blighting influences" (*Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1602 [4th Dept 2020]). To the extent that petitioner attempts to demonstrate that the condemnation is not pursuant to a public purpose by relying on evidence purporting to show the developer was working closely with the Town in connection with the redevelopment project, we note that such cooperation is unremarkable in situations such as here—i.e., where a municipality seeks to foster redevelopment for urban renewal purposes—and wholly fails to establish that the purported public purpose in this case is "merely incidental to the private benefits arising from the condemnation" (*HBC Victor LLC*, 225 AD3d at 1256; *see Penney Prop. Sub Holdings LLC*, 220 AD3d at 1172; *Sun Co. v City of Syracuse Indus. Dev. Agency LLC*, 209 AD2d 34, 43 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]).

Petitioner contends that the condemnation is unjustified inasmuch as the public benefits of the redevelopment project will be realized without the condemnation, and therefore the condemnation is not necessary. We reject that contention. "Private property cannot be taken for public use unless it is necessary for such public use," however, "all that is required of a [condemnor] in determining the necessity for taking private property is that they act in good faith and with sound discretion" (*People v Fisher*, 190 NY 468, 477 [1908]; *see Matter of Gyrodyne Co. of Am., Inc. v State Univ. of N.Y. at Stony Brook*, 17 AD3d 675, 676 [2d Dept 2005], *lv denied* 5 NY3d 716 [2005]). "[I]t is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill" the public purpose (*Matter of PSC, LLC v City of Albany Indus. Dev. Agency*, 200 AD3d 1282, 1287 [3d Dept 2021], *lv denied* 38 NY3d 909 [2022]; *see Gyrodyne Co. of Am., Inc.*, 17 AD3d at 676; *see generally Hallock v State of New York*, 32 NY2d 599, 605 [1973]). Here, we conclude that the Town Board did not abuse its discretion in determining that the condemnation is necessary—even though the Town had already issued some approvals and some parts of the redevelopment have been completed—inasmuch as the full project has not been completed and further approvals will be necessary (*see Butler*, 39 AD3d at 1272). Indeed, the record establishes that the Town has concerns about traffic becoming a "bottleneck[ ]" at the factory site if additional access points are not added, and has indicated that there could be no further development until that concern was addressed. Also supporting a conclusion that the access road is necessary as an additional access point to the factory site is evidence that it would provide first responders with an alternative route to reach the indoor soccer and lacrosse facility located close to petitioner's property. We also note that the proposed condemnation would have a relatively small impact on petitioner's overall property and its parking lot. Thus, under the circumstances presented here, we conclude that the Town Board's determination "that the proposed acquisition is necessary to achieve the desired public purpose is rational" and, therefore, should not be disturbed (*Gyrodyne Co. of Am., Inc.*, 17 AD3d at 676).

Petitioner also contends that the Town Board's determination

should be annulled because the taking violated the prior public use doctrine with respect to the drainage easement located on the portion of petitioner's property that the Town Board seeks to condemn. We reject that contention. Under the prior public use doctrine, generally speaking, "property already devoted to public use can only be condemned by special legislative authority clearly expressed or necessarily implied" (*Buffalo Sewer Auth. v Town of Cheektowaga*, 20 NY2d 47, 53 [1967]). Nevertheless, property already devoted to public use may nonetheless be condemned, provided that "the new use would not [destroy or] materially interfere with the initial use" (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 303-304 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see Matter of Bergen Swamp Preserv. Socy. v Village of Bergen*, 294 AD2d 827, 828 [4th Dept 2002]; *Matter of Board of Coop. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v Town of Colonie*, 268 AD2d 838, 841-842 [3d Dept 2000]). We conclude that petitioner failed to establish that construction of the access road on the property would stop or materially interfere with the operation of the drainage easement and related infrastructure—it merely established the presence of the easement and that the access road would pass over the easement area. Indeed, our review of the record reveals that the drainage easement on the property consisted of the installation of a sewer pipe underground. Consequently, the installation of an impermeable access road over the underground sewer pipe would not materially interfere with the use of the easement inasmuch as the sewer pipe had already been installed and was the entire reason for the drainage easement (*see generally Matter of Village of Ballston Spa v City of Saratoga Springs*, 163 AD3d 1220, 1222 [3d Dept 2018]; *Matter of City of Mechanicville v Town of Halfmoon*, 23 AD3d 897, 899 [3d Dept 2005]).

We also reject petitioner's contention that the Town Board failed to comply with the requirements of SEQRA in making its determination. Our review of the SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or was an abuse of discretion" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks omitted]; *see United Ref. Co. of Pa.*, 173 AD3d at 1812). Further, we note that "[j]udicial review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). To that end, "an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a [final environmental impact statement] will satisfy the substantive requirements of SEQRA" (*Jackson*, 67 NY2d at 417 [internal quotation marks omitted]). Here, we conclude that the Town Board complied with its substantive obligations under SEQRA when it issued a negative declaration inasmuch

as it took the requisite " 'hard look' " at the relevant environmental factors, including stormwater drainage, impacts to plants, animals and archeological resources, as well as traffic, and "made a 'reasoned elaboration' of the basis for its determination" (*Jackson*, 67 NY2d at 417; *see Matter of Renew 81 for All v New York State Dept. of Transp.*, 224 AD3d 1273, 1274-1275 [4th Dept 2024]; *Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1432 [4th Dept 2021]).

Petitioner also contends that the Town Board failed to comply with its SEQRA obligations because it improperly segmented its environmental review. We also reject that contention. Improper "[s]egmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated," which is prohibited in order to prevent "a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review" (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed in part & denied in part* 85 NY2d 854 [1995]; *see Court St. Dev. Project, LLC*, 188 AD3d at 1603; *see generally* 6 NYCRR 617.2 [ah]). Here, respondents note that the complete scope of the entire redevelopment project is not known at this time and—as they conceded at oral argument—at the time of its full completion, the entire project will be further reassessed under SEQRA (*see Matter of Huntley Power, LLC v Town of Tonawanda* [proceeding No. 2], 217 AD3d 1325, 1328 [4th Dept 2023], *lv dismissed* 40 NY3d 1058 [2023], *lv denied* 42 NY3d 1325 [2024]). We note that, absent the identification of any specific future use, the Town Board "was not required to consider the environmental impact of anything beyond the" construction of the access road, and consequently there was no improper segmentation here that would justify annulling the Town Board's determination (*Court St. Dev. Project, LLC*, 188 AD3d at 1603).

Based on our conclusion that petitioner has failed to establish a lack of authority for the condemnation here, we further conclude that it is not "entitled to be reimbursed for reasonable attorney's fees and costs pursuant to EDPL 207 (B)" (*HBC Victor LLC*, 212 AD3d at 125; *see generally Hargett v Town of Ticonderoga*, 13 NY3d 325, 327 [2009]).

Finally, we have considered petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

832

KA 20-01240

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIKEL R. ODLE, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Jefferson County Court (David A. Renzi, J.), rendered August 28, 2020. Defendant was resentenced upon his conviction of murder in the second degree, attempted murder in the first degree and reckless endangerment in the first degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [viii]; [b]), and reckless endangerment in the first degree (§ 120.25), and now appeals from the resentence. We affirm.

Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the resentence (*see generally People v Fortner*, 203 AD3d 1690, 1690 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]), we nevertheless conclude that the resentence is not unduly harsh or severe.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

833

KA 21-01513

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORIAN HAROLD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered September 21, 2021. 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: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, former 130.50 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]). We nevertheless reject defendant's challenge to the severity of his 10-year term of postrelease supervision and conclude that the sentence is not unduly harsh or severe.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

834

KA 23-01276

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLE J. CHAPMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 29, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

835

KA 23-01277

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLE J. CHAPMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 29, 2023. 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.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

836

KA 23-00422

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIEL COLON, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 7, 2022. The judgment convicted defendant, upon a plea of guilty, of attempted 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: Defendant appeals from a judgment convicting him, upon his guilty plea, of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, former 130.75 [1] [b]). We affirm.

Defendant contends that his guilty plea was not voluntarily, knowingly, and intelligently entered because defense counsel did not correctly advise him of the import of his consent to an order of abuse pursuant to Family Court Act § 1051 (a) and related admissions in the context of a Family Court article 10 proceeding that involved the same victim as in this case and largely mirrored the criminal allegations. Contrary to defendant's contention, defense counsel correctly informed defendant, both before the plea proceeding and during the ensuing plea colloquy, of the significance of the Family Court proceeding (*see People v Babb*, 186 AD3d 1058, 1059 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]). For the same reason, we reject defendant's related contention that defense counsel was ineffective.

Defendant further contends that his guilty plea was not voluntarily, knowingly, and intelligently entered because he protested his innocence early in the plea proceeding. We reject that contention. Defendant's cursory protestations of innocence are "unsupported by the record and belied by [defendant's] statements during the plea colloquy" (*People v Gerena*, 174 AD3d 1428, 1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]; *see generally People v Dale*,

142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]) and his prior admissions—under oath—in Family Court.

Finally, defendant did not preserve his contention regarding the order of protection issued at sentencing (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]; *People v Warren*, 222 AD3d 1423, 1423 [4th Dept 2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3]; *Warren*, 222 AD3d at 1423).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

838

KA 23-01942

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

VALENTINO DIXON, DEFENDANT-RESPONDENT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Susan M. Eagan, J.), dated November 1, 2023. The order granted the motion of defendant to vacate a judgment of conviction with respect to criminal possession of a weapon in the second degree and granted a new trial.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, and the judgment of conviction with respect to the count of criminal possession of a weapon in the second degree is reinstated.

Memorandum: In 1992, defendant was convicted, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the third degree (§ 120.00 [2]), and criminal possession of a weapon in the second degree (former § 265.03). The conviction arises from an incident in Buffalo on August 10, 1991, when a 17-year-old male was fatally shot with a machine gun, and other teenagers were wounded. Two of the surviving victims identified defendant as the perpetrator of the crimes. Defendant appealed from the judgment of conviction, and we affirmed (*People v Dixon*, 214 AD2d 1010 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]).

In May 2018, defendant filed a motion pursuant to CPL 440.10, seeking to vacate the judgment, based on, inter alia, newly discovered evidence (*see* CPL 440.10 [1] [g]). Defendant submitted, inter alia, a sworn statement by and videotaped interview with LaMarr Scott, who confessed to being the shooter. Based on those confessions as well as the People's own reinvestigation of the incident, the People consented to vacatur of the judgment with respect to the murder, attempted murder, and assault counts. However, inasmuch as the reinvestigation also revealed that defendant had provided Scott with the loaded machine gun prior to the shooting, they did not consent to vacatur of

the judgment with respect to the count of criminal possession of a weapon in the second degree. Defendant withdrew that portion of his motion seeking to vacate the judgment with respect to that count, and County Court dismissed the remaining counts, which resulted in defendant's release from custody.

In October 2021, defendant filed a second motion pursuant to CPL 440.10, seeking to vacate the judgment of conviction with respect to criminal possession of a weapon in the second degree, based on, inter alia, newly discovered evidence (*see* CPL 440.10 [1] [g]). Defendant attached, inter alia, his own deposition testimony and that of Scott from a civil action. In the depositions, both men testified that defendant provided Scott with a loaded machine gun and transported him to the vicinity of the shooting. Scott further testified that defendant showed him how to use the gun, told Scott that there was a "beef" between the victims' family and defendant's family, and told Scott that they "had some business to handle." The People opposed the motion, contending that defendant's own evidence reflected that he was guilty of criminal possession of a weapon in the second degree as charged in the indictment, although under a theory of accessorial liability rather than the principal actor theory that was presented at trial. The court vacated the judgment with respect to the count of criminal possession of a weapon in the second degree and granted defendant a new trial, concluding that, although the People would have been permitted to amend the indictment to add the accessorial liability theory, there is a reasonable probability that, had the newly discovered evidence been received at trial, the verdict would have been more favorable to defendant. The People appeal.

Pursuant to CPL 440.10 (1) (g), a court may vacate a judgment of conviction on the ground that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence." "It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[ ] (6) which does not merely impeach or contradict the record evidence" (*People v Smith*, 108 AD3d 1075, 1076 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013] [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216 [1955], *cert denied* 350 US 950 [1956]). Defendant has the burden of establishing "by a preponderance of the evidence every fact essential to support the motion" (CPL 440.30 [6]). Furthermore, "[t]he power to grant an order for a new trial on the ground of newly discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound

discretion of the court" (*Salemi*, 309 NY at 215; *see People v White*, 125 AD3d 1372, 1373 [4th Dept 2015]; *People v Pugh*, 236 AD2d 810, 811 [4th Dept 1997], *lv denied* 89 NY2d 1099 [1997]). However, "this Court may 'review the facts and substitute its discretion for that of [the motion court] even in the absence of abuse' " (*People v Tankleff*, 49 AD3d 160, 179 [2d Dept 2007]; *see People v Rickert*, 58 NY2d 122, 133 [1983]). Here, we substitute our discretion for that of the motion court and agree with the People that defendant failed to meet his burden on the motion.

Initially, we reject the People's contention that Scott's confession was not "newly discovered" within the meaning of CPL 440.10. The People contend that defendant was aware of Scott's involvement in the shooting at the time of the trial and therefore could have obtained a statement through due diligence. However, the record reflects that, although Scott first confessed to the crime, he recanted after the People threatened to bring perjury charges, thereby suppressing defendant's ability to obtain Scott's testimony at his trial. "[T]he due diligence requirement is measured against the defendant's available resources and the practicalities of the particular situation" (*People v Bryant*, 117 AD3d 1586, 1588 [4th Dept 2014] [internal quotation marks omitted]). Under the circumstances of this case, we conclude that defendant could not have obtained Scott's confession prior to trial through the exercise of due diligence.

However, we conclude that the evidence in question is not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]; *see generally People v Backus*, 129 AD3d 1621, 1625 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]). Scott's deposition testimony establishes that defendant possessed the loaded machine gun, provided it to Scott, transported Scott to the vicinity of the crime, and had a motive to harm the victims because his family had "beef" with theirs, thus providing sufficient evidence to support a verdict of guilty as an accomplice to the weapons possession of which he was convicted (*see People v Young*, 209 AD3d 1278, 1279 [4th Dept 2022], *lv denied* 39 NY3d 988 [2022]; *see also* Penal Law § 20.00). " '[W]hether one is the actual perpetrator of the offense or an accomplice is, with respect to criminal liability for the offense, irrelevant' " (*People v Rivera*, 84 NY2d 766, 771 [1995]).

Defendant requests that we affirm on the ground, which he asserted in the court below, that consideration of the new evidence in light of a theory of accessorial liability requires an impermissible amendment to the indictment. We agree with the People that we have no authority to affirm on that basis (*see generally People v Smith*, 202 AD3d 1492, 1494 [4th Dept 2022]).

Under CPL 470.15 (1), "[u]pon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant." That provision is "a legislative restriction on the

Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Concepcion*, 17 NY3d 192, 195 [2011]). "[W]here the trial court's decision is fully articulated[,] the Appellate Division's review is limited to those grounds" (*Nicholson*, 26 NY3d at 826). The Appellate Division engages in "the type of appellate overreaching prohibited by CPL 470.15 (1)" when it "renders a decision on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in [the appellant's] favor" (*id.*; *see LaFontaine*, 92 NY2d at 474).

Here, the court determined that "the accessorial liability theory, if presented at a new trial, would not constitute an impermissible amendment to the indictment in violation of the defendant's constitutional rights," clearly resolving that issue in the People's favor. The court's further determination that, even taking into account the theory of accessorial liability, Scott's admissions were "of such character as to create a probability" of a more favorable outcome for defendant (CPL 440.10 [1] [g]) was the only issue decided adversely to the appellant by the motion court (*see LaFontaine*, 92 NY2d at 474). Our "review, therefore, is confined to that issue alone" (*id.*; *see People v Richards*, 151 AD3d 1717, 1719 [4th Dept 2017]; *see also Smith*, 202 AD3d at 1494).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

840

OP 24-00882

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF HOI TRINH, PETITIONER,

V ORDER

DONNA M. SIWEK, IN HER OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT, COUNTY OF ERIE, AND FATHER JOSEPH THIEN NGUYEN, RESPONDENTS.

HGT LAW, NEW YORK CITY (HUNG G. TA OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT DONNA M. SIWEK, IN HER OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT, COUNTY OF ERIE.

FINNERTY OSTERREICHER & ABDULLA, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR RESPONDENT FATHER JOSEPH THIEN NGUYEN.

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 compel respondent Donna M. Siwek, in her official capacity as Justice of the Supreme Court, County of Erie, to determine a motion.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 9 and 10, 2024,

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

841

CA 24-00808

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY
THE COUNTY OF MONROE.

COUNTY OF MONROE, PETITIONER-RESPONDENT, ORDER
ET AL., PETITIONERS;

ALISON DEMARCO AND ABIGAIL DEMARCO,
RESPONDENTS-APPELLANTS.

HFC ASSOCIATES, LLC, NONPARTY RESPONDENT.

CHENEY LAW FIRM, PLLC, GENEVA (DAVID D. BENZ OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOYLAN CODE, LLP, ROCHESTER (MARK A. COSTELLO OF COUNSEL), FOR PETITIONER-RESPONDENT.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered November 6, 2023. The order denied the motion of respondents Alison DeMarco and Abigail DeMarco to, inter alia, vacate a judgment of foreclosure and sale.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

843

CA 23-01844

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

KENNETH KULA, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF NORBERT E. KULA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

KATHERINE LUTHER RESIDENTIAL HEALTH CARE &
REHABILITATION CENTER, INC.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

OLIVE TREE MEDICAL ASSOCIATES, PLLC, AND
JOHN ALLEN PYLMAN, M.D., APPELLANTS.

HIRSCH & TUBIOLO, P.C., PITTSFORD (RICHARD S. TUBIOLO OF COUNSEL), FOR APPELLANTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, WHITE PLAINS (KARA M. EYRE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered September 29, 2023. The order, among other things, granted the motion of plaintiff for leave to amend the complaint to add Olive Tree Medical Associates, PLLC, and John Pylman, M.D., as defendants.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

851

KA 23-01446

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM ROTH, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 10, 2023. The judgment convicted defendant, upon a guilty plea, 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.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

854

KA 23-01118

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER KIRKEY, DEFENDANT-APPELLANT.

JAMES ECKERT, ROCHESTER, FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered May 25, 2023. The judgment convicted defendant upon a jury verdict of driving while intoxicated (two counts), driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, aggravated vehicular homicide, vehicular manslaughter in the first degree, and manslaughter in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [b] [i]), one count of aggravated vehicular homicide (Penal Law § 125.14 [4]), and two counts of manslaughter in the second degree (§ 125.15 [1]).

Defendant contends that the verdict is against the weight of the evidence with respect to defendant's identity as the driver of the vehicle that crashed into a bridge abutment and ended up submerged in a creek, killing the other two occupants of the vehicle, a male and a female. The evidence at trial established that the vehicle belonged to defendant, and testimony and video surveillance showed him driving the vehicle approximately 10 minutes before the accident occurred (*see generally People v Kenny*, 283 AD2d 950, 951 [4th Dept 2001], *lv denied* 96 NY2d 903 [2001]). After the accident, defendant was found on the bank of the creek on the driver's side of the vehicle, and the front driver's side door was open. The female occupant was found still buckled in the front passenger seat, and the body of the male occupant was recovered from the creek the following morning. The front right side of the vehicle struck the bridge abutment, and a reconstruction expert testified that such an impact would have

accelerated the occupants of the vehicle toward the direction of that force. The evidence established that, although airbags in the vehicle had deployed, the vehicle's steering wheel was bent forward on the right side. The expert explained that, in light of how the steering wheel was bent, the driver could have sustained injuries to their left side from hitting the steering wheel. The female and male occupants sustained right-side injuries, and defendant sustained injuries to his chest and left side (*see People v Pascuzzi*, 173 AD3d 1367, 1372-1373 [3d Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Herrera*, 138 AD3d 1141, 1142-1143 [2d Dept 2016], *lv denied* 28 NY3d 971 [2016]).

There was also testimony from a witness that the male occupant did not drive and that defendant would not let anyone borrow his vehicle. Additionally, swabbings from the steering wheel and subsequent DNA analysis showed two male contributors, with the major contributor being defendant and the male occupant being excluded as a possible contributor. 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 defendant's identity as the driver of the vehicle (*see People v Maricevic*, 52 AD3d 1043, 1046 [3d Dept 2008], *lv denied* 11 NY3d 790 [2008]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 (*see generally Bleakley*, 69 NY2d at 495).

Defendant next contends that he was denied an effective summation when County Court sustained the People's objection and held that it agreed that defense counsel had mischaracterized a witness's testimony. That contention is unpreserved for our review inasmuch as defendant did not object to the court's ruling or comments as depriving him of his right to an effective summation (*see People v Gordon*, 181 AD3d 1299, 1300 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]). In any event, his contention is without merit inasmuch as defense counsel had mischaracterized the witness's testimony regarding whether the male occupant's facial injuries were consistent with injuries sustained from an airbag (*see People v Bistonath*, 216 AD2d 478, 479 [2d Dept 1995], *lv denied* 86 NY2d 790 [1995]; *see generally People v Smith*, 16 NY3d 786, 787-788 [2011]; *People v Ashwal*, 39 NY2d 105, 109 [1976]). In addition, defense counsel was not prevented from making the general argument that an airbag could not be excluded as a possible cause of the male occupant's facial injuries (*see People v Kimmy*, 137 AD3d 1723, 1723-1724 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

Defendant's contention that two instances of prosecutorial misconduct during summation denied him a fair trial is not preserved for our review (*see People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]; *People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]). In any event, we conclude that defendant's contention is without merit inasmuch as the alleged instances of prosecutorial misconduct constituted fair

comment on the evidence (*see People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]). Moreover, even assuming, arguendo, that the prosecutor mischaracterized the testimony, we conclude that the prosecutor's remarks were not so pervasive or egregious as to deny defendant a fair trial (*see People v Williams*, 228 AD3d 1249, 1249-1250 [4th Dept 2024]; *King*, 224 AD3d at 1314; *People v Longo*, 212 AD3d 471, 472 [1st Dept 2023], *lv denied* 40 NY3d 935 [2023]).

Defendant further contends that he was denied effective assistance of counsel. Contrary to defendant's contention, a review of the voir dire transcript in totality does not support his claim that defense counsel permitted defendant himself to choose the jury (*see People v Richardson*, 143 AD3d 1252, 1254-1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *cf. People v McKenzie*, 142 AD3d 1279, 1280 [4th Dept 2016]) or that defense counsel was not actively participating in the process (*cf. People v Bell*, 48 NY2d 933, 934 [1979], *rearg denied* 49 NY2d 802 [1980]). We further reject defendant's claim that defense counsel was ineffective in failing to offer a legal basis for seeking the admission of certain allegedly exculpatory statements made by defendant or in failing to object when the court stated that defense counsel had mischaracterized certain testimony during summation. It is well settled that "[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], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Defendant's allegedly exculpatory statements were self-serving and constituted inadmissible hearsay (*see People v Moses*, 197 AD3d 951, 954 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021], *reconsideration denied* 37 NY3d 1163 [2022]) and, as noted above, defense counsel had indeed mischaracterized a witness's testimony in summation.

We reject defendant's further claim that defense counsel mishandled the issue of DNA evidence and was ineffective in eliciting certain testimony of a witness on cross-examination. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1988], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and defendant failed to meet that burden here (*see People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *People v Conley*, 192 AD3d 1616, 1620 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). In addition, inasmuch as we conclude that there was no prosecutorial misconduct during summation, we further conclude that defense counsel was not ineffective for failing to object to the alleged improprieties (*see Townsend*, 171 AD3d at 1481). We have reviewed the remaining claims of ineffective assistance of counsel, and we conclude that, because "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement [has] been met" (*People v Baldi*, 54 NY2d

137, 147 [1981]).

We reject defendant's contention that the court erred in not making an inquiry into defendant's complaints about defense counsel at the close of the People's proof. Although defendant made complaints about the proof that was introduced or not introduced, defendant did not request new counsel and thus "it cannot be said that the court erred in failing to conduct an inquiry to determine whether good cause was shown to substitute counsel" (*People v Singletary*, 63 AD3d 1654, 1654 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009]; *see People v Martinez*, 166 AD3d 1558, 1558-1559 [4th Dept 2018]). In any event, " 'the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit' " (*Martinez*, 166 AD3d at 1559; *see Singletary*, 63 AD3d at 1654).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

856

KA 24-00343

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN L. LOVE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Michael L. Dollinger, J.), entered November 16, 2023. 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 for reasons stated in the decision at County Court.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

857

CAF 23-01988

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF MEILANI M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MAYA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (REBECCA CONSIDINE OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 23, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

858

CAF 23-01989

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF MELODY M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MAYA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (REBECCA CONSIDINE OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 23, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

861

CA 23-02103

PRESENT: SMITH, J.P., CURRAN, GREENWOOD, AND KEANE, JJ.

NEW WAVE ENERGY CORP., JOHN LUDTKA AND NICHOLAS JERGE, PLAINTIFFS-APPELLANTS,

V ORDER

ENERGYMARK, LLC, AND KEVIN CLOUGH, DEFENDANTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COLLIGAN LAW LLP, BUFFALO (ERICK D. KRAEMER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered December 5, 2023. The order granted the motion of defendants for summary judgment and denied the motion of plaintiffs for partial summary judgment.

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: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

865

CA 23-01611

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

PRESTIGE LAWN CARE OF WNY, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FACILITYSOURCE, LLC, DOING BUSINESS AS CBRE,
DEFENDANT-APPELLANT.

GORDON REES SCULLY & MANSUKHANI, LLP, HARRISON (SARAH N. RODMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (MICHAEL FERDMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 1, 2023. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action for, inter alia, breach of contract, seeking payment for lawn care and snow plowing services it provided to commercial properties managed by defendant. Defendant moved pursuant to CPLR 3211 to dismiss the complaint, and Supreme Court denied the motion. We reverse.

The contract between the parties provided that Arizona law would govern "the rights and obligations" of the parties under the contract. It further provided that all disputes arising out of the contract "shall be subject to the exclusive jurisdiction and venue of the state or federal courts sitting in Maricopa County, Arizona." That forum selection clause is prima facie valid and enforceable unless shown by plaintiff to be " 'unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court' " (*Chiarizia v Xtreme Rydz Custom Cycles*, 43 AD3d 1353, 1353-1354 [4th Dept 2007]; *see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Erie Ins. Co. of N.Y. v AE Design, Inc.*, 104 AD3d 1319, 1320 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]).

In opposition to the motion, plaintiff argued that the contract's

"pay-if-paid" provision, together with a provision prohibiting plaintiff from contacting clients of defendant, rendered the contract void as against public policy of New York. Plaintiff's argument, however, "is misdirected [inasmuch as t]he issue [it] raise[s] is really one of choice of law, not choice of forum" (*Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]). " '[O]bjections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause' " (*Erie Ins. Co. of N.Y.*, 104 AD3d at 1320, quoting *Boss*, 6 NY3d at 247). Plaintiff has not shown that enforcement of the *forum selection clause* contravenes New York public policy (*see id.*). Nor has plaintiff shown that enforcement would be unreasonable or unjust or alleged that the clause was the result of fraud or overreaching (*see Bell Constructors v Evergreen Caissons*, 236 AD2d 859, 860 [4th Dept 1997]). Plaintiff's further argument in opposition to the motion—i.e., that it would be a hardship for plaintiff's owner to go to Arizona to litigate this dispute—is an insufficient basis on which to deny the motion (*see Chiarizia*, 43 AD3d at 1354). The fact that New York may be a more convenient forum is immaterial inasmuch as defendant's motion is based on the parties' contract and not on the doctrine of forum non conveniens (*see id.*).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

874

CAF 24-00032

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DERON R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CYNCERE G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorian C. (Cyncere G.)* ([appeal No. 3] — AD3d — [Dec. 20, 2024] [4th Dept 2024]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

875

CAF 24-00035

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DEMONE P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CYNCERE G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorian C. (Cyncere G.)* ([appeal No. 3] — AD3d — [Dec. 20, 2024] [4th Dept 2024]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

876

CAF 24-00036

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DORIAN C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CYNCERE G., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 3 from an order of fact-finding and disposition that, inter alia, adjudged that she abused one of her children (middle child) who, when he was seven months old, was found to have sustained fractures in both arms, both legs, and several ribs. In appeal Nos. 1 and 2, the mother appeals from orders of fact-finding and disposition that, inter alia, adjudged that she derivatively abused her other two children. Following an evidentiary hearing, Family Court determined that petitioner established by a preponderance of the evidence that the mother caused the middle child's injuries, and thereby abused him and derivatively abused the other two children (*see* Family Ct Act § 1046 [a] [i], [ii]). The court further found that the mother had not satisfactorily rebutted petitioner's prima facie case of abuse. We affirm in each appeal.

Family Court Act § 1012 (e) (i) provides that a child is abused when the parent or other legally responsible adult "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or *creates* a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of

physical or emotional health or protracted loss or impairment of the function of any bodily organ" (emphasis added). Initially, to the extent the mother raises contentions in each appeal concerning the legal sufficiency of the evidence supporting the court's finding of abuse with respect to the middle child, her contentions are unpreserved for our review inasmuch as she failed to move to dismiss the petitions on that basis (*see Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435-1436 [4th Dept 2011]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1553 [4th Dept 2010]; *see also Matter of Daniel D. [Tara D.]*, — AD3d —, 2024 NY Slip Op 05665, *1 [4th Dept 2024]).

In any event, we conclude that the mother's contentions with respect to the legal sufficiency of the evidence lack merit. Here, the evidence established that the middle child's "injuries were 'clearly inflicted and not accidental' " (*Matter of Jonah B. [Ferida B.]*, 165 AD3d 787, 789 [2d Dept 2018]; *see Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1), and that his injuries "*create[d] a substantial risk*" of much more serious injuries (Family Ct Act § 1012 [e] [i] [emphasis added]; *see Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1; *Matter of Addison M. [Bridgette M.]*, 173 AD3d 1735, 1736-1737 [4th Dept 2019]). "[U]nder the Family Court Act, a 'child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury' " (*Jonah B.*, 165 AD3d at 789).

In addition, we conclude that there is legally sufficient evidence establishing that she inflicted or allowed to be inflicted the injuries to the middle child. Indeed, we have repeatedly upheld abuse determinations under similar circumstances (*see e.g. Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]). Here, petitioner established a prima facie case of abuse by submitting " 'proof of injuries sustained by [the middle] child . . . of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent,' " i.e., fractures in both arms and both legs, and several fractured ribs, all in various stages of healing, which evidence suggests that the mother did not promptly seek medical attention for the child while in her care (*Avianna M.-G.*, 167 AD3d at 1523, quoting Family Ct Act § 1046 [a] [ii]). Moreover, we conclude that the mother failed to rebut the presumption that she, as the middle child's parent, was responsible for his injuries (*see id.* at 1524).

For the same reasons, we reject the mother's contention in each appeal that the finding that she abused the middle child is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]). Petitioner presented expert medical testimony establishing that the constellation of injuries sustained by the middle child—i.e., the multiple fractures to his limbs and ribs—along with the forces and

mechanisms necessary to cause those injuries, could only have been caused by nonaccidental trauma. The mother offered no testimony to rebut the expert opinion. Based on our review of the record, we cannot say that the court erred in crediting the testimony of petitioner's expert and in declining to credit the testimony offered by the mother (*see generally Zakiyyah T.*, 221 AD3d at 1445).

Finally, we conclude in appeal Nos. 1 and 2 that the court's finding of derivative abuse with respect to the mother's other two children based on evidence that she abused the middle child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the middle child "is so closely connected with the care [of his siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). The abuse "demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

878

CA 23-01788

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF IAN I., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (DAVID A. EGHIGIAN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered October 11, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm for reasons stated in the decision at Supreme Court. We write only to note that, "as evidenced by a reading of [the decision and] the order, [the court] did not consider" respondent's posthearing submission (*Thermo Spas v Red Ball Spas & Baths*, 199 AD2d 605, 606 [3d Dept 1993]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

884

CA 24-00554

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

MELINDA SCHWARTZ, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL A. SCHWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, WILLIAMSVILLE (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 11, 2023, in a divorce action. The order, among other things, directed defendant to immediately destroy or delete certain documents.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

885

CA 24-00556

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

MELINDA SCHWARTZ, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL A. SCHWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, WILLIAMSVILLE (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 20, 2023, in a divorce action. The order, among other things, denied in part defendant's motion to compel discovery.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

886

KA 23-00660

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL J. JACKSON, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 5, 2023. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense and criminal contempt 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 aggravated family offense (Penal Law § 240.75 [1]) and criminal contempt in the first degree (§ 215.51 [c]). We affirm.

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court coerced him into accepting the plea. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve his contention for our review (*see People v Valerio-Lacen*, 224 AD3d 1328, 1329 [4th Dept 2024]; *People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]). Contrary to defendant's contention, this case does not implicate the narrow exception to the preservation rule "where the particular circumstances of a case reveal that a defendant had no actual or practical ability to object to an alleged error in the taking of a plea that was clear from the face of the record" (*People v Conceicao*, 26 NY3d 375, 381 [2015]; *see People v Williams*, 27 NY3d 212, 221 [2016]; *Valerio-Lacen*, 224 AD3d at 1329; *Williams*, 198 AD3d at 1309).

In any event, defendant's challenge to the plea lacks merit. Indeed, defendant's assertion that the court coerced him into pleading guilty is belied by the record because, at the plea colloquy, defendant denied that he had been threatened or otherwise pressured into pleading guilty and, moreover, defendant specifically denied that

the court had said anything to cause him to plead guilty against his will (*see Williams*, 198 AD3d at 1309; *People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). Further, contrary to defendant's assertion, "[a]lthough it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if [the defendant] decides to proceed to trial,' " we conclude that the statements made by the court during the pre-plea proceedings " 'amount to a description of the range of the potential sentences' rather than impermissible coercion" (*People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; *see People v Obbagy*, 147 AD3d 1296, 1297 [4th Dept 2017], *lv denied* 29 NY3d 1035 [2017]). " 'The fact that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " (*Boyde*, 71 AD3d at 1443; *see Obbagy*, 147 AD3d at 1297). Likewise, contrary to defendant's assertion, we conclude on this record that the court "did not coerce defendant into pleading guilty merely . . . by commenting on the strength of the People's evidence against him" (*Pitcher*, 126 AD3d at 1472; *see People v Dix*, 170 AD3d 1575, 1577 [4th Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *People v Hall*, 82 AD3d 1619, 1620 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

887

KA 24-00717

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DEVON DELEE, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR APPELLANT.

CRAIG M. CORDES, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (Theodore H. Limpert, J.), entered March 29, 2024. The order, insofar as appealed from, granted that part of defendant's omnibus motion seeking to reduce count 2 of the indictment to burglary 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 omnibus motion seeking to reduce count 2 of the indictment is denied, count 2 of the indictment is reinstated and the matter is remitted to Onondaga County Court for further proceedings on that count.

Memorandum: The People appeal from an order insofar as it granted that part of defendant's omnibus motion seeking to reduce the second count of the indictment, charging burglary in the first degree (Penal Law § 140.30 [3]), to the lesser included offense of burglary in the second degree (§ 140.25 [1] [d]). We reverse the order insofar as appealed from, deny that part of the omnibus motion seeking reduction of the second count of the indictment, and reinstate that count.

To dismiss a count of the indictment on the basis of insufficient evidence before a grand jury, "a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury" (*People v Gaworecki*, 37 NY3d 225, 230 [2021] [internal quotation marks omitted]; *see People v Lewinski*, 221 AD3d 1468, 1468 [4th Dept 2023]). In the context of grand jury proceedings, "legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*Gaworecki*, 37 NY3d at 230 [internal quotation marks omitted]). On our review, we must determine "whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference" (*id.* [internal

quotation marks omitted]; *see Lewinski*, 221 AD3d at 1468-1469).

As relevant here, the People were required to present competent evidence to the grand jury demonstrating that defendant or another participant in the crime used, or threatened the immediate use of, a dangerous instrument (*see* Penal Law § 140.30 [3]). A dangerous instrument is defined as "any instrument, article or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (§ 10.00 [13]).

At the grand jury hearing, the victim testified that three men entered her apartment and the first man who walked in had a gun. She further testified that, at one point, "the guy with the gun" became "more upset" and hit her "upside the head" with the gun.

It is well established that "a 'gun [that is] used as a bludgeon' is a dangerous instrument" (*People v Spears*, 125 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]) because it " 'is readily capable of causing death or other serious physical injury' " (*People v Wooden*, 275 AD2d 935, 935 [4th Dept 2000], *lv denied* 96 NY2d 740 [2001], quoting Penal Law § 10.00 [13]). Here, County Court ruled that the evidence before the grand jury was legally insufficient to establish that the item used by defendant or another participant in the crime was a dangerous instrument because it was not discharged during the incident and there was no evidence that the item was recovered or tested. That was error. We agree with the People that they were not required to submit evidence that the item described by the victim as a gun was an operable or loaded firearm in order to meet the dangerous instrument element of the crime (*see Spears*, 125 AD3d at 1401). We further agree with the People that they were not required to prove that the victim suffered an injury but, rather, needed only to establish that "under the circumstances in which [the instrument, article, or substance was] used . . . or threatened to be used, [it was] *readily capable* of causing death or other serious physical injury" (Penal Law § 10.00 [13] [emphasis added]; *see People v Carter*, 53 NY2d 113, 116 [1981]). It is reasonable for a grand jury to infer that hitting the victim on the side of the victim's head with a gun could cause serious physical injury. Thus, the evidence was sufficient to permit the inference that defendant or another participant in the crime used a dangerous instrument (*see* Penal Law § 140.30 [3]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

889

KA 19-01490

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKEEM L. COLBERT, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered June 17, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and resisting arrest (§ 205.30). Relying on *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), defendant contends that his conviction of criminal possession of a weapon in the second degree is unconstitutional. Defendant failed to preserve that contention for our review (*see People v Cabrera*, 41 NY3d 35, 39 [2023]; *People v David*, 41 NY3d 90, 95-96 [2023]; *People v Bell*, 229 AD3d 1178, 1179 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Bell*, 229 AD3d at 1179; *People v Ocasio*, 222 AD3d 1364, 1365 [4th Dept 2023]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

891

KA 18-00714

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAGOBERTO C. MIRANDA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DANIEL P. HUGHES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered February 16, 2018. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Although defendant retains the right to appellate review of his challenge to the voluntariness of the plea regardless of the validity of his waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant correctly concedes that his challenge is not preserved for our review because he did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024]; *People v Brown*, 151 AD3d 1951, 1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]). We decline to exercise our power to review defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Cornish*, 214 AD3d 1456, 1456 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

896

CA 23-00525

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF YANETTA S. MATHIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RYAN L. ROBINSON, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

CATHERINE M. SULLIVAN, LIVERPOOL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Onondaga County (Michele Pirro Bailey, A.J.), entered February 2, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, determined that respondent committed acts constituting the family offense of harassment in the second degree against petitioner.

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

Memorandum: In this family offense proceeding pursuant to Family Court Act article 8, respondent appeals from an order of fact-finding and disposition in which Supreme Court, inter alia, determined that he committed acts constituting the family offense of harassment in the second degree against petitioner (Family Ct Act § 812 [1]; Penal Law § 240.26 [1]). Contrary to respondent's contention, we conclude that the court did not err in refusing to assign him counsel at the fact-finding hearing after he was no longer represented by retained counsel inasmuch as the record establishes that respondent "failed to fully and timely make the disclosure necessary to support his claim of indigency" (*Matter of Moiseeva v Sichkin*, 129 AD3d 974, 975 [2d Dept 2015]; *see Matter of Jane Aubrey P. [Cynthia R.]*, 94 AD3d 497, 497-498 [1st Dept 2012]; *Matter of Iadicicco v Iadicicco*, 270 AD2d 721, 722-723 [3d Dept 2000]; *see generally Carney v Carney*, 160 AD3d 218, 224-225 [4th Dept 2018]). Contrary to respondent's further contention, we conclude that petitioner established by a preponderance of the evidence that respondent committed acts constituting harassment in the second degree (*see Matter of Harvey v Harvey*, 214 AD3d 1462, 1462-1463 [4th Dept 2023]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

903

TP 24-01022

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF DUNCAN MACDONALD, PETITIONER,

V ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX 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, Wyoming County [Melissa Lightcap Cianfrini, A.J.], entered June 28, 2024) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated incarcerated individual rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

912

CA 24-01075

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

RED TARGET, LLC, DOING BUSINESS AS SCJ
COMMERCIAL FINANCIAL SERVICES,
PLAINTIFF-RESPONDENT,

V ORDER

LANE NO. 1, DOING BUSINESS AS ROUTE 11 CLUB,
DEFENDANT,
AND RICHARD L. SPOSATO, ALSO KNOWN AS
RICHARD SPOSATO, DEFENDANT-APPELLANT.

RICHARD L. SPOSATO, DEFENDANT-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered December 15, 2023. The order denied the motion of defendant Richard L. Sposato, also known as Richard Sposato, to vacate a default judgment.

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: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

915

CA 23-01470

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ELIZABETH BEVARS, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF BETTY JEAN MCKNIGHT, DECEASED, PETITIONER-APPELLANT,

V ORDER

PETER S. MUSCHAMP, RESPONDENT-RESPONDENT.

CROSSMORE & TIFFANY LAW OFFICE, ITHACA (KIRSTIN E. TIFFANY OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (SYED OMAR SHAH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Seneca County (Barry L. Porsch, S.), entered August 7, 2023. The order granted the motion of respondent to dismiss the petition.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

925

KA 21-00823

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILBERTO MELENDEZ ORTEGA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered September 22, 2020. The judgment convicted defendant upon a jury verdict of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [1]). Defendant's conviction arises from a robbery of a convenience store by defendant and a codefendant who forcibly stole money from the convenience store clerk while using or threatening the immediate use of knives.

Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress identification testimony from the convenience store clerk. Defendant contends that the showup was unnecessary because the police had enough confirmation that defendant was one of the two perpetrators and thus there was no urgency or exigent circumstances to justify the showup identification. Defendant further contends that the requirements of temporal and spatial proximity were not met inasmuch as the showup took place an hour after the crime at a location approximately two miles from the scene of the crime.

"Showup identifications are disfavored, since they are suggestive by their very nature" (*People v Ortiz*, 90 NY2d 533, 537 [1997]; *see People v Johnson*, 81 NY2d 828, 831 [1993]). Although such procedures "are not presumptively infirm" (*People v Duuvon*, 77 NY2d 541, 543 [1991]), the court must determine whether the showup was " 'reasonable under the circumstances—i.e., justified by exigency or temporal and

spatial proximity [to the crime]—and, if so, whether the showup as conducted was unduly suggestive' " (*People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* 580 US 873 [2016]; *see People v Gilford*, 16 NY3d 864, 868 [2011]; *People v Knox*, 170 AD3d 1648, 1649 [4th Dept 2019]).

Defendant's contention that the showup procedure was not done in temporal and spatial proximity to the crime is preserved for our review inasmuch as the court expressly decided that question in its decision (*see People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021]). Defendant's contention, however, that the showup identification was unnecessary and not supported by exigent circumstances is not preserved for our review (*see People v Cruz*, 236 AD2d 269, 270 [1st Dept 1997], *lv denied* 89 NY2d 1091 [1997]; *see generally Johnson*, 192 AD3d at 1613; *People v Walker*, 155 AD3d 1685, 1686 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]). In any event, contrary to defendant's contention, "a showup is not improper merely because the police already have probable cause to detain a suspect" (*People v Howard*, 22 NY3d 388, 403 [2013]). In addition, the court properly determined that the showup procedure was reasonable under the circumstances inasmuch as it was conducted in geographic and temporal proximity to the crime (*see People v Smith*, 185 AD3d 1203, 1207 [3d Dept 2020]; *People v Harris*, 57 AD3d 1427, 1428 [4th Dept 2008], *lv denied* 12 NY3d 817 [2009]; *People v Ramos*, 34 AD3d 1363, 1363 [4th Dept 2006], *lv denied* 8 NY3d 884 [2007]), and thus it was permissible even in the absence of exigent circumstances (*see People v Ball*, 57 AD3d 1444, 1445 [4th Dept 2008], *lv denied* 12 NY3d 755 [2009]; *People v Hampton*, 50 AD3d 1605, 1606 [4th Dept 2008], *lv denied* 10 NY3d 959 [2008]). Moreover, even assuming, arguendo, that the showup identification should have been suppressed, we conclude that any error in admitting the clerk's in-court identification of defendant is harmless beyond a reasonable doubt (*see People v Waggoner*, 218 AD3d 1221, 1223-1224 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023], *reconsideration denied* 41 NY3d 967 [2024]; *People v Bynum*, 125 AD3d 1278, 1278 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]).

We reject defendant's further contention that he was denied effective assistance of counsel. Defense counsel's failure to make a closing argument at the suppression hearing does not constitute ineffective assistance inasmuch as any such argument would have had little or no chance of success (*see People v Perkins*, 160 AD3d 1455, 1457 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]; *People v Rodriguez*, 134 AD3d 512, 513 [1st Dept 2015], *lv denied* 27 NY3d 968 [2016]). Similarly, defense counsel's failure to request a probable cause hearing does not constitute ineffective assistance. Although defendant would have likely received such a hearing if it was requested because the codefendant had received a probable cause hearing, suppression of the evidence based on an alleged lack of probable cause also would have had little or no chance of success (*see People v Burgess*, 159 AD3d 1384, 1385 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]; *see also People v Crouch*, 70 AD3d 1369, 1370 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]).

Defendant has failed to demonstrate the absence of strategic or

other legitimate explanations for defense counsel's brief questioning of prospective jurors during voir dire and his failure to challenge one prospective juror for cause (*see People v Weeks*, 221 AD3d 1469, 1470-1471 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *see generally People v Thompson*, 21 NY3d 555, 559-560 [2013]; *People v Benevento*, 91 NY2d 708, 712 [1998]). In addition, "the record does not reflect that counsel's decision to allow a previously rejected prospective juror to serve as an alternate fell below the standard for effective assistance" (*People v Molano*, 70 AD3d 1172, 1176 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]). Defendant also failed to demonstrate the absence of a legitimate or strategic reason for defense counsel's failure to request a charge on the defense of intoxication, especially in light of defendant's testimony that he did not commit the crimes charged (*see People v Lancaster*, 143 AD3d 1046, 1051-1052 [3d Dept 2016], *lv denied* 28 NY3d 1147 [2017], *reconsideration denied* 29 NY3d 999 [2017]; *see generally People v Bailey*, 195 AD3d 1486, 1488 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]). We have examined defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]). In any event, his contention is without merit (*see People v Garner*, 136 AD3d 1374, 1374-1375 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]). The sentence is not unduly harsh or severe.

Entered: December 20, 2024 Ann Dillon Flynn
Clerk of the Court

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

931

CA 24-00197

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR CSAB MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES, SERIES 2006-3,
PLAINTIFF-APPELLANT,

V ORDER

FRANCIS X. SOMMERS, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

ROBERTSON, ANSCHUTZ, SCHNEID, CRANE & PARTNERS, PLLC, WESTBURY (JOSEPH F. BATTISTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), dated March 16, 2023. The order, inter alia, denied the motion of plaintiff to vacate a conditional order and judgment of dismissal.

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: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

933

CA 24-00697

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

JEROME PAUL WILLIAMS, PLAINTIFF-APPELLANT,

V ORDER

HOGANWILLIG, PLLC, COREY J. HOGAN, ESQ.,
STEVEN G. WISEMAN, ESQ., STEVEN M. COHEN, ESQ.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIVERON LAW PLLC, AMHERST (EDWARD P. YANKELUNAS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Niagara County (Edward Pace, J.), entered October 19, 2023. The amended order, insofar as appealed from, granted those parts of the motion of defendants HoganWillig, PLLC, Corey J. Hogan, Esq., Steven G. Wiseman, Esq., and Steven M. Cohen, Esq. for summary judgment seeking to dismiss plaintiff's first through third causes of action and claims for punitive damage and attorney's fees, and for summary judgment on their second counterclaim and denied that part of the cross-motion of plaintiff seeking summary judgment.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

937

CA 23-00958

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF JPMORGAN CHASE BANK, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED MARCH 7, 1996 BY DAVID MINKIN FOR THE BENEFIT OF ROBERT THALL, HOWARD LESTER, PATRICIA B. LESTER, PAUL H. BRIGER (TRUST NO. 1.), PAUL H. BRIGER (TRUST NO. 2.), PETITIONER-RESPONDENT, ET AL., PETITIONER,

V ORDER

PETER LESTER, RESPONDENT-RESPONDENT, AND PRESCOTT LESTER, RESPONDENT-APPELLANT.

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, NEW YORK CITY (MARYANN C. STALLONE OF COUNSEL), FOR RESPONDENT-APPELLANT.

LIPPES MATHIAS LLP, ROCHESTER (SVETLANA K. IVY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Christopher S. Ciaccio, S.), entered April 27, 2023. The order granted the cross-motion of petitioner JPMorgan Chase Bank, N.A., to strike the reply papers of respondent Prescott Lester and denied the motion of respondent Prescott Lester for a change of venue.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

948

CAF 23-02126

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF GRACE PUCHALSKI,
PETITIONER-APPELLANT,

V ORDER

TIMOTHY J. LEMKE, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT E. GENANT, MEXICO, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Donald P. VanStry, R.), entered October 16, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole legal and physical custody of the subject child to respondent.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

952

CA 23-01656

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

TINA CALVANESO, ALSO KNOWN AS TINA NUNEZ,
PLAINTIFF-APPELLANT,

V ORDER

GENE CALVANESO, DEFENDANT-RESPONDENT.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

A. ANGELO DIMILLO, LOCKPORT, FOR DEFENDANT-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered August 30, 2023. The order, among other things, awarded defendant sole custody of the subject child.

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: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

954

CA 24-00042

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

LETICIA LEE, PLAINTIFF-APPELLANT,

V ORDER

MICROSOFT CORPORATION, DEFENDANT-RESPONDENT.

LETICIA LEE, PLAINTIFF-APPELLANT PRO SE.

ORRICK, HERRINGTON & SUTCLIFFE LLP, NEW YORK CITY (JOSE MARIO VALDES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered November 6, 2023. The order, among other things, granted the motion of defendant to compel arbitration and to stay the action and denied the cross-motion of plaintiff for a default judgment.

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

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court

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

955

CA 22-01970

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

TARA ANGELI-JOHNSON AND SEAN JOHNSON,
PLAINTIFFS-RESPONDENTS,

V ORDER

RAYEES NIZAM, M.D., ASSOCIATED
GASTROENTEROLOGISTS OF CENTRAL NEW YORK, P.C.,
MICHAEL J. PICCIANO, M.D., CNY FAMILY CARE, LLP,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (GABRIELLE L. BULL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered November 3, 2022. The order denied the motion of defendants Rayees Nizam, M.D., Associated Gastroenterologists of Central New York, P.C., Michael J. Picciano, M.D., and CNY Family Care, LLP for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Sutton Inv. Corp. v City of Syracuse*, 12 AD3d 1201, 1201 [4th Dept 2004]).

Entered: December 20, 2024

Ann Dillon Flynn
Clerk of the Court