SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 4, 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

779

CAF 18-00056

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF CASEY KELLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA M. KELLER, RESPONDENT-APPELLANT.

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

STUART J. LAROSE, SYRACUSE, FOR PETITIONER-RESPONDENT.

MICHAEL J. KERWIN, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered November 29, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order granting petitioner father sole legal and physical custody of the subject child. Contrary to the mother's contention, we conclude that the father established the requisite change in circumstances sufficient to warrant an inquiry into whether the existing custody arrangement was in the best interests of the child. It is well settled that "the continued deterioration of the parties' relationship is a significant change in circumstances justifying a change in custody" (*Matter of Gaudette v Gaudette*, 262 AD2d 804, 805 [3d Dept 1999], *lv denied* 94 NY2d 790 [1999]; *see Lauzonis v Lauzonis*, 120 AD3d 922, 924 [4th Dept 2014]). Here, the evidence at the hearing established that "the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances" (*Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]). Contrary to the mother's further contention, Family Court did not err in granting sole legal and physical custody to the father. "The court's determination with respect to the child's best interests 'is entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1393 [4th Dept

2016]; *see Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]). Finally, the mother's contention that reversal is warranted because the court was biased against her is unpreserved for our review inasmuch as "[s]he failed to make a motion asking the court to recuse itself" (*Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]), but we would be remiss in failing to admonish the Referee, the Attorney for the Child, and the mother's own counsel for their unseemly conduct and unprofessional comments throughout the hearing. While we acknowledge that Family Court matters can be emotional and taxing on the parties, that is not an excuse for a lapse in courtroom decorum from the attorneys and professionals in attendance. In any event, we conclude that the mother's contention lacks merit inasmuch as the record does not establish that the court was biased or prejudiced against her (*see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1343 [4th Dept 2017]), despite the Referee's intemperate remarks.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

782

OP 18-02035

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF ANDIS R. ZELTINS, PETITIONER,

V MEMORANDUM AND ORDER

HON. JASON L. COOK, RESPONDENT.

LAW OFFICE OF BRIAN T. STAPLETON, ESQ., WHITE PLAINS (BRIAN T. STAPLETON OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul a determination of respondent. The determination denied the application of petitioner for a pistol permit.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his pistol permit application. We reject petitioner's contention that the determination is arbitrary and capricious. "The State has a substantial and legitimate interest and[,] indeed, a grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (*Matter of Galletta v Crandall*, 107 AD3d 1632, 1632 [4th Dept 2013] [internal quotation marks omitted]). A licensing officer, such as respondent, "has broad discretion to grant or deny a permit under Penal Law § 400.00 (1)" (*Matter of Parker v Randall*, 120 AD3d 946, 947 [4th Dept 2014]) " 'and may do so for any good cause' " (*Galletta*, 107 AD3d at 1632).

Although there were several factors that militated in favor of granting petitioner's application, we cannot conclude that respondent abused his discretion in denying the application after considering petitioner's criminal history (*see id.* at 1633; *see also Matter of Jackson v Anderson*, 149 AD3d 933, 934 [2d Dept 2017]; *Matter of Kelly v Klein*, 96 AD3d 846, 847 [2d Dept 2012]) and a recent incident where petitioner's girlfriend had sought police intervention while in the midst of an argument with petitioner (*see Matter of Nash v Nassau*

County, 150 AD3d 1120, 1121 [2d Dept 2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

784

TP 19-00440

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF ANTHONY PUGLIESE, AGENT
UNDER POWER OF ATTORNEY FOR ANTONIO PUGLIESE,
PETITIONER,

V MEMORANDUM AND ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF HEALTH, RESPONDENT.

THE MARRONE LAW FIRM, P.C., SYRACUSE (CHRISTINE KHAMIS OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Gregory R. Gilbert, J.], entered December 11, 2018) to review a determination of respondent. The determination denied petitioner's application for Chronic Care Medical Assistance benefits.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to challenge a determination, made after a fair hearing, that he is ineligible for Medicaid coverage. We confirm that determination. When reviewing a Medicaid eligibility determination made after a fair hearing, we must determine whether the agency's decision is "supported by substantial evidence and [is] not affected by an error of law," bearing in mind that the petitioner "bears the burden of demonstrating eligibility" (*Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013] [internal quotation marks omitted]). We will uphold the agency's determination when it is "premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute" (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658 [1998]; *see Matter of Peterson v Daines*, 77 AD3d 1391, 1392-1393 [4th Dept 2010]).

Here, we conclude that the agency's determination, which is based on its conclusion that the principal of a trust of which petitioner is a beneficiary is an available resource, is supported by substantial

evidence and is not affected by an error of law. Petitioner's son, as a trustee, depleted a majority of the trust's value by using a home equity line of credit secured by a trust asset to, inter alia, pay for petitioner's living and caregiver expenses. Because the trust instrument gave the trustees broad discretion in the distribution of the trust principal, including for petitioner's benefit, the agency did not err in concluding that the principal is an available resource for purposes of petitioner's Medicaid eligibility determination (*see* 18 NYCRR 360-4.5 [b] [1] [ii]; *see also Matter of Vitale v Woodhouse*, 270 AD2d 951, 951-952 [4th Dept 2000]; *Matter of Frey v O'Reagan*, 216 AD2d 565, 566 [2d Dept 1995]), despite the fact that petitioner's son no longer wishes to exercise his discretion to make such distributions (*see Matter of Flannery v Zucker*, 136 AD3d 1385, 1385-1386 [4th Dept 2016]). Further, petitioner's contention that the home equity line of credit should have been excluded from the eligibility determination as a bona fide loan is irrelevant inasmuch as the line of credit had been exhausted and was not considered an asset at the time petitioner's application was made. Finally, based on the foregoing, we conclude that the determination is supported by a rational basis and is not arbitrary or capricious.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

786

CA 18-01304

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF STEPHEN FOX,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF GENEVA ZONING BOARD OF APPEALS, TOWN OF GENEVA, MARK VENUTI, IN HIS CAPACITY AS TOWN SUPERVISOR OF TOWN OF GENEVA, FLOYD KOFAHL, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF GENEVA AND LORRIE S. NAEGELE, IN HER CAPACITY AS TOWN CLERK OF TOWN OF GENEVA,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

WEAVER MANCUSO FRAME LLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (LAUREN MILLER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 7, 2018 in a CPLR article 78 proceeding and action under 42 USC §§ 1983, 1985 and 1988. The judgment dismissed the first cause of action in the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the first cause of action in the petition-complaint is granted.

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and action under 42 USC §§ 1983, 1985, and 1988 seeking, inter alia, to annul the determination of respondent-defendant Town of Geneva Zoning Board of Appeals (ZBA) affirming in part the order to remedy issued by respondent-defendant Floyd Kofahl, in his capacity as Code Enforcement Officer of respondent-defendant Town of Geneva, upon his decision that petitioner's property was in violation of certain provisions of the Town of Geneva Code (Code) as then written. The ZBA determined, among other things, that the breakwall, septic system retaining wall, and north side retaining wall (collectively, walls) constructed on petitioner's lakefront property constituted fences as defined by Code former § 77-1, and that petitioner's property was in violation of the permitting and other requirements of the Code attendant to the status

of the walls as fences. In appeal No. 1, petitioner appeals from a judgment that dismissed the first cause of action in the petition-complaint seeking to annul the ZBA's determination and to vacate the order to remedy. In appeal No. 2, petitioner appeals from an order that denied petitioner's motion for leave to renew the first cause of action.

It is well settled that "[l]ocal zoning boards have broad discretion, and '[a] determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence' " (*Matter of Corigliano v Zoning Bd. of Appeals of City of New Rochelle*, 18 AD3d 750, 750 [2d Dept 2005], quoting *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]). "The interpretation by a zoning board of its governing code is generally entitled to great deference by the courts" (*Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467 [4th Dept 2009]; *see Appelbaum v Deutsch*, 66 NY2d 975, 977-978 [1985]) and, so long as the interpretation "is neither 'irrational, unreasonable nor inconsistent with the governing [code],' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]). " 'Where, however, the question is one of pure legal interpretation of [the code's] terms,' deference to the zoning board is not required" (*Emmerling*, 67 AD3d at 1467-1468, quoting *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]). Additionally, a determination by the zoning board that " 'runs counter to the clear wording of a [code] provision' is given little weight" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 103 [1997]; *see Emmerling*, 67 AD3d at 1468).

We agree with petitioner in appeal No. 1 that the determination of the ZBA lacks a rational basis and is not supported by substantial evidence. Initially, the parties agree that the primary issue is whether the walls—the existence and characteristics of which are not in dispute—fall within the definition of fences under the Code, and we conclude that deference to the ZBA is not required inasmuch as "[t]he issue posed is susceptible to resolution as a matter of law by interpretation of the [Code] terms" (*Matter of Winterton Props., LLC v Town of Mamakating Zoning Bd. of Appeals*, 132 AD3d 1141, 1142 [3d Dept 2015]; *see Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 515-517 [2d Dept 2006]; *Matter of Mack v Board of Appeals, Town of Homer*, 25 AD3d 977, 979-980 [3d Dept 2006]). In relevant part, Code former § 77-1 defines "fence" as "[a]ny structure, regardless of composition, . . . that is erected or maintained for the purpose of enclosing a piece of land or dividing a piece of land into distinct portions." It is well established that an "ordinance is to be construed as a whole, reading all of its parts together to determine the legislative intent and to avoid rendering any of its language superfluous" (*Matter of Erin Estates, Inc. v McCracken*, 84 AD3d 1487, 1489 [3d Dept 2011]). Moreover, where, as here, "the language of a[n ordinance] is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]). Contrary to the ZBA's determination and the interpretation

advocated by respondents-defendants, both of which improperly read out of Code former § 77-1 the language regarding purpose, we agree with petitioner that the purpose of erecting or maintaining the structure is central to whether the structure meets the definition of a "fence."

Here, the undisputed relevant evidence establishes that the walls do not fall within the plain meaning of fences as defined by Code former § 77-1 inasmuch as they were not erected for the purpose of enclosing or dividing a piece of land (*see Winterton Props., LLC* , 132 AD3d at 1143; *Erin Estates, Inc.*, 84 AD3d at 1489; *Emmerling*, 67 AD3d at 1468). Instead, the breakwall was constructed to maintain the shoreline of the lake in light of the future construction of a house on petitioner's property, the septic system retaining wall was constructed to secure the integrity of the proposed leach field, and the north side retaining wall was constructed to provide better drainage and avoid soil erosion. We thus conclude that the ZBA's determination affirming the order to remedy with respect to the violations of the Code that depend on the walls being considered fences lacks a rational basis and is not supported by substantial evidence.

We further agree with petitioner in appeal No. 1 that the ZBA's determination affirming the order to remedy with respect to the remaining violations of the Code is not supported by substantial evidence (*see generally Toys "R" Us*, 89 NY2d at 419).

We therefore reverse the judgment in appeal No. 1 and grant the first cause of action in the petition-complaint, thereby annulling the ZBA's determination and vacating the order to remedy. In light of our determination in appeal No. 1, we do not consider petitioner's remaining contentions therein and, furthermore, the appeal in appeal No. 2 is moot (*see JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

787

CA 19-00450

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF STEPHEN FOX,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF GENEVA ZONING BOARD OF APPEALS, TOWN OF GENEVA, MARK VENUTI, IN HIS CAPACITY AS TOWN SUPERVISOR OF TOWN OF GENEVA, FLOYD KOFAHL, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF GENEVA AND LORRIE S. NAEGELE, IN HER CAPACITY AS TOWN CLERK OF TOWN OF GENEVA,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

WEAVER MANCUSO FRAME LLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (LAUREN MILLER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered February 11, 2019 in a CPLR article 78 proceeding and action under 42 USC §§ 1983, 1985 and 1988. The order denied petitioner-plaintiff's motion for leave to renew the first cause of action in his petition-complaint.

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

Same memorandum as in *Matter of Fox v Town of Geneva Zoning Bd. of Appeals* ([appeal No. 1] — AD3d — [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

801

CA 18-01842

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

TERESSA BUTCHELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER J. TERHAAR, D.O., ALLEGHENY REGIONAL BONE AND JOINT SURGERY, P.C., OLEAN GENERAL HOSPITAL UPPER ALLEGHENY HEALTH SYSTEM, INC., DEFENDANTS-APPELLANTS, AND WILLIAM J. WONDERLING, RPA-C, DEFENDANT.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS PETER J. TERHAAR, D.O. AND ALLEGHENY REGIONAL BONE AND JOINT SURGERY, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (RYAN P. CRAWFORD OF COUNSEL), FOR DEFENDANTS-APPELLANTS OLEAN GENERAL HOSPITAL AND UPPER ALLEGHENY HEALTH SYSTEM, INC.

KUSTELL LAW GROUP, LLP, BUFFALO (KATHRYN M. EASTMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 29, 2018. The order, insofar as appealed from, granted plaintiff's motion to the extent that it sought to vacate an order dismissing the complaint against defendants-appellants.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied in its entirety, and the order dated January 25, 2017 is reinstated.

Memorandum: After commencing this medical malpractice action on June 23, 2015, plaintiff discharged her attorneys on December 28, 2016. Supreme Court granted the subsequent cross motion of plaintiff's attorneys to withdraw, provided plaintiff until March 9, 2017 to appear with new counsel or appear pro se, and directed that her failure to appear would result "in dismissal of plaintiff's complaint without further order." Plaintiff did not appear by March 9 and instead moved on December 6, 2017 to, inter alia, vacate the order of dismissal (default order) and restore the action to the calendar on the grounds that she had a reasonable excuse for her default and a meritorious cause of action. Plaintiff ultimately obtained new counsel and filed a notice of appearance dated February 2, 2018.

Defendants-appellants (defendants) appeal from an order that, inter alia, granted plaintiff's motion insofar as it sought to vacate that part of the default order dismissing the complaint against defendants and restored her case to the calendar. We reverse the order insofar as appealed from.

"A plaintiff seeking relief from a default [order] must establish a reasonable excuse for the default and a meritorious cause of action" (*Testa v Koerner Ford of Syracuse* [appeal No. 2], 261 AD2d 866, 868 [4th Dept 1999]; *see Loucks v Klimek*, 108 AD3d 1037, 1038 [4th Dept 2013]). " 'Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court . . . , the movant must submit supporting facts in evidentiary form sufficient to justify the default' " (*Incorporated Vil. of Hempstead v Jablonsky*, 283 AD2d 553, 554 [2d Dept 2001]; *see Brehm v Patton*, 55 AD3d 1362, 1363 [4th Dept 2008]).

Plaintiff contends that she established a reasonable excuse for her default because she believed that the court had extended her time to appear. We reject that contention. In support of the motion to vacate, plaintiff submitted her affidavit, in which she asserted that she "relied upon the representation of another attorney [she had] retained [who] said that he had contacted the court to extend [her] time," and she attached to the affidavit the attorney's purported text message indicating he had contacted the court for that purpose. The text message, however, is undated and does not state that the court actually granted an extension. Indeed, it is undisputed that no extension was granted. Further, plaintiff did not state when she received the text message, whether she received it prior to the March 9, 2017 deadline to appear, or what the result of the attorney's request for an extension of time was. The evidence submitted by plaintiff therefore did not establish a reasonable excuse for the default (*see generally Brehm*, 55 AD3d at 1363). Insofar as plaintiff also contends that she established a reasonable excuse because she was searching for new counsel while in default, we agree with defendants that plaintiff was provided sufficient time to obtain new counsel and that the mere inability to secure counsel does not establish a reasonable excuse for her default (*see generally 135 Bowery LLC v 10717 LLC*, 145 AD3d 1225, 1227-1228 [3d Dept 2016]; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1099 [4th Dept 2013]). Inasmuch as plaintiff failed to establish a reasonable excuse for her default, the court erred in granting in part her motion to vacate.

In light of that determination, we need not consider whether plaintiff established a potentially meritorious claim (*see generally Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]; *Abbott*, 109 AD3d at 1100; *Loucks*, 108 AD3d at 1038).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

807

CA 18-02295

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

JOSEPH ADDEO, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CLARIT REALTY, LTD.,
DEFENDANT-APPELLANT-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Paul B. Wojtaszek, J.), entered October 1, 2018. The order denied the respective motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion and dismissing the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell while walking through an entryway into a building owned by defendant and leased to plaintiff's employer. Defendant appeals and plaintiff cross-appeals from an order that denied defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of negligence.

With respect to the appeal and cross appeal, we conclude that plaintiff established as a matter of law that a dangerous condition existed on defendant's property that caused him to fall, i.e., an improperly secured metal strip along the bottom of a doorway (*see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]; *cf. Werner v Kaleida Health*, 96 AD3d 1569, 1570 [4th Dept 2012]), and defendant failed to raise an issue of fact regarding the existence of a dangerous condition or the cause of plaintiff's fall (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We agree with defendant on its appeal, however, that Supreme Court erred in denying its motion inasmuch as it established as a matter of law that it was an out-of-possession landlord that had no duty to maintain or repair the metal strip on which plaintiff allegedly tripped and plaintiff failed to raise an issue of fact in opposition (*see generally Ferro v*

Burton, 45 AD3d 1454, 1454-1455 [4th Dept 2007]). We therefore modify the order accordingly. For the same reason, we conclude with respect to plaintiff's cross appeal that the court properly denied his cross motion.

It is well settled that " 'an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable . . . for personal injuries caused by an unsafe condition existing on the premises' " (*Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018]; *see Ferro*, 45 AD3d at 1455). Here, in support of its motion, defendant submitted the lease between defendant and plaintiff's employer, which provided that the lessee was responsible for all maintenance and repair of the premises except for "Major Improvements," which the lease defined as "any major repair (repairs that are not of the nature of ordinary maintenance such as local patches, caulking, flashing)" including "replacement of the roof, replacement of load-bearing walls and foundations, [and] repairs to the concrete floor." We conclude that maintenance of the allegedly bent or defective metal strip was not a "Major Improvement[]" under the lease (*see generally Regensdorfer v Central Buffalo Project Corp.*, 247 AD2d 931, 932 [4th Dept 1998]).

Further, the record established that defendant relinquished control of the premises. The fact that, under the lease, defendant reserved the right to enter the leased premises for purposes of inspection and performing "Major Improvements," is " 'insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord' " (*Ferro*, 45 AD3d at 1455). "[A]n out-of-possession landlord who reserves that right may be held liable for injuries to a third party only where a specific statutory violation exists" (*Regensdorfer*, 247 AD2d at 932), and plaintiff failed to allege a specific statutory violation pertaining to the metal strip (*see Brown v BT-Newyo, LLC*, 93 AD3d 1138, 1138-1139 [3d Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Kilimnik v Mirage Rest.*, 223 AD2d 530, 531 [2d Dept 1996]). Although plaintiff also contends that the concrete comprising the stairs and entryway where plaintiff fell was in a state of disrepair and alleges related violations of the Property and Maintenance Code of New York, the state of the concrete was not identified as a defective condition in plaintiff's bill of particulars and was instead improperly raised for the first time in opposition to defendant's motion and in support of his cross motion (*see Flynn v Haddad*, 109 AD3d 1209, 1210 [4th Dept 2013]; *Marchetti v East Rochester Cent. School Dist.*, 26 AD3d 881, 881 [4th Dept 2006]). In any event, plaintiff testified at his deposition that he tripped on a bent metal strip only, not on defective concrete.

In light of our determination, we do not address the remaining contentions of either party.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

808

CA 19-00437

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

JACQUELINE ROSE AND HEATHER LAPIER,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT-APPELLANT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 21, 2018. The order denied in part defendant's motion for summary judgment and denied plaintiffs' cross motion for summary judgment.

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

Memorandum: Plaintiffs owned a home that defendant insured. After the home was damaged in a fire, plaintiffs commenced this breach of contract action to recover certain expenses that defendant refused to cover. Plaintiffs appeal from an order insofar as it denied their cross motion for summary judgment on the complaint and granted that part of defendant's motion for summary judgment dismissing the second cause of action. Defendant cross-appeals from the order insofar as it denied those parts of its motion for summary judgment dismissing the first and third causes of action. We affirm.

Contrary to plaintiffs' contentions on their appeal and defendant's contentions on its cross appeal, Supreme Court properly denied both plaintiffs' cross motion and defendant's motion with respect to the first and third causes of action inasmuch as triable issues of fact preclude a grant of summary judgment to either party on those causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiffs' further contention on their appeal, the court properly granted that part of defendant's motion with respect to the second cause of action and denied that part of plaintiffs' cross motion with respect to the second cause of action inasmuch as defendant met its initial burden with respect to that cause of action and plaintiffs failed to raise a triable issue of fact

in opposition (*see generally id.*).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

815

KA 14-00761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. DIBBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 16, 2014. The judgment convicted defendant, upon a nonjury verdict, of attempted aggravated assault upon a police officer or a peace officer, attempted criminal possession of a weapon in the second degree, attempted robbery in the third degree, attempted menacing a police officer or peace officer, and attempted escape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted menacing a police officer or peace officer and dismissing count four of indictment No. 11-04-044, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a nonjury verdict of attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11), attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]), attempted robbery in the third degree (§§ 110.00, 160.05), attempted menacing a police officer or peace officer (§§ 110.00, 120.18), and attempted escape in the third degree (§§ 110.00, 205.05). The conviction in appeal No. 1 arose from a February 4, 2011 incident when an Ontario County Sheriff’s Deputy was returning defendant to jail after defendant was arraigned in Town Court in another matter, and defendant lunged through the partition in the deputy’s vehicle and placed his hand on the deputy’s service weapon.

The arraignment from which defendant was being transported was related to charges stemming from a separate February 2, 2011 incident in which defendant led an Ontario County Sheriff’s Deputy on a motor vehicle chase and thereafter brandished a knife. After he was

convicted of the charges at issue in appeal No. 1, defendant entered a guilty plea pursuant to *North Carolina v Alford* (400 US 25 [1970]) in connection with the February 2, 2011 incident. In appeal No. 2, defendant appeals from the judgment entered upon that guilty plea convicting him of driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]) and menacing a police officer or peace officer (Penal Law § 120.18).

While the criminal proceedings in appeal No. 1 and appeal No. 2 were pending, defendant became the subject of an investigation about various forgery incidents occurring in January 2011. On the same day as his guilty plea at issue in appeal No. 2, defendant entered another *Alford* plea in connection with the January 2011 forgery incidents. In appeal No. 3, defendant appeals from the judgment entered upon that guilty plea convicting him of criminal possession of a forged instrument in the second degree (Penal Law § 170.25).

In appeal No. 4, defendant appeals from an order denying, without a hearing, his motion pursuant to CPL 440.10 seeking to vacate the judgments of conviction at issue in appeal No. 1 and appeal No. 2.

With respect to appeal No. 1, defendant contends that his waiver of the right to a jury trial was not knowing, voluntary, or intelligent because County Court suggested during its waiver colloquy that, in a bench trial, it could consider matters outside of the trial record. Defendant, however, failed to preserve his contention for our review (*see People v Lane*, 160 AD3d 1363, 1365 [4th Dept 2018]; *People v Williams*, 149 AD3d 986, 986 [2d Dept 2017], *lv denied* 29 NY3d 1135 [2017]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court abused its discretion in denying his request for substitution of counsel. It is well settled that "counsel may be substituted only where 'good cause' is shown" (*People v Porto*, 16 NY3d 93, 100 [2010]), and we conclude that the "strategic disagreement between defendant and counsel concerning counsel's handling of [issues relating to defendant's competency to stand trial] was not a 'conflict' requiring substitution" (*People v Banks*, 265 AD2d 163, 163 [1st Dept 1999], *lv denied* 94 NY2d 819 [1999]). We similarly conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defendant's trial] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). In particular, " 'the mistake of [trial] counsel with respect to [the] minimum sentence [available for a class D felony] does not rise to the level of ineffective assistance of counsel' " (*People v Fowler*, 45 AD3d 1372, 1374 [4th Dept 2007], *lv denied* 9 NY3d 1033 [2008], quoting *People v Modica*, 64 NY2d 828, 829 [1985]). Notably, after defense counsel inaccurately stated that the minimum permissible sentence pursuant to Penal Law § 70.06 (6) (c) for a conviction of a class D felony was four years rather than three years, the prosecutor immediately corrected the mistake.

Defendant's challenge to the legal sufficiency of the evidence in appeal No. 1 is preserved only in part because, in moving for a trial order of dismissal, defendant raised only some of the specific grounds raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Jacobson*, 60 AD3d 1327-1328 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence provides a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the offenses of attempted aggravated assault upon a police officer or a peace officer, attempted criminal possession of a weapon in the second degree, attempted robbery in the third degree, and attempted escape in the third degree. Specifically, with respect to the conviction of attempted aggravated assault upon a police officer or a peace officer, we conclude that the People established that the firearm was loaded and operable (*see People v Shaffer*, 66 NY2d 663, 664 [1985]), through circumstantial evidence (*see People v Machado*, 144 AD3d 1633, 1634-1635 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]). We have reviewed defendant's remaining challenges to the legal sufficiency of the evidence with respect to the charges of attempted aggravated assault upon a police officer or a peace officer, attempted criminal possession of a weapon in the second degree, attempted robbery in the third degree, and attempted escape in the third degree, and we conclude that they are without merit. We further conclude that, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict with respect to those charges is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that his conviction of attempted menacing a police officer or peace officer must be reversed because that offense is not a legally cognizable crime. As relevant here, Penal Law § 120.18 provides that "[a] person is guilty of menacing a police officer or peace officer when he or she intentionally places or attempts to place a police officer . . . in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, . . . pistol, . . . or other firearm, whether operable or not, where such officer was in the course of performing his or her official duties and the defendant knew or reasonably should have known that such victim was a police officer." Thus, according to the definition of menacing a police officer or peace officer set forth in the Penal Law, the attempt to commit the crime is already an element of the offense, and "there cannot be an attempt to commit a crime which is itself a mere attempt to do an act or accomplish a result" (*People v Schmidt*, 76 Misc 2d 976, 978 [Crim Ct, Bronx County 1974]; *see People v Tucker*, 151 AD3d 1085, 1086 [2d Dept 2017]; *People v Diaz*, 146 Misc 2d 260, 264 [Crim Ct, Bronx County 1990]; *see also People v Campbell*, 72 NY2d 602, 607 [1988]). Although defendant failed to raise this issue at trial, preservation is not required inasmuch as this issue constitutes a mode of proceedings error (*see People v Martinez*, 81 NY2d 810, 812 [1993]; *People v*

Stevenson, 71 AD3d 796, 797 [2d Dept 2010], *lv denied* 14 NY3d 893 [2010]).

We therefore modify the judgment in appeal No. 1 by reversing that part convicting defendant of attempted menacing a police officer or peace officer and dismissing count four of indictment No. 11-04-044. The sentence imposed in appeal No. 1 is not unduly harsh or severe.

Contrary to defendant's contention in appeal Nos. 2 and 3, our determination in appeal No. 1 to reverse the judgment in part and dismiss count four of the indictment does not require reversal of the judgments in appeal Nos. 2 and 3 pursuant to *People v Fuggazzatto* (62 NY2d 862 [1984]) inasmuch as the sentences imposed in appeal Nos. 2 and 3 "will still run 'concurrently with and not exceed' " the sentence imposed in appeal No. 1 (*People v Freeman*, 159 AD3d 1337, 1337 [4th Dept 2018], *lv denied* 31 NY3d 1447 [2018], quoting *Fuggazzatto*, 62 NY2d at 863).

Defendant failed to preserve his contention in appeal No. 3 that the court erred in ordering him to pay a 10% surcharge in connection with the collection of restitution (*see People v Rossborough*, 160 AD3d 1486, 1487 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

In appeal No. 4, we reject the contention of defendant that the court was required to summarily grant his CPL 440.10 motion. A court must grant a CPL 440.10 motion without conducting a hearing if "the sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof" (CPL 440.30 [3] [c]). In this case, neither circumstance applies. We further conclude that the court properly denied defendant's motion without a hearing inasmuch as either defendant's allegations made in support of the motion are contradicted by the record (*see* CPL 440.30 [4] [d] [i]), or there is no reasonable possibility that the allegations are true (*see* CPL 440.30 [4] [d] [ii]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

816

KA 15-00845

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. DIBBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, of driving while ability impaired by drugs and menacing a police officer or peace officer.

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

Same memorandum as in *People v Dibble* ([appeal No. 1] — AD3d — [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

817

KA 17-00460

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. DIBBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Same memorandum as in *People v Dibble* ([appeal No. 1] — AD3d — [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

818

KA 17-01668

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. DIBBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered July 7, 2017. The order denied the motion of defendant to vacate judgments of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Dibble* ([appeal No. 1] — AD3d — [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

833

CA 18-02266

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

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MCCARTHY ACQUISITION CORPORATION, DOING BUSINESS AS MCCARTHY FORD, ET AL., DEFENDANTS, THOMAS J. PIERONI, AUTOMOTIVE FLEET LEASING SERVICES, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., AND BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., DEFENDANTS-APPELLANTS-RESPONDENTS.
(ACTION NO. 1.)

THOMAS J. PIERONI, BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., PLAINTIFFS-APPELLANTS-RESPONDENTS, ET AL., PLAINTIFFS,

V

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 2.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND PLAINTIFFS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT AND DEFENDANT-RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 14, 2018. The order, among other things, granted the motion of plaintiff-defendant Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company, for leave to reargue and/or renew its motion for summary judgment, and upon reargument and renewal, granted that motion in part.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by in action No. 1 denying the motion of plaintiff, Ford Motor Credit Company LLC, formerly known as Ford

Motor Credit Company, for summary judgment in its entirety and reinstating the counterclaims of defendants Thomas J. Pieroni, Automotive Fleet Leasing Services, Inc., doing business as Automotive Fleet Leasing Co., and Bentley Holdings, Inc., doing business as Automotive Fleet Leasing Co., and in action No. 2 denying that part of the motion of defendant, Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company, to dismiss the fraud and deceit cause of action and reinstating that cause of action insofar as asserted by plaintiffs Thomas J. Pieroni and Bentley Holdings, Inc., doing business as Automotive Fleet Leasing Co., and as modified the order is affirmed without costs.

Memorandum: The two actions before us stem from a dispute over entitlement to the value of certain vehicles transferred from a now-defunct automobile dealership (dealership). Pursuant to a floor plan financing and security agreement, plaintiff-defendant Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company (Ford Credit), gave the dealership financing to acquire vehicles in exchange for a security interest in the vehicles. Ford Credit commenced action No. 1 against the dealership and its guarantors after the dealership was "out of trust"; 79 vehicles were missing from the dealership's inventory for which Ford Credit never received payment. Ford Credit then amended the complaint to include, inter alia, defendants-plaintiffs Thomas J. Pieroni (Pieroni), Automotive Fleet Leasing Services, Inc., doing business as Automotive Fleet Leasing Co., and Bentley Holdings, Inc., doing business as Automotive Fleet Leasing Co. (Bentley) (collectively, Pieroni Companies). Ford Credit alleged that the Pieroni Companies were the purported buyers or participants in the transfer of some of the vehicles that were missing from the dealership's inventory (vehicles). As relevant to this appeal, Ford Credit asserted against the Pieroni Companies conversion (fourth) and tortious interference with an existing contract (fifth) causes of action. The Pieroni Companies asserted counterclaims against Ford Credit. Pieroni and Bentley, among others, commenced action No. 2 against Ford Credit, and in a prior order, Supreme Court dismissed all causes of action in action No. 2 except for the fraud and deceit cause of action. Ford Credit moved for summary judgment in action No. 1 and the court denied that motion. The Pieroni Companies now appeal and Ford Credit cross-appeals from an order that, inter alia, granted Ford Credit's motion for leave to reargue and/or renew its motion for summary judgment in action No. 1 and thereupon in action No. 1 granted those parts of Ford Credit's motion for summary judgment with respect to the fourth and fifth causes of action insofar as asserted against the Pieroni Companies and for summary judgment dismissing the counterclaims of the Pieroni Companies in action No. 1, and granted Ford Credit's motion to dismiss the fraud and deceit cause of action in action No. 2.

We agree with the Pieroni Companies on their appeal that the court erred in granting in part Ford Credit's motion for summary judgment in action No. 1 and in granting the motion to dismiss the fraud and deceit cause of action in action No. 2, and we therefore modify the order by in action No. 1 denying the motion for summary judgment in its entirety and reinstating the counterclaims of the

Pieroni Companies, and in action No. 2 denying the motion to dismiss the fraud and deceit cause of action and reinstating that cause of action insofar as asserted by Pieroni and Bentley. In general, "a security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof" (UCC 9-315 [a] [1]). An exception is that a "buyer in ordinary course of business . . . takes free of a security interest" (UCC 9-320 [a]). A buyer in ordinary course, however, "does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt" (UCC 1-201 [b] [9]).

Ford Credit met its initial burden on its motions in action No. 1 and action No. 2 of establishing that its security interest in the vehicles was not extinguished by the transfer of the vehicles to the Pieroni Companies because the Pieroni Companies were not buyers in ordinary course (*see generally Hann Fin. Serv. Corp. v Republic Auto Credit Group, LLC*, 18 AD3d 434, 436 [2d Dept 2005]). Ford Credit submitted evidence that the dealership's records did not show any advance deposits made by the Pieroni Companies on the dealership's balance sheets and that any advance deposits that were made by the Pieroni Companies were in fact short-term loans inasmuch as the money was shortly thereafter returned to the Pieroni Companies. In opposition to the motions, however, the Pieroni Companies raised a triable issue whether they gave new value for the vehicles. In particular, they submitted a schedule showing the advance payments they made to the dealership for six years prior to the bulk purchase of the vehicles. They also submitted the affidavit of the president of the dealership, who averred that Bentley had more than enough money on deposit with the dealership to be used for the purchase of the vehicles. The president denied that the funds deposited with the dealership were loans. Thus, we conclude that whether the transfer of the vehicles was made with new value or instead was in satisfaction of a money debt is an issue of fact for the jury to determine (*see generally* UCC 1-201 [b] [9]; *United States v Handy & Harman*, 750 F2d 777, 782 [9th Cir 1984]), and neither party is entitled to summary judgment.

Inasmuch as Ford Credit is not entitled to summary judgment in action No. 1, it is thus not entitled to the amount of proceeds from the sale of the vehicles that remain in escrow. Ford Credit's contention on its cross appeal that it is entitled to damages in excess of the amount remaining in escrow is therefore moot.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

852

CAF 18-01202

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

IN THE MATTER OF KIERSTEN A. SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHERRI BALLAM, RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

IN THE MATTER OF SHERRI BALLAM,
PETITIONER-APPELLANT,

V

KIERSTEN A. SMITH, RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.

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

PAUL B. WATKINS, FAIRPORT, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered June 12, 2018. The order granted petitioner-respondent sole legal custody and physical placement of the subject child and denied visitation to respondent-petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent-petitioner grandmother appeals from an order that, inter alia, granted sole legal custody and physical placement of the subject child to petitioner-respondent mother and denied visitation to the grandmother.

Initially, we note that while this appeal was pending, Family Court granted the grandmother's subsequent petition seeking visitation. The mother then moved to dismiss this appeal as moot insofar as the grandmother contends that the court erred in failing to grant her visitation in the order on appeal (*see Matter of Jones v Tucker*, 125 AD3d 1273, 1273 [4th Dept 2015]). Under the circumstances

presented here, however, we conclude that the exception to the mootness doctrine applies (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). We therefore deny the mother's renewed motion to dismiss the appeal insofar as it concerns the issue of visitation.

Nevertheless, we affirm the order on appeal. We reject the grandmother's contention that the court erred in denying her petition for custody and granting custody to the mother. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998]; *see Matter of Lakeya P. v Ajja M.*, 169 AD3d 1409, 1410-1411 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [4th Dept 2014], *lv dismissed in part and denied in part* 24 NY3d 927 [2014]). Here, the grandmother failed to meet her burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether an award of custody to the grandmother is in the best interests of the child (*see generally Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]). In particular, we conclude that the grandmother failed to establish her claim that the mother suffered from unaddressed, serious mental health issues that would warrant a finding of extraordinary circumstances (*cf. Lakeya P.*, 169 AD3d at 1410-1411; *Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]).

Contrary to the grandmother's further contention, we conclude that, as of the time that the order was entered, the record supports the court's determination that it was in the best interests of the subject child to deny the grandmother visitation "in view of the grandmother's failure to abide by court orders, the grandmother's animosity toward the [mother], with whom the child[now] reside[s], and the fact that the grandmother frequently engaged in acts that undermined the subject child[]'s relationship with" the mother (*Matter of Ordona v Campbell*, 132 AD3d 1246, 1247-1248 [4th Dept 2015]; *see generally Matter of Jones v Laubacker*, 167 AD3d 1543, 1544-1546 [4th Dept 2018]). 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" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Macri v Brown*, 133 AD3d 1333, 1333-1334 [4th Dept 2015]), and we perceive no basis for disturbing the court's determination here (*cf. Matter of Richardson v Ludwig*, 126 AD3d 1546, 1547 [4th Dept 2015]; *see generally Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]).

Finally, we reject the grandmother's contention that the child was deprived of effective assistance of counsel on appeal (*see Matter*

of Ferguson v Skelly, 80 AD3d 903, 906 [3d Dept 2011], *lv denied* 16 NY3d 710 [2011]). The record, the briefs, and the statements of the attorneys at oral argument do not support the grandmother's allegations that the Attorney for the Child failed to make a recommendation in accordance with the child's wishes or that she failed to consult with the child (*see generally Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]).

All concur except CURRAN, J., who dissents and votes to dismiss the appeal in part and otherwise affirm in accordance with the following memorandum: I agree with the majority that Family Court did not err in denying respondent-petitioner grandmother's petition for custody based on her failure to establish that extraordinary circumstances exist to warrant an inquiry into whether an award of custody to the grandmother is in the best interests of the child (*see generally Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]; *Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446-1447 [4th Dept 2017]). I also agree with the conclusion that the child was not deprived of effective assistance of counsel on appeal (*see generally Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]).

I respectfully dissent, however, from the majority's conclusion that, despite the entry of a new order granting the grandmother's subsequent petition for visitation, the exception to the mootness doctrine applies and permits this Court to review her contention that the court improperly denied her visitation with the subject child in the order on appeal (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). I conclude that the exception does not apply, and therefore I would grant petitioner-respondent mother's renewed motion to dismiss the appeal with respect to the issue of visitation.

The majority plainly agrees with my conclusion that the grandmother's contention with respect to visitation is moot here because the subsequent order granted the grandmother visitation rights. Indeed, the rights of the parties with respect to visitation cannot and will not "be directly affected by the determination" of the visitation issue on this appeal (*id.* at 714). Any "corrective measures which this Court might have taken with respect to the order appealed from would have *no practical effect*" because of the subsequent order (*Matter of Cullop v Miller*, 173 AD3d 1652, 1652-1653 [4th Dept 2019] [internal quotation marks omitted and emphasis added]; *see Matter of Lateesha J.*, 252 AD2d 503, 503-504 [2d Dept 1998]). In essence, the grandmother is no longer aggrieved by that part of the order on appeal concerning visitation (*see generally Matter of Kahlil S.*, 12 NY3d 898, 898 [2009]; *Matter of Mahagan v New York State Dept. of Health*, 53 AD3d 1118, 1119 [4th Dept 2008]).

As noted above, I disagree with the majority's application of the exception to the mootness doctrine. In my view, this Court's precedent compels the conclusion that the issue of visitation raised by the grandmother is rendered unreviewable by the subsequent order concerning visitation and that the exception does not apply. I note that we have consistently held that where an attorney for a party "has

submitted new information, obtained during the pendency of [an] appeal, indicating that the order of visitation has been superseded by a subsequent order . . . , the . . . challenge to the order [on] appeal . . . has been rendered moot" (*Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]). Cases in which we have applied this rule to conclude that an issue such as visitation is moot and further concluded that the exception to the mootness doctrine does not apply are practically legion (*see e.g. Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]; *Matter of Dawley v Dawley* [appeal No. 2], 144 AD3d 1501, 1502 [4th Dept 2016]; *Matter of Warren v Hibbs*, 136 AD3d 1306, 1306 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]; *Matter of Smith v Cashaw* [appeal No. 1], 129 AD3d 1551, 1551 [4th Dept 2015]; *Matter of Morgia v Horning* [appeal No. 1], 119 AD3d 1355, 1355 [4th Dept 2014]; *see also Cullop*, 173 AD3d at 1652-1653; *Matter of Pugh v Richardson*, 138 AD3d 1423, 1423-1424 [4th Dept 2016]; *Matter of Trombley v Payne*, 133 AD3d 1252, 1252 [4th Dept 2015]; *Matter of Salo v Salo*, 115 AD3d 1368, 1368 [4th Dept 2014]).

The majority provides no explanation of what circumstances or facts present in this particular case justify application of the exception to the mootness doctrine, cryptically asserting only that the exception applies "[u]nder the circumstances presented here[.]" I see no facts or circumstances, however, that would substantively differentiate the instant appeal from any of the above-cited cases and justify application of the exception to the mootness doctrine in this case but not in the others. In my view, application of the exception should be consistent and, absent elucidation of the relevant distinguishing facts, the majority's approach creates a confusing incongruence in our jurisprudence on that issue.

Even without resort to our overwhelming precedent, I conclude that no part of the rationale underlying the exception to the mootness doctrine is implicated here. The exception is based on "three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Hearst Corp.*, 50 NY2d at 714-715). Even assuming that similar visitation issues are likely to recur between the parties, I conclude that such issues can easily be addressed via new petitions based on new allegations and that they will not typically raise novel issues likely to evade judicial review if left unreviewed.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

853

CA 18-02086

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

CENTERLINE/FLEET HOUSING PARTNERSHIP, L.P. - SERIES B, A DELAWARE LIMITED PARTNERSHIP, AND RCHP SLP II, L.P., A DELAWARE LIMITED PARTNERSHIP, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF HOPKINS COURT ASSOCIATES, L.P., A NEW YORK LIMITED PARTNERSHIP, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOPKINS COURT APARTMENTS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY CAPITAL COMPANY, LLC, A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY HOPKINS ASSOCIATES, A NEW YORK GENERAL PARTNERSHIP, CRS PROPERTIES, INC., A NEW YORK CORPORATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

WINTHROP & WEINSTINE, P.A., MINNEAPOLIS, MINNESOTA (DAVID A. DAVENPORT, OF THE MINNESOTA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND WOODS OVIATT GILMAN LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

BOIES SCHILLER FLEXNER LLP, LOS ANGELES, CALIFORNIA (ERIC S. PETTIT, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), dated July 21, 2017. The order denied the motion of defendants-appellants for summary judgment.

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

Memorandum: Plaintiffs, as limited partners, and defendant Hopkins Court Apartments, LLC, a Delaware Limited Liability Company (HCA), as general partner, are members of a partnership formed for the purpose of constructing and operating an affordable housing complex for senior citizens. In 2016, HCA, acting pursuant to section 4.3 (E) of the partnership agreement, refinanced the project without plaintiffs' consent. Plaintiffs thereafter commenced this action against HCA and three of its affiliates (collectively, defendants), asserting, inter alia, breach of contract and breach of fiduciary duty causes of action. In appeal No. 1, defendants appeal from an order

denying their motion for, among other things, summary judgment dismissing the complaint against them. In appeal No. 2, defendants appeal from an order that, inter alia, denied their motion for leave to renew their prior motion insofar as it sought summary judgment dismissing the complaint against them. We affirm in both appeals.

We reject defendants' contention in appeal No. 1 that Supreme Court erred in denying the motion with respect to the breach of contract causes of action. It is undisputed that the resolution of those causes of action depends on the interpretation of section 4.3 (E) of the partnership agreement, which provides that "[n]otwithstanding anything to the contrary herein or in the Contribution Agreement, the General Partner shall have the right to refinance the Apartment Complex after the expiration of the Compliance Period without the Consent of the Special Limited Partner, provided that (i) the resulting debt service coverage ratio for the Apartment Complex (i.e., total income minus operating expenses (including customary repairs and maintenance) and replacement reserves divided by debt service) is no less than 1.10 and (ii) the terms and conditions of such new financing are substantially similar to the terms and conditions of the permanent loan being refinanced." It is well settled that " '[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon' " (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). Here, although we agree with defendants that their interpretation of the provision is reasonable, we cannot conclude that it is the only reasonable interpretation thereof. In reaching this conclusion, we agree with defendants that the court erred in concluding that section 4.3 (E) of the partnership agreement is unambiguous in plaintiffs' favor. Viewing the language of that section along with the agreement as a whole (*see id.*), we conclude that it would be reasonable to interpret it as requiring either that the debt service coverage ratio requirement was intended to limit the amount of the refinance, while the "substantially similar" requirement was intended to restrict the other details of the loan or, alternatively, that the amount of a loan qualifies as one of the loan's terms, in which case the disparity between the principal amount of the original loan and the amount of the refinanced loan potentially violated the "substantially similar" requirement. Contrary to the contentions of both plaintiffs and defendants, the extrinsic evidence presented on the original motion does not clarify this ambiguity. Where, as here, " 'ambiguity or equivocation exists and the extrinsic evidence presents a question of credibility or a choice among reasonable inferences, the case should not be resolved by way of summary judgment' " (*Mohawk Val. Water Auth. v State of New York*, 159 AD3d 1548, 1550 [4th Dept 2018]).

We similarly reject defendants' contention in appeal No. 1 that the court erred in denying the motion insofar as it sought summary

judgment dismissing the breach of fiduciary duty causes of action as duplicative of the breach of contract causes of action. It is well established that "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (*Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 [1st Dept 1987]; *see Meyers v Waverly Fabrics, Div. of Schumacher & Co.*, 65 NY2d 75, 80 n 2 [1985]; *LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 976 [4th Dept 2001]). While plaintiffs' fiduciary duty causes of action certainly arise out of the same underlying transaction as the breach of contract causes of action, i.e., the 2016 refinance, the fiduciary duty causes of action are based on distinct factual theories and allegations. Contrary to defendants' related contention, their reliance on the advice-of-counsel defense is misplaced inasmuch as the legal opinion letter submitted to support this defense does not reference defendants' fiduciary duty and includes certain exclusions and qualifications that expressly restrict the scope of the opinion to the refinance transaction itself.

Contrary to defendants' contention in appeal No. 2, the court properly denied their motion for leave to renew. In support of that motion, defendants submitted deposition transcripts containing information relevant to the underlying motion for summary judgment, i.e., the interpretation of section 4.3 (E) of the partnership agreement. "It is well established that a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418, 1419 [4th Dept 2015] [internal quotation marks omitted]; *see* CPLR 2221 [e] [2], [3]).

As the moving parties, defendants "bore the burden of proving that the new evidence [they] sought to present could not have been discovered earlier with due diligence and would have led to a different result" (*DiPizio Constr. Co., Inc.*, 134 AD3d at 1419 [internal quotation marks omitted]). Here, defendants did not meet that burden inasmuch as nothing prevented them from conducting discovery, including depositions, prior to moving for summary judgment (*cf. id.*; *Foxworth v Jenkins*, 60 AD3d 1306, 1307 [4th Dept 2009]; *Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324, 325-326 [1st Dept 2005]). Defendants simply failed to provide a reasonable justification for not procuring the deposition testimony before moving for summary judgment (*see Caronia v Peluso*, 170 AD3d 649, 650-651 [2d Dept 2019]; *Justino v Santiago*, 116 AD3d 411, 411 [1st Dept 2014]).

We have reviewed defendants' remaining contentions and conclude that none warrants reversal or modification of either order on appeal.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

859

CA 18-02084

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

CENTERLINE/FLEET HOUSING PARTNERSHIP, L.P. - SERIES B, A DELAWARE LIMITED PARTNERSHIP, AND RCHP SLP II, L.P., A DELAWARE LIMITED PARTNERSHIP, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF HOPKINS COURT ASSOCIATES, L.P., A NEW YORK LIMITED PARTNERSHIP, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOPKINS COURT APARTMENTS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY CAPITAL COMPANY, LLC, A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY HOPKINS ASSOCIATES, A NEW YORK GENERAL PARTNERSHIP, CRS PROPERTIES, INC., A NEW YORK CORPORATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

WINTHROP & WEINSTINE, P.A., MINNEAPOLIS, MINNESOTA (DAVID A. DAVENPORT, OF THE MINNESOTA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND WOODS OVIATT GILMAN LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

BOIES SCHILLER FLEXNER LLP, LOS ANGELES, CALIFORNIA (ERIC S. PETTIT, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 1, 2018. The order, insofar as appealed from, denied the motion of defendants-appellants for leave to renew their motion for summary judgment.

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

Same memorandum as in *Centerline/Fleet Hous. Partnership, L.P. - Series B v Hopkins Ct. Apts., LLC* ([appeal No. 1] — AD3d — [Oct 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

861

CA 19-00002

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

LAKEVIEW LOAN SERVICING, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK EDWARD FINN, LINDA FINN,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (AMARIS ELLIOTT-ENGEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SCHILLER, KNAPP, LEFKOWITZ & HERTZEL, LLP, LATHAM (GREGORY J. SANDA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered April 2, 2018. The order, inter alia, granted the motion of plaintiff for summary judgment and appointed a referee.

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

Memorandum: In this residential foreclosure action, Mark Edward Finn and Linda Finn (defendants) appeal from an order granting plaintiff's motion for, inter alia, summary judgment on the complaint and an order of reference. A final judgment of foreclosure and sale was subsequently entered in this action, and defendants did not appeal from that judgment. Inasmuch as "[t]he right to appeal from an intermediate order terminates with the entry of a final judgment" (*Matter of Scott v Manilla*, 203 AD2d 972, 973 [4th Dept 1994]; *see generally* CPLR 5501 [a] [1]), this appeal from the intermediate order must be dismissed (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

862

KA 17-00927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAE-KWON CHAMBERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 (Stephen J. Dougherty, J.), rendered May 3, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the second degree.

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

Same memorandum as in *People v Chambers* ([appeal No. 2] – AD3d – [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

863

KA 19-00442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAE-KWON CHAMBERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 28, 2017. Defendant was resentenced upon his conviction of attempted arson in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted arson in the second degree (Penal Law §§ 110.00, 150.15) and, in appeal No. 2, he appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

We otherwise affirm the judgment in appeal No. 1 and affirm the resentence in appeal No. 2 (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016]). Initially, we agree with defendant that his waiver of the right to appeal is invalid because County Court "conflated the right to appeal with those rights automatically forfeited by the guilty plea" (*People v Rogers*, 159 AD3d 1558, 1558 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). The record therefore does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]).

Defendant, however, failed to preserve his contention that the court erred in sentencing him without resolving purported factual

inconsistencies between the presentence report and the report from the Center for Community Alternatives inasmuch as defendant did not object to the disputed statements in the presentence report, nor did he move to strike them (*see generally People v Dogan*, 154 AD3d 1314, 1316-1317 [4th Dept 2017], *lv denied* 30 NY3d 1115 [2018]; *People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016]). We further conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status, and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Quinones*, 160 AD3d 1441, 1441 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]; *People v Parmelee*, 184 AD2d 534, 535 [2d Dept 1992]). "The decision 'whether to grant or deny youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Williams*, 204 AD2d 1002, 1002 [4th Dept 1994], *lv denied* 83 NY2d 973 [1994]). Despite the existence of some factors weighing in favor of such an adjudication, the record establishes that defendant, together with his codefendant, set multiple fires within a brief period of time, including at a residence where the occupants were sleeping and in a car where the fire spread to an adjacent residence. Although no one was harmed, the property damage was estimated at $500,000. In light of, among other things, the serious nature of the crime, we conclude that the court did not abuse its discretion in denying defendant's request.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

869

KA 16-02260

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY E. KNIFFIN, 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 (William F. Kocher, J.), rendered October 28, 2016. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed without prejudice to the People to file any appropriate charges.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal mischief in the fourth degree (Penal Law § 145.00 [3]) arising from allegations that defendant caused damage to a newly resurfaced road that was under repair by spinning the tires of his vehicle on the road. Defendant contends that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 30.30. Initially, although the People contend that defendant waived that contention by failing to move for that relief upon reasonable notice to the People (*see* CPL 210.45 [1]; *People v Baxter*, 216 AD2d 931, 931 [4th Dept 1995]; *see generally People v Lawrence*, 64 NY2d 200, 203 [1984]), we are "precluded from affirming on that ground inasmuch as the court did not rule on that issue" (*People v Davis*, 159 AD3d 1531, 1534 [4th Dept 2018]; *see* CPL 470.15 [1]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]). Nevertheless, defendant's contention lacks merit. "[A] statement of readiness made contemporaneously with the filing of the indictment can be effective to stop the 'speedy trial' clock if the indictment is filed at least two days before the CPL 30.30 period ends" (*People v Carter*, 91 NY2d 795, 798 [1998]). Here, the indictment was so filed, and the prosecutor thereafter promptly notified defense counsel of the statement of readiness (*see People v Freeman*, 38 AD3d 1253, 1253 [4th Dept 2007], *lv denied* 9 NY3d 875 [2007], *reconsideration denied* 10 NY3d 811 [2008]; *People v Smith*, 1

AD3d 955, 956 [4th Dept 2003], *lv denied* 1 NY3d 634 [2004]; *see also Carter*, 91 NY2d at 798-799).

We agree with defendant, however, that the single-count indictment was rendered duplicitous by the trial evidence. CPL 200.30 (1) provides that "[e]ach count of an indictment may charge one offense only." Thus, "acts which separately and individually make out distinct crimes must be charged in separate and distinct counts" (*People v Bauman*, 12 NY3d 152, 154 [2009]). Here, the indictment charged defendant with damaging "the road surface at the intersection of Woolhouse Road and County Road #32" and thus was not facially defective. At trial, however, the evidence established that defendant committed two distinct offenses by damaging two different portions of the road at that intersection at two different times. Consequently, "[r]eversal is required because the jury may have convicted defendant of an unindicted [act of criminal mischief], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges . . . , as well as the danger that . . . different jurors convicted defendant based on different acts" (*People v Wade*, 118 AD3d 1370, 1371-1372 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014] [internal quotation marks omitted]; *see People v Clark*, 6 AD3d 1066, 1068 [4th Dept 2004], *lv denied* 3 NY3d 638 [2004]; *cf. People v Gianni*, 303 AD2d 1012, 1012-1013 [4th Dept 2003], *lv denied* 100 NY2d 581 [2003]). We therefore reverse the judgment and dismiss the indictment without prejudice to the People to file any appropriate charges (*see generally People v Cox*, 145 AD3d 1507, 1507-1508 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

870

CA 19-00463

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

HEALTHNOW NEW YORK, INC., DOING BUSINESS AS
BLUE CROSS BLUE SHIELD OF WESTERN NEW YORK,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID HOME BUILDERS, INC., DOING BUSINESS AS
DAVID HOMES, DEFENDANT,
AND EMPLOYER SERVICES CORPORATION,
DEFENDANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered September 11, 2018. The order, among other things, granted that part of the motion of defendant Employer Services Corporation seeking to dismiss plaintiff's first cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Employer Services Corporation in its entirety and reinstating the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover health insurance benefits paid on behalf of an employee of defendant Employer Services Corporation (ESC), a professional employment organization that provided work site employees to, inter alia, defendant David Home Builders, Inc., doing business as David Homes. According to plaintiff, ESC knew, at the time it enrolled the employee in plaintiff's health care plan, that the employee did not meet the eligibility requirements for coverage. As a result, plaintiff alleged that ESC breached its Group Health Care Contract (Contract) with plaintiff and engaged in fraud.

Shortly after ESC was added as a defendant, it moved pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint against it. Plaintiff opposed the motion and requested that Supreme Court convert that part of the motion with respect to the first cause of action to one for summary judgment and award judgment to it on that cause of

action. The court granted the motion in part, dismissing the breach of contract cause of action against ESC, and denied plaintiff's request.

We agree with plaintiff that the court should have denied the motion in its entirety. Accepting as true all of plaintiff's allegations in the amended complaint (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that it sufficiently pled a breach of contract cause of action by setting forth factual allegations establishing " 'the existence of a contract, . . . plaintiff's performance under the contract, [ESC's] breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). We thus conclude that dismissal of that cause of action was not warranted under CPLR 3211 (a) (7).

We further conclude that dismissal under CPLR 3211 (a) (1) was not warranted. In granting the motion insofar as it sought dismissal of the breach of contract cause of action, the court determined that the provision of certain remedies in the Contract precluded plaintiff from seeking additional damages from ESC under the "canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other" (*Mastrocovo v Capizzi*, 87 AD3d 1296, 1298 [4th Dept 2011]). The court further determined that the indemnification provision in the Contract did not apply to disputes between the parties. We conclude that the court erred in determining that plaintiff was limited to the remedies set forth in the Contract.

"[I]t is a basic tenet of the law of damages that where there has been a violation of a contractual obligation the injured party is entitled to fair and just compensation commensurate with [the] loss" (*Terminal Cent. v Modell & Co.*, 212 AD2d 213, 218 [1st Dept 1995]). "Limitations on a party's liability will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract" (*id.*; *see PRO Net v ACC TeleCom Corp.*, 294 AD2d 857, 858 [4th Dept 2002]). As a result, "[u]nder New York law, a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive" (*RCN Telecom Servs., Inc. v 202 Ctr. St. Realty, LLC*, 204 Fed Appx 920, 922 [2d Cir 2006]; *see Sutton Madison, Inc. v 27 E. 65th St. Owners Corp.*, 8 AD3d 90, 92 [1st Dept 2004]; *Locke v Aston*, 1 AD3d 160, 161 [1st Dept 2003]; *cf. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 581-582 [2018]; *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*, 106 AD3d 437, 438 [1st Dept 2013]).

Here, the Contract provided that, in the event an ineligible person was enrolled in the health care plan, plaintiff "may elect" certain remedies. It also addressed the obligations of the person who had received such benefits. There was nothing in the Contract stating that the contractual remedies were plaintiff's sole and exclusive remedies against ESC, i.e., the other party to the Contract (*see*

Sutton Madison, Inc., 8 AD3d at 92; *Locke*, 1 AD3d at 161; *Terminal Cent.*, 212 AD2d at 218; *Hidden Val. Co. v Paris*, 95 AD2d 771, 772 [2d Dept 1983], *appeal dismissed* 60 NY2d 644 [1983]). "Such statement of exclusivity or remedial bar could have been, but was not, set forth" in the Contract (*Hidden Val. Co.*, 95 AD2d at 772).

We further agree with plaintiff that the court erred in determining that the indemnification provision of the Contract did not apply to intra-party disputes. "The indemnification clause at issue provides for coverage of extremely broad claims, and is consistent with other clauses that have been held to provide for indemnification . . . for intra-party disputes" (*Square Mile Structured Debt [One], LLC v Swig*, 110 AD3d 449, 449 [1st Dept 2013]; *see Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645, 646 [1st Dept 2013]). As in *Crossroads ABL LLC*, the parties here "chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required" (105 AD3d at 646; *see Matter of 2-4 Kieffer Lane LLC v County of Ulster*, 172 AD3d 1597, 1601 [3d Dept 2019]; *Colonial Sur. Co. v Genesee Val. Nurseries, Inc.*, 94 AD3d 1422, 1424 [4th Dept 2012]; *cf. Autocrafting Fleet Solutions, Inc. v Alliance Fleet Co.*, 148 AD3d 1564, 1566 [4th Dept 2017]).

Finally, plaintiff contends that the court erred in denying its application to convert that part of ESC's motion with respect to the breach of contract cause of action into a motion for summary judgment and to award plaintiff judgment on that cause of action. We reject that contention inasmuch as summary resolution of the issues was premature and discovery was necessary to offer sufficient evidentiary proof on the merits of plaintiff's causes of action (*see generally DeAngelis v Timberpeg E., Inc.*, 51 AD3d 1175, 1176 [3d Dept 2008]; *County of Nassau v Velasquez*, 44 AD3d 987, 989 [2d Dept 2007]). In any event, plaintiff failed to establish its entitlement to judgment as a matter of law on the breach of contract cause of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We therefore modify the order by denying ESC's motion in its entirety and reinstating the first cause of action.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

876

CA 19-00345

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

TIMOTHY J. FARNHAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MIC WHOLESALE LTD, SHUWEN ZHANG, DEFENDANTS,
AND MANHEIM AUTO AUCTION, DEFENDANT-APPELLANT.

CRUSER, MITCHELL, NOVITZ, SANCHEZ, GASTON & ZIMET, LLP, FARMINGDALE (GARY E. DVOSKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered April 9, 2018. The order denied the motion of defendant Manheim Auto Auction for summary judgment dismissing all claims against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained at an automobile auction facility owned and operated by Manheim Auto Auction (defendant) in Manheim, Pennsylvania. Defendant's property consisted of a large parking lot, where thousands of vehicles were parked, as well as several buildings, including an "auction building." During the auction process, each vehicle for sale was assigned a parking spot in the lot and, when it was time to auction off the vehicle, a driver drove it down a marked traffic lane in the parking lot and into the auction building. According to plaintiff, who regularly attended defendant's auctions, he was standing at the end of one of the lanes in a clearly marked "safety area" waiting for a particular vehicle to be auctioned when he was struck by a vehicle that was owned by defendant MIC Wholesale LTD (MIC) and operated by MIC's employee, defendant Shuwen Zhang. Plaintiff settled the action against MIC and Zhang, and the case proceeded against defendant. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint against it, and we affirm.

Contrary to defendant's contention, New York law controls the resolution of its motion and this appeal. "[B]ecause New York is the forum state, i.e., the action was commenced here, 'New York's choice-of-law principles govern the outcome of this matter' " (*Burnett v*

Columbus McKinnon Corp., 69 AD3d 58, 60 [4th Dept 2009]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz - - New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). Here, defendant failed to establish the existence of any conflict between New York and Pennsylvania law with respect to the issues raised in the motion, and therefore we need not engage in any choice of law analysis (*see Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 759-760 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000]; *McCarthy v Coldway Food Express Co.*, 90 AD2d 459, 460-461 [1st Dept 1982]).

Regarding the merits, we reject defendant's contention that it met its initial burden of establishing as a matter of law that it was not negligent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is well established that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs*., 98 NY2d 136, 138 [2002]). "It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in [a] reasonably safe condition" (*Di Ponzio v Riordan*, 89 NY2d 578, 582 [1997]). Here, although defendant submitted an affidavit of a professional engineer who opined that the "design and traffic controls utilized in the subject parking lot in the vicinity of the incident were appropriate and consistent with the state of the practice," it is well settled that "compliance with industry standards . . . does not establish as a matter of law that such defendant was not negligent" (*Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1532-1533 [4th Dept 2012]; *see Miner v Long Is. Light. Co.*, 40 NY2d 372, 380-381 [1976]; *Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1042 [4th Dept 2013]). Furthermore, while the expert indicated in his affidavit that he is a senior project engineer, he provided no "further information . . . to establish any specialized knowledge, experience, training, or education with respect to the relevant subject matter" in this case, i.e., parking/auction lot design (*Paul v Cooper*, 45 AD3d 1485, 1487 [4th Dept 2007] [internal quotation marks omitted]; *see Stever v HSBC Bank USA, N.A.*, 82 AD3d 1680, 1681 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]). To the extent that defendant claims there was a lack of actual or constructive notice of the alleged defective design of the premises, we conclude that defendant failed to establish that it did not create the condition (*see Hayes*, 100 AD3d at 1534). "Actual or constructive notice of a defective condition is not required where defendant[] created the dangerous condition" (*id*.).

We similarly reject defendant's contention that the actions of Zhang were the sole proximate cause of the accident. "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal

quotation marks omitted]; *see Paul*, 45 AD3d at 1487). Additionally, "it is well settled that there may be more than one proximate cause of the accident" (*Przesiek v State of New York*, 118 AD3d 1326, 1327 [4th Dept 2014]). Based on defendant's submissions, we conclude that there are questions of fact whether the actions of Zhang were a natural and foreseeable consequence of the circumstances created by defendant, i.e., allowing non-employees to drive in the subject area and the overall design and operation of the auction lot (*see Paul*, 45 AD3d at 1487; *see also Fuller v Marcello*, 17 AD3d 1017, 1018-1019 [4th Dept 2005]; *Phelan v Ferello*, 207 AD2d 874, 875 [2d Dept 1994]; *see generally Hain*, 28 NY3d at 533-534).

Contrary to defendant's final contention, it was not entitled to summary judgment dismissing the complaint against it on the ground of assumption of the risk. As stated by the Court of Appeals, the "application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]). Here, plaintiff was not engaging in any requisite activity or event sponsored or supported by defendant at a designated venue (*see id.*). Rather, plaintiff was simply standing in a safety area at defendant's automobile auction facility when he was struck by a motor vehicle, and therefore the doctrine of assumption of the risk does not apply (*see generally Knight v Holland*, 148 AD3d 1726, 1728 [4th Dept 2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

878

CA 18-02291

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

COURTNEY L. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, CHRISTINA PUGH, AND RONALD W. PUGH, JR., DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS CHRISTINA PUGH AND RONALD W. PUGH, JR.

THE DIETRICH LAW FIRM, PC, WILLIAMSVILLE (BRIAN R. WOOD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 16, 2018. The order, insofar as appealed from, denied in part the motion of defendants Christina Pugh and Ronald W. Pugh, Jr., and the cross motion of defendant State Farm Mutual Automobile Insurance Company for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the cross motion of defendant State Farm Mutual Automobile Insurance Company for summary judgment dismissing the complaint against it insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury under the permanent consequential limitation of use category of serious injury within the meaning of Insurance Law § 5102 (d) and granting the motion of defendants Christina Pugh and Ronald W. Pugh, Jr. in its entirety and dismissing the complaint against them and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in two separate motor vehicle accidents. On March 3, 2016, a vehicle driven by plaintiff, who had supplemental uninsured/underinsured motorist coverage under a policy issued by defendant State Farm Mutual Automobile Insurance Company (State Farm), was rear-ended during a four-vehicle accident on an expressway. On April 21, 2016, plaintiff was involved in another accident when the vehicle in which she was a passenger was rear-ended

while stopped at a red light by a vehicle allegedly operated by defendant Christina Pugh and owned by defendant Ronald W. Pugh, Jr. (Pughs). The Pughs moved and State Farm cross-moved for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the respective accidents. As relevant on appeal, Supreme Court denied the motion and cross motion in part with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury. State Farm and the Pughs each appeal.

Contrary to State Farm's contention, we conclude that the court properly denied its cross motion with respect to the significant limitation of use category inasmuch as State Farm's own submissions contain conflicting medical evidence on the issue whether plaintiff sustained a serious injury under that category as a result of the first accident (*see Lake v Safeco Ins. Co. of Am.*, 147 AD3d 1407, 1408 [4th Dept 2017]; *Aleksiejuk v Pell*, 300 AD2d 1066, 1066-1067 [4th Dept 2002]). Contrary to State Farm's further contention, we also conclude that it failed to meet its burden with respect to the 90/180-day category inasmuch as its own submissions raise triable issues of fact with respect to that category (*see Jackson v City of Buffalo*, 155 AD3d 1522, 1523-1524 [4th Dept 2017]; *Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]; *Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [4th Dept 2004]).

We agree with State Farm, however, that the court erred in denying its cross motion with respect to the permanent consequential limitation of use category. We therefore modify the order accordingly. State Farm met its initial burden by submitting evidence establishing as a matter of law that plaintiff did not sustain a serious injury under that category (*see Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]), and plaintiff failed to raise a triable issue of fact inasmuch as the assertion in the affidavit of her spine surgeon that plaintiff sustained a 25% permanent consequential limitation of use of her lower back was conclusory and unsupported by objective medical evidence (*see Arrowood v Lowinger*, 294 AD2d 315, 316 [1st Dept 2002]; *Sorriento v Daddario*, 282 AD2d 957, 958 [3d Dept 2001]).

We also agree with the Pughs that the court should have granted their motion in its entirety. We therefore further modify the order accordingly. The Pughs met their initial burden on the motion by submitting "persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]" rather than the second accident (*Carrasco v Mendez*, 4 NY3d 566, 580 [2005]; *see Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013]; *Overhoff v Perfetto*, 92 AD3d 1255, 1256 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]), and plaintiff's submissions in opposition to the motion "did not adequately address how plaintiff's current medical problems, in light of [plaintiff's] past medical history, are causally related to the [second] accident" (*Kwitek*, 105 AD3d at 1421 [internal quotation marks omitted]; *see Overhoff*, 92 AD3d at 1256; *Spanos v Fanto*, 63 AD3d

1665, 1666 [4th Dept 2009]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

885

KA 16-00632

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. CAHOON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered March 17, 2016. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]), based on Lien Law § 79-a (1) (b), defendant contends that the evidence is not legally sufficient to support the conviction. We affirm.

Pursuant to Lien Law § 79-a (1) (b), "[a]ny trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money . . . for any purpose other than the trust purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if . . . such funds were received by the trustee as contractor or subcontractor, as such terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time." Article 3-A of the Lien Law further provides that "funds . . . received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, . . . shall constitute assets of a trust" (Lien Law § 70 [1]). "The assets of an article 3-A trust 'shall be held and applied' to payment of article 3-A trust beneficiaries and costs of the improvement to real property" (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 261 [2002], quoting § 71).

Defendant contends that the evidence is legally insufficient to

establish that he was a contractor within the meaning of the Lien Law because he did not sign the agreement pursuant to which his construction company contracted with the property owner to build a house. Defendant failed to preserve his contention for our review, however, "inasmuch as his motion for a trial order of dismissal was not specifically directed at the alleged error on appeal" (*People v Cooper*, 77 AD3d 1417, 1418 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that defendant's contention lacks merit. Although the statute defines a contractor as "a person who enters into a contract with the owner of real property for the improvement thereof" (Lien Law § 2 [9]), "the term for purposes of the Lien Law must be restricted to 'one who would be so characterized in . . . common speech' " (*Carl A. Morse, Inc. v Rentar Indus. Dev. Corp.*, 85 Misc 2d 304, 308 [Sup Ct, Queens County 1976], *affd* 56 AD2d 30 [2d Dept 1977], *affd* 43 NY2d 952 [1978], *appeal dismissed* 439 US 804 [1978], quoting *McNulty Bros. v Offerman*, 221 NY 98, 105 [1917]). "As such, [a contractor] is one who has undertaken to improve the property of another . . . . The determination is then not based on the terms by which parties refer to themselves but rather on all of the facts constituting the relationship" (*id.*; *see Burns Elec. Co. v Walton St. Assoc.*, 136 AD2d 291, 295 [4th Dept 1988], *affd* 73 NY2d 738 [1988]). Thus, in *McNulty*, the Court of Appeals explained that a contractor "is one who, in the usual course of trade, has undertaken to improve the property of another" (221 NY at 105).

Here, the evidence at trial, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), establishes that defendant was the sole principal of Cahoon Construction, the entity with whom the property owner contracted to construct the house; that defendant was the sole authorized signatory of the account into which the construction funds at issue were deposited; and that defendant signed a letter indicating that he was indeed the contractor. Thus, contrary to defendant's contention, the evidence is legally sufficient to establish that he was a contractor in possession of trust funds for purposes of the Lien Law (*cf. People v Correia*, 57 AD3d 1487, 1488 [4th Dept 2008]; *see generally People v Melino*, 52 AD3d 1054, 1055 [3d Dept 2008], *lv denied* 11 NY3d 791 [2008]).

Defendant further contends that the evidence is legally insufficient to establish that he misappropriated trust funds pursuant to Lien Law § 79-a (1) (b). We reject that contention. The evidence, viewed in the light most favorable to the People, is legally sufficient to establish that defendant did not maintain the required records for the trust (*see* Lien Law § 75 [1]-[3]), and it is well settled that "failure of such a trustee to maintain the requisite books and records constitutes presumptive evidence of diversion" (*People v Miller*, 23 AD3d 699, 700 [3d Dept 2005], *lv denied* 6 NY3d 815 [2006]; *see People v Grates*, 66 AD3d 1517, 1518 [4th Dept 2009]). The evidence also establishes that the property owner submitted a claim for a refund of trust assets and that defendant failed to provide an accounting or pay that claim within 31 days.

Contrary to defendant's additional contention, the evidence is legally sufficient to disprove the defense set forth in Lien Law § 79-a (1) (b), i.e., that a trustee's failure to pay a claim for trust funds "shall not be deemed larceny by reason of failure to pay the disputed claim within thirty-one days of the date when it is due if the trustee pays such claim within thirty-one days after the final determination of such dispute," provided that the trustee "disputes in good faith the existence, validity or amount of a trust claim or disputes that it is due" (*id.*). Here, upon the property owner submitting a claim for reimbursement of trust funds, defendant replied by letter within the 31-day limit. Although the letter arguably could be construed to dispute the existence of the claim, under the circumstances, the evidence was legally sufficient to permit the jury to conclude that defendant did not, in good faith, dispute the claim. Indeed, the evidence establishes that defendant failed to maintain the required records (*see* Lien Law § 75 [1]-[3]), respond to any of the property owner's requests for an accounting of the funds, or perform more than minimal work on the subject property, and further establishes that defendant used the trust funds for numerous non-trust expenditures and failed to take any action on the claim after doing so.

Finally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

887

KA 18-01573

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. GOODEARL, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 27, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a definite term of imprisonment of one year, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Niagara County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [2]) and sentencing him to a determinate term of three years' imprisonment plus 10 years' postrelease supervision. Preliminarily, we agree with defendant that his waiver of the right to appeal at the underlying plea proceeding does "not encompass the sentence . . . imposed following his violation of probation" (*People v Johnson*, 77 AD3d 1441, 1442 [4th Dept 2010], *lv denied* 15 NY3d 953 [2010]; *see People v Jones*, 148 AD3d 1807, 1808 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *People v Rodriguez*, 259 AD2d 1040, 1040 [4th Dept 1999]). Contrary to the People's contention, the preservation rule does not apply to defendant's challenge to the scope of his waiver of the right to appeal (*see People v McGrew*, 118 AD3d 1490, 1490 [4th Dept 2014], *lv denied* 23 NY3d 1065 [2014]; *People v Lewis*, 48 AD3d 880, 880-881 [3d Dept 2008]; *People v Hoover*, 37 AD3d 298, 299-300 [1st Dept 2007]).

On the merits, we agree with defendant that the sentence imposed following the revocation of his probation is unduly harsh and severe. Defendant was originally sentenced to, inter alia, 10 years'

probation, and he served eight of those 10 years without incident. Defendant has no prior criminal record, was gainfully employed during his eight years on probation, and during that time attended assigned sex offender treatment programs, albeit without successful completion. Only after defendant had nearly completed his probationary term did the Probation Department allege that he was noncompliant with sex offender treatment. Under these circumstances, we are "of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose a determinate sentence" (Penal Law § 70.80 [4] [c]), and we therefore modify the judgment as a matter of discretion in the interest of justice by reducing defendant's sentence to a definite term of imprisonment of one year (*see generally id.*; CPL 470.15 [2] [c]; [6] [b]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

888

KA 17-01706

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE COLBERT, JR., DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 4, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal was invalid because the oral and written waivers were inadequate. We reject that contention. The plea allocution establishes that the oral waiver was voluntarily, knowingly, and intelligently entered, even though defendant gave one-word answers to County Court's questions (*see People v Frazier*, 63 AD3d 1633, 1633 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *cf. People v Wilson*, 159 AD3d 1542, 1544 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Although a "written waiver of the right to appeal . . . does not serve to validate [an] otherwise inadequate oral waiver where . . . there is no indication that [the court] obtained a knowing and voluntary waiver of that right at the time of the plea" (*People v Homer*, 151 AD3d 1949, 1949 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]), here, the oral waiver was adequate. Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

890

KA 16-01906

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEBASTIAN VAZQUEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 23, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that his plea was not knowing, voluntary and intelligent and that Supreme Court erred in denying his motion to withdraw the plea. We affirm.

Defendant's contention that his plea was involuntary because he suffered from a mental disease or defect that negated an element of the crime is not preserved for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground, and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]). We decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Although defendant preserved his further contention that his plea was involuntary due to his alleged mental deficiencies and drug use by moving to withdraw the plea on the ground that those conditions led to his purported lack of understanding of the plea proceedings (*see People v Jackson*, 163 AD3d 1273, 1274 [3d Dept 2018], *lv denied* 32 NY3d 1065 [2018]), the court did not err in denying the motion without a hearing inasmuch as those allegations were belied by defendant's statements and actions during the proceedings (*see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *People v Watkins*, 107 AD3d 1416, 1417 [4th Dept 2013], *lv denied* 22

NY3d 959 [2013]).

Contrary to defendant's further contention, we conclude that the plea was not "rendered involuntary by [the court's] initial reluctance to accept the plea agreement. Courts are 'not required to accept [a] defendant's . . . guilty plea merely because the plea bargain had been found acceptable to both the prosecution and defense' " (*People v Russell*, 55 AD3d 1314, 1315 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009]). Here, inasmuch as defendant's initial statements to the court indicated that he did not understand the proceedings, the court properly permitted him to discuss the matter with defense counsel and, after a discussion with "defense counsel concerning [the sentencing parameters of the plea], defendant proceeded with the colloquy with no further indication of any confusion" (*People v Ernst*, 144 AD3d 1605, 1607 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Defendant further contends that the court abused its discretion in failing to sua sponte order a competency evaluation pursuant to CPL article 730. We reject that contention. "Ordering a competency examination under CPL 730.30 (1) lies within the sound discretion of the trial court . . . A defendant is presumed to be competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground[s] . . . to believe that the defendant was an incapacitated person' " (*People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, inasmuch as "[n]othing on the face of the record demonstrates that defendant lacked a rational understanding of the nature and consequences of his plea" (*People v Karlsen*, 147 AD3d 1466, 1468 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]), the court had no duty to inquire into defendant's mental capacity to plead guilty (*see People v Thomas*, 139 AD3d 986, 986-987 [2d Dept 2016], *lv denied* 27 NY3d 1156 [2016]).

We reject defendant's contention that the court erred in failing to substitute counsel in place of his second assigned attorney. His request for that attorney to be relieved consisted of conclusory assertions of ineffectiveness of counsel, which were insufficient to require any inquiry by the court (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *Lewicki*, 118 AD3d at 1329). Moreover, defendant's contention that his second assigned attorney had a conflict of interest lacks merit because that contention is based on events that did not occur until after the court denied that request.

Contrary to defendant's further contention, the court properly refused to suppress the showup identification of him by an eyewitness to the crime. Prior to that showup identification, the police conducted a showup procedure with the victim, which was reasonable under the circumstances because it was conducted in "geographic and temporal proximity to the crime" (*People v Brisco*, 99 NY2d 596, 597 [2003]; *see People v Kirkland*, 49 AD3d 1260, 1260-1261 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008], *cert denied* 555 US 1181 [2009]; *People v Davis*, 48 AD3d 1120, 1122 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]). Defendant's contention that the identification procedure with the eyewitness was unnecessary lacks merit. That identification procedure, like the identification procedure with the victim, took

place in spatial and temporal proximity to the crime (*see People v Johnson*, 164 AD3d 1593, 1594 [4th Dept 2018], *lv denied* 32 NY3d 1173 [2019]; *cf. People v Knox*, 170 AD3d 1648, 1649-1650 [4th Dept 2019]), and it was also conducted "in the course of a 'continuous, ongoing investigation' " (*People v Lewis*, 97 AD3d 1097, 1098 [4th Dept 2012], *lv denied* 19 NY3d 1103 [2012], quoting *Brisco*, 99 NY2d at 597).

Finally, the sentence is not unduly harsh or severe.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

896

CA 19-00452

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

MICHELE GENTILE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JESSICA N. GENTILE, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW MALENICK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

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

LITTMAN & BABIARZ, ITHACA (PETER N. LITTMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 5, 2018. The order denied the motion of defendant Matthew Malenick for summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this wrongful death and personal injury action seeking damages arising from the death of her daughter (decedent). Matthew Malenick (defendant) appeals from an order that denied his motion for summary judgment dismissing the complaint against him. We agree with defendant that Supreme Court erred in denying his motion, and we therefore reverse the order, grant the motion, and dismiss the complaint against him.

The Court of Appeals has clearly stated that, "as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a *serious* violation of the law and the injuries for which the plaintiff seeks recovery are the *direct* result of that violation" (*Manning v Brown*, 91 NY2d 116, 120 [1997]). "[R]ecovery is denied, not because the plaintiff contributed to his [or her] injury, but because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act" (*Barker v Kallash*, 63 NY2d 19, 24 [1984]). "The *Barker/Manning* rule is based on the sound premise that a plaintiff cannot rely upon an *illegal act* or *relationship* to define the defendant's duty . . . [,

which bars] claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act" (*Alami v Volkswagen of Am.*, 97 NY2d 281, 287 [2002]).

Here, defendant met his initial burden on the motion by submitting expert opinion evidence and his deposition testimony establishing that decedent's death was the result of her ingestion of heroin and several prescription drugs, which unquestionably constitutes serious criminal conduct, and that decedent's death was the direct result of that illegal conduct. Consequently, defendant established that the *Barker/Manning* rule bars recovery. The central "issue is not that of the statute prohibiting [drug use], itself the object of a changing legislative view, but of the paramount public policy imperative that the law, whatever its content at a given time or for however limited a period, be obeyed" (*Reno v D'Javid*, 42 NY2d 1040, 1040 [1977]; *see Alami*, 97 NY2d at 285; *cf. Mikel v City of Rochester*, 265 AD2d 861, 862 [4th Dept 1999]).

Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The affidavit of plaintiff's purported expert, i.e., plaintiff's boyfriend, failed to establish that he "is possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Hokenson v Sears, Roebuck & Co.*, 159 AD3d 1501, 1502 [4th Dept 2018] [internal quotation marks omitted]; *cf. People v Maynard*, 143 AD3d 1249, 1252 [4th Dept 2016], *lv denied* 28 NY3d 1148 [2017]). Furthermore, contrary to her contention, plaintiff failed to submit "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" whether defendant injected decedent with heroin and exercised mental control over decedent (*Alvarez*, 68 NY2d at 324).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

898

CA 19-00388

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

MARTIN S. AUER, PLAINTIFF,
AND LAWRENCE SLOANE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN S. DYSON, GEORGE L. INGALLS, RICHARD M. FLYNN, FREDERICK R. CLARK, ROBERT I. MILLONZI, CONSTITUTING POWER AUTHORITY OF THE STATE OF NEW YORK, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

AARON M. ZIMMERMAN, SYRACUSE, AND GARY LAVINE, FOR PLAINTIFF-APPELLANT.

HOLLAND & KNIGHT, LLP, NEW YORK CITY (KATHERINE A. SKEELE OF COUNSEL), PUGH, JONES & JOHNSON, P.C., AND MICHAEL MCCARTHY, ASSISTANT GENERAL COUNSEL, NEW YORK POWER AUTHORITY, WHITE PLAINS, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 7, 2018. The order, inter alia, granted the motion of defendant Power Authority of the State of New York for a change of venue to Albany County.

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

Memorandum: Using an index number assigned to a declaratory judgment action that settled in the 1980s, Lawrence Sloane (plaintiff) moved by order to show cause in 2018 to, inter alia, "enforce" the various determinations made in the prior action. Plaintiff now appeals from an order that, inter alia, granted the motion of defendant Power Authority of the State of New York to change venue.

We dismiss the appeal because plaintiff charted an improper procedural course under these circumstances. Although a party is not generally required to commence a separate action to enforce a prior declaratory judgment, plaintiff's current motion raises issues "wholly separate and distinct" from those raised in the prior action and thus cannot be treated as a proper application to enforce the determinations rendered in such prior action (*Matter of Korn v Gulotta*, 186 AD2d 195, 197-198 [2d Dept 1992], *lv dismissed* 81 NY2d 759 [1992], *rearg denied* 81 NY2d 835 [1993]). In other words, plaintiff "should [have] proceed[ed] by a new plenary action" rather

than by "motion in an action which has been terminated" (*County of Erie v Axelrod*, 80 AD2d 701, 702 [3d Dept 1981], *lv dismissed* 53 NY2d 604, 797 [1981]), and it is undisputed that plaintiff did not commence a new plenary action. "Without an underlying action the order putatively on appeal does not constitute an appealable paper," and the appeal must therefore be dismissed (*Matter of Town of Cicero v Lakeshore Estates, LLC*, 152 AD3d 1168, 1169 [4th Dept 2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

899

CA 19-00269

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

PETER L. HAINES AND MINNIE H. BRENNAN, AS CO-EXECUTORS OF THE ESTATE OF PATRICIA S. HAINES, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOLLY WEST, ALSO KNOWN AS HOLLY W. WEST, AND WILLIAM J. HURLBURT, INDIVIDUALLY, AND DOING BUSINESS AS MILTON R. HURLBURT, DEFENDANTS-APPELLANTS.

CARMEL, MILAZZO & DICHIARA LLP, NEW YORK CITY (CHRISTOPHER P. MILAZZO OF COUNSEL), FOR DEFENDANT-APPELLANT HOLLY WEST, ALSO KNOWN AS HOLLY W. WEST.

SHULTS & SHULTS, HORNELL (DAVID SHULTS OF COUNSEL), FOR DEFENDANT-APPELLANT WILLIAM J. HURLBURT, INDIVIDUALLY, AND DOING BUSINESS AS MILTON R. HURLBURT.

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

Appeals from an order and judgment (one paper) of the Supreme Court, Steuben County (Daniel J. Doyle, J.), entered July 17, 2018. The order and judgment granted plaintiffs' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, to set aside as a fraudulent conveyance a default judgment entered against defendant Holly West, also known as Holly W. West, in favor of defendant William J. Hurlburt, individually and doing business as Milton R. Hurlburt. Defendants now appeal from an order and judgment that granted plaintiffs' motion for summary judgment on the third and fourth causes of action, for violations of Debtor and Creditor Law § 276 and for attorneys' fees under section 276-a, respectively. We reverse.

Debtor and Creditor Law § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as

to both present and future creditors." To meet his or her initial burden in moving for summary judgment with respect to a section 276 cause of action, a plaintiff must establish the requisite intent to hinder, delay, or defraud by "clear and convincing evidence" (*Jensen v Jensen*, 256 AD2d 1162, 1163 [4th Dept 1998]). "[B]ecause direct evidence of fraudulent intent is often elusive, courts will consider badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014] [internal quotation marks omitted]).

We agree with defendants that plaintiffs failed to meet their initial burden with respect to the section 276 cause of action because they did not eliminate triable issues of fact with respect to defendants' alleged fraudulent intent. We note that "the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent" (*id.* at 1288-1289; *see Skiff-Murray v Murray*, 17 AD3d 807, 811 [3d Dept 2005]). Here, "[a]lthough the submitted facts establish . . . 'badges of fraud' indicative of fraudulent intent . . . , they fail to establish defendant[s'] fraudulent intent as a matter of law" (*Taylor-Outten v Taylor*, 248 AD2d 934, 935 [4th Dept 1998]).

We further conclude that, inasmuch as triable issues of fact exist with respect to defendants' actual intent to hinder, delay, or defraud, plaintiffs also failed to establish their entitlement to an award of attorneys' fees pursuant to Debtor and Creditor Law § 276-a (*see id.*; *cf. Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

900

CA 19-00306

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

KAYONA HANNAH, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

CHRISTOPHER LANPHER, MARIE LANPHER AND KARL WEEKES, INDIVIDUALLY, AND DOING BUSINESS AS MELKAR ENTERPRISES, LLC, DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (JEREMY M. BUCHALSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 4, 2018. The judgment and order granted the motion of defendants for summary judgment dismissing the complaint with respect to plaintiff Kayona Hannah.

It is hereby ORDERED that the judgment and order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated with respect to plaintiff Kayona Hannah.

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly caused by childhood exposure to lead paint in an apartment owned or managed by defendants. Defendants moved for summary judgment dismissing the complaint with respect to Kayona Hannah (plaintiff). Supreme Court granted the motion, and plaintiff appeals. We reverse, deny the motion, and reinstate the complaint with respect to plaintiff.

We agree with plaintiff that the court erred in granting the motion. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, defendants met their initial burden by submitting plaintiff's own deposition testimony together with her medical and school records, which demonstrate an absence of cognitive deficits or mental health issues causally connected to lead exposure (*see*

generally Hamilton v Miller, 23 NY3d 592, 602-603 [2014]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). Plaintiff, however, raised triable issues of fact by submitting the report of an expert who diagnosed her with a major neurocognitive disorder due to lead toxicity and who concluded, based on scientific data and plaintiff's medical history, that plaintiff's cognitive deficits were most likely caused by childhood lead exposure (*cf. Adrian T. v Millshan Realty Co., LLC*, 147 AD3d 473, 474-475 [1st Dept 2017]; *Veloz v Refika Realty Co.*, 38 AD3d 299, 300 [1st Dept 2007], *lv denied* 9 NY3d 817 [2008]).

Finally, we further agree with plaintiff that defendants failed to meet their initial burden insofar as they sought summary judgment on the ground that the action with respect to plaintiff is time-barred (*see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]; *see also* CPLR 214-c [2]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

904

CA 18-01866

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

ANITA J. USZKIEWICZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANDREW S. HUTHER, EDWARDS AMBULANCE, INC.,
LAUREN M. CRITELLI, POWER LINE CONSTRUCTORS, INC.,
AND PLC TRENCHING CO., LLC, DEFENDANTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF FRANK J. LAURINO, BETHPAGE (FRANK LAURINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANDREW S. HUTHER AND EDWARDS AMBULANCE, INC.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LAUREN M. CRITELLI, POWER LINE CONSTRUCTORS, INC. AND PLC TRENCHING CO., LLC.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered September 17, 2018. The order granted defendants' respective motion and cross motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: In this action to recover damages for injuries sustained as a result of a motor vehicle accident, plaintiff appeals from an order that granted defendants' respective motion and cross motion for summary judgment dismissing the complaint against them. Plaintiff contends that Supreme Court erred in granting the motion and cross motion with respect to her claim under the 90/180-day category of serious injury (*see generally* Insurance Law § 5102 [d]). We reject that contention. Defendants met their initial burdens with respect to the 90/180-day category by submitting evidence establishing as a matter of law that plaintiff did not sustain a serious injury under that category, and plaintiff failed to raise an issue of fact in opposition (*see Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]; *LaBeef v Baitsell*, 104 AD3d 1191, 1192 [4th Dept 2013]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

905

CA 19-00266

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

EDWARD J. HAGGERTY, AS TRUSTEE OF THE JAMES J. HAGGERTY TRUST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILIP M. STEITZ, DOING BUSINESS AS PREMIER TIRE COMPANY, INC., DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE (P. DOUGLAS DODD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 10, 2018 after a nonjury trial. The order dismissed the complaint.

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

Memorandum: Plaintiff, the lessor of a building, commenced this action to recover damages allegedly resulting from, inter alia, defendant's breach of a lease requiring defendant to obtain "[b]usiness liability and property damage insurance." After a nonjury trial, Supreme Court determined that plaintiff failed to establish by a preponderance of the evidence that defendant breached the lease by failing to obtain fire insurance, and the court therefore dismissed the complaint. We affirm. Contrary to plaintiff's contention, the lease is ambiguous with respect to the kind of insurance that defendant was required to obtain because the language used in the lease's insurance clause " 'is reasonably susceptible of more than one interpretation' " (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1514 [4th Dept 2017], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Because the lease is ambiguous, the parties were properly permitted to offer extrinsic evidence to establish their intent in using the language in the insurance clause (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Ames v County of Monroe*, 162 AD3d 1724, 1726 [4th Dept 2018]). Upon our review of the record, we conclude that the court's determination is supported by "a fair interpretation of the evidence" (*Cianchetti v Burgio*, 145 AD3d 1539, 1541 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]; *see Suprunchik v Viti*, 139 AD3d 1389,

1390 [4th Dept 2016]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

912

KA 19-00521

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACHAI TURNER, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 14, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress evidence obtained as a result of a traffic stop on the ground that the traffic stop was unlawful. Testimony at the suppression hearing established that a patrol officer stopped the vehicle in which defendant was a passenger after observing it make a left turn from a two-way road into the right-most of the three lanes in the intersecting road that were proceeding in the vehicle's direction of travel. The officer believed that the vehicle was required to complete the turn in the lane closest to the center line and that the driver thus committed a traffic violation by completing the turn in the right-most lane.

Initially, we agree with defendant that, contrary to the People's contention and the officer's belief, the driver of the vehicle in which defendant was a passenger did not violate Vehicle and Traffic Law § 1160 (b) by completing the left turn in the right-most lane. As relevant here, section 1160 (b) requires that a "left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered." Unlike the language used in other subsections of section 1160, the language of subsection (b) does not specify how close to the center line a vehicle must be when it completes its turn, nor does it designate a specific lane within which

the vehicle must complete the turn (*compare* § 1160 [b] *with* § 1160 [a], [c], [e]). In light of the more specific language employed elsewhere in the statute, we read the use of the more general phrase "right of the center line" as meaningful and intentional (*see generally Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60-61 [2013]). Indeed, reading "right of the center line" to mean the lane to the *immediate right* of the center line, or as close to center as possible, would improperly render the more specific language used elsewhere in the statute superfluous (*see generally Matter of Stateway Plaza Shopping Ctr. v Assessor of City of Watertown*, 87 AD3d 1359, 1361 [4th Dept 2011]).

Nevertheless, suppression is not required here because the stop was the result of the officer's objectively reasonable belief that he observed a traffic violation (*see People v Guthrie*, 25 NY3d 130, 134 [2015], *rearg denied* 25 NY3d 1191 [2015]; *People v Estrella*, 10 NY3d 945, 946 [2008], *cert denied* 555 US 1032 [2008]). In light of " 'the reality that an officer may suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become[,]' " an officer's misreading of a statute that is susceptible of multiple interpretations and has not been definitively construed by New York appellate courts may amount to a reasonable mistake of law justifying a traffic stop (*Guthrie*, 25 NY3d at 134-135, quoting *Heien v North Carolina*, 574 US —, —, 135 S Ct 530, 539 [2014]). Notwithstanding our interpretation of Vehicle and Traffic Law § 1160 (b) above, the "right of the center line" language is, in our view, susceptible of multiple interpretations, including the interpretation taken by the officer here, and the ambiguity has not previously been definitively construed. Thus, we conclude that the officer's mistake of law was objectively reasonable and that the stop was lawful.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

917

CAF 18-00435

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

IN THE MATTER OF FREDERICKA S. AND
DE'LAWRENCE S., III.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JOLANDA S., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 21, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights with respect to the subject children.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to the subject children pursuant to Social Services Law § 384-b (4) (c). We affirm.

Contrary to the mother's contention, the admission in evidence of certain testimony of petitioner's expert did not violate the mother's right to due process under the two-part test stated in *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). *Floyd Y.* applies in a narrow context: the admission of hearsay evidence serving as the basis of an expert's opinion at civil commitment hearings held pursuant to article 10 of the Mental Hygiene Law (*see id.* at 106-109). In cases such as respondent's, however, courts apply the professional reliability exception to the foundational requirements for expert testimony without addressing *Floyd Y.* (*see e.g. Matter of Angel SS. [Caroline SS.]*, 129 AD3d 1119, 1120 [3d Dept 2015]; *Matter of Kaitlyn X. [Arthur X.]*, 122 AD3d 1170, 1171 [3d Dept 2014]). To the extent that *Floyd Y.* requires additional due process scrutiny in the civil commitment context, its analysis should not be applied to the instant Family Court proceedings.

In any event, even assuming, arguendo, that the court erred in allowing petitioner's expert to provide certain testimony, the error

is harmless in light of the expert's non-hearsay testimony regarding his own testing and personal observations (*see generally Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

930

KA 17-00914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM A. VALERIO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered March 17, 2017. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment of conviction is vacated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant pleaded guilty to criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]) in exchange for, inter alia, a determinate sentence of imprisonment to run concurrently with a sentence of imprisonment imposed on a prior unrelated conviction in Massachusetts. During the plea colloquy, Supreme Court assured defendant that, due to such concurrency, he would have to serve no more than 1½ years of additional prison time for the New York crime. Approximately four years after defendant was sentenced in accordance with the plea bargain, however, his prior sentence in Massachusetts was reduced in exchange for his cooperation in an unsolved homicide. Consequently, it became impossible to fulfill the New York court's promise that defendant would serve no more than 1½ years of additional prison time in order to satisfy the New York judgment. Defendant therefore moved to vacate the New York judgment pursuant to CPL article 440, but the court denied the motion without a hearing. A Justice of this Court granted defendant leave to appeal, and we now reverse.

We note at the outset that, contrary to the People's implicit contention, defendant's motion is not barred by CPL 440.10 (2) (c) inasmuch as the relevant ground for relief did not arise until several years after the deadline to file a direct appeal from the judgment had

expired. Further, contrary to the court's determination, defendant's motion is not barred by CPL 440.10 (2) (b) inasmuch as he never filed a direct appeal from the judgment.

On the merits, it is well settled that, "[g]enerally, 'when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored' " (*People v Monroe*, 21 NY3d 875, 878 [2013]). Here, the "reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea" (*People v Rowland*, 8 NY3d 342, 345 [2007]), i.e., "the judge's specific representation [that defendant's guilty plea in New York] would thereby extend his [aggregate] incarceratory term by a year and a half only" (*Monroe*, 21 NY3d at 877-878). Consequently, we grant defendant's motion, vacate the judgment of conviction, and remit the matter to Supreme Court to either vacate defendant's guilty plea or impose a sentence that conforms with the plea bargain (*see id.*; *see also Rowland*, 8 NY3d at 344-345).

Defendant's remaining contentions are academic in light of our determination.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

931

KA 17-00439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOUSSA BABAGANA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 31, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to his contention, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Supreme Court was " 'not required to engage in any particular litany' in order to obtain a valid waiver of the right to appeal" (*People v Tantao*, 41 AD3d 1274, 1275 [4th Dept 2007], quoting *People v Moissett*, 76 NY2d 909, 910 [1990]), and the waiver "is not invalid on the ground that the court did not specifically inform defendant that his general waiver of the right to appeal encompassed the court's suppression ruling[]" (*id.*, citing *People v Kemp*, 94 NY2d 831, 833 [1999]). Defendant's contention that he was denied effective assistance of counsel does not survive his plea or the valid waiver of the right to appeal " 'inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see People v Rausch*, 126 AD3d 1535,

1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

934

KA 17-00296

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL M. SWANK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered June 27, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal, and that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). The valid waiver of the right to appeal with respect to both the conviction and sentence encompasses defendant's contentions that County Court should have sentenced him to parole supervision pursuant to CPL 410.91 and that the sentence is unduly harsh and severe (*see People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018]; *cf. People v Copes*, 145 AD3d 1639, 1639-1640 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]). Defendant's valid waiver of the right to appeal also encompasses his challenge to the court's suppression ruling (*see Moore*, 158 AD3d at 1312; *People v Celi*, 149 AD3d 1548, 1549 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]).

Finally, even assuming, arguendo, that defendant's contention that the proceedings were electronically recorded and later transcribed in violation of Judiciary Law § 295 survives both the guilty plea and waiver of the right to appeal (*see People v Harrison*,

85 NY2d 794, 796 [1995]), that contention is unpreserved because defendant did not object to the use of the electronic recording device or the absence of a stenographer (*see People v Votra*, 173 AD3d 1643, 1644 [4th Dept 2019]; *People v Bennett*, 165 AD3d 1624, 1625 [4th Dept 2018]; *People v Rogers*, 159 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

938

CA 19-00382

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

SRP 2012-4, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CYNTHIA L. CHAN, ALSO KNOWN AS CYNTHIA CHAN, CATHERINE AMDUR, DEFENDANTS-RESPONDENTS, JOHN DOE #1, ET AL., DEFENDANTS.

RICHLAND & FALKOWSKI, PLLC, ASTORIA (DANIEL H. RICHLAND OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WESTERN NEW YORK LAW CENTER, INC., BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT CYNTHIA L. CHAN, ALSO KNOWN AS CYNTHIA CHAN.

FIDELITY NATIONAL LAW GROUP, NEW YORK CITY (VANESSA R. ELLIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT CATHERINE AMDUR.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered September 13, 2018. The order, inter alia, denied the motion of plaintiff for summary judgment, granted the cross motion of defendant Cynthia L. Chan, also known as Cynthia Chan, for summary judgment, dismissed the complaint, and sua sponte granted summary judgment to defendant Catherine Amdur on her counterclaim.

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

Memorandum: Plaintiff commenced this foreclosure action against, inter alia, defendants Cynthia L. Chan and Catherine Amdur. Chan purchased certain real property and, in 1998, executed a note secured by a mortgage on the property. The note and mortgage were eventually assigned to plaintiff in 2016. Prior to that assignment, Chan commenced an action in 2013 against the then-current holder of the note and mortgage, Onyx Capital, LLC (Onyx), seeking to discharge the mortgage on the ground that the applicable statute of limitations for a foreclosure action had passed. Chan obtained a default judgment against Onyx, and the mortgage was cancelled and discharged. Chan then sold the property to Amdur in 2015. The title abstract listed the mortgage as cancelled and discharged. After receiving assignment of the note and mortgage from Onyx, plaintiff moved to vacate the default judgment against Onyx on the ground of lack of personal jurisdiction. Supreme Court (Nowak, Jr., J.) denied the motion, but we reversed the court's order, granted the motion, vacated the default

judgment, and dismissed Chan's complaint (*Chan v Onyx Capital, LLC*, 156 AD3d 1361 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). Apparently recognizing that it could not recover on Chan's personal obligation under the note because of her discharge in bankruptcy (*see generally Citimortgage, Inc. v Chouen*, 154 AD3d 914, 916 [2d Dept 2017]), plaintiff elected instead to commence this present foreclosure action against Chan and Amdur (*see generally Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2d Dept 2011]; *Wyoming County Bank & Trust Co. v Kiley*, 75 AD2d 477, 480 [4th Dept 1980]). Plaintiff moved for summary judgment, and Chan cross-moved for summary judgment dismissing the complaint. Supreme Court (Sedita, III, J.) denied plaintiff's motion, granted Chan's cross motion, sua sponte granted summary judgment in favor of Amdur on her counterclaim to quiet title to her interest in the property, and dismissed the complaint. We affirm.

Contrary to plaintiff's contention, the foreclosure action was properly dismissed because Amdur was a bona fide purchaser for value (*see generally U.S. Bank Natl. Assn. v Vanvliet*, 24 AD3d 906, 909 [3d Dept 2005]). A bona fide purchaser is "one who purchases real property in good faith, for valuable consideration, without actual or record notice of another party's adverse interests in the property and is the first to record the deed or conveyance" (*Panther Mtn. Water Park, Inc. v County of Essex*, 40 AD3d 1336, 1338 [3d Dept 2007]). There is no dispute that Amdur purchased the property for valuable consideration, and the evidence submitted by Amdur established that she had notice that the mortgage at issue had been cancelled and discharged by the default judgment. We reject plaintiff's contention that, because the default judgment was later vacated, it could not be relied upon by Amdur when she purchased the property. "It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal" (*Da Silva v Musso*, 76 NY2d 436, 440 [1990]). Amdur "justifiably relied on an order cancelling [and discharging the mortgage], even though it had been entered on default" (*George v Grand Bay Assoc. Enter. Inc.*, 45 AD3d 451, 452 [1st Dept 2007]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

946

CA 19-00013

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

VULCRAFT OF NEW YORK, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SOLVAY IRON WORKS, INC., DEFENDANT,
AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
DEFENDANT-APPELLANT-RESPONDENT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (CHRISTOPHER A. CARDILLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered July 27, 2018. The order and judgment, among other things, denied the motion of defendant Fidelity and Deposit Company of Maryland for summary judgment dismissing the complaint against it, granted that part of the cross motion of plaintiff seeking summary judgment against that defendant and dismissed the counterclaim of that defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the cross motion in its entirety and reinstating the counterclaim of defendant Fidelity and Deposit Company of Maryland and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action, inter alia, to recover on a payment bond issued by Fidelity and Deposit Company of Maryland (defendant). Defendant appeals from an order and judgment that, inter alia, denied defendant's motion for summary judgment dismissing the complaint against it, granted that part of plaintiff's cross motion for summary judgment on its cause of action against defendant, and sua sponte dismissed defendant's counterclaim against plaintiff. Plaintiff cross-appeals from the same order and judgment insofar as it, in effect, denied that part of plaintiff's cross motion for attorneys' fees pursuant to State Finance Law § 137 (4) (c).

Contrary to defendant's contention on its appeal and plaintiff's contention on its cross appeal, triable issues of fact exist concerning plaintiff's demand for payment on the bond and whether such demand was "actually received" by the general contractor within the

time period prescribed by law (State Finance Law § 137 [3]; *see generally Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 547-548 [2d Dept 2006]). Thus, while Supreme Court properly denied defendant's motion, it erred in granting plaintiff's cross motion with respect to its cause of action against defendant (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and we modify the order and judgment accordingly. Moreover, given that plaintiff never sought summary judgment dismissing defendant's counterclaim against it, the court further erred in sua sponte dismissing that counterclaim (*see Sunrise Nursing Home, Inc. v Ferris*, 111 AD3d 1441, 1442 [4th Dept 2013]). We therefore further modify the order and judgment by reinstating the counterclaim. Finally, given our determination that the court erred in granting plaintiff's cross motion in part, we reject plaintiff's contention on its cross appeal that it was entitled to attorneys' fees pursuant to section 137 (4) (c).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

949

KA 18-01777

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. WEBER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered April 12, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing 10 points for use of forcible compulsion under risk factor 1. As the People correctly concede, the court erred in that assessment inasmuch as defendant pleaded guilty to criminal sexual act in the first degree under subdivision (3) of Penal Law § 130.50, which does not require evidence of forcible compulsion (*cf. People v Law*, 94 AD3d 1561, 1563 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]), and there was no other evidence in the record establishing that defendant used forcible compulsion in committing the crime. When those 10 points are subtracted, defendant's total score makes him a presumptive level two risk.

Nevertheless, we note that an upward departure from the presumptive level may be warranted, i.e., there may be evidence of "an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). Here, however, "because defendant was determined to be a level three sex offender, County Court had no reason to consider whether clear and convincing evidence exists to warrant such a departure" (*People v Swain*, 46 AD3d 1157, 1159 [3d Dept 2007]; *see People v Stewart*, 61 AD3d 1059, 1061 [3d Dept 2009]; *see also People v*

Felice, 100 AD3d 609, 610 [2d Dept 2012]). Consequently, under the circumstances presented, we deem it appropriate to "remit the matter to County Court for further proceedings to determine whether an upward departure from defendant's presumptive risk level is warranted" (*People v Brown*, 148 AD3d 1705, 1707 [4th Dept 2017]; *see Stewart*, 61 AD3d at 1061; *see also People v Price*, 31 AD3d 1114, 1115 [4th Dept 2006]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

950

KA 16-00348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. BAKER, ALSO KNOWN AS CHAZ,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CHARLES E. BAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 1, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, grand larceny in the fourth degree, attempted grand larceny in the third degree, criminal mischief in the third degree, petit larceny (three counts), conspiracy in the fifth degree, criminal possession of stolen property in the fifth degree and possession of burglar's tools.

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

Memorandum: Defendant appeals from two judgments arising from his involvement in a series of burglaries. In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the third degree (Penal Law § 140.20), grand larceny in the fourth degree (§ 155.30 [1]), attempted grand larceny in the third degree (§§ 110.00, 155.35 [2]), and criminal mischief in the third degree (§ 145.05 [2]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]). We affirm in each appeal.

Addressing first appeal No. 1, to the extent that defendant contends in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence, we reject that contention. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490,

495 [1987]). 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 also reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends in his main brief that County Court erred in allowing the People to impeach their own witness. Although we agree with defendant that the court erred (*see* CPL 60.35 [1]; *People v Fitzpatrick*, 40 NY2d 44, 51-52 [1976]; *People v Sanders*, 2 AD3d 1420, 1420 [4th Dept 2003]), we nonetheless conclude that the error is harmless (*see People v Saez*, 69 NY2d 802, 804 [1987]; *People v Cartledge*, 50 AD3d 1555, 1555-1556 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]). Defendant failed to preserve for our review his contention in his main brief that the verdict is repugnant (*see People v Alfaro*, 66 NY2d 985, 987 [1985]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it does not require reversal or modification of the judgment in appeal No. 1.

Defendant failed to preserve for our review his further contention in his main brief in appeal No. 1 that, in determining the sentence to be imposed, the court penalized him for exercising his right to trial (*see People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]). In any event, that contention lacks merit (*see id.*). Finally, contrary to defendant's contention in his main brief in both appeals, the sentences are not unduly harsh or severe.

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

951

KA 16-00347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. BAKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CHARLES E. BAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 1, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Same memorandum as in *People v Baker* ([appeal No. 1] — AD3d — [Oct. 4, 2019] [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

952

KA 17-01638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIJAH BELL, 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 December 20, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts) and promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the conviction of those counts is not supported by sufficient evidence and that the verdict with respect to those counts is against the weight of the evidence. Defendant failed to preserve his challenge to the sufficiency of the evidence inasmuch as his motion for a trial order of dismissal and his renewed motion were not " 'specifically directed' " at the error alleged on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Townsley*, 50 AD3d 1610, 1611 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *People v Jackson*, 4 AD3d 773, 773 [4th Dept 2004], *lv denied* 2 NY3d 801 [2004]). In any event, the contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that would lead a rational juror to conclude that defendant was attempting to prevent correction officers from performing their lawful duty and, in doing so, caused physical injuries to two of the correction officers (*see People v Campbell*, 72 NY2d 602, 604-605 [1988]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We further conclude that the verdict on those counts is not

against the weight of the evidence. According great deference to the jury's " 'opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]), and viewing the evidence in light of the elements of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we are satisfied that the jury did not "fail[ ] to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel due to defense counsel's failure to preserve defendant's challenge to the sufficiency of the evidence and failure to request a justification defense instruction. Defense counsel's failure to preserve a challenge to the legal sufficiency of the evidence "does not constitute ineffective assistance because [that] challenge[] would not have been meritorious" (*People v Person*, 153 AD3d 1561, 1563-1564 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]; *see People v Campbell*, 128 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]). "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). With respect to defense counsel's failure to request a justification defense instruction, defendant has failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to request that instruction (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Johnson*, 136 AD3d 1338, 1339 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Viewing the evidence, the law, and the circumstances of this case in their totality at the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

953

KA 16-01617

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MORRIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRITTNEY CLARK 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 (Thomas J. Miller, J.), rendered May 9, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the first degree and assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [viii]; [b]) and assault in the first degree (§ 120.10 [1]), defendant contends that County Court erred in failing to grant that part of his postplea pro se motion seeking substitution of counsel. There is no indication in the record, however, that the court ruled on that part of the motion; i.e., the court neither granted nor denied it on the record before us. The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, *or not ruled upon*, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999] [emphasis added]; *see People v Concepcion*, 17 NY3d 192, 197-198 [2011]), and thus the court's failure to rule on the motion cannot be deemed a denial thereof. We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's postplea pro se motion (*see generally People v Hallmark*, 122 AD3d 1438, 1439 [4th Dept 2014]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

954

KA 17-00745

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR G. SHARPE, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Douglas A. Randall, A.J.), rendered January 22, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [4]) and robbery in the first degree (§ 160.15 [4]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Joubert*, 158 AD3d 1314, 1315 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Slishevsky*, 149 AD3d 1488, 1488-1489 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]), that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see Bryant*, 28 NY3d at 1096; *Joubert*, 158 AD3d at 1315; *Slishevsky*, 149 AD3d at 1489), and that his waiver of the right to appeal was a condition of the bargained-for plea deal, not a consequence thereof (*see Slishevsky*, 149 AD3d at 1489). We note that defendant's oral waiver of the right to appeal was supplemented by a valid written waiver executed by defendant, which Supreme Court adequately discussed at the plea colloquy by "inquir[ing] of defendant whether he understood the written waiver," and ensuring that "he had . . . read the waiver before signing it" (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

We further conclude that the valid waiver of the right to appeal encompasses defendant's remaining contention (*see generally People v*

Lopez, 6 NY3d 248, 255-256 [2006]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

955

KA 15-01250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAKWAN PATTERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered May 13, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in denying his request for a jury charge on the defense of justification to prevent a robbery. We reject that contention, and therefore we affirm.

Defendant was convicted of murder arising from an incident occurring outside a convenience store in Rochester, in which he shot the victim after a verbal confrontation. The evidence at trial, including the soundless surveillance footage from the store's security camera, establishes that the victim and two other men were standing outside of the store, and the victim said something to defendant as he opened the door to the store. After a brief conversation with the victim, defendant then walked away from the store, crossing the sidewalk and the lane of traffic nearest the store, while the victim and the two men with him did not move. After crossing the center line of the street, however, defendant removed a handgun from his pocket, reversed course, returned to the sidewalk near the storefront, and shot the victim two times. The victim had one empty hand visible and the other remained in his pocket until after the shooting. Defendant testified that he believed that the victim was going to rob him, based on defendant's testimony that the victim said "[y]ou know what time it is" to defendant during their discussion. In addition, a prosecution witness testified that the victim said to defendant, as defendant initially walked away, "[w]hen you come back, bring everything you

have." Defendant testified that he interpreted those statements as meaning that the victim was about to rob him. The court granted defendant's request for an instruction on justification pursuant to Penal Law § 35.15 (2) (a), but refused to charge subdivision (2) (b) regarding justification in defense of a robbery.

Initially, we conclude that defendant's contention is preserved for our review. The charge conference was conducted off the record in chambers, but the court placed on the record its determination to give the instruction on justification under Penal Law § 35.15 (2) (a), and defense counsel noted for the record that he had also requested a charge under subdivision (b), which the court denied. Thus, "[i]t is true that the defense lawyer[] never said on the record 'we object to this [ruling],' but [he] did not have to, because [his] objection was clear from the . . . summary of [his] position. Because the trial judge was made aware, before he ruled on the issue, that the defense wanted him to rule otherwise, preservation was adequate" (*People v Caban*, 14 NY3d 369, 373 [2010]; *cf. People v Daggett*, 150 AD3d 1680, 1682 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *see generally People v Torres* [appeal No. 1], 97 AD3d 1125, 1126 [4th Dept 2012], *affd* 20 NY3d 890 [2012]).

With respect to the merits of defendant's contention, it is well settled that, "[i]n determining whether a justification instruction is required, the court must view the evidence in the light most favorable to defendant . . . 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 Brown*, 169 AD3d 1488, 1488-1489 [4th Dept 2019]; *see generally People v Petty*, 7 NY3d 277, 284 [2006]; *People v McManus*, 67 NY2d 541, 549 [1986]). Thus, a court confronted with a request to charge justification in defense of a robbery must first determine whether there is a reasonable view of the evidence that "the defendant had the requisite beliefs under section 35.15[(2) (b)], that is, whether he believed deadly force was necessary to avert the . . . commission of one of the felonies enumerated therein[, and] whether . . . , in light of all the 'circumstances', . . . a reasonable person could have had these beliefs" (*People v Goetz*, 68 NY2d 96, 115 [1986]).

Here, we reject defendant's contention that a reasonable person could have believed that the victim was "committing or attempting to commit a . . . robbery" at the time defendant fired his weapon (Penal Law § 35.15 [2] [b]). Initially, we note that the two statements on which defendant relies are equivocal inasmuch as both could be interpreted as either that the victim said he was going to rob defendant, or that the victim threatened to shoot defendant for disrespecting him if he returned to the victim's location. More importantly, regardless of whether defendant's belief would have been reasonable at an earlier point in time, and "[e]ven if defendant's trial testimony establishes that he actually believed that the victim was [preparing to rob] him with a weapon . . . , there is no reasonable view of the evidence that 'a reasonable person in . . . defendant's circumstances would have believed' the victim to [be

committing or attempting to commit a robbery at the time of the shooting]. Put simply, the surveillance footage reflects that defendant's [shooting] of the victim with the [handgun] cannot be considered" to have been to prevent a robbery (*People v Sparks*, 29 NY3d 932, 935 [2017]; *see People v Richardson*, 174 AD3d 1535, 1536 [4th Dept 2019]; *People v Sadler*, 153 AD3d 1285, 1286 [2d Dept 2017], *lv denied* 30 NY3d 1022 [2017]). Thus, we conclude that "[t]he court properly refused to include in its justification charge an instruction on the use of deadly physical force to prevent the commission of a robbery (Penal Law § 35.15 [2] [b]). There was no reasonable view of the evidence, viewed in the light most favorable to defendant, that at the time of the assault the victim was using or threatening the immediate use of force to obtain [property]" (*People v Green*, 32 AD3d 364, 365 [1st Dept 2006], *lv denied* 7 NY3d 902 [2006]; *see People v Owens*, 256 AD2d 1220, 1222 [4th Dept 1998], *lv denied* 93 NY2d 877 [1999]; *People v Irving*, 234 AD2d 31, 31 [1st Dept 1996], *lv denied* 89 NY2d 924 [1996]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

956

KA 17-01208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEQUANN THOMAS, ALSO KNOWN AS POOH BEAR,
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (NOHA A. ELNAKIB OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 7, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [2]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and assault in the second degree (§ 120.05 [2]) arising from allegations that defendant forcibly stole money and personal property from a victim and, in the course of doing so, shot that victim with a loaded firearm. Defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence, primarily based on his challenge to the credibility of the victim regarding the identity of the perpetrator. We reject those contentions.

Even assuming, arguendo, that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient to support the conviction with respect to each charge of which he was convicted (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see id.*). Contrary to defendant's contention, the " '[i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations' " (*People v Odums*, 121 AD3d 1503, 1504 [4th Dept 2014], *lv denied* 26 NY3d 1042 [2015]). The victim's initial reluctance to cooperate with the police investigation and to testify at trial was adequately explained, and his testimony was corroborated by other evidence (*see People v Smith*, 173 AD3d 414, 414 [1st Dept 2019], *lv denied* — NY3d — [Aug. 26, 2019]; *People v Walker*, 279 AD2d 696, 698 [3d Dept 2001], *lv denied* 96 NY2d 869 [2001]). Among other things, the victim's description of the incident and the perpetrator's clothing was consistent with street surveillance video that captured a portion of the incident including the shooting, and the evidence established that the perpetrator's clothing matched that worn by defendant in a photo on his social media account (*see People v Young*, 152 AD3d 981, 982 [3d Dept 2017], *lv denied* 30 NY3d 955 [2017]). Furthermore, contrary to defendant's contention, although the victim had an extensive criminal history, "[t]he fact that [he] had an unsavory background . . . [does] not render his testimony incredible" (*People v Bernard*, 100 AD3d 916, 916-917 [2d Dept 2012], *lv denied* 20 NY3d 1096 [2013]; *see People v Maxwell*, 103 AD3d 1239, 1241 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]).

We also reject defendant's contention that he was denied effective assistance of counsel. Contrary to defendant's contention, the record before us does not establish that defense counsel had any basis upon which to challenge the search warrant for defendant's social media account, and it is well settled that "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Francis*, 63 AD3d 1644, 1644 [4th Dept 2009], *lv denied* 13 NY3d 835 [2009] [internal quotation marks omitted]; *see People v Caban*, 5 NY3d 143, 152 [2005]). To the extent that defendant's contention involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Carey*, 162 AD3d 1476, 1478 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]). Contrary to defendant's additional contention, we conclude that he was not deprived of effective assistance by defense counsel's failure to object to alleged bolstering testimony of a police investigator inasmuch as any such objection would have had little or no chance of success (*see People v Reed*, 151 AD3d 1821, 1822 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]). In any event, even assuming, arguendo, that the testimony constituted bolstering, we note that defense counsel " 'may have had a strategic reason for failing to [object to such testimony] inasmuch as he may not have wished to draw

further attention to [such testimony]' " (*id.*). Finally, defendant's "complaint about defense counsel's performance during . . . closing arguments 'merely amounts to a second-guessing of counsel's trial strategy and does not establish ineffectiveness' " (*People v Simpson*, 173 AD3d 1617, 1620 [4th Dept 2019]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

959

CAF 18-00436

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

IN THE MATTER OF SUNNY B. POROMON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONIQUE T. EVANS, RESPONDENT-APPELLANT,
AND EVELYN ADAMS, NOW KNOWN AS EVANS,
RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 21, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody of the subject child.

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

Memorandum: Respondent mother appeals from an order that modified the prior order of custody and visitation by, inter alia, granting petitioner father sole legal custody of the subject child.

Contrary to the mother's contention, Family Court properly admitted in evidence hearsay statements during the fact-finding hearing to establish that the child had been sexually abused while under the mother's supervision by his half brother. It is well settled that " '[a] child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006]). Such statements, when corroborated, "are admissible in custody and visitation proceedings that are based in part upon allegations of abuse or neglect" (*Matter of Montalbano v Babcock*, 155 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018] [internal quotation marks omitted]; *see Matter of Cobane v Cobane*, 57 AD3d 1320, 1321 [3d

Dept 2008], *lv denied* 12 NY3d 706 [2009]). Courts have " 'considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse' " (*Nicholas J.R.*, 83 AD3d at 1490; *see Matter of Nicole V.*, 71 NY2d 112, 118 [1987], *rearg denied* 71 NY2d 890 [1988]). Here, we conclude that the child's out-of-court statements were sufficiently corroborated by, inter alia, an expert who did more than merely vouch for the child's credibility and, instead, "objectively validate[d] [the child's] account" of the alleged abuse (*Matter of Dezarae T. [Lee V.]*, 110 AD3d 1396, 1398 [3d Dept 2013]; *see Matter of Nikita W. [Michael W.]*, 77 AD3d 1209, 1210 [3d Dept 2010]; *Matter of Randy A.*, 248 AD2d 838, 839 [3d Dept 1998]).

In any event, even assuming, arguendo, that the court erred in admitting the child's hearsay statements, we conclude that any error is harmless because there was otherwise a sound and substantial basis in the record to support the court's determination to award the father sole legal custody (*see Matter of Jones v Jones*, 160 AD3d 1428, 1429 [4th Dept 2018]; *Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1319-1320 [4th Dept 2016]).

The father established a sufficient change in circumstances to warrant an inquiry into the best interests of the child through evidence of the mother's criminal conviction, the breakdown in the parents' ability to cooperate, and mother's admitted failure to provide the child with necessary medication (*see Matter of Nathaniel V. v Kristina W.*, 173 AD3d 1308, 1310 [3d Dept 2019]; *Matter of Mattice v Palmisano*, 159 AD3d 1407, 1408 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *see generally Matter of Moore v MacRae*, 177 AD2d 1012, 1012-1013 [4th Dept 1991]). Moreover, the evidence adduced at the hearing amply established that the award of sole legal custody to the father was in the child's best interest given the mother's incarceration, her failure to exercise visitation or telephonic rights with the child, and the child's own stated wishes (*see generally Matter of Charles AA. v Annie BB.*, 157 AD3d 1037, 1039-1040 [3d Dept 2018]; *Matter of Aronica v Aronica*, 151 AD3d 1605, 1606 [4th Dept 2017]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

960

CAF 18-00306

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

IN THE MATTER OF JACK S. AND MARLEY S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LEAH S., RESPONDENT-APPELLANT,
AND FRANKLIN O.S., III, RESPONDENT.

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 9, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent mother appeals from a "Corrected Order" that, inter alia, determined that she neglected the subject children pursuant to section 1012 (f) (i) (B). We affirm.

Initially, we note that, on a prior appeal, we affirmed Family Court's contemporaneous determination that respondent father also neglected the subject children (*Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842 [4th Dept 2019]). Nevertheless, we analyze the evidence separately with respect to this appeal by the mother.

Family Court Act § 1046 (a) (iii) creates a presumption of neglect where, insofar as relevant here, a parent "repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment," and it is well settled that such presumption eliminates the need for evidence that the parent's conduct resulted in impairment, or the imminent danger of impairment, to the subject children's physical, mental, or emotional condition (*see Matter of*

Samaj B. [Towanda H.-B.—Wade B.], 98 AD3d 1312, 1313 [4th Dept 2012]; *Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453 [1st Dept 2011]). Here, the evidence at the hearing establishes, among other things, that the mother lost a job due to her drug use, she appeared intoxicated by drugs or alcohol on an occasion when police officers arrived to check on respondent father, she admitted that she used cocaine during the relevant time period, and she took prescription drugs in a suicide attempt that left her hospitalized. The mother failed to rebut the presumption of neglect that arose from the evidence that she " 'chronically and persistently misuses alcohol and drugs which, in turn, substantially impair[ed] . . . her judgment while [the] child[ren were] entrusted to . . . her care' " (*Samaj B.*, 98 AD3d at 1313). Additionally, the court properly drew " 'the strongest possible negative inference' against the [mother] after [she] failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Brittany W. [Patrick W]*, 103 AD3d 1217, 1218 [4th Dept 2013]). Thus, contrary to the mother's contention, a preponderance of the evidence establishes that she neglected the children (*see generally Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1612-1613 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017]; *Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court

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

970

CAE 19-01765

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

IN THE MATTER OF JOHN L. DEMARCO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY BOARD OF ELECTIONS, COLLEEN ANDERSON AND DOUGLAS FRENCH, AS COMMISSIONERS CONSTITUTING THE BOARD, KAREN BAILEY TURNER, AS CANDIDATE FOR OFFICE OF MONROE COUNTY COURT, MICHAEL L. DOLLINGER, AS CANDIDATE FOR OFFICE OF MONROE COUNTY COURT AND KYLE R. STEINEBACH, AS CANDIDATE FOR OFFICE OF MONROE COUNTY COURT,
RESPONDENTS-RESPONDENTS.

COUCH WHITE, LLP, ALBANY (JAMES WALSH OF COUNSEL), FOR PETITIONER-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS MONROE COUNTY BOARD OF ELECTIONS, COLLEEN ANDERSON AND DOUGLAS FRENCH, AS COMMISSIONERS CONSTITUTING THE BOARD.

SANTIAGO BURGER LLP, PITTSFORD (MICHAEL A. BURGER OF COUNSEL), FOR RESPONDENT-RESPONDENT KYLE R. STEINEBACH, AS CANDIDATE FOR OFFICE OF MONROE COUNTY COURT.

MICHAEL T. ANSALDI, ROCHESTER, FOR RESPONDENT-RESPONDENT MICHAEL L. DOLLINGER, AS CANDIDATE FOR OFFICE OF MONROE COUNTY COURT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 10, 2019 in a proceeding pursuant to Election Law article 16 and CPLR article 78. The order and judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to Election Law article 16 and CPLR article 78 seeking, inter alia, to invalidate the ballot with a three-column design that was proposed by respondent Monroe County Board of Elections (Board) for the office of Monroe County Court in the November 5, 2019 general election and to compel the adoption of a ballot with a two-column design. Contrary to

petitioner's contention, we conclude that Supreme Court properly dismissed the petition because petitioner did not file a verified petition at the time of commencement as required by Election Law § 16-116. "The Election Law requirement of a verified petition is a jurisdictional condition precedent to commencing a proceeding" (*Matter of Callahan v Russo*, 123 AD2d 518, 518 [4th Dept 1986]; *see Matter of Goodman v Hayduk*, 64 AD2d 937, 938 [2d Dept 1978], *affd* 45 NY2d 804 [1978]; *Matter of O'Connell v Ryan*, 112 AD2d 1100, 1100 [3d Dept 1985], *lv denied* 65 NY2d 607 [1985]). Thus, although petitioner filed the verification the following day, that subsequent filing was insufficient to cure the jurisdictional defect (*see Goodman*, 64 AD2d at 938; *O'Connell*, 112 AD2d at 1100; *see also Matter of Haberstro v Scholl* [appeal No. 1], 213 AD2d 1082, 1082 [4th Dept 1995]). Contrary to the further contention of petitioner, respondents did not waive their objection to the defective pleading inasmuch as they "[gave] notice with due diligence to [petitioner's] attorney" of their objection (CPLR 3022).

Entered: October 4, 2019

Mark W. Bennett
Clerk of the Court