SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 8, 2019

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

135/17

CA 16-00250

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

IN THE MATTER OF RICCELLI ENTERPRISES, INC., ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, 3679 RIVER ROAD, INC., ET AL., INTERVENORS-PETITIONERS-PLAINTIFFS-RESPONDENTS,

V ORDER

STATE OF NEW YORK WORKERS' COMPENSATION BOARD, ET AL., RESPONDENTS-DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (PATRICIA S. NAUGHTON OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS AND INTERVENORS-PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered May 8, 2015. The order, inter alia, granted the motion of petitioners-plaintiffs and intervenors-petitioners-plaintiffs for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 15, 2019,

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

All concur except SCUDDER, J., who is not participating.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

136/17

CA 16-00661

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

IN THE MATTER OF RICCELLI ENTERPRISES, INC., ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, 3679 RIVER ROAD, INC., ET AL., INTERVENORS-PETITIONERS-PLAINTIFFS-RESPONDENTS,

V ORDER

STATE OF NEW YORK WORKERS' COMPENSATION BOARD, ET AL., RESPONDENTS-DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (PATRICIA S. NAUGHTON OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS AND INTERVENORS-PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered April 4, 2016. The order denied the motion of respondents-defendants for leave to renew.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 15, 2019,

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

All concur except SCUDDER, J., who is not participating.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1088

CA 18-00641

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY THE CITY OF UTICA, PETITIONER-RESPONDENT;

OPINION AND ORDER

VLADIMIR SUPRUNCHIK, RESPONDENT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN HARTNETT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 25, 2018. The order, insofar as appealed from, denied that part of respondent's application seeking to vacate that portion of a judgment of foreclosure that deemed respondent's personal property located at a foreclosed property to be abandoned to petitioner.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the application is granted in part, and the judgment of foreclosure, entered February 24, 2016, is vacated insofar as it deems the personal property of respondent abandoned to petitioner.

Opinion by TROUTMAN, J.:

The issue before us is whether Supreme Court erred in denying that part of respondent's application that sought to vacate for lack of jurisdiction a default judgment, entered in a tax foreclosure proceeding pursuant to RPTL article 11, insofar as that judgment deemed abandoned certain items of personal property belonging to respondent. We hold that the court erred in denying the application to that extent. Accordingly, the order insofar as appealed from should be reversed, the application granted in part, and the judgment vacated insofar as it deems the personal property of respondent abandoned to petitioner.

I

Respondent operated a business dismantling automobiles in a building located on a parcel of real property in petitioner, City of Utica. Inside the building were hundreds of auto parts belonging to respondent. The parcel, which was owned by a third party, became

subject to an in rem tax foreclosure proceeding commenced by petitioner. According to the petition and notice of foreclosure, the proceeding was "brought against the real property only" and, if an interested party defaulted, that party would be "forever barred and foreclosed of all his or her right, title and interest and equity of redemption in and to the parcel . . . and a judgment of foreclosure [could] be taken by default." The owner of the parcel defaulted, and the court entered a default judgment on February 24, 2016, which, inter alia, awarded possession of the parcel of real property, as well as "all items of personal property thereon[] deemed abandoned," to petitioner. Thereafter, petitioner contracted with a salvage company to remove and dispose of respondent's personal property.

Respondent attempted to reclaim his personal property during subsequent proceedings in Bankruptcy Court. When those attempts were unsuccessful, he made an application in Supreme Court by order to show cause entered December 18, 2017 for, among other things, an order vacating for lack of jurisdiction that part of the judgment that deemed his personal property abandoned. Petitioner opposed the application on various grounds, contending, inter alia, that the application was time-barred pursuant to the one-month limitations period set forth in RPTL 1131. The court denied the application.

II

We agree with respondent that his application is timely. The section upon which petitioner relies, RPTL 1131, provides:

> "In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of all right, title, and interest and equity of redemption in and to the parcel in which the person has an interest and a judgment in foreclosure may be taken by default as provided by [RPTL 1136 (3)]. A motion to reopen any such default may not be brought later than one month after entry of the judgment."

That section, by its own terms, applies only to a default "as provided by" RPTL 1136 (3), which subdivision empowers the court, upon the taxpayer's default, to enter a judgment awarding the tax district "possession of any parcel of real property described in the petition of foreclosure." Thus, the one-month limitations period applies only to an application to reopen a default judgment with respect to a parcel of real property described in an underlying petition of foreclosure. It does not apply where, as here, the application seeks to vacate for lack of jurisdiction a provision in a judgment disposing of personal property not described in the petition.

Petitioner contends that public policy demands finality for default judgments in tax foreclosure proceedings. Otherwise, petitioner contends, municipalities will be left vulnerable to liability for damage to personal property left behind on parcels of

real property that are subject to such proceedings. We emphasize, however, that the issues before us in this appeal do not implicate whether and to what extent municipalities may be held liable for damage to personal property under such circumstances. We must decide only whether respondent's application was timely and whether the court had jurisdiction to enter a judgment disposing of personal property.

III

With respect to the latter, we agree with respondent that the court lacked jurisdiction to dispose of personal property. Supreme Court may exercise in rem jurisdiction over real property in a proceeding to foreclose a tax lien (*see* RPTL 1120 *et seq.*). A proceeding of that kind "produces a judgment binding only on those who have been named as parties and duly notified—the usual understanding of what due process requires" (Siegel & Connors, NY Prac § 101 at 216 [6th ed 2018]). " '[T]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title' " (*Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017]). Here, petitioner did not provide notice to respondent with respect to respondent's personal property and could not have done so. The notice procedures in the statute relate to real property only, not personal property (*see* RPTL 1122-1125). Moreover, RPTL article 11 does not contain a mechanism by which the tax district may obtain a party's personal property upon that party's default. In the event of a default, the tax district is awarded "possession of any *parcel of real property* described in the petition of foreclosure" and is entitled to a deed conveying to the tax district full and complete title to the parcel (RPTL 1136 [3] [emphasis added]). Upon the execution of the deed, any person with a right or interest "in or upon *such parcel* shall be barred and forever foreclosed" of that right or interest (*id.* [emphasis added]).

Nothing in RPTL article 11 confers upon Supreme Court in rem jurisdiction over personal property. Indeed, there is only one reference to personal property in the entire article: "Proceedings to enforce collection by distress and sale of personal property or other means of compulsory collection shall not be a condition precedent to the remedies provided in this article" (RPTL 1156 [2]). That language acknowledges that in rem tax foreclosure proceedings under RPTL article 11 are distinct from any proceedings against personal property. RPTL article 11 does not grant jurisdiction over personal property located on a parcel of real property that is the subject of an in rem tax foreclosure proceeding, nor does it permit the tax district to obtain a judgment awarding the tax district such personal property.

It follows that, here, to the extent the court awarded possession of respondent's personal property to petitioner in the judgment of foreclosure, the court acted in excess of its jurisdiction. Therefore, the court erred in denying that part of respondent's application to vacate the judgment insofar as it made that award (*see*

CPLR 5015 [a] [4]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1091

CA 17-01540

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

PAULA L. GIBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.

PAULA L. GIBBS, PLAINTIFF-APPELLANT PRO SE.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 18, 2017. The order, among other things, granted the motion of Zdarsky Sawicki & Agostinelli LLP and Gerald T. Walsh to withdraw as counsel for plaintiff and granted Zdarsky Sawicki & Agostinelli LLP a charging lien, pursuant to Judiciary Law § 475, on the proceeds of any amount recovered by plaintiff in this action.

It is hereby ORDERED that said appeal is unanimously dismissed insofar as it concerns plaintiff's former counsel, Zdarsky Sawicki & Agostinelli LLP and Gerald T. Walsh, and the order is modified on the law by vacating the seventh ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for breach of a homeowner's insurance policy issued by defendant as a result of defendant's refusal to pay plaintiff under the policy after her home suffered water damage. Following trial, the jury returned a verdict finding defendant liable for breach of the policy and awarding damages. Supreme Court, however, ordered a new trial on damages to the dwelling and additional living expenses unless plaintiff stipulated to reduced awards, and we affirmed on appeal (*Gibbs v State Farm Fire & Cas. Co.*, 137 AD3d 1618 [4th Dept 2016]). Prior to commencement of the new trial on damages, the court granted the motion of plaintiff's counsel, Zdarsky Sawicki & Agostinelli LLP and Gerald T. Walsh (former counsel), to withdraw from representing plaintiff and for a charging lien on the proceeds of any amount recovered by plaintiff in the action and, among other things, adjourned the scheduled new trial on damages, stayed the proceedings, and granted defendant's request to toll plaintiff's entitlement to prejudgment statutory interest on any award until the commencement of the new trial on damages. Plaintiff appeals.

At the outset, we dismiss the appeal insofar as it concerns former counsel. In relevant part, CPLR 5515 (1) provides that "[a]n appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered." "A complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal . . . Where, however, the 'appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court . . . may grant an extension of time for curing the omission' " (*AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655, 1657 [4th Dept 2012], quoting CPLR 5520 [a]; *see M Entertainment, Inc. v Leydier*, 13 NY3d 827, 828-829 [2009]). Here, plaintiff neglected to serve former counsel with the notice of appeal, but she did not completely fail to comply with CPLR 5515 (1) inasmuch as the notice of appeal was timely filed and timely served upon defendant (*see* CPLR 2103 [b] [2]; [c]; 5513 [d]). We are "thus authoriz[ed] . . . to determine whether to exercise [our] discretion pursuant to CPLR 5520 (a)" (*M Entertainment, Inc.*, 13 NY3d at 828; *see Matter of Leonard v Regan*, 167 AD2d 790, 791 [3d Dept 1990]). Nonetheless, inasmuch as plaintiff has not requested such relief and former counsel has not filed a brief, and given the potential for prejudice, we decline to exercise our discretion pursuant to CPLR 5520 (a) to allow plaintiff an extension of time to cure the omission (*see Augur v Augur*, 82 AD3d 1342, 1343 [3d Dept 2011]; *cf. Matter of Miranda F. [Kevin D.]*, 91 AD3d 1303, 1304 [4th Dept 2012]).

With respect to the appeal insofar as it concerns defendant, we agree with plaintiff that the court erred in tolling her entitlement to prejudgment statutory interest on any award until the commencement of the new trial on damages. We therefore modify the order accordingly. Any delay of the new trial on damages attributable to plaintiff on the basis that she caused former counsel to withdraw for just cause is of no moment inasmuch as "prejudgment interest must be calculated from the date that liability is established regardless of which party is responsible for the delay, if any, in the assessment of the plaintiff's damages" (*Love v State of New York*, 78 NY2d 540, 544 [1991]; *see* CPLR 5002; *St. Lawrence Factory Stores v Ogdensburg Bridge & Port Auth.*, 121 AD3d 1226, 1229 [3d Dept 2014], *lv denied* 25 NY3d 907 [2015], *rearg denied* 26 NY3d 948 [2015]; *Singer v Town of Tonawanda*, 270 AD2d 962, 962 [4th Dept 2000]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1093

CA 18-00648

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

IN THE MATTER OF SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES BY AND IN THE NAME OF PETER GAMBA, ITS PRESIDENT, AND COALITION TO PROTECT NEW YORK, BY AND IN THE NAME OF KATHRYN BARTHOLOMEW, ITS TREASURER,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION AND LOCKWOOD HILLS, LLC, RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), AND RACHEL TREICHLER, HAMMONDSPORT, FOR PETITIONERS-APPELLANTS.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (CLAIBORNE E. WALTHALL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND BASIL SEGGOS, COMMISSIONER.

BARCLAY DAMON LLP, ALBANY (YVONNE E. HENNESSEY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION AND LOCKWOOD HILLS, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Yates County (William F. Kocher, A.J.), entered June 20, 2017 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the amended petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioners appeal from a judgment that denied their motion for a temporary injunction and granted defendants' respective motions to dismiss the amended petition against them. This matter involves the recent renovation of a power plant that burned coal to generate electricity for nearly 80 years. The plant went temporarily inactive in 2011 and, three years later, respondents Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC (collectively, Greenidge) bought it seeking to resume

operations using natural gas and biomass, rather than coal. Respondent New York State Department of Environmental Conservation, the lead agency on the environmental review of the proposed operations pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8), issued an amended negative declaration on June 28, 2016 based on revisions to certain air permits that were issued to Greenidge. Then, on October 17, 2016, the New York State Department of Public Service issued a notice to proceed with construction of a natural gas pipeline necessary to operate the plant.

On October 31, 2016, petitioners commenced this CPLR article 78 proceeding and sought in their amended petition to, inter alia, vacate the air permits based on alleged deficiencies in the SEQRA review. Significantly, although petitioners also sought to enjoin Greenidge from "taking steps to repower" the plant or constructing the pipeline, petitioners did not request a temporary restraining order (TRO). Instead, petitioners waited until December 23, 2016 to serve motion papers upon respondents seeking temporary injunctive relief. On January 5 and 6, 2017, respondents moved to dismiss the amended petition on the grounds of lack of standing and mootness. Oral argument was held on January 24, 2017, and Supreme Court reserved decision. In March, respondents informed the court that construction was completed and that the plant had resumed operations. On April 21, 2017, the court issued a decision denying petitioners' motion, granting respondents' motions, and dismissing the amended petition. A judgment was entered on June 20, 2017.

Petitioners filed a notice of appeal on July 19, 2017, but they did not seek an order from this Court enjoining operation of the plant. Petitioners perfected the appeal on April 17, 2018. Thereafter, Greenidge moved to dismiss petitioners' appeal as moot. In response, on July 9, 2018, petitioners cross-moved for an order enjoining the installation of certain equipment intended to mitigate fish impingement and entrapment. We denied Greenidge's motion to dismiss without prejudice to renew it at oral argument, and denied petitioners' cross motion.

We agree with respondents that the appeal should be dismissed as moot (*see generally Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728 [2004]). Litigation over construction is rendered moot when the progress of the work constitutes a change in circumstances that would prevent the court from " 'rendering a decision that would effectively determine an actual controversy' " (*id.* at 728-729). In addition to the progress of the construction, other factors relevant to evaluating claims of mootness are whether the party challenging the construction sought injunctive relief, whether the "work was undertaken without authority or in bad faith" (*id.* at 729; *see Matter of Wallkill Cemetery Assn., Inc. v Town of Wallkill Planning Bd.*, 73 AD3d 1189, 1191 [2d Dept 2010]), and whether "substantially completed work" can be undone without undue hardship (*Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 729; *see Matter of Dowd v Planning Bd. of Vil. of Millbrook*, 54 AD3d 339, 340 [2d Dept 2008]). The primary factor in the mootness analysis is "a challenger's failure to seek

preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173 [2002]; *see Wallkill Cemetery Assn., Inc.*, 73 AD3d at 1190). Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding" (*Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 750 [1st Dept 2012], *affd* 20 NY3d 919 [2012]).

The plant has been operating lawfully since March 2017. The failure to preserve the status quo is entirely the fault of petitioners, who waited until the last possible day to commence this proceeding, failed to request a TRO, failed to pursue an injunction with any urgency, waited until the last possible day to take an appeal, spent nine months perfecting the appeal, and failed to seek injunctive relief from this Court until approximately one year after the entry of the judgment, in a transparent attempt to avoid dismissal of this appeal. As a result, the plant "was fully constructed and has been operational for almost two years[, and] [t]hus, the petitioners have failed to preserve their rights pending judicial review" (*Wallkill Cemetery Assn., Inc.*, 73 AD3d at 1190).

Furthermore, it is undisputed that Greenidge did not undertake the project in bad faith. Indeed, Greenidge performed no work until "review pursuant to SEQRA was completed and all necessary approvals and permits were issued" (*id.* at 1191).

Petitioners do not dispute that Greenidge spent at least $12 million on construction of the plant. They contend, however, that some of the most expensive equipment has yet to be installed at a cost of approximately $44 million. Their estimate is based upon facts in a completely unrelated case involving the installation of purportedly similar equipment in New York County (*Matter of Sierra Club v Martens*, 53 Misc 3d 1204[A], 2016 NY Slip Op 51391[U] [Sup Ct, NY County 2016], *affd* 156 AD3d 454 [1st Dept 2017]). The assertion that the equipment to be installed in this case is approximate in cost to the equipment installed in that case is based upon sheer speculation. Regardless of the cost of any equipment that has yet to be installed, the construction long ago progressed to the stage where production of electricity using natural gas could proceed. Thus, we conclude that "construction of [the plant] is well under way, at considerable cost to [Greenidge]" (*Dowd*, 54 AD3d at 340).

Petitioners further contend that they are not requesting that Greenidge undo any of the completed construction. Petitioners thus assume that the relief they ultimately seek, i.e., the preparation of a full environmental impact statement, would not require significant, costly alterations to the construction that has already occurred. We see no basis for that assumption. Greenidge undertook the construction project with all the necessary permits based upon the conclusions and requirements of the existing SEQRA review. Greenidge substantially completed that construction, and we therefore conclude that petitioners' challenge to the SEQRA review became moot (*see*

generally Matter of Riverkeeper, Inc. v Johnson, 52 AD3d 1072, 1073-1074 [3d Dept 2008], *lv denied* 11 NY3d 716 [2009]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1129

KA 16-02112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY LEE BROWN, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (W. Patrick Falvey, A.J.), rendered February 18, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree under count five of the indictment and as modified the judgment is affirmed and a new trial is granted on that count.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [7]) and promoting prison contraband in the first degree (§ 205.25 [2]). The charges relate to an altercation that occurred while defendant was incarcerated, during which he allegedly assaulted a correction officer (subject correction officer) who was, together with other correction officers, attempting to prevent defendant from harming himself. With respect to the assault count, the People alleged that defendant stabbed the subject correction officer in the arm with a state-issued pen and, with respect to the promoting prison contraband count, they alleged that he was in possession of a "hand crafted cutting instrument."

We agree with defendant that County Court erred in refusing to charge the jury on the defense of justification with respect to the assault count. In determining whether a justification instruction is required, the court must view the evidence in the light most favorable to defendant (*see People v McManus*, 67 NY2d 541, 549 [1986]; *People v Gentile*, 23 AD3d 1075, 1075 [4th Dept 2005], *lv denied* 6 NY3d 813 [2006]) and, "if on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified, the failure to charge the defense constitutes reversible error" (*People v Padgett*, 60 NY2d 142, 145 [1983]; *see McManus*, 67 NY2d at 549; *People*

v Masten, 203 AD2d 956, 956 [4th Dept 1994]).

A defendant is justified in "us[ing] physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person" (Penal Law § 35.15 [1]). When physical force is used on a law enforcement agent, a justification charge is warranted "[w]here the evidence adduced at the trial permits the inference that the defendant was the victim of an unprovoked police assault or of the use of excessive physical force" (*People v Sanza*, 37 AD2d 632, 632 [2d Dept 1971]; *see People v Ruiz*, 96 AD2d 845, 845-846 [2d Dept 1983]).

Here, defendant testified at trial that the altercation was an unprovoked attack by a number of correction officers in retaliation for earlier grievances he had lodged against prison staff. Defendant testified that he felt "trapped" by the attack and started biting another correction officer in self-defense. Correction officers who witnessed the altercation testified that the two officers involved in the altercation were engaged in a prolonged "struggle" with defendant, during which the three men "wrestl[ed] pretty hard." Although defendant denied causing the injuries of the subject correction officer, that officer testified that defendant did cause his injuries.

Contrary to the People's contention, defendant was entitled to a justification charge, even though at trial he denied assaulting the subject correction officer, and argued that the People failed to prove that he possessed the pen used to injure the subject correction officer. "[A] defendant's entitlement to a charge on a claimed defense is not defeated solely by reason of its inconsistency with some other defense raised or even with the defendant's outright denial that he was involved in the crime" (*People v Butts*, 72 NY2d 746, 748 [1988]). Rather, "[a] jury may believe portions of both the defense and prosecution evidence . . . and still find . . . that defendant acted justifiably" (*People v Steele*, 26 NY2d 526, 529 [1970], citing *People v Asan*, 22 NY2d 526, 530 [1968]; *see People v Zona*, 14 NY3d 488, 493 [2010]). Here, viewing the evidence in the light most favorable to defendant, there was a "reasonable view of the evidence . . . that, if believed, would have supported a finding that [defendant's] actions were justified" (*Masten*, 203 AD2d at 956). We therefore conclude that the court should have charged the jury on the defense of justification with respect to the assault count. Because we reject defendant's further contentions that the conviction of assault in the second degree is not supported by legally sufficient evidence and that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), defendant is entitled only to a new trial on that count, rather than dismissal thereof (*see generally* CPL 470.20 [5]). We therefore modify the judgment accordingly.

Defendant's contention that the conviction of promoting prison contraband in the first degree is not supported by legally sufficient evidence is unpreserved for our review (*see generally People v Gray*,

86 NY2d 10, 19 [1995]). We also reject his contention that the verdict with respect to that crime is against the weight of the evidence. The People presented testimony from several correction officers establishing that a translucent plastic ring and a can lid with tape and gauze attached to it were recovered from defendant's cell, defendant was making a slashing motion at his wrist prior to the officers entering the cell, and he threw something to the ground as officers entered the cell. Viewing the evidence in light of the elements of promoting prison contraband in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and according great deference to the factfinder's resolution of credibility issues (*see People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]), we conclude that the verdict on that count is supported by the weight of the credible evidence.

We further reject defendant's contention that he was denied effective assistance of counsel. The record shows that defense counsel generally provided meaningful representation by examining and cross-examining witnesses, giving a coherent opening statement and summation, moving for a mistrial, and presenting a reasonable trial strategy (*see generally People v Baldi*, 54 NY2d 137, 151 [1981]). Contrary to defendant's claim, counsel sought and received a *Sandoval* ruling. Additionally, to the extent that defendant contends that counsel was ineffective for failing to challenge a prospective juror, that contention lacks merit inasmuch as defendant "failed to show the absence of a strategic explanation for defense counsel's failure to challenge th[at] prospective juror[]" (*People v Irvin*, 111 AD3d 1294, 1296 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014], *reconsideration denied* 26 NY3d 930 [2015] [internal quotation marks omitted]; *see also People v Barboni*, 21 NY3d 393, 405-407 [2013]). To the extent that defendant contends that defense counsel was ineffective for failing to investigate potential impeachment evidence, that contention also lacks merit (*see People v Watkins*, 77 AD3d 1403, 1404-1405 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]; *see generally People v Garcia*, 62 AD3d 507, 508 [1st Dept 2009], *lv denied* 13 NY3d 835 [2009]).

Finally, defendant did not preserve for our review his further contentions that he was denied due process and a fair trial by the court's failure to conduct an inquiry or issue a curative instruction with respect to defendant's legs being shackled at trial and to issue a curative instruction regarding his appearance in a prison uniform (*see People v German*, 145 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *People v Jones*, 111 AD3d 1148, 1148 [3d Dept 2013], *lv denied* 23 NY3d 1063 [2014], *reconsideration denied* 24 NY3d 1044 [2014]; *see generally* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1136

CA 18-00566

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

CARL WEISS AND ANNE WEISS,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

ZELLAR HOMES, LTD., DAVID ZELLAR, MODERN HOME MECHANICS, INC., DEFENDANTS-RESPONDENTS,
PROBUILD COMPANY LLC, DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACASE (MICHAEL J. BALESTRA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

THE LAW FIRM OF ELIAS C. SCHWARTZ, PLLC, GREAT NECK (MICHELLE ENGLANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

CURTIN LAW FIRM, P.C., CAZENOVIA (PAUL J. CURTIN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ZELLAR HOMES, LTD. AND DAVID ZELLAR.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 6, 2018. The order, among other things, denied the motion of plaintiffs for partial summary judgment and granted the "third party cross motion[s]" of defendants Zellar Homes, LTD. and David Zellar.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion and dismissing the second counterclaim of defendants Zellar Homes, LTD. and David Zellar, denying the "third party cross motion[s]" of defendants Zellar Homes, LTD. and David Zellar, and vacating the first, fourth and fifth ordering paragraphs, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiffs contracted with defendants Zellar Homes, LTD. and David Zellar (collectively, Zellar defendants) to construct a residence in Skaneateles. Plaintiffs halted the project after construction began due to alleged defects in the work and thereafter commenced this action against Zellar defendants and numerous subcontractors, including defendants ProBuild Company LLC (ProBuild) and Modern Home Mechanics, Inc. (MHM), seeking damages for, among other things, diversion of trust funds in violation of Lien Law article 3-A and breach of contract. Plaintiffs moved for partial summary judgment on liability on their diversion of trust funds cause of action and dismissing Zellar defendants' counterclaim for breach of

contract, and for an order determining that the contract was unenforceable and that Zellar defendants are limited to seeking recovery under quantum meruit. ProBuild moved and MHM cross-moved for partial summary judgment on certain cross claims against Zellar defendants and, in papers submitted in opposition to those motions, Zellar defendants filed "third party cross motion[s]" seeking an order directing plaintiffs, as owner trustees under Lien Law article 3-A, to release trust funds to ProBuild and MHM in the amounts currently due and owing to them. Plaintiffs appeal and ProBuild, in effect, cross-appeals from an order that, among other things, granted the cross motions of Zellar defendants and directed plaintiffs to deposit sufficient funds into Zellar defendants' purported trust account to pay the claims of all the unpaid subcontractors, and denied as moot the motions of plaintiff and ProBuild and the cross motion of MHM.

We agree with plaintiffs on their appeal that Supreme Court erred in denying those parts of their motion seeking partial summary judgment dismissing Zellar defendants' counterclaim for breach of contract and an order determining that the contract was unenforceable, and that Zellar defendants are limited to seeking recovery under quantum meruit. We therefore modify the order accordingly. In support of their motion, plaintiffs established that the contract at issue failed to comply with General Business Law § 771 inasmuch as it did not "contain the following notice to the owner in clear and conspicuous bold face type: 'Any contractor, subcontractor, or materialman who provides home improvement goods or services pursuant to your home improvement contract and who is not paid may have a valid legal claim against your property known as a mechanic's lien' " (§ 771 [1] [d]). In opposition, Zellar defendants failed to raise a triable issue of fact whether the contract complied with that section (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and, contrary to their contention, the failure "to enter into a signed written home improvement contract in conformity with General Business Law § 771 bars recovery based upon breach of contract" (*Frank v Feiss*, 266 AD2d 825, 826 [4th Dept 1999]). Nevertheless, although "the failure to strictly comply with the statute bars recovery under an oral or insufficiently detailed written home improvement contract, such failure does not preclude recovery for completed work under principles of quantum meruit" (*Harter v Krause*, 250 AD2d 984, 986-987 [3d Dept 1998]; *see Frank*, 266 AD2d at 826).

We reject Zellar defendants' contention, advanced as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that plaintiffs' motion with respect to the breach of contract counterclaim was premature because further discovery was necessary. In opposing a summary judgment motion as premature pursuant to CPLR 3212 (f), "the opposing party must make an evidentiary showing supporting [the conclusion that facts essential to justify opposition may exist but cannot then be stated, and] mere speculation or conjecture [is] insufficient" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014] [internal quotation marks omitted]). The opposing party must demonstrate that "the discovery sought would

produce evidence sufficient to defeat the motion . . . , and that facts essential to oppose the motion were in [the movant's] exclusive knowledge and possession and could be obtained by discovery" (*id*. [internal quotation marks omitted]). Zellar defendants failed to make the requisite showing here.

We also agree with plaintiffs that the court erred in denying that part of their motion seeking partial summary judgment on liability on their cause of action alleging diversion of trust funds in violation of Lien Law article 3-A, and we therefore further modify the order accordingly. Plaintiffs met their initial burden on that part of the motion by establishing that Zellar defendants possessed trust funds within the meaning of the Lien Law and failed to keep the records required by that statute. Lien Law § 75 (4) provides that the "[f]ailure of the trustee to keep the books or records required by th[at] section shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him [or her] . . . for purposes other than a purpose of the trust as specified in section seventy-one of this chapter" (*see Teves v Greenspun*, 159 AD3d 1105, 1106-1107 [3d Dept 2018]; *Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp*., 130 AD3d 1409, 1411 [3d Dept 2015]). The evidence submitted by Zellar defendants in opposition to the motion failed to raise a triable issue of fact, and indeed supported the conclusion that they neglected to comply with the requirements of Lien Law § 75 (*see generally Matter of Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 1155-1156 [3d Dept 2011]).

Additionally, we agree with plaintiffs that the court erred in granting Zellar defendants' purported cross motions seeking an order directing plaintiffs to release trust funds to ProBuild and MHM. Assuming, arguendo, that Zellar defendants submitted a proper cross motion seeking that relief from plaintiffs (*cf. Mango v Long Is. Jewish-Hillside Med. Ctr*., 123 AD2d 843, 844 [2d Dept 1986]), we conclude that they did not rely upon any law that would permit such relief and did not state which, if any, cause of action, cross claim or counterclaim was the basis for the relief sought, and "[w]e note that the court failed to specify . . . the cause or causes of action that served as the basis for granting the [cross] motion[s]" (*Abbott Bros. II Steak Out, Inc. v Tsoulis*, 162 AD3d 1472, 1474 [4th Dept 2018]). Moreover, Zellar defendants failed to submit evidence in admissible form demonstrating that there are no material issues of fact regarding the propriety of the requested relief and thus failed to establish their entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). Furthermore, by directing that plaintiffs calculate the claims of *all* possible unpaid subcontractors and deposit funds to pay all of them into Zellar defendants' trust account, the court erred in awarding relief beyond that requested in those purported cross motions (*see generally Integrated Voice & Data Sys., Inc. v Groh*, 147 AD3d 1302, 1304 [4th Dept 2017]). We therefore further modify the order by denying Zellar defendants' cross motions and vacating the first ordering paragraph.

On its cross appeal, ProBuild contends that the court erred in denying its motion for partial summary judgment on its cross claims against Zellar defendants for personal guarantee and breach of contract. In light of its determination with respect to Zellar defendants' cross motions, the court denied that motion on the ground that it was moot. In view of our determination, the motion of ProBuild is no longer moot, and therefore we further modify the order by vacating the fifth ordering paragraph, and we remit the matter to Supreme Court for a determination of that motion on the merits (*see Lynch v Waters*, 82 AD3d 1719, 1723-1724 [4th Dept 2011]). We note that the court also deemed moot the cross motion for partial summary judgment of MHM, a nonappealing party, for the same reason it deemed ProBuild's motion to be moot. Although we have the power to search the record and determine MHM's cross motion despite its failure to appeal from the order (*see* CPLR 3212 [b]; *see e.g. Tannenbaum v Republic Ins. Co.*, 249 AD2d 460, 461-462 [2d Dept 1998], *lv denied* 92 NY2d 810 [1998]; *see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]), we decline to do so under the circumstances presented here. Nevertheless, because that cross motion is no longer moot, we further modify the order by vacating the fourth ordering paragraph, and we also direct Supreme Court to determine that cross motion on the merits upon remittal (*see Johnson v Yarussi Const., Inc.*, 74 AD3d 1772, 1773 [4th Dept 2010]; *Chang Han Kim v Clymer Cent. Sch.*, 72 AD3d 1547, 1548 [4th Dept 2010]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1138

CA 17-01840

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

DAWN CALHOUN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, HERKIMER COUNTY OFFICE OF EMPLOYMENT AND TRAINING ADMINISTRATION, KARIN ZIPKO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, JEFF WHITTEMORE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, STEVEN BILLINGS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

JOHNSON & LAWS, LLC, CLIFTON PARK (GREGG T. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered May 18, 2017. The order denied plaintiff's motion for a new trial.

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

Memorandum: Plaintiff was employed on a contract basis in an administrative office of defendant County of Herkimer (County) under the supervision of defendant Steven Billings. Billings's wife, a special education teacher, had been assigned to work with plaintiff's son, who had been classified as learning disabled. Over the course of several months, plaintiff had expressed dissatisfaction with the special education services provided to her son by the school district generally and Billings's wife in particular. After plaintiff was informed by Billings that her employment contract would not be renewed due to impending federal funding cuts and she was told that she was not eligible for reinstatement in a different position, she commenced this action alleging, inter alia, that defendants subjected her to unlawful retaliation based upon her advocacy on behalf of her son. Plaintiff appeals in appeal No. 1 from an order denying her posttrial motion pursuant to CPLR 4404 (a) seeking to set aside the jury verdict in favor of defendants and a new trial. Plaintiff appeals in appeal No. 2 from an order granting the motion of defendant Jeff Whittemore,

the personnel director for the County, seeking attorneys' fees as a prevailing party.

Addressing first the order in appeal No. 1, plaintiff contends that Supreme Court improperly denied her motion as defective for failure to submit the trial transcript in support of the motion. We are unable to determine on this record whether the court denied the motion on that ground inasmuch as the court did not set forth its reasoning in writing and, although oral argument was conducted on the motion after which the court purportedly rendered a decision, there is no transcript of those proceedings in the record (*see generally OneWest Bank, FSB v Spencer*, 145 AD3d 1488, 1488 [4th Dept 2016]; *McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]; *Corina v Boys & Girls Club of Schenectady, Inc.*, 82 AD3d 1477, 1477 n [3d Dept 2011]). In any event, inasmuch as "[t]he case did not involve complex legal or factual issues, the trial was brief and the same judge that presided over the trial determined [the] motion," we conclude that the absence of a trial transcript did not preclude meaningful review of the motion and, thus, the motion was not defective (*Johnstone v First Class Mgt. of N.Y., LLC*, 138 AD3d 1222, 1223 [3d Dept 2016]; *see McPherson v City of New York*, 122 AD3d 809, 810 [2d Dept 2014]; *cf. Frank v City of New York*, 161 AD3d 713, 713 [1st Dept 2018]).

Plaintiff asserts that, pursuant to CPLR 4404 (a), she is entitled to a new trial in the interest of justice on several grounds. Contrary to plaintiff's contention, she is not entitled to a new trial on the ground that defendants' counsel improperly referenced certain prejudicial information during cross-examination of her. We conclude that the curative instruction given by the court immediately after the reference was "sufficient to neutralize the prejudicial effect of the error" (*Dennis v Capital Dist. Transp. Auth.*, 274 AD2d 802, 803 [3d Dept 2000]; *see Country Park Child Care, Inc. v Smartdesign Architecture PLLC*, 129 AD3d 1636, 1637 [4th Dept 2015]; *Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]).

We reject plaintiff's contention that a new trial is warranted because the court erred in ruling that Billings's wife could not be questioned about the substance of her conversations with Billings. Confidential communications between spouses are generally privileged inasmuch as one spouse "shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage" (CPLR 4502 [b]). "The [spousal] privilege falls . . . when the substance of a communication, and not the mere fact of its occurrence, is revealed to third parties" (*Matter of Vanderbilt [Rosner—Hickey]*, 57 NY2d 66, 74 [1982]). Here, contrary to plaintiff's contention, the spousal privilege was not waived because the testimony and affidavits of Billings's wife did not reveal the substance of any confidential communication to third parties (*see id.*; *cf. People v Weeks*, 15 AD3d 845, 846 [4th Dept 2005], *lv denied* 4 NY3d 892 [2005]).

Plaintiff further contends that she is entitled to a new trial because defendants' production of several of Billings's emails and

related documents about federal funding on the first day of trial constituted an unfair surprise and was prejudicial. We reject that contention. Inasmuch as plaintiff was aware from the moment of her termination and throughout the lengthy pretrial litigation that defendants' position was that her contract was not renewed due to impending federal funding cuts, the record demonstrates that plaintiff anticipated that defendants' defense to her action would be that such reduction in budget, not retaliation, was the basis for the termination. She therefore cannot claim surprise that defendants sought to introduce documentary evidence supporting that defense (*see Ruzycki v Baker*, 9 AD3d 854, 855 [4th Dept 2004]; *Stafford v Molinoff*, 228 AD2d 662, 663 [2d Dept 1996]; *cf. Hannon v Dunkirk Motor Inn*, 167 AD2d 834, 834-835 [4th Dept 1990]). In addition, although the documents were not produced until the first day of trial, they were not received in evidence until Billings testified on behalf of defendants several days later. Thus, the record does not establish that plaintiff was prejudiced by defendants' delayed disclosure inasmuch as plaintiff's attorney had several days to review the documents and sufficient notice to prepare for cross-examination of Billings (*see Ruzycki*, 9 AD3d at 855).

Plaintiff also contends that she is entitled to a new trial because the court erred in failing to provide the expansive jury charge initially proposed by plaintiff's attorney regarding the County's corporate knowledge of plaintiff's protected activity. Plaintiff failed to preserve that contention for our review inasmuch as her attorney, following a charge conference, acquiesced to the court providing a single sentence from the proposed charge, and plaintiff's attorney did not object to the charge after the court instructed the jury (*see Lucas v Weiner*, 99 AD3d 1202, 1202 [4th Dept 2012]).

By failing to timely object, plaintiff also failed to preserve for our review her contention that the number of jurors who agreed to the verdict as reported on the verdict sheet was inconsistent with the number of jurors who agreed to the verdict when polled (*see Cornell Univ. v Gordon*, 76 AD3d 452, 453 [1st Dept 2010]; *see also* CPLR 4113 [a]). Additionally, because plaintiff appealed in appeal No. 1 from only the order denying her posttrial motion pursuant to CPLR 4404, and she did not raise on that motion her further contention that the jury rendered an inconsistent verdict, that contention is not properly before us on this appeal (*see Topczij v Clark*, 28 AD3d 1139, 1140 [4th Dept 2006]; *see also Meldrim v Hill*, 260 AD2d 836, 837 n 1 [3d Dept 1999]).

Additionally, we conclude that plaintiff failed to preserve for our review her contention that the verdict is against the weight of the evidence inasmuch as she did not raise that issue in her posttrial motion (*see Nitzke v Loveland*, 188 AD2d 1058, 1059 [4th Dept 1992]). In any event, the evidence did not so preponderate in favor of plaintiff that the verdict "could not have been reached on any fair interpretation of the evidence" (*Harris v Stoelzel*, 96 AD3d 1459, 1460 [4th Dept 2012] [internal quotation marks omitted]).

In appeal No. 2, plaintiff contends that the court erred in granting Whittemore's motion for attorneys' fees. We agree. The court granted the motion on the basis of 42 USC § 1988, which authorizes the award of attorneys' fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation" (*Christiansburg Garment Co. v EEOC*, 434 US 412, 421 [1978]; *see Fox v Vice*, 563 US 826, 833 [2011]). Nonetheless, it remains " 'very rare [for] victorious defendants in civil rights cases [to] recover attorneys' fees' " (*Shields v Carbone*, 99 AD3d 1055, 1057 [3d Dept 2012], quoting *Sista v CDC Ixis N. Am., Inc.*, 445 F3d 161, 178 [2d Cir 2006]; *see Nicholas v Harder*, 637 Fed Appx 51, 52 [2d Cir 2016]).

Here, in determining that plaintiff's claim against Whittemore was frivolous, the court relied on plaintiff's testimony during her deposition. During her deposition, however, plaintiff specifically stated that the factual basis for her claim against Whittemore was that he was the personnel director and his conduct caused injury to her because he allowed someone else to be placed in the position to which she sought to be reinstated. Contrary to the court's determination, any inability of plaintiff to provide further elaboration during her deposition, which was taken early in the litigation shortly after commencement of the action, did not establish that her claim against Whittemore was frivolous. Moreover, a claim may not "be deemed groundless where[, as here,] the plaintiff has made a sufficient evidentiary showing to forestall summary judgment and has presented sufficient evidence at trial to prevent the entry of judgment against him [or her] as a matter of law" (*LeBlanc-Sternberg v Fletcher*, 143 F3d 765, 771 [2d Cir 1998]; *see Nicholas*, 637 Fed Appx at 52). Although the civil rights allegations against Whittemore may have been weak, we cannot deem plaintiff's claim "frivolous, unreasonable, or without foundation" (*Christiansburg Garment Co.*, 434 US at 421; *see Shields*, 99 AD3d at 1057). We therefore reverse the order in appeal No. 2 and deny the motion.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1139

CA 17-01841

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

DAWN CALHOUN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, ET AL., DEFENDANTS,
AND JEFF WHITTEMORE, IN HIS INDIVIDUAL AND
OFFICIAL CAPACITY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

JOHNSON & LAWS, LLC, CLIFTON PARK (GREGG T. JOHNSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered July 18, 2017. The order granted the motion of defendant Jeff Whittemore for attorneys' fees.

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

Same memorandum as in *Calhoun v County of Herkimer* ([appeal No. 1] — AD3d — [Feb. 8, 2019] [4th Dept 2019]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1187

KA 16-01505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR FEDDIMAN, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered June 27, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). We reject defendant's contention that his waiver of the right to appeal was not knowing, voluntary, and intelligent (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). County Court "did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]), and we conclude that "[t]he 'plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Williams*, 132 AD3d 1291, 1291 [4th Dept 2015], *lv denied* 26 NY3d 1151 [2016]). Defendant's contention that his plea was not knowingly, voluntarily, or intelligently entered because he did not specify when or where the crime occurred is actually a challenge to the factual sufficiency of the plea allocution (*see People v Loper*, 118 AD3d 1394, 1394-1395 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]) and thus is encompassed by the valid waiver of the right to appeal (*see People v Schmidli*, 118 AD3d 1491, 1491 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014]). The valid waiver of the right to appeal also forecloses defendant's challenge to the severity of his sentence (*see generally Lopez*, 6 NY3d

at 255).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1192

KA 16-02291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN S. HINES, ALSO KNOWN AS DANCE, JOHN,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered September 26, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We reject defendant's contention that his waiver of the right to appeal was not knowing, voluntary, and intelligent (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court "did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]), and we conclude that "the court engaged defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Massey*, 149 AD3d 1524, 1525 [4th Dept 2017], *amended on rearg on other grounds* 151 AD3d 1969 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017] [internal quotation marks omitted]). Defendant's contention that his plea was not knowingly, voluntarily, and intelligently entered because he did not recite the elements of the crimes and replied only "yes" or "no" to many of the court's questions is actually a challenge to the factual sufficiency of the plea allocution, which is foreclosed by defendant's valid waiver of the right to appeal (*see People v Livermore*, 161 AD3d 1569,

1569 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]; *Massey*, 149 AD3d at 1525). The valid waiver of the right to appeal also forecloses defendant's challenge to the severity of his sentence (*see generally Lopez*, 6 NY3d at 255).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1224

CA 18-00066

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF
THE REAL PROPERTY TAX LAW BY THE COUNTY OF WAYNE
RELATING TO THE 2015 TOWN AND COUNTY TAX.
---------- MEMORANDUM AND ORDER
COUNTY OF WAYNE, PETITIONER-APPELLANT;

PAUL J. SCHENK, JR., PAUL J. SCHENK, SR., AND
SHIREEN SCHENK, RESPONDENTS-RESPONDENTS.

DANIEL C. CONNORS, COUNTY ATTORNEY, LYONS (ERIN M. HAMMOND OF COUNSEL), FOR PETITIONER-APPELLANT.

FINUCANE & HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered August 28, 2017 in a proceeding pursuant to RPTL article 11. The order conditionally granted respondents' motion to vacate a default judgment of foreclosure.

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

Memorandum: Respondent Paul J. Schenk, Jr. (Schenk) owned residential real property upon which his parents, respondents Paul J. Schenk, Sr. and Shireen Schenk (hereafter, respondent parents), held a mortgage lien. Petitioner commenced this in rem tax foreclosure proceeding pursuant to RPTL article 11 seeking to foreclose delinquent tax liens on the property. Both Schenk and the respondent parents expressly acknowledged receiving proper notice of the commencement of the foreclosure proceeding (*see* RPTL 1125). Schenk subsequently entered into an installment agreement with petitioner as authorized by RPTL 1184 and corresponding local law, but he thereafter failed to make any monthly installment payments and was thus in default of the agreement (*see* RPTL 1184 [8] [a] [i]), thereby rendering the property ineligible for withdrawal from the foreclosure proceeding (*see* RPTL 1138 [1] [e]). Petitioner subsequently sought and obtained a default judgment of foreclosure that was entered May 4, 2017 (*see* RPTL 1136 [3]). On June 13, 2017, respondents moved for, inter alia, vacatur of the judgment. Petitioner appeals from an order that granted respondents' motion by, inter alia, ordering vacatur of the judgment and cancellation of the deed conveying the property to petitioner upon

proof of payment of the taxes and penalties due on the property. We reverse.

A motion to reopen a default judgment of tax foreclosure "may not be brought later than one month after entry of the judgment" (RPTL 1131; *see Matter of County of Ontario [Helser]*, 72 AD3d 1636, 1637 [4th Dept 2010]). Here, we agree with petitioner that there is no basis to conclude that respondents were not required to bring their motion within the applicable time period. Inasmuch as respondents acknowledged receiving proper notice of the foreclosure proceeding, the record establishes that petitioner fulfilled its obligation to afford respondents due process, which "is satisfied by notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017] [internal quotation marks omitted]). Contrary to respondents' contention, "due process does not require service of notice of entry of a default judgment on a tax debtor, only . . . notice of the pendency of the action and an opportunity to respond . . . [and not] additional notices as each step in the foreclosure proceeding [is] completed" (*Matter of County of Clinton [Bouchard]*, 29 AD3d 79, 82 [3d Dept 2006] [internal quotation marks omitted]; *see Weigner v City of New York*, 852 F2d 646, 652 [2d Cir 1988], *cert denied* 488 US 1005 [1989]). In addition, contrary to Supreme Court's determination, even in cases in which we have approved vacatur of a default judgment of foreclosure on the ground that courts have inherent discretionary power to vacate judgments for sufficient reason and in the interests of substantial justice, the exercise of such discretion was available to the courts upon consideration of a timely motion (*see Matter of County of Genesee [Spicola]*, 125 AD3d 1477, 1477 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]; *Matter of County of Genesee [Butlak]*, 124 AD3d 1330, 1330 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]; *Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1755-1756 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]; *Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, 1065 [4th Dept 2009]). Here, inasmuch as respondents brought their motion more than one month after entry of the default judgment of foreclosure, the motion was untimely (*see* RPTL 1131), thereby requiring denial of the motion on that ground (*see Matter of County of Otsego [Force]*, 128 AD3d 1165, 1166 [3d Dept 2015]; *Matter of County of Sullivan [Fay]*, 79 AD3d 1409, 1410 [3d Dept 2010], *lv dismissed* 17 NY3d 787 [2011], *rearg denied* 17 NY3d 846 [2011]; *Helser*, 72 AD3d at 1637; *Bouchard*, 29 AD3d at 82).

We further agree with petitioner that the court erred in granting respondents' implicit request for an extension of time to bring the motion (*see* CPLR 2004). The Court of Appeals has emphasized that, " '[a]s a general rule, there should be no resort to the provisions of the CPLR in instances where the [RPTL] expressly covers the point in issue' " (*Matter of Westchester Joint Water Works v Assessor of the City of Rye*, 27 NY3d 566, 575 [2016], quoting *W.T. Grant Co. v Srogi*, 52 NY2d 496, 514 [1981]; *see* CPLR 101). We conclude that RPTL article 11 comprehensively addresses the situation where a default judgment of

foreclosure is properly obtained and the defaulting property owner seeks to reopen the default and, therefore, such property owner "may not reach outside of the RPTL to [reopen] such a proceeding" (*Westchester Joint Water Works*, 27 NY3d at 574). More particularly, RPTL 1131 expressly covers the point in issue here inasmuch as it provides, in unambiguous and prohibitory language, that "[a] motion to reopen any such default *may not* be brought later than one month after entry of the judgment" (emphasis added). To countenance resort to CPLR 2004 under these circumstances would undermine the statutory scheme established by the legislature and erode the finality of foreclosure proceedings even after a defaulting property owner has been afforded due process (*see generally Matter of Commercial Structures, Inc. v City of Syracuse*, 107 AD2d 1054, 1054-1055 [4th Dept 1985], *lv dismissed* 64 NY2d 609 [1985]). We thus conclude that the court had no authority under these circumstances to entertain respondents' untimely motion.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1232

CA 18-00380

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

WILLIS WOOD, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ARTIFACT PROPERTIES, LLC, AND DAVID PERKINS,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DAVID PERKINS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.) entered July 26, 2017. The order, among other things, denied in part the motion of defendant Artifact Properties, LLC for summary judgment, denied in part the motion of defendant David Perkins for summary judgment and denied in part the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion seeking partial summary judgment with respect to liability on the Labor Law § 240 (1) cause of action against defendant Artifact Properties, LLC and granting the motion of defendant Artifact Properties, LLC in its entirety and dismissing the amended complaint and cross claim against it, and as modified the order is affirmed without costs.

Memorandum: Defendant Artifact Properties, LLC (Artifact) owns an 85-acre residential property in the Town of Vienna, Oneida County. Plaintiff was hired to demolish the roof of an outbuilding on the property, and he was injured in the course of that work. Plaintiff thereafter commenced this action against Artifact and its alleged statutory agent, defendant David Perkins. In his amended complaint, plaintiff asserted causes of action against both defendants for common-law negligence and the violation of Labor Law §§ 240 (1) and 241 (6). Defendants cross-claimed against each other for indemnification and/or contribution.

Artifact thereafter moved for, inter alia, summary judgment dismissing both plaintiff's amended complaint against it and Perkins' cross claim. Perkins moved for summary judgment dismissing the amended complaint against him. Plaintiff moved for, inter alia, partial summary judgment as to liability on each cause of action against each defendant.

Supreme Court granted defendants' motions in part and dismissed plaintiff's causes of action under Labor Law § 241 (6); in all other respects, defendants' motions were denied. The court also granted that part of plaintiff's motion seeking partial summary judgment as to liability on his section 240 (1) cause of action against each defendant, contingent upon the jury's finding that the one- or two-family home exemption did not apply; in all other respects, plaintiff's motion was denied. Defendants appeal and plaintiff cross-appeals from that order.

Artifact's moving papers established, as a matter of law, its entitlement to the one- or two-family home exemption from liability under Labor Law § 240 (1) (*see Stejskal v Simons*, 3 NY3d 628, 629 [2004]; *Khela v Neiger*, 85 NY2d 333, 338 [1995]; *Fawcett v Stearns*, 142 AD3d 1377, 1377-1379 [4th Dept 2016]). In opposition, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's contention, Artifact's classification of the property as commercial in certain tax filings does not estop it from relying upon the exemption in this action (*see Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal*, 142 AD3d 433, 435 [1st Dept 2016], *affd* 31 NY3d 679 [2018]; *cf. Amalfi, Inc. v 428 Co., Inc.*, 153 AD3d 1610, 1610-1611 [4th Dept 2017]; *see generally Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). The Internal Revenue Code's definition of a residential property is considerably narrower than the scope of the one- or two-family home exemption to liability under section 240 (1) (*compare* 26 USC § 280A, *with Fawcett*, 142 AD3d at 1377-1379 *and Yerdon v Lyon*, 259 AD2d 864, 864-865 [3d Dept 1999], *lv denied* 94 NY2d 754 [1999]), and, as such, Artifact's tax declarations are not " 'logically incompatible' " with its current reliance upon that exemption (*Brookford*, 142 AD3d at 435; *see generally Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008]). The court thus erred in granting plaintiff partial summary judgment as to liability on his cause of action against Artifact under section 240 (1), and it further erred in denying Artifact summary judgment dismissing that cause of action. We therefore modify the order accordingly. Artifact's alternative grounds for dismissing the section 240 (1) cause of action against it are academic.

Artifact's moving papers also established its entitlement to judgment as a matter of law dismissing plaintiff's common-law negligence cause of action against it (*see Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]). In opposition, plaintiff failed to raise a triable issue of fact. Thus, while the court properly refused to award plaintiff summary judgment as to liability on that cause of action, the court erred in refusing to dismiss that cause of action on Artifact's motion. We therefore further modify the order accordingly.

We likewise agree with Artifact that it is entitled to summary judgment dismissing Perkins' cross claim (*see Littleton v Amberland Owners, Inc.*, 94 AD3d 953, 953-954 [2d Dept 2012]), and we further modify the order accordingly. Finally, we have considered and rejected the various challenges to the court's determinations regarding plaintiff's causes of action against Perkins and his Labor Law § 241 (6) cause of action against Artifact.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1233

CA 18-00381

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

WILLIS WOOD, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

ARTIFACT PROPERTIES, LLC, AND DAVID PERKINS,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DAVID PERKINS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.) entered July 26, 2017. The order, among other things, conditionally granted that part of plaintiff's motion seeking partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that said appeals and cross appeal are unanimously dismissed without costs (*see Foster v Kanous*, 24 AD3d 1205, 1205 [4th Dept 2005]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1245

TP 18-00664

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

IN THE MATTER OF B.P. GLOBAL FUNDS, INC., DOING BUSINESS AS THE NEW OZONE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY, RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PETITIONER.

CHRISTOPHER R. RIANO, GENERAL COUNSEL, NEW YORK STATE LIQUOR AUTHORITY, NEW YORK CITY (JAIME C. GALLAGHER 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, Erie County [John F. O'Donnell, J.], entered April 16, 2018) to annul a determination of respondent. The determination, inter alia, canceled the liquor license of petitioner.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by vacating the penalty insofar as it cancelled petitioner's liquor license, and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul a determination of respondent that found petitioner in violation of various provisions of the Alcoholic Beverage Control Law and, among other penalties, cancelled petitioner's liquor license. Contrary to petitioner's contention, when reviewing this administrative determination made after a hearing required by statute or law, the standard of review applied by this Court is whether the determination is supported by substantial evidence (*cf. Matter of Pierino v Brown*, 281 AD2d 960, 960 [4th Dept 2001]; *see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). It is well settled that a "record contains substantial evidence to support an administrative determination when reasonable minds could adequately accept the conclusion or ultimate fact based on the relevant proof" (*Matter of Bounds v Village of Clifton Springs Zoning Bd. of Appeals*, 137 AD3d 1759, 1760 [4th Dept 2016] [internal quotation marks omitted]). "[O]ften there is substantial evidence on both sides of an issue

disputed before an administrative agency . . . Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018] [internal quotation marks omitted]). Thus, where there is conflicting evidence, the administrative agency has discretion to weigh the evidence and make a determination based thereon, and the courts will not reject a determination that is supported by substantial evidence (*see Bounds*, 137 AD3d at 1760).

Here, contrary to petitioner's contention, substantial evidence supports respondent's determination that petitioner's employees violated Alcoholic Beverage Control Law § 106 (15) by, inter alia, impeding respondent's investigation (*see Matter of Surf City Enters. of Syracuse, Inc. v New York State Liq. Auth.*, 96 AD3d 1458, 1459 [4th Dept 2012]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Petitioner's further contention that respondent acted irrationally in charging it with violating Alcoholic Beverage Control Law § 106 (12) based on petitioner's failure to maintain employment and payroll records "is not properly before us because petitioner[] failed to raise it at the administrative level and thus failed to exhaust [its] administrative remedies with respect to" that contention (*Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906, 908 [4th Dept 2001]).

We agree, however, with petitioner that the cancellation of its liquor license is a penalty "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Pell*, 34 NY2d at 237). Although petitioner's record indicates previous infractions, we conclude that, "[u]nder all the circumstances of this particular violation . . . the cancellation of petitioner's license was too severe a penalty" (*Matter of Corey v State Liq. Auth.*, 34 AD2d 1094, 1095 [4th Dept 1970]; *see Matter of Star Enters. v New York State Liq. Auth.*, 248 AD2d 623, 624 [2d Dept 1998]; *see generally Matter of Shore Haven Lounge v New York State Liq. Auth.*, 37 NY2d 187, 190-191 [1975]). We therefore modify the determination and grant the petition in part by vacating the penalty insofar as it cancelled petitioner's liquor license, and we remit the matter to respondent for imposition of an appropriate penalty less severe than cancellation.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1246

CA 18-00635

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF ONTARIO.

MEMORANDUM AND ORDER

COUNTY OF ONTARIO, PETITIONER-RESPONDENT;

CORI DUVALL, RESPONDENT-APPELLANT.

THE LEGAL AID SOCIETY OF ROCHESTER, ROCHESTER (ZACHARY J. PIKE OF COUNSEL), FOR RESPONDENT-APPELLANT.

JASON S. DIPONZIO, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 7, 2017 in a proceeding pursuant to RPTL article 11. The order denied respondent's motion seeking, inter alia, to vacate a default judgment of foreclosure.

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

Memorandum: In this in rem tax foreclosure proceeding pursuant to RPTL article 11, respondent property owner appeals from an order denying her motion seeking, inter alia, to vacate the judgment of foreclosure entered upon her default. As pertinent here, RPTL 1131 provides that a motion to vacate a default judgment "may not be brought later than one month after entry of the judgment." Contrary to respondent's contention, "the statute of limitations set forth in RPTL 1131 applies even where, as here, the property owner asserts that he or she was not notified of the foreclosure proceeding" (*Matter of County of Herkimer [Moore]*, 104 AD3d 1332, 1333 [4th Dept 2013]; *see Lakeside Realty LLC v County of Sullivan*, 140 AD3d 1450, 1452 [3d Dept 2016], *lv denied* 28 NY3d 905 [2016]; *Matter of County of Clinton [Greenpoint Assets, Ltd.]*, 116 AD3d 1206, 1207 [3d Dept 2014]). Because the default judgment was entered on March 7, 2017, but respondent did not seek relief until May 16, 2017, Supreme Court properly denied respondent's motion as untimely.

In addition, we reject respondent's contention that, because petitioner failed to comply with the notice requirements of RPTL 1125, the court lacked jurisdiction to issue the default judgment of foreclosure (*see generally Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017]). Even assuming,

arguendo, that respondent's contention is preserved for our review, we conclude that the affidavit of posting, service and publication signed by the Ontario County Treasurer, read in conjunction with the affidavit of the Treasurer submitted in opposition to respondent's motion, establishes that notice of the foreclosure proceeding was duly mailed to respondent by both certified and first class mail, as required by RPTL 1125 (1) (b) (i) (*cf. Maxim Dev. Group*, 151 AD3d at 1614). Although petitioner erroneously sent notice to respondent at an incorrect and nonexistent address, it also sent notice to her at the correct address, and "[t]he failure of an intended recipient to receive any such notice shall not invalidate any tax or prevent the enforcement of the same as provided by law" (RPTL 1125 [3] [b]). Finally, respondent failed to preserve her contention that the court should have vacated the default judgment in the interests of substantial justice (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1267

CAF 16-01715

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

IN THE MATTER OF FAITH B., NEVEAH B.,
ELIJAH B., GRACE B., AND JOSHUA B.

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

RANDI B., RESPONDENT,
AND JOSHUA B., SR., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILD.

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILD.

RACHEL K. MARRERO, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 22, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Joshua B., Sr., abused the oldest subject child.

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

Memorandum: Respondent father appeals from an order determining, following a fact-finding hearing, that he abused the oldest subject child. The father allegedly committed an act of sexual abuse against the child while she was staying in the psychiatric unit of Erie County Medical Center (ECMC). The child's stay in ECMC was less than 24 hours. Prior to the hearing, the father sought disclosure of the child's psychiatric records. Family Court permitted disclosure of psychiatric records pertaining to the dates of the alleged incident of abuse, but denied disclosure of any other records. ECMC provided the court with records in response to a subpoena. The court reviewed those records in camera and then provided the father's attorney with the psychiatric records pertaining to the dates in question. The father's attorney requested that the court mark the remaining psychiatric records provided by ECMC as an exhibit for appellate review. Although the court agreed to do so, that exhibit has since been lost.

The father contends that the court committed reversible error by failing to preserve the exhibit. Contrary to the assertion of petitioner and the Attorney for the Child, the father preserved his contention for our review by requesting that the court mark the exhibit for appellate review (*see generally Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018]). Nevertheless, we reject that contention because the father does not assert an "appealable issue" (*Matter of Patrick S.*, 305 AD2d 1111, 1112 [4th Dept 2003] [internal quotation marks omitted]; *see People v Kenyatta*, 116 AD2d 739, 740 [2d Dept 1986], *lv denied* 67 NY2d 945 [1986]). Indeed, "[i]t is not enough to merely allege that documentary evidence has been lost" (*Kenyatta*, 116 AD2d at 740), and, here, the father makes no contention that the court abused its discretion in refusing to disclose the exhibit (*cf. L.T. v Teva Pharms. USA, Inc.*, 71 AD3d 1400, 1401 [4th Dept 2010]).

The father's remaining contentions are not preserved for our review.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1270

CA 18-00901

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

SOUTHWESTERN INVESTORS GROUP, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JH PORTFOLIO DEBT EQUITIES, LLC, DEFENDANT,
DARREN TURCO AND JACOB ADAMO, DEFENDANTS-APPELLANTS,

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COOLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 4, 2018. The order, insofar as appealed from, denied in part the motion of defendants Darren Turco and Jacob Adamo to dismiss plaintiff's amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the amended complaint is dismissed against defendants Darren Turco and Jacob Adamo.

Memorandum: Plaintiff, a debt buying company, commenced this action alleging, inter alia, that Darren Turco and Jacob Adamo (defendants) fraudulently induced it to purchase additional debt portfolios pursuant to its agreements with a third party by misrepresenting the terms of the financing arrangement secured by defendants to facilitate the purchase of such portfolios. Defendants appeal from an order that, inter alia, denied those parts of their pre-answer motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the second and seventh causes of action sounding in fraudulent inducement. We reverse the order insofar as appealed from.

"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[] 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], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "To allege a cause of action based on fraud, plaintiff must assert 'a misrepresentation or a material omission of fact which was false and known to be false by defendant,

made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' " (*id.* at 142, quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). " 'The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the 'out-of-pocket' rule" (*Lama Holding Co.*, 88 NY2d at 421, quoting *Reno v Bull*, 226 NY 546, 553 [1919]; *see Connaughton*, 29 NY3d at 142). "Under this rule, the loss is computed by ascertaining the 'difference between the value of the bargain which . . . plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain' " (*Lama Holding Co.*, 88 NY2d at 421, quoting *Sager v Friedman*, 270 NY 472, 481 [1936]).

Here, we conclude that, even as supplemented by the affidavit of plaintiff's president (*see Sargiss v Magarelli*, 12 NY3d 527, 531 [2009]), "plaintiff's pleading is fatally deficient because [it] did not assert compensable damages resulting from defendants' alleged fraud" (*Connaughton*, 29 NY3d at 143). With respect to the purchase of the subject portfolios, plaintiff received an interest therein worth more than the amount of its alleged investment (*see Lama Holding Co.*, 88 NY2d at 422). Further, contrary to plaintiff's contention, the allegation that it lost the enhanced collections on the portfolios that defendants purportedly told it that it could receive under the terms of the financing arrangement is a "quintessential lost opportunity, which is not a recoverable out-of-pocket loss" (*Connaughton*, 29 NY3d at 143; *see Kensington Publ. Corp. v Kable News Co.*, 100 AD2d 802, 803 [1st Dept 1984]). "Damages are to be calculated to compensate plaintiff[] for what [was] lost because of the fraud, not to compensate . . . for what . . . might have [been] gained . . . [T]here can be no recovery of profits which would have been realized in the absence of fraud" (*Lama Holding Co.*, 88 NY2d at 421). Plaintiff's remaining allegations do not assert compensable damages resulting from defendants' alleged fraud (*see generally Connaughton*, 29 NY3d at 143; *Lama Holding Co.*, 88 NY2d at 422).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1327

CA 18-01020

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

NANCY BURKHART, AS ADMINISTRATOR OF THE ESTATE
OF BRIAN BURKHART, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PEOPLE, INC., ELISA SMITH, KATELYNNE COLEMAN, AMY
MAZURKIEWICZ, DEFENDANTS-RESPONDENTS,
LUCIAN VISONE, AND LAKEFRONT CONSTRUCTION, INC.,
DEFENDANTS.

CONNORS LLP, BUFFALO (JOSEPH D. MORATH, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL E. APPELBAUM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 2, 2018. The order, insofar as appealed from, granted those parts of the motion of defendants People, Inc., Elisa Smith, Katelynne Coleman and Amy Mazurkiewicz seeking partial summary judgment dismissing plaintiff's claim for punitive damages and seeking to strike certain allegations from the bill of particulars.

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

Memorandum: Plaintiff commenced this action on behalf of her brother, Brian Burkhart (decedent), a developmentally disabled individual who resided in a group home owned and operated by defendant People, Inc. (People), seeking damages for injuries sustained by decedent that were allegedly caused by, inter alia, the negligence of People and three of its employees, defendant Elisa Smith, defendant Katelynne Coleman and defendant Amy Mazurkiewicz (collectively, defendants). The complaint alleges two instances of negligence involving People and its employees. The first instance relates to the allegedly inadequate response of Smith and Mazurkiewicz to seizures suffered by decedent on January 12, 2008. The second instance relates to an incident on January 17, 2008 in which decedent, on an outing at a local movie theater under the supervision of Coleman, was allowed to wander from the theater and onto a busy nearby roadway, where he was struck by a vehicle driven by defendant Lucian Visone and owned by defendant Lakefront Construction, Inc. Decedent allegedly suffered serious injuries as a result of that accident. Decedent subsequently passed away in 2015, and there is no indication in the record that

plaintiff has sought leave to amend the complaint to include a cause of action for wrongful death.

Defendants moved for, inter alia, summary judgment dismissing plaintiff's claim for punitive damages against them. We conclude that, contrary to plaintiff's contention, Supreme Court properly granted that branch of defendants' motion. "[T]he standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013], *rearg denied* 21 NY3d 976 [2013]; *see Sample v Yokel*, 94 AD3d 1413, 1416 [4th Dept 2012]). In this case, the alleged misconduct on the part of defendants that plaintiff contends warrant punitive damages is either unrelated to the injuries sustained by decedent (*see DeLeo v County of Monroe*, 130 AD3d 1549, 1551 [4th Dept 2015]; *Hale v Saltamacchia*, 28 AD3d 715, 715 [2d Dept 2006]; *O'Connor v Kuzmicki*, 14 AD3d 498, 499 [2d Dept 2005]), or does not manifest the requisite spite, malice, improper motive, or conscious and deliberate disregard for the interests of others to justify an award of punitive damages (*see Marinaccio*, 20 NY3d at 511; *Dupree v Giugliano*, 20 NY3d 921, 924 [2012], *rearg denied* 20 NY3d 1045 [2013]).

In light of our determination, we reject plaintiff's contention that the court erred in granting, in part, that aspect of defendants' motion to strike various allegations in plaintiff's bill of particulars, inasmuch as those allegations were relevant only to her claim for punitive damages (*see Irving v Four Seasons Nursing & Rehabilitation Ctr.*, 121 AD3d 1046, 1048 [2d Dept 2014]; *Aronis v TLC Vision Ctrs., Inc.*, 49 AD3d 576, 578 [2d Dept 2008]; *Van Caloen v Poglinco*, 214 AD2d 555, 557 [2d Dept 1995]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1340

KA 13-01612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMONT FREEMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), entered June 14, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) upon a determination that he violated the terms and conditions of his probation.

At the outset, we note that, although defendant has served his sentence and the maximum expiration date of his period of postrelease supervision has passed, a "determination that defendant has violated the conditions of his probation is 'a continuing blot on [his] record' with potential future consequences" (*People v Wiggins*, 151 AD3d 1859, 1859 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017], quoting *Matter of Williams v Cornelius*, 76 NY2d 542, 546 [1990]). Thus, contrary to the People's contention, the instant appeal is not moot.

Defendant contends that Supreme Court erred in concluding that he violated the conditions of his probation by using marihuana, failing to obtain employment or enroll in school, and failing to report police contact to his probation officer inasmuch as those violations are de minimis. However, "[a]t no time during the probation revocation proceedings did defendant raise any challenge to the allegedly 'de minimis' nature of the violation[s] or raise any due process challenge to the proceeding" (*People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]). Thus, defendant's contention is not preserved for our review. In any event, it lacks merit. We

further reject defendant's contention that the People presented only hearsay evidence to establish that defendant violated the aforementioned conditions of his probation (*see Wiggins*, 151 AD3d at 1860).

Defendant also contends that the court erred in concluding that he violated the conditions of his probation by failing to consent to a search of an apartment that he was in at the time of the search and by possessing contraband. Insofar as defendant contends that the contraband should have been suppressed because it was discovered as a result of an unlawful search, the contention is unpreserved (*see People v Bevilacqua*, 91 AD3d 1120, 1121 n [3d Dept 2012]; *People v Soprano*, 27 AD3d 964, 965 [3d Dept 2006]), and we decline to exercise our power to address the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). To the extent that defendant's remaining contentions regarding the failure to consent to a search and possession of contraband are preserved, we conclude that they lack merit.

Contrary to defendant's further contention, the People established that defendant was aware of each of the conditions of his probation. Here, the record reflects that defendant signed an amended order and conditions of probation in open court, acknowledging that he read, understood, and agreed to accept the conditions (*see People v Hale*, 93 NY2d 454, 461 [1999]).

Finally, defendant contends that he was deprived of effective assistance of counsel in various respects. We reject defendant's allegation that defense counsel was ineffective in failing to move to suppress the contraband inasmuch as defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" under the circumstances of this case (*People v Bank*, 129 AD3d 1445, 1447 [4th Dept 2015], *affd* 28 NY3d 131 [2016], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). We have reviewed defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1358

KA 17-00692

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALPHONSE O'NEILL, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 29, 2017. The judgment convicted defendant, upon a nonjury verdict, of attempted criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of attempted criminal sexual act in the third degree (Penal Law §§ 110.00, 130.40 [3]). Defendant waived his challenge to the legal sufficiency of the evidence by consenting to the submission of attempted criminal sexual act in the third degree as a lesser included offense of attempted criminal sexual act in the first degree (*see* CPL 300.50 [1], [6]; *see also People v Daniels*, 75 AD3d 1169, 1170 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]; *People v McDuffie*, 46 AD3d 1385, 1386 [4th Dept 2007], *lv denied* 10 NY3d 867 [2008]). "Defendant ought not be allowed to take the benefit of the favorable charge and complain about it on appeal" (*McDuffie*, 46 AD3d at 1386 [internal quotation marks omitted]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that, although an acquittal would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its

determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Here, while there were some inconsistencies in the victim's testimony, we conclude that "[t]he victim's testimony was not 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]; *see People v Simonetta*, 94 AD3d 1242, 1244 [3d Dept 2012], *lv denied* 19 NY3d 1029 [2012]), and that there is no basis for disturbing the court's credibility determinations in this case. Although the court acquitted defendant of the charges in the indictment involving the element of forcible compulsion and the other charges submitted as lesser included offenses involving anal sexual conduct and sexual intercourse, thereby reflecting the court's uncertainty concerning much of the victim's testimony with respect to defendant's conduct and the nature of the encounter, the court was entitled to credit parts of the victim's testimony while rejecting other parts (*see People v Toft*, 156 AD3d 1234, 1235 [3d Dept 2017]; *People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]; *Simonetta*, 94 AD3d at 1244; *People v Kalen*, 68 AD3d 1666, 1667 [4th Dept 2009], *lv denied* 14 NY3d 842 [2010]). Based on the weight of the credible evidence adduced at trial, including the victim's testimony that defendant kept asking her to perform oral sex on him, that she kept saying "no" and begging him to stop but defendant would not listen to her, and that defendant's penis touched her jaw, we conclude that the court was justified in finding beyond a reasonable doubt that, during some form of sexual encounter between defendant and the victim, defendant attempted to engage in oral sexual conduct with the victim without her consent (*see* Penal Law §§ 110.00, 130.40 [3]; *see generally People v Newton*, 8 NY3d 460, 463-464 [2007]; *People v Evans*, 79 AD3d 454, 454 [1st Dept 2010], *lv denied* 17 NY3d 795 [2011]). We reject defendant's speculative contention that the court considered an inculpatory statement made by him to a detective that had been suppressed prior to trial inasmuch as, "[i]n this nonjury case, the court is presumed to have considered only competent evidence in reaching the verdict . . . , and there is no basis in this record to conclude that the court did otherwise" (*People v Clinkscales*, 277 AD2d 930, 931 [4th Dept 2000], *lv denied* 96 NY2d 733 [2001]; *cf. People v Memon*, 145 AD3d 1492, 1493 [4th Dept 2016]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1361

KA 16-02149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ALEXANDER COLON-COLON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered September 2, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed, and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 470.45.

Opinion by NEMOYER, J.:

The law demands strict and literal compliance with the constitutional and statutory framework for waiving indictment. That did not occur here. The superior court information must therefore be dismissed.

FACTS

In December 2015, a felony complaint was filed in the Batavia City Court charging defendant with two counts of rape in the second degree (Penal Law § 130.30 [1] [sexual intercourse between an adult and a minor under age 15]). The felony complaint alleged that "from September 1st, 2013 to September 9th, 2013," defendant had "sexual intercourse with a 14 year old female on two occasions while he was 19 years old [in the] City of Batavia." Attached to the felony complaint was a supporting deposition from the alleged victim, who averred that she had sexual relations with defendant on two occasions while she was 14 years old, and on three occasions while she was 15 years old. It is undisputed that the victim turned 15 years old on September 9, 2013.

Defendant waived his right to a preliminary hearing and was held for action by the grand jury. Defendant subsequently waived his right to indictment and consented to prosecution by superior court information (SCI). To memorialize that waiver, defendant signed a written waiver of indictment in open court in the presence of his attorney. The written indictment waiver was also signed by defense counsel and the Genesee County District Attorney. Insofar as relevant here, the written waiver provides as follows:

> "I, **ALEXANDER COLON COLON**, . . . having been held for the action of the Grand Jury . . . upon the charged offense(s) of **RAPE IN THE SECOND DEGREE (Two Counts)**, contrary to Penal Law [§] 130.30-1, a class D felony, and having been advised of my right to have said charge(s) presented to a Grand Jury . . . , do hereby waive my right to be prosecuted by indictment for such offense(s) and I hereby consent to be prosecuted therefor by Superior Court Information."

Critically, the written waiver does not contain any data whatsoever regarding the "date and approximate time and place of each offense to be charged in the superior court information," as explicitly required by CPL 195.20. Notwithstanding that defect, County Court determined that the written waiver "fully complie[d] with the provisions of Sections 195.10 and 195.20 of the Criminal Procedure Law" and approved it accordingly (*see* CPL 195.30 [requiring judicial approval of indictment waiver upon determination that it complies with CPL 195.10 and 195.20]).

The ensuing SCI charged defendant with two counts of second-degree rape under Penal Law § 130.30 (1). Count one alleged that defendant, "between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old." Count two alleged that defendant, "on a second occasion between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old."

Defendant subsequently satisfied the SCI by pleading guilty to the lesser-included offense of attempted rape in the second degree under count one. As part of the plea bargain, defendant waived his right to appeal. The court thereafter imposed the maximum sentence for attempted rape in the second degree: 4 years' imprisonment and 10 years' postrelease supervision.

Defendant appeals, and we now reverse.

DISCUSSION

I

"In 1974, article I, § 6 of the State Constitution was amended to provide a single exception to the constitutional requirement that a person charged with an infamous offense be prosecuted by indictment" (*People v Menchetti*, 76 NY2d 473, 476 [1990]). As a result of that change, article I, section 6 now says in relevant part that:

> "a person held for the action of a grand jury upon a charge for [an infamous] offense, other than one punishable by . . . life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel."

"To implement this constitutional amendment, the Legislature enacted CPL article 195," which specifies in great detail the procedure to be followed when an accused felon wishes to waive his or her right to indictment and consent to prosecution by SCI (*Menchetti*, 76 NY2d at 476; *see also* CPL 200.15 [codifying additional jurisdictional requirements for SCIs]).

Because "an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court" (*People v Zanghi*, 79 NY2d 815, 817 [1991]), the Court of Appeals has repeatedly stressed that the "[f]ailure to adhere to the statutory procedure for waiving indictment" is a "jurisdictional[defect] affecting 'the organization of the court or the mode of proceedings prescribed by law' " (*People v Boston*, 75 NY2d 585, 589 n [1990], quoting *People v Patterson*, 39 NY2d 288, 295 [1976], *affd* 432 US 197 [1977]; *see People v Myers*, 32 NY3d 18, 21 n 1 [2018]; *People v Milton*, 21 NY3d 133, 136 [2013]; *Zanghi*, 79 NY2d at 817-818). On that issue, there is near-universal consensus: an accused felon may waive his or her right to indictment " '*only* within the express authorization of the governing constitutional and statutory [provisions]' " (*Myers*, 32 NY3d at 22 n 2, quoting *People v Trueluck*, 88 NY2d 546, 549 [1996] [emphasis added]), and those provisions must therefore be "followed to the letter" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 195.20, at 202 [2007 ed]). Indeed, as recently as 2010, the Court of Appeals reiterated that its own "precedent makes clear that the parties *must comply* with the constitutional and statutory requirements relating to waiver of indictment" (*People v Pierce*, 14 NY3d 564, 570 [2010] [emphasis added]). Thus, if the parties to a criminal action wish to bypass the grand jury, only "strict," literal, and complete adherence to the statutory and constitutional mechanics for waiving indictment will produce a valid felony conviction (*People v Casdia*, 78 NY2d 1024, 1026 [1991]; *see People v Catnott*, 92 AD3d 977, 978 [3d Dept 2012]; *People v Quarcini*,

4 AD3d 864, 865 [4th Dept 2004]).

The consequences of failing to comply with the relevant constitutional and statutory requirements are severe and unforgiving. As one trial judge correctly observed, "any defect in the waiver of indictment procedure is a jurisdictional defect and will result in the reversal of a conviction and vacatur[] of a guilty plea" (*People v Padilla*, 42 Misc 3d 1221[A], 2014 NY Slip Op 50113[U], *16 [Rockland County Ct 2014]). In other words, a deviation from the statutory provisions for waiving indictment "will cause a jurisdictional defect that invalidates any plea or verdict, even though the statutory provision involved is not among those mandated by the constitutional authorization for waiver" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 195.20, at 202 [2007 ed]). The bottom line for parties contemplating a felony prosecution by SCI is this: "Do not take any 'short-cut', because substantial compliance will not be tolerated" (*id.*).[1]

Compounding the peril of straying from the legislatively-constructed path for waiving indictment is the complete absence of structural barriers to appellate review. To that end, it is well established that a "challenge to the validity of [a] waiver of indictment is not forfeited by [a] plea of guilty and would not be precluded by any valid waiver of the right to appeal" (*People v Janelle*, 146 AD3d 808, 809 [2d Dept 2017] [internal quotation marks omitted]; *see Pierce*, 14 NY3d at 570 n 2; *People v Melvin*, 148 AD3d 1753, 1754 [4th Dept 2017]; *People v Lugg*, 108 AD3d 1074, 1074 [4th Dept 2013]). Likewise, a " 'challenge[] to the jurisdictional requirements of the waiver of indictment . . . need not be preserved for [appellate] review' " (*Melvin*, 148 AD3d at 1754; *see Myers*, 32 NY3d at 21 n 1; *Boston*, 75 NY2d at 589 n; *Janelle*, 146 AD3d at 809;

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[1] About 20 years ago, several decisions came out stating that certain aspects of the statutorily-enumerated process for waiving indictment are not jurisdictionally required (*see e.g. People v Montanez*, 287 AD2d 407, 408 [1st Dept 2001], *lv denied* 97 NY2d 685 [2001]; *People v Long*, 273 AD2d 67, 67 [1st Dept 2000], *lv denied* 95 NY2d 854 [2000]; *People v George*, 261 AD2d 711, 712-713 [3d Dept 1999], *lv denied* 93 NY2d 1018 [1999]). We do not agree that the statutorily-mandated steps for waiving indictment can be neatly sorted into jurisdictional and nonjurisdictional requirements, especially given the practical difficulties in identifying neutral, forward-looking criteria by which to classify any particular step as either jurisdictional or non-jurisdictional. We note the Third Department's recent conclusion that all statutorily-prescribed aspects of the indictment-waiver process are of equal jurisdictional significance (*see People v Busch-Scardino*, 166 AD3d 1314, 1315-1316 [3d Dept 2018]; *accord People v Rivera*, 24 AD3d 367, 369-371 [1st Dept 2005]; *but see People v Windley*, 228 AD2d 875, 876 [3d Dept 1996], *lv denied* 88 NY2d 997 [1996]). "Any other interpretation would render the statute's language . . . superfluous or redundant" (*Busch-Scardino*, 166 AD3d at 1316).

Lugg, 108 AD3d at 1074).

II

CPL 195.20 is a key component of the procedure for waiving indictment, and it "reiterates the constitutional requirements and specifies additional items the written waiver must include" (*Myers*, 32 NY3d at 22 n 2; *see Zanghi*, 79 NY2d at 817). Like all provisions of article 195, CPL 195.20 must be "strictly and unequivocally" enforced (*Catnott*, 92 AD3d at 978; *see People v Donnelly*, 23 AD3d 921, 922 [3d Dept 2005]; *see generally Casdia*, 78 NY2d at 1026).

Insofar as relevant to this case, CPL 195.20 provides that a "waiver of indictment shall be evidenced by a written instrument, which *shall contain* the name of the court in which it is executed, the title of the action, and the name, *date and approximate time and place* of each offense to be charged in the [SCI]" (emphasis added). Here, it is undisputed that the written waiver of indictment does not contain any data whatsoever about the date, the time, or the place of any – much less each – offense to be charged in the SCI. Thus, the indictment waiver is jurisdictionally defective because it plainly fails to comply with the explicit statutory requirements of CPL 195.20 (*see People v Walker*, 148 AD3d 1570, 1570-1571 [4th Dept 2017]).[2]

Our determination preserves and reinforces the nexus between the voluntariness of an indictment waiver and the parties' strict compliance with the process laid down in the State Constitution and the Criminal Procedure Law. As the Court of Appeals recently stated in *Myers*, "[c]ompliance with the constitutionally-specified waiver mechanism establishes the prima facie validity of the waiver of the right to prosecution by indictment. Absent record evidence suggesting that a defendant's waiver was involuntary, unknowing or unintelligent, the prima facie showing is conclusive" (*id.*, 32 NY3d at 23). In other words, compliance with the literal terms of CPL 195.20 and its companion provisions is the sine qua non of the voluntariness of an indictment waiver (*see generally Trueluck*, 88 NY2d at 549).

The Court of Appeals' observations in *Myers* assume particular significance in this case, where only some of the multiple instances of sexual contact between defendant and the victim constituted second-degree rape in light of her intervening 15th birthday. Thus, from the perspective of a criminal defendant poised to waive his right to

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[2] We emphasize that the People make no argument predicated on the "single document" rule of *People v Lamoni* (230 AD2d 628, 629 [1st Dept 1996], *lv denied* 89 NY2d 925 [1996]) and its progeny (*see e.g. People v Sterling*, 27 AD3d 950, 951-952 [3d Dept 2006], *lv denied* 6 NY3d 898 [2006]; *People v Salvalo*, 286 AD2d 636, 636 [1st Dept 2001], *lv denied* 97 NY2d 687 [2001]). We have never decided whether to adopt the "single document" rule in this Department, and we have no occasion to consider that issue here.

indictment, it was of paramount importance to ensure that the SCI charged only conduct within the statutory definition of that crime, i.e., sexual contact that occurred before the victim's 15th birthday. And there might be no way of ascertaining that critical detail if, in contravention of the legislative command embodied by CPL 195.20, the written waiver itself neglected to specify the dates and times of the subject offenses.

CONCLUSION

The written indictment waiver in this case is jurisdictionally defective because it failed to comply with CPL 195.20. Accordingly, the judgment should be reversed, the guilty plea vacated, the indictment waiver rejected, the SCI dismissed, and the matter remitted to the Genesee County Court for proceedings pursuant to CPL 470.45 (*see People v Priest*, 155 AD3d 1599, 1599-1600 [4th Dept 2017]; *see also People v Eulo*, 156 AD3d 720, 721 [2d Dept 2017]; *Walker*, 148 AD3d at 1570-1571; *People v Libby*, 246 AD2d 669, 671 [2d Dept 1998]). Defendant's remaining contentions are academic.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1369

CA 18-00474

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

JASON JOHNSON, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PIXLEY DEVELOPMENT CORP.,
DEFENDANT-RESPONDENT-APPELLANT,
AND CANDY APPLE CAFÉ, INC., DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 8, 2017. The order granted the motion of defendant Candy Apple Café, Inc., seeking summary judgment and dismissed the complaint and cross claims against it, denied the motion of defendant Pixley Development Corp., seeking summary judgment dismissing the complaint and the cross claim against it, and denied plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the cross claims of defendant Pixley Development Corp., denying the motion of defendant Candy Apple Café, Inc. in part and reinstating the complaint against it insofar as the complaint alleges that Candy Apple Café, Inc. had constructive notice of the alleged dangerous condition, and granting the motion of defendant Pixley Development Corp. in part and dismissing the complaint against it insofar as the complaint alleges that Pixley Development Corp. had actual notice of the alleged dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he allegedly slipped and fell on ice in the rear delivery area behind a plaza owned by defendant Pixley Development Corp. (Pixley) while delivering supplies to defendant Candy Apple Café, Inc. (Café), a tenant of the plaza. Plaintiff moved for summary judgment on the complaint, and defendants separately moved for, inter alia, summary judgment dismissing the complaint against

them. Supreme Court granted the Café's motion, dismissing the complaint as well as all cross claims against the Café, but denied the motions of Pixley and plaintiff. Plaintiff appeals and Pixley cross-appeals.

As an initial matter, we conclude that the court erred in dismissing Pixley's cross claims against the Café inasmuch as the cross claims were not " 'the subject of the motions before the court' " (*Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011, 1012 [4th Dept 2005], quoting *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430 [1996]; *see Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]), and we therefore modify the order accordingly. Additionally, we conclude that the court erred in granting that part of the Café's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that the Café had constructive notice of the icy condition; the court also erred in denying that part of Pixley's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that Pixley had actual notice of the icy condition. We therefore further modify the order accordingly.

We agree with plaintiff and Pixley on their appeal and cross appeal that the Café failed to establish as a matter of law that it did not owe a duty to plaintiff. " 'Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . . The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [4th Dept 2006]; *see Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1444 [4th Dept 2012]). Although the Café established that it did not occupy or own the rear delivery area and did not employ it for a special use, the Café failed to establish as a matter of law that it did not exercise control over that area. The evidence submitted by the Café demonstrates that it had "a procedure in place to clear snow and ice" from at least some portion of the rear delivery area (*Santerre v Golub Corp.*, 11 AD3d 945, 946 [4th Dept 2004]; *cf. Figueroa v Tso*, 251 AD2d 959, 959 [3d Dept 1998]) and thus "assumed some responsibility for maintenance of [that area], including snow removal" (*Silverberg v Palmerino*, 61 AD3d 1032, 1034 [3d Dept 2009]; *see Baker v Cayea*, 74 AD3d 1619, 1620 [3d Dept 2010]). We thus conclude that triable issues of fact exist concerning the Café's "control over the immediate area in question and [its] undertaking of efforts to remove ice and snow within that area" (*Santerre*, 11 AD3d at 947).

Inasmuch as it is undisputed that Pixley, as owner of the plaza, owed a duty to plaintiff and there are triable issues of fact whether the Café owed a duty to plaintiff, the next question becomes whether there are issues of fact concerning their breach of those duties, i.e., whether they created the dangerous condition " 'or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Stever v HSBC Bank USA, N.A.*, 82 AD3d 1680, 1681 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *see also Gorokhovskiy v NYU*

Hosps. Ctr., 150 AD3d 966, 967 [2d Dept 2017]). By briefing the issue of only constructive notice as it regards the Café, we conclude that plaintiff has "abandoned any claims that [the Café] had actual notice of or created the dangerous condition" (*Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397 [4th Dept 2017]). Nevertheless, inasmuch as Pixley opposed the Café's motion on the grounds that the Café had either actual or constructive notice of the allegedly dangerous condition, we must address the merits of those two theories of negligence as asserted against the Café. We therefore affirm that part of the order granting the Cafe's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that the Café created the allegedly dangerous condition as well as that part of the order denying plaintiff's motion for summary judgment on the complaint to the extent that the complaint alleges that the Café created or had actual notice of the allegedly dangerous condition (*see generally Burriesci v Paul Revere Life Ins. Co.*, 255 AD2d 993, 994 [4th Dept 1998]).

With respect to the issue of actual notice, we conclude that the Café and Pixley met their initial burdens of establishing that they lacked such notice by demonstrating that they received no complaints concerning the relevant area and were unaware of any ice in that location before plaintiff's accident (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857 [4th Dept 2005]). In opposition to the Café's motion, Pixley did not submit any evidence raising a triable issue of fact whether the Café had actual notice of the dangerous condition. We thus conclude that, contrary to Pixley's contention, the court properly granted the Café's motion with respect to the allegation that the Café had actual notice of the dangerous condition. Although plaintiff submitted evidence in support of his motion and in opposition to Pixley's motion from which it could be inferred that Pixley had a general awareness of icy conditions at the plaza in the days preceding plaintiff's accident, it is well settled that a " '[g]eneral awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused' a plaintiff to fall" (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1829 [4th Dept 2010], *lv dismissed* 17 NY3d 734 [2011]; *see Cosgrove v River Oaks Rest., LLC*, 161 AD3d 1575, 1576 [4th Dept 2018]). We therefore further conclude that the court erred in denying Pixley's motion with respect to the allegation that Pixley had actual notice of the dangerous condition and properly denied plaintiff's motion for summary judgment with respect to that allegation against Pixley.

Even assuming, arguendo, that defendants met their initial burden of establishing that they lacked constructive notice of the dangerous condition, we conclude that plaintiff raised triable issues of fact whether the alleged defect was "visible and apparent and [existed] for a sufficient length of time prior to the accident to permit [defendants] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). We thus conclude that the court erred in granting the Café's motion with respect to the allegation that the Café had constructive notice of the dangerous

condition, properly denied Pixley's motion with respect to the allegation that Pixley had constructive notice of the dangerous condition, and properly denied plaintiff's motion with respect to those issues.

Contrary to Pixley's contention, we conclude that the court properly denied its motion with respect to the allegation that Pixley created the dangerous condition. Although Pixley met its initial burden on that theory of negligence, plaintiff raised triable issues of fact whether Pixley's past repairs and repaving of the rear delivery area created the dangerous condition (*see Cosgrove*, 161 AD3d at 1577; *Benty v First Methodist Church of Oakfield*, 24 AD3d 1189, 1190 [4th Dept 2005]). Contrary to Pixley's further contention, the fact that plaintiff's expert engineer based his opinion upon an inspection that occurred three years after the accident does not render the expert's affidavit speculative inasmuch as the expert reviewed many other contemporaneous documents. Moreover, although that "asserted shortcoming may well go to the weight to be accorded the expert's opinion at trial," the expert affidavit is nevertheless sufficient to raise a triable issue of fact on summary judgment as to Pixley's creation of a dangerous condition where, as here, there is no evidence that the conditions of the lot had changed since the accident (*Hyatt v Price Chopper Operating Co., Inc.*, 90 AD3d 1218, 1220 [3d Dept 2011]; *cf. Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 166 [1st Dept 2004]). Due to those triable issues of fact, we conclude that the court properly denied plaintiff's motion with respect to the allegation that Pixley created the dangerous condition.

Inasmuch as there are triable issues of fact concerning defendants' negligence, we further conclude that the court properly denied plaintiff's motion with respect to the issue of proximate cause.

Contrary to the contentions of the parties, we conclude that no one was entitled to summary judgment related to defendants' storm-in-progress affirmative defenses. Although defendants met their initial burden of establishing as a matter of law that there was a storm in progress at the time of the accident, plaintiff raised a triable issue of fact whether the ice on which he slipped had formed before the storm commenced by submitting the detailed affidavit of his expert meteorologist, the relevant weather reports and the affidavit of his coworker (*see Hayes v Norstar Apts., LLC*, 77 AD3d 1329, 1330 [4th Dept 2010]; *Sheldon v Henderson & Johnson Co., Inc.*, 75 AD3d 1155, 1156 [4th Dept 2010]; *Schuster v Dukarm*, 38 AD3d 1358, 1359 [4th Dept 2007]).

Finally, we conclude that the court properly denied without prejudice that part of plaintiff's motion that sought a "decision to th[e] effect" that Pixley violated six sections of the Property Maintenance Code of New York. Contrary to Pixley's contention, the claims that Pixley violated those sections were properly raised in the original and supplemental bills of particulars (*see generally Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]). We nevertheless conclude that plaintiff's expert failed to

establish as a matter of law that Pixley violated those sections on the date of plaintiff's accident (*see Garcia*, 6 AD3d at 166). Inasmuch as plaintiff failed to meet his initial burden related to those claims, the burden never shifted to Pixley to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1396

KA 12-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY T. HENDERSON, JR., ALSO KNOWN AS BUTTER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered September 26, 2012. The appeal was held by this Court by order entered March 31, 2017, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (148 AD3d 1779). The proceedings were held and completed (Douglas A. Randall, J.).

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 burglary in the second degree (Penal Law § 140.25 [2]). We previously held this case, reserved decision, and remitted the matter for a hearing upon determining that County Court (Geraci, J.) had erred in summarily denying defendant's pro se motion to withdraw his guilty plea (*People v Henderson*, 137 AD3d 1670, 1670-1671 [4th Dept 2016]). In support of the motion, defendant had alleged that his attorney erroneously advised him before he pleaded guilty that his plea could be withdrawn at any time prior to sentencing (*id.* at 1670). Upon remittal, defendant was represented by new counsel, and County Court (Randall, J.) heard the testimony of defendant's former counsel. Defense counsel then sought to call defendant as a witness, but the court precluded defendant's testimony and closed the hearing without rendering a decision on defendant's motion to withdraw his plea. We concluded on resubmission that the court erred in failing to rule on defendant's motion, and we therefore held the case, reserved decision, and again remitted the matter to County Court to reopen the hearing and rule on defendant's motion after affording him an opportunity to testify (*People v Henderson*, 148 AD3d 1779, 1780 [4th Dept 2017]).

This matter returns to us following completion of that hearing, during which the court heard testimony from defendant and the prosecutor involved in defendant's plea colloquy. Contrary to defendant's contention, the court did not abuse its discretion in denying his motion to withdraw his plea of guilty (*see* CPL 220.60 [3]; *People v Muccigrosso*, 269 AD2d 754, 754 [4th Dept 2000], *lv denied* 95 NY2d 800 [2000]; *see also People v DeLeon*, 40 AD3d 1008, 1009 [2d Dept 2007], *lv denied* 9 NY3d 874 [2007]; *see generally People v Brown*, 14 NY3d 113, 116 [2010]). The hearing testimony from defendant's former counsel belies defendant's allegation that he was advised by his former counsel that he could unilaterally withdraw his plea prior to sentencing, and the court did not abuse its discretion in resolving the credibility issues created by any conflict between the testimony of defendant's former counsel and the prosecutor and that of defendant (*see People v Colon*, 122 AD3d 1309, 1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]). We reject defendant's further contention that his recitation of the facts during the plea colloquy "cast[] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1417

CA 18-00077

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

JACQUELYN BENEDICT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY BENEDICT, DEFENDANT-APPELLANT.

TIMOTHY A. BENEDICT, ROME, DEFENDANT-APPELLANT PRO SE.

EISENHUT & EISENHUT, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 3, 2017. The judgment, among other things, granted the parties a divorce and determined the issues of child custody, child support, spousal maintenance and the equitable distribution of marital property.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and in the exercise of discretion by vacating the eighth, tenth and eleventh decretal paragraphs and substituting therefor the respective provisions directing that, for the period from May 2, 2013 to May 2, 2014, defendant's child support obligation is $15,490.40 per year or $1,290.87 per month; for the period from May 2, 2014 to April 1, 2016, defendant's child support obligation is $15,101.10 per year or $1,258.43 per month; and for the period from April 1, 2016 forward, defendant's child support obligation is $15,315.30 per year or $1,276.28 per month, and striking from the fifteenth decretal paragraph the child support sum of $1,455.47 and substituting therefor the sum of $1,276.28, and as modified the judgment is affirmed without costs.

Memorandum: Defendant father appeals from a judgment of divorce entered following a trial that, among other things, awarded plaintiff mother sole legal and physical custody of the parties' child and directed the father to pay child support, maintenance and attorney's fees to the mother.

We reject the father's contention that Supreme Court erred in failing to award joint legal custody of the child. Joint custody is inappropriate where, as here, " 'the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner' " (*Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]; *see Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]). The record establishes that, although the parties could sometimes

effectively communicate with each other, most of their interactions were acrimonious, and that the father physically and emotionally abused the mother. Thus, the court's determination that joint legal custody is inappropriate has a sound and substantial basis in the record (*see Kleinbach*, 151 AD3d at 1687; *see also Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1350-1351 [4th Dept 2007]; *see generally Forrestel v Forrestel*, 125 AD3d 1299, 1299 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015])

Contrary to the father's contention, the record also supports the court's determination that it was in the child's best interests to award sole legal and physical custody to the mother and to deny him any extended weekend and holiday visitation (*see generally Matter of Abdo v Ahmed*, 162 AD3d 1742, 1743 [4th Dept 2018]; *Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1672 [4th Dept 2017]). Evidence of the father's temper and acts of domestic violence against the mother and his other children demonstrates that he possesses " 'a character [that] is ill-suited to the difficult task of providing [his] young child[ ] with moral and intellectual guidance' " (*Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293, 1293 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]).

The father further contends that the court erred in imposing a sanction pursuant to CPLR 3126 precluding him from introducing evidence at trial of the income he generated from his law firm. The court imposed that sanction only after the father violated a discovery order compelling production of his law firm's business ledgers, he was held in criminal contempt as a result of that violation, and he failed to produce those documents after being afforded an opportunity to purge himself of contempt. Based on the father's willful failure to disclose the business ledgers, we conclude that the court did not abuse its discretion in imposing a preclusion sanction (*see* CPLR 3126 [2]; *Matter of Duma v Edgar*, 58 AD3d 1085, 1086 [3d Dept 2009]; *see generally Perry v Town of Geneva*, 64 AD3d 1225, 1226 [4th Dept 2009]). We also reject the father's contention that the mother was not entitled to disclosure of the business ledgers because he produced over 1,800 pages of financial documents. The mother was entitled to disclosure of the business ledgers because the court ordered that disclosure following its proper determination that those ledgers were relevant to her claims for maintenance, child support, and attorney's fees (*see generally* CPLR 3101 [a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Gromoll v Bertolino*, 4 AD3d 759, 759 [4th Dept 2004]).

We agree with the father however that, in determining his child support obligation, the court erred in applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]). It is well settled that "blind application of the statutory formula to [combined parental income] over [the statutory cap], without any express findings or record evidence of the [child's] actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula" (*Antinora v Antinora*, 125 AD3d 1336, 1338

[4th Dept 2015] [internal quotation marks omitted]; *see Bandyopadhyay v Bandyopadhyay*, 141 AD3d 1099, 1100 [4th Dept 2016]; *Matter of Malecki v Fernandez*, 24 AD3d 1214, 1215 [4th Dept 2005]). Here, in awarding child support on income above the statutory cap, the court considered only the father's financial situation. "[T]he court made no factual findings that the child[ ] [had] financial needs that would not be met unless child support were ordered to be paid out of parental income in excess of [the statutory cap]," and we conclude that, "even if the court had made such a finding, there is no evidence in the record to support it" (*Bandyopadhyay*, 141 AD3d at 1100). Therefore, in the exercise of our discretion, we fix the father's basic child support obligation on the basis of the combined parental CSSA income up to the cap amount, and we modify the judgment by vacating the eighth, tenth and eleventh decretal paragraphs and substituting therefor the respective provisions directing that, for the period from May 2, 2013 to May 2, 2014, the father's child support obligation is $15,490.40 per year or $1,290.87 per month; for the period from May 2, 2014 to April 1, 2016, the father's child support obligation is $15,101.10 per year or $1,258.43 per month; and for the period from April 1, 2016 forward, the father's child support obligation is $15,315.30 per year or $1,276.28 per month (*see Bandyopadhyay*, 141 AD3d at 1100-1101). Thus, we further modify the judgment by striking from the fifteenth decretal paragraph the child support sum of $1,455.47 and substituting therefor the sum of $1,276.28.

Contrary to the father's contention, we conclude that the court did not abuse its discretion in awarding attorney's fees to the mother inasmuch as the father was the monied spouse and he engaged in dilatory conduct (*see Blake v Blake*, 83 AD3d 1509, 1509 [4th Dept 2011]; *cf. D'Amato v D'Amato*, 132 AD3d 1424, 1425 [4th Dept 2015]). Finally, we have reviewed the father's remaining contentions and conclude that they lack merit.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1451

KA 16-02196

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM SMART, ALSO KNOWN AS ADAM D. SMART,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered October 25, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by amending the order of protection in favor of defendant's biological daughter to allow contact, communication, or access permitted by a subsequent order issued by a Family or Supreme Court in a custody, visitation or child abuse or neglect proceeding, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that County Court erred in issuing an order of protection in favor of a witness to a prior crime (*see* CPL 530.13 [4] [a]), i.e., his biological daughter, without providing that the order of protection could be modified by a subsequent visitation order issued by Family Court or Supreme Court. As a preliminary matter, we agree with defendant that his waiver of the right to appeal does not preclude us from considering his contention inasmuch as the order of protection was "not a part of the plea agreement" (*People v Lilley*, 81 AD3d 1448, 1448 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]), and is not a part of his sentence (*see People v Nieves*, 2 NY3d 310, 316 [2004]; *People v Tate*, 83 AD3d 1467, 1467 [4th Dept 2011]).

The issuance of an order of protection "incident to a criminal proceeding is an ameliorative measure intended to safeguard the rights of victims . . . both prior to and after conviction" (*Nieves*, 2 NY3d at 316), and "is not a form of punishment" (*People v Foster*, 87 AD3d

299, 301 [2d Dept 2011]). Here, the order of protection issued in this criminal proceeding bars all contact between defendant and his child, and cannot be modified by a subsequent visitation order of Family Court or Supreme Court unless it is first modified or vacated by the criminal court (*see Matter of Utter v Usher*, 150 AD3d 863, 865 [2d Dept 2017]; *Matter of Samantha WW. v Gerald XX.*, 107 AD3d 1313, 1316 [3d Dept 2013]). We agree with defendant that, under the circumstances of this case, the order of protection should be subject to any subsequent orders of custody and visitation, and we therefore modify the judgment by amending the order of protection in favor of defendant's biological daughter so that contact will be allowed if ordered by Family or Supreme Court in a custody, visitation or child abuse or neglect proceeding (*see People v Howes*, 93 AD3d 954, 955 [3d Dept 2012]; *People v Hull*, 52 AD3d 962, 964 [3d Dept 2008]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1453

KA 17-00187

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WATSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 4, 2017. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Lopez*, 6 NY3d 248, 256 [2006]). The record establishes that defendant had " 'a full appreciation of the consequences' of such waiver" (*Bradshaw*, 18 NY3d at 264) inasmuch as Supreme Court "provided defendant with an extensive and detailed description of the proposed waiver of the right to appeal" and ascertained his understanding thereof (*People v Thomas*, 158 AD3d 1191, 1191 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *see People v Walker*, 151 AD3d 1765, 1765 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]; *People v Verse*, 61 AD3d 1409, 1409 [4th Dept 2009], *lv denied* 12 NY3d 930 [2009]). Contrary to defendant's further contention, as we have repeatedly stated, "a waiver of the right to appeal [is] not rendered invalid based on [a] court's failure to require [the] defendant to articulate the waiver in his [or her] own words" (*People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014] [internal quotation marks omitted]; *see e.g. People v Scott*, 144 AD3d 1597, 1597 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]).

Defendant contends that the court abused its discretion in denying his motion to withdraw his plea of guilty, which was premised

on his allegations that he was under the influence of recently prescribed pain medication that affected his ability to understand the plea proceeding and that the plea was therefore not knowing, intelligent and voluntary. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]), we conclude that his contention lacks merit. Defendant, in response to the court's inquiry during the plea proceeding, denied that he had "any drugs or alcohol or substances like that in [his] system" (*see People v Feliz*, 70 AD3d 1355, 1356 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *People v Spikes*, 28 AD3d 1101, 1102 [4th Dept 2006], *lv denied* 7 NY3d 818 [2006]), and his contention is further "belied by the record of the plea proceeding, which establishes that defendant's factual allocution was lucid and detailed and that defendant understood both the nature of the proceedings and that he was [forfeiting and] waiving various rights" (*People v Hayes*, 39 AD3d 1173, 1175 [4th Dept 2007], *lv denied* 9 NY3d 923 [2007]; *see Davis*, 129 AD3d at 1614).

Finally, defendant's challenge to the severity of the enhanced sentence imposed as a result of his postplea conduct is not encompassed by his valid waiver of the right to appeal inasmuch as the court "failed to advise defendant prior to his waiver of the potential period of incarceration that could be imposed for an enhanced sentence" (*People v Tyo*, 140 AD3d 1697, 1699 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016] [internal quotation marks omitted]; *see People v Scott*, 101 AD3d 1773, 1774 [4th Dept 2012], *lv denied* 21 NY3d 1019 [2013]). We conclude, however, that the sentence is not unduly harsh or severe.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

1461

CA 18-01324

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

DANIEL J. BECK AND DEBRA BECK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
AND NIAGARA FALLS WATER BOARD,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 26, 2017. The order denied the cross motion of defendant Niagara Falls Water Board for summary judgment dismissing the complaint and cross claims against it.

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

Memorandum: This premises liability action stems from injuries sustained by 17-year-old Daniel J. Beck (plaintiff) while he was working as an employee of the National Maintenance Contracting Corporation (NMCC), a welding and fabricating company with a facility located at the intersection of 56th Street and Simmons Avenue in the City of Niagara Falls. Plaintiff was assisting a coworker in using a forklift and a clamp to transport a steel beam to a different location within NMCC's facility via Simmons Avenue, when the forklift struck one or more potholes and the beam fell, causing an injury to plaintiff's foot. The Niagara Falls Water Board (defendant) was responsible for the care and maintenance of the area on Simmons Avenue where the incident is alleged to have occurred. Defendant appeals from an order that denied its cross motion for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiffs failed to identify the cause and the location of the incident. We affirm.

Contrary to defendant's contention, Supreme Court properly denied the cross motion as premature because discovery, including the depositions of the parties involved in the incident, had not been completed (*see* CPLR 3212 [f]; *Syracuse Univ. v Games 2002, LLC*, 71

AD3d 1531, 1531-1532 [4th Dept 2010]), and plaintiffs, in opposing defendant's cross motion as premature pursuant to CPLR 3212 (f), made the requisite evidentiary showing to support the conclusion that facts essential to justify opposition may exist but could not then be stated (*see Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]; *see also Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]). Plaintiffs' submissions in response to defendant's cross motion, which included written statements from three witnesses and NMCC's accident reports, established that testimony regarding both the specific cause and specific location of the incident could be obtained through discovery, and that "facts essential to oppose the [cross] motion were in [the movant's] exclusive knowledge and possession and could be obtained through discovery" (*Resetarits Constr. Corp.*, 118 AD3d at 1456 [internal quotation marks omitted]).

Defendant's remaining contention, that the complaint must be dismissed because the notice of claim is insufficient, was raised for the first time in its reply papers and is therefore not properly before us (*see Matter of Board of Mgrs. v Assessor, City of Buffalo*, 156 AD3d 1322, 1324 [4th Dept 2017]; *Jackson v Vatter*, 121 AD3d 1588, 1589 [4th Dept 2014]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

21

CA 18-01430

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

JENNIFER M. EBBOLE AND MICHAEL P. EBBOLE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PETER J. NAGY, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 26, 2018. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Defendant appeals from an order that, inter alia, denied his motion for summary judgment dismissing the complaint. We affirm. Plaintiffs were crossing a street outside of a crosswalk when defendant hit them with his car. Defendant did not meet his prima facie burden of establishing entitlement to judgment as a matter of law because his own motion papers raise a triable issue of fact whether he was negligent (*see Pagels v Mullen*, 167 AD3d 185, 188-189 [4th Dept 2018]). In support of his motion, defendant submitted the report of his expert, wherein the expert opined that defendant would have had only two seconds' warning between the time when he saw plaintiffs and the time when the collision occurred. A period of two seconds "is generally insufficient to raise a triable issue of fact with respect to a driver's failure to take evasive action" (*Lupowitz v Fogarty*, 295 AD2d 576, 576 [2d Dept 2002]). Defendant also submitted, however, the deposition testimony of one of the plaintiffs, who testified that he made eye contact with defendant right before crossing the street and that defendant's car was stopped at that time (*cf. Singh v Reagan*, 118 AD3d 1474, 1475 [4th Dept 2014]). We conclude that defendant's expert, in his report, did not assume the truth of the plaintiff's testimony in reaching his conclusion, and therefore, his opinion did not satisfy defendant's initial burden of eliminating all material issues of fact (*see Perez v New York City Hous. Auth.*, 114 AD3d 586, 586 [1st Dept 2014]). Thus, there are issues of fact whether defendant was negligent — i.e., whether he saw

what was there to be seen and had enough time to take evasive action to avoid the collision (*see Spicola v Piracci*, 2 AD3d 1368, 1369 [4th Dept 2003]; *see generally Brenner v Dixon*, 98 AD3d 1246, 1248 [4th Dept 2012]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

28

KA 16-02165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEWIS J. STEINBRECHER, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered September 28, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). The plea was conducted by County Court, and the proceeding was later transferred to Supreme Court for sentencing. Contrary to defendant's contention, he knowingly, intelligently, and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The record of the plea proceeding establishes that the court engaged him in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and informed him that the waiver was a condition of the plea agreement" (*People v Snyder*, 151 AD3d 1939, 1939 [4th Dept 2017] [internal quotation marks omitted]). The valid waiver of the right to appeal encompasses defendant's challenges to the factual sufficiency of the plea allocution (*see People v Tyo*, 140 AD3d 1697, 1698 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *People v Gardner*, 101 AD3d 1634, 1634-1635 [4th Dept 2012]). Defendant's contention that the plea was involuntary because he was confused at the time of the plea, he was coerced into pleading guilty, and he was innocent survives the waiver of the right to appeal (*see People v Cyganik*, 154 AD3d 1336, 1337 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]), and he preserved that contention for our review through his motion to withdraw the plea (*see generally People v Lopez*, 71 NY2d 662, 665 [1988]). Defendant's contention, however, is belied by his responses during the plea colloquy (*see People v*

McCullen, 162 AD3d 1661, 1661 [4th Dept 2018]). We reject defendant's related contention that the courts abused their discretion in denying his motion and renewed motion to withdraw the plea (*see People v Haffiz*, 19 NY3d 883, 884 [2012]; *People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Defendant failed to preserve for our review his contention that the sentencing court erred in failing to redact the presentence report (*see Tyo*, 140 AD3d at 1698; *People v Tolliver*, 55 AD3d 1302, 1302 [4th Dept 2008]). Defendant made only general complaints about the report, did not set forth any specific arguments, and made no motion to redact the report (*see Tyo*, 140 AD3d at 1698). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]; *see generally Lopez*, 6 NY3d at 255-256).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

34

CA 18-00013

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

IN THE MATTER OF SEALAND WASTE LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CARROLL, TOWN OF CARROLL ZONING BOARD OF APPEALS, AND ALAN GUSTAFSON, CODE ENFORCEMENT OFFICER OF TOWN OF CARROLL,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

CAROL L. JONES, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF DONALD J. JONES,
DECEASED, AND JONES CARROLL, INC., NECESSARY OR INTERESTED PARTIES.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered April 6, 2017 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment denied and dismissed the petition-complaint of Sealand Waste LLC in its entirety.

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

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioner-plaintiff appeals from a judgment that, in effect, denied and dismissed its petition-complaint seeking, inter alia, a declaration that respondent-defendant Town of Carroll's Local Law No. 1 of 2007 (2007 Law) is null and void. We affirm. "[W]here, as here, 'there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211 (a) (4) on the ground that there is another action pending' " (*Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1430 [4th Dept 2018]; *see* CPLR 7804 [f]). We conclude that Supreme Court did not abuse its discretion in dismissing the petition-complaint on that basis. Further, inasmuch as the 2007 Law has not

been declared invalid, the court properly concluded that respondents-defendants did not act in an arbitrary and capricious manner in denying petitioner-plaintiff's application for certain permits on the ground that such permits related to a proposed expansion of a landfill that is not allowed pursuant to the 2007 Law. In light of our determination, we do not address petitioner-plaintiff's remaining contentions.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

37

CA 18-01210

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

IN THE MATTER OF JAMES TOMASO,
PETITIONER-RESPONDENT,

V ORDER

LBR ENTERPRISES, LLC, AND MICHAEL J. ROBERTSON,
RESPONDENTS-APPELLANTS.

KARL E. MANNE, HERKIMER, FOR RESPONDENTS-APPELLANTS.

NORMAN L. MASTROMORO, LITTLE FALLS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Herkimer County Court (John H. Crandall, J.), entered April 18, 2018. The order affirmed in part a judgment (denominated order) of the Little Falls City Court (Joy A. Malone, J.) dated December 7, 2017.

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

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

44

KA 08-02494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE KAHLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 20, 1993. The appeal was held by this Court by order entered April 26, 2013, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (105 AD3d 1322). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to conduct a reconstruction hearing to determine whether defense counsel was informed of the contents of an unrecorded note received from the jury during its deliberations at defendant's 1993 trial (*People v Kahley*, 105 AD3d 1322 [4th Dept 2013]). We conclude that the court properly found upon remittal that the evidence at the reconstruction hearing established that defense counsel had been made aware during deliberations of the contents of the jury note at issue.

Defendant contends that the court erred in admitting in evidence at the reconstruction hearing a page from defense counsel's contemporaneous trial notes in which he recorded the events that occurred during deliberations, including the jury's issuance of notes, because the document constitutes attorney work product. We reject that contention. An attorney's "interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be . . . work product" and are not subject to disclosure (*Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443, 445 [1st Dept 1989]; *see also* CPL 240.10 [2]), but documents do not become work product merely because they were prepared by an attorney (*see Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1st Dept 1980]). The court properly determined that defendant did not meet his burden of demonstrating

that the document constituted attorney work product because it was merely a recording of events in the courtroom and not "uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]). Further, the court properly determined that the document was admissible under the past recollection recorded exception to the hearsay rule (*see generally People v Taylor*, 80 NY2d 1, 8 [1992]). Contrary to defendant's contention, the required foundation for admission of the evidence was established despite the fact that defense counsel did not recall making the notes and thus could not testify that they accurately represented his knowledge and recollection when made. "There is no requirement . . . that evidence in the form of past recollection recorded be corroborated by the witness' independent recollection of the event or by a 'general present memory of what was happening.' Indeed, the witness must swear that he or she 'has no present recollection whatever of the facts sworn to' " (*People v Somarriba*, 192 AD2d 484, 485 [1st Dept 1993]). In light of our determination, we do not reach defendant's remaining contention.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

45

KA 17-00455

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY M. LOGSDON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated February 17, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Although the risk assessment instrument prepared by the Board of Examiners of Sex Offenders classified defendant as a presumptive level one risk, County Court sua sponte ordered an upward departure to a level two risk based on defendant's history of posttraumatic stress disorder (PTSD) and purported traumatic brain injury (TBI), and on defendant's removal of the victim from New York State for the purpose of continuing a sexual relationship.

Initially, we conclude that the court erred insofar as it based its determination on defendant's history of PTSD and purported TBI. Although defendant was diagnosed with PTSD and may have sustained a TBI, the record is devoid of evidence that any such mental impairment "is causally related to a[ ] risk of reoffense" (*People v Diaz*, 100 AD3d 1491, 1491 [4th Dept 2012], *lv denied* 20 NY3d 858 [2013] [internal quotation marks omitted]; *see People v Burgos*, 39 AD3d 520, 520-521 [2d Dept 2007]; *People v Zehner*, 24 AD3d 826, 827 [3d Dept 2005]; *cf. People v Collins*, 104 AD3d 1220, 1221 [4th Dept 2013], *lv denied* 21 NY3d 855 [2013]; *People v Andrychuk*, 38 AD3d 1242, 1243-1244

[4th Dept 2007], *lv denied* 8 NY3d 816 [2007]). Moreover, the evidence at the SORA hearing included a letter from defendant's psychotherapist, which indicates that defendant is cooperative, willing to engage in treatment, and remorseful, and an assessment prepared by defendant's counselor for sex offender treatment, which indicates that he has a low risk of recidivism.

Nor is the continuing nature of the crime sufficient to support the upward departure because, even if additional points were assessed for risk factor 4, i.e., continuing course of sexual misconduct, defendant's total risk factor score would not result in defendant's classification as a presumptive level two risk (*see generally People v Barody*, 54 AD3d 1109, 1110 [3d Dept 2008]). Further, there is no basis for an upward departure where, as here, the alleged aggravating factor is adequately taken into account by the risk assessment guidelines (*see generally People v Shackelton*, 117 AD3d 1283, 1284 [3d Dept 2014]; *People v Grady*, 81 AD3d 1464, 1464 [4th Dept 2001]). Finally, although we conclude that defendant's actions in taking the victim across state lines constitute an aggravating factor that is, "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines" (*People v Gillotti*, 23 NY3d 841, 861 [2014]), we further conclude that the court improvidently exercised its discretion in granting an upward departure based on that factor under the circumstances of this case. We therefore substitute our own discretion (*see generally People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *People v Goossens*, 75 AD3d 1171, 1171 [4th Dept 2010]), and we modify the order by determining that defendant is a level one risk.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

47

KA 17-00929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS J. MADIGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered July 7, 2016. The judgment convicted defendant, upon a jury verdict, of possessing a sexual performance by a child (eleven counts) and promoting a sexual performance by a child (eleven 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 11 counts of possessing a sexual performance by a child (Penal Law § 263.16) and 11 counts of promoting a sexual performance by a child (§ 263.15). The conviction arises from an investigation in which the police discovered that the IP address associated with defendant's Internet provider subscription had been used to share child pornography via peer-to-peer software and, upon executing a search warrant, found such content on an external hard drive located in a camper on defendant's property. We affirm.

Defendant contends that County Court erred in refusing to suppress evidence seized from his property because the police exceeded the scope of the search warrant by searching the camper. We reject that contention. The Federal and State Constitutions provide that warrants shall not be issued except "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized" (US Const 4th Amend; NY Const, art I, § 12; *see People v Cook*, 108 AD3d 1107, 1108 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]). Although "[p]articularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized[,] . . . hypertechnical accuracy and completeness of description" in the warrant is not required (*People v Nieves*, 36 NY2d

396, 401 [1975]; *see People v Williams*, 140 AD3d 1526, 1527 [3d Dept 2016], *lv denied* 28 NY3d 1076 [2016]; *People v DeWitt*, 107 AD3d 1452, 1453 [4th Dept 2013]). Contrary to defendant's contention, we conclude that the police did not exceed the scope of the search warrant inasmuch as the camper was included in the description of the places authorized to be searched (*see People v Schaefer*, 163 AD3d 1179, 1181 [3d Dept 2018], *lv denied* 32 NY3d 1007 [2018]; *Cook*, 108 AD3d at 1108-1109; *cf. People v Caruso*, 174 AD2d 1051, 1051 [4th Dept 1991]).

We also reject defendant's further contention that reversal is required because he did not waive on the record his constitutional right to testify. "Although there is a fundamental precept that a criminal defendant has the right to testify in his or her own defense guaranteed by the Federal and State Constitutions . . . , it is well settled that, ordinarily, the trial court does not have a general obligation to sua sponte ascertain if the defendant's failure to testify was a voluntary and intelligent waiver of his [or her] right" (*People v Pilato*, 145 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017] [internal quotation marks omitted]; *see People v Fratta*, 83 NY2d 771, 772 [1994]; *People v Mauricio*, 8 AD3d 1089, 1090 [4th Dept 2004], *lv denied* 3 NY3d 678 [2004]). Contrary to defendant's contention, we conclude that this case "does not present any of the exceptional, narrowly defined circumstances in which judicial interjection through a direct colloquy with the defendant [would] be required to ensure that the defendant's right to testify is protected" (*Pilato*, 145 AD3d at 1595 [internal quotation marks omitted]).

Finally, we reject defendant's contention that the verdict is against the weight of the evidence. 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, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Henry*, 166 AD3d 1289, 1290-1292 [3d Dept 2018]; *People v Yedinak*, 157 AD3d 1052, 1055-1056 [3d Dept 2018]; *People v Tucker*, 95 AD3d 1437, 1438-1440 [3d Dept 2012], *lv denied* 19 NY3d 1105 [2012]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

53

CAF 18-00178

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

IN THE MATTER OF DOMINIC T.M.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

KATHLEEN KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 9, 2018 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 these four appeals, respondent mother appeals from respective orders that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the four subject children. We affirm in each appeal.

Initially, we note that the mother's contention that "petitioner did not make significant efforts to reunite [her] with the child[ren] is not properly before us inasmuch as it was conclusively determined in the prior proceedings to terminate [the mother's] parental rights . . . We note in any event that the [mother] admitted to the permanent neglect of the child[ren] and consented to the entry of the suspended judgment, and thus no appeal would lie therefrom because [the mother was] not aggrieved, based on [her] consent" (*Matter of Kh'Niayah D. [Niani J.]*, 155 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018] [internal quotation marks omitted]).

Contrary to the mother's further contention, there is a sound and substantial basis in the record for Family Court's determination that petitioner established by a preponderance of the evidence at the revocation hearing that she violated several terms of the suspended

judgment (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1618 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1678 [4th Dept 2016]). Those violations included the mother's failure during the period of the suspended judgment to maintain a verifiable means of financial support and to abide by the rules for visitation. Consequently, inasmuch as the mother has been unable "to overcome the specific problems that led to the removal of the child[ren] from her home," we conclude that the court properly determined that it is in the children's best interests to revoke the suspended judgment and terminate her parental rights (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015]).

Equally without merit is the mother's contention that the court failed to conduct a proper dispositional hearing to determine the best interests of the children. "It is well established that a hearing on a petition alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and that the disposition shall be based on the best interests of the child[ren]" (*Matter of Alisa E. [Wendy F.]*, 114 AD3d 1175, 1176 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]; *see Jenna D.*, 165 AD3d at 1619). It is also well established that a parent's noncompliance with the terms of the suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests (*see Jenna D.*, 165 AD3d at 1619). Here, we conclude that the court properly conducted a hearing that addressed both the alleged violations of the suspended judgment and the children's best interests, and there was no need for an additional hearing (*see id.*; *Matter of Jeremiah J.W. [Tionna W.]*, 134 AD3d 848, 849 [2d Dept 2015], *lv dismissed* 27 NY3d 1061 [2016]).

We have examined the mother's remaining contentions and conclude that none warrants reversal or modification of the orders.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

54

CAF 18-00179

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

IN THE MATTER OF NYJEER K.S.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

KATHLEEN KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 9, 2018 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.

Same memorandum as in *Matter of Dominic T.M.* ([appeal No. 1] — AD3d — [Feb. 8, 2019] [4th Dept 2019]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

55

CAF 18-00180

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

IN THE MATTER OF TYRESE M.M.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CASSIE M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

KATHLEEN KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 9, 2018 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.

Same memorandum as in *Matter of Dominic T.M.* ([appeal No. 1] — AD3d — [Feb. 8, 2019] [4th Dept 2019]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

56

CAF 18-00181

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

IN THE MATTER OF IRENE A.-J.R.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CASSIE M., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

KATHLEEN KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered January 9, 2018 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.

Same memorandum as in *Matter of Dominic T.M.* ([appeal No. 1] — AD3d — [Feb. 8, 2019] [4th Dept 2019]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

61

CA 18-01381

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

DIANE M. FULLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARMOR VOLUNTEER FIRE CO., INC.,
DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered April 3, 2018. The order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when she slipped and fell on black ice in the rear parking lot of defendant's fire hall, where plaintiff and her husband intended to play bingo. In her amended complaint, as amplified by her bill of particulars, plaintiff asserted a single cause of action, for negligence, alleging that defendant had constructive notice of the icy condition and that the lighting in the rear parking lot was inadequate. Viewing the evidence in the light most favorable to plaintiff (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the amended complaint.

Contrary to defendant's contention, it failed to meet its initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is well established that, "[t]o constitute constructive notice, a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendant failed to establish that the ice was not visible upon a reasonable inspection (*see Derosia v Gasbarre & Szatkowski Assn.*, 66 AD3d 1423, 1424 [4th Dept 2009]). In support of its motion, defendant submitted the deposition testimony of one of its

members, who stated that he plowed much of the rear parking lot to "bare blacktop" two hours before plaintiff arrived. In addition, defendant submitted the deposition testimony of plaintiff and her husband, which established that the parking lot in the area of the fall was dark and that the lighting nearby was inadequate. Thus, by its own submissions, defendant raised an issue of fact "whether the ice was merely difficult to see because of the lighting conditions, 'i.e., whether the condition was visible and apparent [upon a reasonable inspection] and had existed for a sufficient length of time before plaintiff's accident to permit defendant[] to discover and remedy it' " (*id*. at 1425; *see O'Bryan v Tonawanda Hous. Auth*., 140 AD3d 1702, 1703 [4th Dept 2016]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

88

CA 18-01657

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

JOSE M. BERMUDEZ, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AARON J. PEUSER AND MARIE T. ENTWISTLE,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF JOHN TROP, DEWITT (THERESA M. ZEHE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF MARC JONAS, UTICA (MARC JONAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 10, 2018. The order, inter alia, directed defendants to produce the written statement of a nonparty witness.

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

Memorandum: Defendants appeal from an order that, in effect, directed disclosure of a nonparty's written statement. An appeal from a discovery order is rendered moot, however, when the disputed material is disclosed before the appeal is decided (*see Vandashield Ltd v Isaacson*, 146 AD3d 552, 555 [1st Dept 2017]; *Khoury v Chouchani*, 27 AD3d 1071, 1073 [4th Dept 2006]; *Matter of Franklin [International Bus. Machs. Corp.]*, 215 AD2d 759, 759 [2d Dept 1995]; *cf. Matter of Camara v Skanska, Inc.*, 150 AD3d 548, 549 [1st Dept 2017]; *but see Matter of New York City Asbestos Litig.*, 109 AD3d 7, 12 n 2 [1st Dept 2013], *lv dismissed* 22 NY3d 1016 [2013]). Here, defendants disclosed the disputed statement during the pendency of this appeal. We therefore dismiss the appeal as moot (*see Vandashield Ltd*, 146 AD3d at 553; *Khoury*, 27 AD3d at 1072; *Franklin*, 215 AD2d at 759).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

96

KA 17-00270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORY C. THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 16, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree, burglary in the third degree (four counts), grand larceny in the fourth degree (three counts) and attempted grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, robbery in the third degree (Penal Law § 160.05), defendant contends that the grand jury proceeding was defective, and that County Court erred in refusing to grant his motion to dismiss the indictment on that ground. We reject that contention.

Pursuant to CPL 210.35 (5), a grand jury proceeding is defective when "[t]he proceeding . . . fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result." This provision "is the statutory equivalent of the common-law principle that an indictment issued by a legally constituted [g]rand [j]ury need not be dismissed because of a simple technical error if the accused was not prejudiced or the fundamental integrity of the process impaired" (*People v Williams*, 73 NY2d 84, 90 [1989]). Consequently, "[d]ismissal under CPL 210.35 (5) is limited to instances of prosecutorial misconduct, fraud, or errors that potentially prejudice the grand jury's ultimate decision" (*People v Morales*, 160 AD3d 1414, 1418 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]; *see People v East*, 78 AD3d 1680, 1680-1681 [4th Dept 2010]).

Here, we reject defendant's contention that the proceeding was

defective because the prosecutor gave perjury instructions regarding defendant's grand jury testimony to the same grand jury that indicted him on the set of charges upon which he was convicted, and that the court therefore erred in refusing to dismiss the indictment (*see generally* CPL 210.20 [1] [c]). The record establishes that the grand jury voted to indict defendant on the first set of charges before the prosecutor gave the perjury instructions. Thus, the first set of charges could not have been impacted by those instructions. Furthermore, the court later dismissed the perjury charge, and thus defendant sustained no prejudice from that indictment.

Defendant failed to preserve for our review his contention that the court erred in imposing a collection surcharge of 10% of the amount of restitution (*see* CPL 470.05 [2]; *People v Rossborough*, 160 AD3d 1486, 1487 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]; *People v Kirkland*, 105 AD3d 1337, 1338 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]). 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]). The sentence is not unduly harsh or severe.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

100

CA 18-01377

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

JAYMEE SUE ROWLAND, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICHARD ROWLAND, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY SLAYTON, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GREGORY G. BROIKOS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 17, 2017. The order denied the motion of defendant Timothy Slayton to change the venue of this action from Monroe County to Steuben County.

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 decedent's wrongful death and conscious pain and suffering resulting from an accident that occurred in Steuben County. We reject the contention of Timothy Slayton (defendant) that Supreme Court abused its discretion in denying his motion to change the venue of this action from Monroe County to Steuben County pursuant to CPLR 510 (3). " 'The party moving for a change of venue pursuant to CPLR 510 (3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change' " (*Rochester Drug Coop., Inc. v Marcott Pharmacy N. Corp.*, 15 AD3d 899, 899 [4th Dept 2005]). Here, although defendant provided the names, addresses, and occupations of the prospective witnesses; a statement of the witnesses' expected testimony that is sufficiently specific to allow the court to determine whether the witnesses are material; and a basis for concluding that the witnesses would be available and willing to testify (*see id.*; *Roth v Meyer*, 248 AD2d 1001, 1001 [4th Dept 1998]; *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172-173 [2d Dept 1995]; *Zinker v Zinker*, 185 AD2d 698, 698 [4th Dept 1992]), defendant failed to establish that the prospective witnesses would be inconvenienced if the change of venue were not granted (*cf. Seguin v Landfried*, 96 AD3d 1433, 1433 [4th Dept 2012]). Furthermore, plaintiff offered to

conduct all depositions of the witnesses in Steuben County and to limit the time of the depositions in an effort to minimize any hardship on the witnesses. We therefore conclude that "the court did not abuse its discretion in denying the motion inasmuch as defendant[] failed to meet [his] burden of proving that the convenience of material witnesses and the ends of justice would be promoted by the change" (*Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1735 [4th Dept 2016] [internal quotation marks omitted]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

108

CA 18-00864

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

LISA M. KLUMPP AND DWAYNE KLUMPP,
PLAINTIFFS-RESPONDENTS,

V ORDER

JOHN N. PHILIPPS, JR., DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered August 21, 2017. The order granted the motion of plaintiffs for summary judgment on the issue of liability.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 8, 2018,

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

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

131

CA 17-00093

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

MARK F. GRAVES, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JESSICA R. HUFF, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-RESPONDENT.

EFTIHIA BOURTIS, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (Edward C. Gangarosa, R.), entered September 7, 2016. The order, inter alia, denied the application of plaintiff for a modification of custody.

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

Same memorandum as in *Graves v Huff* ([appeal No. 2] — AD3d — [Feb. 8, 2019] [4th Dept 2019]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

132

CA 17-02033

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

MARK F. GRAVES, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JESSICA R. HUFF, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-RESPONDENT.

EFTIHIA BOURTIS, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered September 5, 2017. The order, insofar as appealed from, granted that part of the motion of defendant to dismiss plaintiff's application for a modification of custody.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, the application filed on August 1, 2017 is reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In appeal No. 1, plaintiff father appeals from an order that, after an evidentiary hearing, denied his application to modify an existing custody order regarding the parties' sons. In appeal No. 2, the father appeals from an order that, inter alia, granted that part of defendant mother's motion to dismiss, on forum non conveniens grounds, a subsequently-filed application to modify the same custody order.

In appeal No. 1, we reject the father's contention that Supreme Court erred in refusing to modify the existing custody arrangement. It is well settled that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record . . . , i.e., it is not supported by a sound and substantial basis in the record" (*Matter of Nevin H. [Stephanie H.]*, 164 AD3d 1090, 1093 [4th Dept 2018] [internal quotation marks omitted]). Here, we see no reason to disturb the court's credibility assessments, and we conclude that the custody determination is supported by a sound and substantial basis in the record. We therefore affirm the order in appeal No. 1.

In appeal No. 2, however, we agree with the father that the court erred in dismissing the application on forum non conveniens grounds. In custody matters, "[b]efore determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court . . . shall consider all relevant factors," including eight enumerated factors (Domestic Relations Law § 76-f [2]). Here, the record fails to establish that the court considered all of the requisite statutory factors. We therefore reverse the order in appeal No. 2 insofar as appealed from, deny the mother's motion to dismiss in its entirety, reinstate the father's application filed on August 1, 2017, and remit the matter to Supreme Court for further proceedings thereon in compliance with section 76-f (2) (*see Matter of Berg v Narolis*, 64 AD3d 1188, 1189 [4th Dept 2009]; *see also Matter of Wilson v Linn*, 79 AD3d 1767, 1768 [4th Dept 2010]; *Matter of Scala v Tefft*, 42 AD3d 689, 692 [3d Dept 2007]). The father's remaining contention in appeal No. 2 is academic.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

138

KA 16-02357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEAH GIGLIOTTI, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 23, 2016. The judgment convicted defendant, upon her plea of guilty, of kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of kidnapping in the second degree (Penal Law § 135.20). We agree with defendant that her waiver of the right to appeal does not encompass her challenge to the severity of the sentence. "[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal [her] conviction that [she] was also waiving [her] right to appeal any issue concerning the severity of the sentence" (*People v Testerman*, 149 AD3d 1559, 1559 [4th Dept 2017] [internal quotation marks omitted]; *see People v Lorenz*, 119 AD3d 1450, 1450 [4th Dept 2014], *lv denied* 24 NY3d 962 [2014]). Furthermore, " '[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [Supreme] Court and defendant regarding the [written] waiver of the right to appeal to ensure that' defendant was aware that it encompassed [her] challenge to the severity of the sentence" (*People v Avellino*, 119 AD3d 1449, 1449-1450 [4th Dept 2014]). Nonetheless, we conclude that the negotiated sentence is not unduly harsh or severe. Defendant was charged by indictment with, inter alia, four counts of kidnapping in the first degree, a class A-I felony. She was permitted to plead guilty to one count of kidnapping in the second degree with the understanding that she would receive the agreed-upon sentence.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

142

CA 18-01251

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

ROSALIE SAWYER, PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, DEFENDANT-RESPONDENT, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT AURORA PARK, LLC, ABSOLUT FACILITIES MANAGEMENT, LLC, AND ISRAEL SHERMAN, DEFENDANTS-APPELLANTS.

KAUFMAN BORGEEST & RYAN LLP, NEW YORK CITY (ELDAR MAYOUHAS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (COLLEEN P. FAHEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 16, 2017. The order, insofar as appealed from, granted the motion of plaintiff for leave to renew/reargue and, upon renewal and reargument, granted a temporary stay of arbitration.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 21, 2018,

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

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

145

OP 18-01519

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

IN THE MATTER OF MONROE COUNTY FEDERATION OF SOCIAL WORKERS, IUE-CWA LOCAL 381, PETITIONER,

V MEMORANDUM AND ORDER

THOMAS A. STANDER, J.S.C., AND COUNTY OF MONROE, RESPONDENTS.

TREVETT CRISTO P.C., ROCHESTER (MICHAEL T. HARREN OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENT COUNTY OF MONROE.

Proceeding pursuant to CPLR article 78 (commenced in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondent Thomas A. Stander, J.S.C., to render a judgment in the underlying proceeding.

It is hereby ORDERED that said petition is unanimously dismissed with costs.

Memorandum: Petitioner commenced this original CPLR article 78 proceeding to compel Hon. Thomas A. Stander (respondent), a now retired Supreme Court Justice, to render a judgment in an underlying special proceeding (*see* CPLR 411). We conclude that the petition must be dismissed. First, the proceeding is untimely. "[W]here, as here, the proceeding is in the nature of mandamus to compel, it 'must be commenced within four months after refusal by respondent, upon demand of petitioner, to perform its duty' " (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017]; *see* CPLR 217 [1]). Here, petitioner made its demand for a judgment in July 2017, and respondent refused that demand by letter to the parties dated December 21, 2017. This proceeding was commenced in August 2018, well beyond the four-month limitations period. Second, the petition is jurisdictionally defective inasmuch as petitioner never obtained personal jurisdiction over respondent (*see* CPLR 7804 [c]; *Matter of Hock v Brennan*, 107 AD3d 991, 992 [2d Dept 2013]; *Matter of Taylor v Poole*, 285 AD2d 769, 770 [3d Dept 2001]; *Matter of Lothrop v Edelstein*, 112 AD2d 433, 434 [2d Dept 1985]).

Finally, the petition is wholly without merit inasmuch as petitioner is not entitled to mandamus relief. A writ of mandamus "is

an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought" (*Matter of Dinsio v Supreme Ct., Appellate Div., Third Jud. Dept.*, 125 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015], *rearg denied* 26 NY3d 1134 [2016]; *see Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016]). CPLR 411 provides that a court "shall direct that a judgment be entered determining the rights of the parties to the special proceeding." A CPLR article 78 proceeding terminates in a judgment even if the document appealed from is denominated an order (*see CRP/Extell Parcel I, L.P. v Cuomo*, 27 NY3d 1034, 1037 [2016]; *Matter of McMillian v Lempke*, 149 AD3d 1492, 1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]). Here, respondent issued a "decision and order" in the underlying proceeding; that paper is deemed a judgment, from which petitioner failed to take a timely appeal (*see Matter of Aarismaa v Bender*, 108 AD3d 1203, 1204 [4th Dept 2013]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

147

CA 18-00188

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

ERICA L. NYSTROM, FORMERLY KNOWN AS ERICA L. WATKINS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, INC., BOONVILLE FAMILY PRACTICE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

BURKE SCOLAMIERO & HURD, LLP, ALBANY (THOMAS A. CULLEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 22, 2017. The order, among other things, directed defendant Rome Memorial Hospital, Inc. to produce certain hospital records for in camera review.

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

Memorandum: Defendants-appellants appeal from an order compelling defendant Rome Memorial Hospital, Inc. (Hospital) to produce for in camera review certain hospital records. Inasmuch as the Hospital already provided those records to Supreme Court, which subsequently provided them to plaintiff, we dismiss the appeal as moot because the Hospital complied with the discovery demand at issue on this appeal. Under the circumstances, the parties' rights "will not be directly affected by a determination of the appeal" (*Matter of Franklin [International Bus. Machs. Corp.]*, 215 AD2d 759, 759 [2d Dept 1995]; *see Hyman v Pierce*, 145 AD3d 1224, 1224-1225 [3d Dept 2016]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

170

KA 17-01709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAMIA N. JOHNSON, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 4, 2016. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]) and, contrary to defendant's further contention, "[Supreme] Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625 [4th Dept 2009], *lv denied* 13 NY3d 742 [2009]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]). Defendant's valid waiver of the right to appeal forecloses her challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

172

KA 17-00650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEX ROSARIO, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered February 29, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that he received ineffective assistance of counsel. Here, because the victim identified defendant at trial and testified that he knew defendant prior to the incident, defense counsel was not ineffective in failing to call an expert witness to testify about the reliability of eyewitness identifications (*see People v Smith*, 128 AD3d 1434, 1435 [4th Dept 2015], *lv denied* 26 NY3d 1011 [2015]; *People v Smith*, 118 AD3d 1492, 1493 [4th Dept 2014], *lv denied* 25 NY3d 953 [2015]; *People v Faison*, 113 AD3d 1135, 1136 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014]).

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 further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court

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

180

CAF 16-02184

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

IN THE MATTER OF PATRICK J. GIBBARDO,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LATASHA L. RAMOS,
RESPONDENT-PETITIONER-RESPONDENT.

SUSAN LARAGY, ROCHESTER, FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified an order of custody.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father appeals from an order that, inter alia, modified a prior order of custody and visitation by reducing his visitation with his son. Contrary to the father's contention that respondent-petitioner mother failed to demonstrate a sufficient change in circumstances warranting a review of the existing custody arrangement, "a change in circumstances exists where, as here, the parents' relationship becomes so strained and acrimonious that communication between them is impossible" (*Matter of Murphy v Wells*, 103 AD3d 1092, 1093 [4th Dept 2013], *lv denied* 21 NY3d 854 [2013]; *see Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]). Contrary to the father's next contention, Family Court did not abuse its discretion in reducing his visitation. It is well settled that "a court's determination regarding . . . visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record, i.e., is not supported by a sound and substantial basis in the record" (*Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Ordona v Cothern*, 126 AD3d 1544, 1545 [4th Dept 2015]; *Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]). Here, we conclude that there is a sound and substantial basis in the record to support the court's determination.

Contrary to the further contention of the father, the court did

not abuse its discretion in denying his motion to reopen the proof after he left court early during the first day of the hearing and did not return for the completion of the hearing on the next adjourned date (*see Matter of Jayden T. [Amy T.]*, 118 AD3d 1075, 1076 [3rd Dept 2014]; *Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306 [4th Dept 2012]). This is "not an instance in which a party [sought] 'to reopen and supply defects in evidence which have inadvertently occurred' " (*Matter of Radisson Community Assn., Inc. v Long*, 28 AD3d 88, 91 [4th Dept 2006]; *see Matter of Markham v Comstock*, 38 AD3d 1262, 1263-1264 [4th Dept 2007]; *cf. Matter of Dutchess County Dept. of Social Servs. v Shirley U.*, 266 AD2d 459, 460 [2d Dept 1999]).

Entered: February 8, 2019

Mark W. Bennett
Clerk of the Court