SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 8, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

668

CA 11-00248

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ.

ELIZABETH L. HAIDT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH F. KURNATH, M.D., DEFENDANT,
HENRY WENGENDER AND LYNN WENGENDER,
DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 28, 2010. The judgment and order, insofar as appealed from, denied that part of the motion of defendants Henry Wengender and Lynn Wengender seeking summary judgment dismissing the first amended complaint against Lynn Wengender and granted that part of the cross motion of plaintiff seeking to dismiss Lynn Wengender's fifth affirmative defense.

It is hereby ORDERED that the appeal by defendant Henry Wengender is dismissed and the judgment and order is otherwise affirmed without costs.

Memorandum: Henry Wengender and Lynn Wengender (collectively, defendants) appeal, as limited by their brief, from a judgment and order denying that part of their motion seeking summary judgment dismissing the first amended complaint against Lynn Wengender (defendant) as time-barred and granting that part of plaintiff's cross motion to dismiss the fifth affirmative defense as asserted by defendant, based on the statute of limitations. We note at the outset that the appeal by defendant Henry Wengender must be dismissed inasmuch as Supreme Court granted that part of defendants' motion seeking to dismiss the first amended complaint against him, and thus he is not "[a]n aggrieved party" (CPLR 5511).

We conclude that the court properly determined that the first amended complaint against defendant was not time-barred based upon the relation back doctrine. Pursuant to that doctrine, the claims asserted against a newly added defendant in an amended pleading may relate back to claims previously asserted against another defendant for statute of limitations purposes where those defendants are united

in interest (*see Buran v Coupal*, 87 NY2d 173, 177-178). In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him [or her] as well" (*id.* at 178 [internal quotation marks omitted]; *see Brock v Bua*, 83 AD2d 61, 69).

As defendant correctly concedes, plaintiff satisfied the first two prongs of the relation back test. We reject defendant's contention, however, that plaintiff failed to satisfy the third prong of the relation back test, i.e., that defendant "knew or should have known that[,] but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against [her] as well" (*Morel v Schenker*, 64 AD3d 403, 403; *see Goldstein v Brookwood Bldg. Corp.*, 74 AD3d 1801). "[P]laintiff[] established that [her] failure to include [defendant in the original complaint] . . . was a mistake and not . . . the result of a strategy to obtain a tactical advantage" (*Brown v Aurora Sys.*, 283 AD2d 956, 957; *see Goldstein*, 74 AD3d 1801; *see generally Buran*, 87 NY2d at 178). In support of her cross motion and in opposition to defendants' motion, plaintiff submitted evidence demonstrating that she did not have sufficient knowledge of defendant's role in prescribing the antibiotic when the alleged medical malpractice occurred or when the action was timely commenced against defendant Joseph F. Kurnath, M.D., approximately 2½ years later. Rather, the testimony of plaintiff at her first deposition, more than two years after the action was commenced against Dr. Kurnath, establishes that her "knowledge" of defendant's role was largely the result of leading questions by Dr. Kurnath's attorney.

Defendant's further contention that she did not have "notice . . . within the applicable limitations period" is unpreserved for our review (*Buran*, 87 NY2d at 180) and, in any event, that contention is without merit. We reject the dissent's conclusion that "the applicable limitations period" must be so narrowly construed that it does not include the 120-day period for service. Indeed, we note that defendant received notice of plaintiff's claim at the same time as Dr. Kurnath, the original defendant.

All concur except SMITH, J.P., and PERADOTTO, J., who dissent and vote to reverse the judgment and order insofar as appealed from in accordance with the following Memorandum: We agree with the majority that the appeal by Henry Wengender should be dismissed. We conclude, however, that the first amended complaint against Lynn Wengender (defendant) should be dismissed as time-barred because the relation back doctrine does not apply under the circumstances of this case, and we therefore respectfully dissent in part. It is undisputed that the action was not commenced against defendant until after the expiration

of the 2½-year statute of limitations applicable to medical malpractice actions (*see* CPLR 214-a). Thus, the claims against her must be dismissed unless they relate back to the claims asserted in the timely filed complaint against defendant Joseph F. Kurnath, M.D. It is well settled that "the three conditions that must be satisfied in order for claims against one defendant to relate back to claims asserted against another are that: (1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him [or her] as well" (*Buran v Coupal*, 87 NY2d 173, 178 [internal quotation marks omitted]). After a defendant demonstrates that the statute of limitations has expired, the plaintiff bears the burden of establishing that the relation back doctrine applies (*see Austin v Interfaith Med. Ctr.*, 264 AD2d 702, 703). We agree with the majority that plaintiff met her burden with respect to the first two prongs of the *Buran* test, but we conclude that she failed to meet her burden with respect to the third prong.

In support of defendants' motion seeking, inter alia, summary judgment dismissing the first amended complaint against defendant as time-barred, defendants submitted the deposition testimony of plaintiff regarding her telephone conversation with defendant prior to the time when defendant prescribed plaintiff the medication at issue. Defendants also submitted the deposition testimony of plaintiff that she read defendant's name on the prescription bottle containing that medication. Defendants thereby demonstrated that plaintiff was aware from the outset that defendant was involved in her treatment. "Thus, the failure to include [defendant] . . . in the timely commenced original suit was not the result of a mistake as to the identity of the correct defendant, and [defendant] had no reason to think that [she] would have been named in the related action but for a mistake as to [her] identity" (*Nani v Gould*, 39 AD3d 508, 510; *see also Cardamone v Ricotta*, 47 AD3d 659, 660-661). In addition, because plaintiff was "fully aware of the existence of [defendant] . . ., [her] failure to join [defendant] was a mistake of law, which is not the type of mistake contemplated by the relation[ ]back doctrine" (*Doe v HMO-CNY*, 14 AD3d 102, 106 [internal quotation marks omitted]; *see Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 165).

Furthermore, "[i]t is well established that the linchpin of the relation back doctrine [is] notice to the [proposed] defendant within the applicable limitations period" (*Lostracco v Mt. St. Mary's Hosp. of Niagara Falls*, 38 AD3d 1312, 1312 [internal quotation marks omitted]; *see Buran*, 87 NY2d at 180; *Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167). Here, the original complaint was not served upon Dr. Kurnath until after the expiration of the statute of limitations. "Because no one was served until [after the statute of limitations expired], there is no basis to conclude that defendant had any idea

that a lawsuit was pending, much less that [she] would be among the named defendants," within the applicable limitations period (*Cole*, 309 AD2d at 1167-1168).

Inasmuch as plaintiff failed to meet her burden with respect to the third prong of the *Buran* test, we would reverse the judgment and order insofar as appealed from, grant that part of defendants' motion seeking summary judgment dismissing the first amended complaint against defendant, deny that part of plaintiff's cross motion seeking to dismiss the fifth affirmative defense as asserted by defendant and dismiss the first amended complaint against her.

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

670

CA 10-02435

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ.

JASON THOME, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BENCHMARK MAIN TRANSIT ASSOCIATES, LLC, CHRISTA CONSTRUCTION, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

WEBSTER SZANYI LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 11, 2010 in a personal injury action. The order, insofar as appealed from, granted those parts of the motion of plaintiff seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against defendants Benchmark Main Transit Associates, LLC and Christa Construction, LLC.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and those parts of plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim against defendants Benchmark Main Transit Associates, LLC and Christa Construction, LLC are denied.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when the scissor lift on which he was standing tipped over. Benchmark Main Transit Associates, LLC and Christa Construction, LLC (collectively, defendants) appeal from an order that, inter alia, granted those parts of plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against them. Although defendants purport to appeal from "each and every portion of the [o]rder . . . as well as from the whole [o]rder," we note that defendants are aggrieved only by those parts of the order granting plaintiff's motion with respect to the section 240 (1) claim against them. Contrary to defendants' contention, plaintiff met his initial burden on those parts of the motion. "In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240 (1), he [or she] must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries . . . However, if adequate safety devices are

provided and the worker either chooses not to use them or misuses them, then liability under section 240 (1) does not attach" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 236). Here, plaintiff met his initial burden of establishing a statutory violation by submitting evidence that he was standing on the raised scissor lift when it tipped over and that he was in the process of measuring and installing metal studs at that time (*cf. Primavera v Benderson Family 1968 Trust*, 294 AD2d 923; *see generally Dean v City of Utica*, 75 AD3d 1130; *Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098). Thus, the scissor lift "failed while plaintiff was [engaged in] . . . work requiring the statute's special protections" (*Melber v 6333 Main St.*, 91 NY2d 759, 763-764).

We agree, however, with the further contention of defendants that they raised a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries. In opposition to the motion, defendants submitted evidence that plaintiff was aware that holes had been cut into the concrete floor of the building in which he was working and that, on the morning of his accident, plaintiff had been specifically directed not to operate the scissor lift in the area where the holes had been cut. Further, defendants submitted evidence that plaintiff drove the raised lift into that area while looking at the ceiling rather than where the lift was going. Consequently, "[u]nlike those situations in which a safety device fails for no apparent reason, thereby raising the presumption that the device did not provide proper protection within the meaning of Labor Law § 240 (1), here there is a question of fact [concerning] whether the injured plaintiff's fall [resulted from] his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries" (*Bahrman v Holtsville Fire Dist.*, 270 AD2d 438, 439).

SMITH, J.P., CARNI, and SCONIERS, JJ., concur; MARTOCHE, J., concurs in the following Memorandum: I concur in the result reached by the majority, but I respectfully disagree with the majority's analysis. In my view, plaintiff failed to meet his initial burden on those parts of his motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against Benchmark Main Transit Associates, LLC and Christa Construction, LLC (collectively, defendants).

The manner in which the accident occurred is not in dispute. Plaintiff was standing on a scissor lift and, when he repositioned the scissor lift to perform his work, one of its wheels entered a hole in the floor and the scissor lift tipped over, causing plaintiff to fall and sustain injuries. In my view, the facts of this case render it subject to the holding of the Court of Appeals in *Melber v 6333 Main St.* (91 NY2d 759). There, the plaintiff was installing metal studs into the top of a drywall and, in order to reach the height necessary to complete his work, he stood on 42-inch stilts. At some point during the course of his work, the plaintiff needed a clamp that was located some distance away from the work area, and he "walked" on the stilts down an open corridor to retrieve the clamp. In the process, he tripped over electrical conduit protruding from the unfinished floor and fell to the ground, sustaining injuries. The Court of Appeals held that Labor Law § 240 (1) should be broadly construed but

that the "extraordinary protections of the statute in the first instance apply only to a narrow class of dangers--a determination critical to the resolution of" the appeal in *Melber* (*id.* at 762). The Court cited its decision in *Rocovich v Consolidated Edison Co.* (78 NY2d 509) and reiterated that "the statutory language did not itself specify the hazards to be guarded against[] but rather focused on the safety devices to be used to avoid them" (*Melber*, 91 NY2d at 762). In *Rocovich* (78 NY2d at 511-512), the plaintiff worker injured his foot and ankle when he fell into a 12-inch trough containing heated industrial oil. In determining that Labor Law § 240 (1) did not apply, the Court of Appeals stated that "it [was] difficult to imagine how [the] plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk [that] called for any of the protective devices of the types listed" in the statute (*id.* at 514-515).

With respect to the facts in *Melber* (91 NY2d at 763), the Court concluded that conduit protruding from the floor was akin to a trough filled with hot oil, inasmuch as it was a hazard against which employees should be protected, but that neither hazard could be avoided by proper placement or utilization of one of the safety devices listed in Labor Law § 240 (1). The Court specified that the stilts in *Melber* performed the function required of them, namely, allowing the plaintiff to perform his work safely at a height, and it noted that, had the stilts failed while the plaintiff was installing the metal studs, "a different case would be presented" (*id.* at 764). Nevertheless, the injury sustained by the plaintiff in *Melber* "resulted from a separate hazard--electrical conduit protruding from the floor," and thus the Court concluded that the injury "flowed from a deficiency in the device that was wholly unrelated to the hazard [that] brought about its need in the first instance" (*id.* [internal quotation marks omitted]).

Here, as in *Melber,* the accident was not the result of elevation-related work but, rather, it "was the result of a separate and unrelated hazard," namely, the unguarded hole (*Primavera v Benderson Family 1968 Trust*, 294 AD2d 923, 924). As in *Melber*, none of the safety devices enumerated in the statute would have prevented the wheel of the scissor lift from entering the hole and causing the scissor lift to tip over. Thus, I conclude that plaintiff is not entitled to partial summary judgment on the Labor Law § 240 (1) claim against defendants. Neither, however, are defendants entitled to summary judgment dismissing that claim against them because there are other potential theories of liability that plaintiff may pursue at trial, including that he should have been provided with a lanyard and safety harness to use while working in the scissor lift at an elevated height (*see generally Leniar v Metropolitan Tr. Auth.*, 37 AD3d 425, 426). Because plaintiff's bill of particulars is so general that such a theory could conceivably still be advanced, I see no reason to search the record and grant summary judgment dismissing the section 240 (1) claim against defendants.

PERADOTTO, J., dissents and votes to affirm in the following Memorandum: I respectfully dissent because I cannot agree with the

majority that there is a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries.

This Labor Law and common-law negligence action arises out of an accident that occurred during the construction of a large retail store (hereafter, project). The concrete floor of the building contained several three-foot by three-foot holes that were not guarded or barricaded in any manner, although wooden pallets had been placed in the holes as a safety measure. At the time of the accident, plaintiff was installing struts on the interior ceiling joists using a scissor lift raised to a height of approximately 20 feet. The task required plaintiff to occasionally reposition the scissor lift to enable him to reach other bolts on the same strut, as well as to move on to the next strut. While plaintiff was repositioning the scissor lift to reach the next strut, a wheel of the scissor lift entered one of the holes in the floor, causing the lift to tip over and plaintiff to fall to the ground. Plaintiff commenced this action against, inter alia, Benchmark Main Transit Associates, LLC, the owner of the property, and Christa Construction, LLC, the general contractor (collectively, defendants). Supreme Court granted those parts of plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against defendants. I would affirm.

I agree with the majority that plaintiff met his initial burden on those parts of the motion by establishing that the scissor lift "failed while plaintiff was [engaged in] . . . work requiring the . . . special protections" of Labor Law § 240 (1) (*Melber v 6333 Main St.*, 91 NY2d 759, 763-764). As the majority notes, plaintiff submitted evidence establishing that, at the time of the accident, he was standing on the raised scissor lift and was in the process of installing metal struts to the interior roof joists. Further, plaintiff "established the requisite causal link between his injuries and the violation of defendants' nondelegable duty to ensure that the scissor lift was 'so . . . placed and operated as to give proper protection' to plaintiff" (*Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098, quoting § 240 [1]).

Contrary to the conclusion of the majority, however, I conclude that defendants failed to raise a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries. In opposition to the motion, defendants submitted the deposition testimony of the foreman on the project, who testified that, on the morning of the accident, he told plaintiff "to work in the center of the building" and away from the holes, which were located on the "sides" of the building. According to the foreman, plaintiff's accident occurred outside the area that the foreman defined as the "center" of the building, although he could not recall how far away from that area plaintiff was at the time of the accident. In viewing photographs of the work site, the foreman could not identify any "landmark" or other object demarcating the area he defined as the center of the building. Notably, plaintiff's employer was hired to install struts throughout the entire building, including the area where plaintiff's accident occurred, and the task required plaintiff to move the scissor lift around the building. In any event, even

assuming, arguendo, that plaintiff was "specifically directed not to operate the scissor lift in the area where the holes had been cut," as the majority states, defendants' "nondelegable duty under [Labor Law §] 240 (1) is not met merely by providing safety instructions . . ., but by furnishing, *placing* and operating [safety] devices so as to give [plaintiff] proper protection" (*Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1086 [internal quotation marks omitted] [emphasis added]; *see Haystrand v County of Ontario*, 207 AD2d 978). Here, "the fact that the scissor lift tipped establishes that it was not so 'placed . . . as to give proper protection' to plaintiff" (*Ward*, 13 AD3d 1098, quoting § 240 [1]). Thus, inasmuch as plaintiff established that the accident was caused, at least in part, by a statutory violation, his actions cannot be the sole proximate cause of his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106).

In determining that defendants raised a triable issue of fact whether plaintiff's actions were the sole proximate cause of the accident, the majority points to evidence submitted by defendants suggesting that plaintiff repositioned the raised lift "while looking at the ceiling rather than where the lift was going." That evidence, however, raises at most an issue of "contributory negligence[, which] is not a defense to a claim based on Labor Law § 240 (1)" (*Stolt v General Foods Corp.*, 81 NY2d 918, 920; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39; *Ferris v Benbow Chem. Packaging, Inc.*, 74 AD3d 1831).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

674

CA 11-00279

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE ESTATE OF ALDONA K. MARRIOTT, DECEASED.

GAIL MARRIOTT, PETITIONER-APPELLANT;

ROBERT W. MARRIOTT, RESPONDENT-RESPONDENT.

MEMORANDUM AND ORDER

MCMAHON AND GROW, ROME (DAVID C. GROW OF COUNSEL), FOR PETITIONER-APPELLANT.

PETER M. HOBAICA, LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered June 8, 2010. The order denied petitioner's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted in accordance with the following Memorandum: Petitioner commenced this proceeding pursuant to SCPA 2103 seeking discovery and delivery of certain assets that allegedly belonged to the estate of Aldona K. Marriott (decedent). We agree with petitioner that Surrogate's Court erred in denying her motion for summary judgment seeking, inter alia, an order directing that the net proceeds from the sale of decedent's residence (hereafter, property) be released to her estate.

While decedent was in the hospital, she executed a durable general power of attorney using the statutory short form (hereafter, POA form), which purported to grant certain powers to decedent's sons, Thomas Marriott and Robert W. Marriott (respondent), and respondent's wife. Decedent formally revoked the power of attorney approximately two months later, shortly after Thomas Marriott conveyed the property to himself and respondent for consideration of $1. After the commencement of this proceeding, Thomas Marriott conveyed his purported one-half share of the property back to the estate for no consideration. Thereafter, the estate and respondent sold the property to a third party for $135,000. This proceeding concerns respondent's purported share of the net proceeds from the sale, which is presently in escrow pending resolution of the proceeding.

We conclude that petitioner met her burden of establishing that the property belonged to decedent at the time of her death (*see Matter*

of Murray, 84 AD3d 106; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and that respondent failed to raise a triable issue of fact in opposition (*see Matter of Coviello*, 78 AD3d 696, 697-698; *see generally Zuckerman*, 49 NY2d at 562). The purported conveyance of the property by Thomas Marriott to himself and respondent was unauthorized inasmuch as it was made pursuant to a POA form that did not validly grant Thomas Marriott such authority (*see* General Obligations Law former § 5-1501 [1]). The statute in effect at the time the POA form was executed and the directions on the POA form explicitly require the principal, i.e., decedent, to place her "initials" in designated spaces on the form to indicate her "choice[s]" with respect to the specific powers granted to her agents (*id.*). "[I]f the [designated] space[s are] not initialed, no authority is granted" (*Matter of Hoerter*, 15 Misc 3d 1101[A], 2007 NY Slip Op 50448[U], *6). Specifically, the POA form directs the principal to "**[i]nitial in the blank space to the left of [his or her] choice any one or more of the following lettered subdivisions as to which [he or she] WANT[S] to give [his or her] agent[s] authority. If the blank space to the left of any particular lettered subdivisions is NOT initialed, NO AUTHORITY WILL BE GRANTED for matters that are included in that subdivision. Alternatively, the letter corresponding to each power [he or she] wish[es] to grant may be written or typed on the blank line in subdivision '(Q),' and [he or she] may then put [his or her] initials in the blank space to the left of subdivision '(Q)' in order to grant each of the powers so indicated**" (*see* former § 5-1501 [1]).

Here, the POA form executed by decedent contains an "X" next to subdivision "(Q)," which grants all of the listed powers to the agents, including the power to conduct real estate transactions. The decedent's initials, however, do not appear to the left of any of the specific powers or the catchall subdivision "(Q)," nor do they appear anywhere else on the POA form. Although an "X" or another such mark may be sufficient where a principal routinely signs his or her name with such a mark, i.e., where the principal lacks the capacity for a standard signature (*see generally* General Construction Law § 46; *Hoerter*, 2007 NY Slip Op 50448[U], *6), that is not the case here. Indeed, decedent signed her full name on the POA form, thus rebutting any suggestion that she was unable to affix her initials to the form or that it was her practice to execute documents with an "X" (*see generally* § 46). Inasmuch as "the blank space to the left of . . . subdivision ['(Q)'] is NOT initialed, NO AUTHORITY [WAS] GRANTED" to decedent's sons to convey or to otherwise dispose of her property (General Obligations Law former § 5-1501 [1]; *see Matter of Ungar v Feller*, 24 Misc 3d 1222[A], 2009 NY Slip Op 51554[U], *4). Thus, based on the record before us, we conclude that the purported conveyance of the property pursuant to the power of attorney is void (*see Matter of White*, 11 Misc 3d 1054[A], 2006 NY Slip Op 50210[U], *4-5), and the proceeds from the sale thereof constitute property of decedent's estate.

We therefore reverse the order, grant the motion and direct that respondent's purported share of the net proceeds from the sale of the

subject property be released to the estate.

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

713

CA 10-02401

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

DANIEL B. LANDIS AND JANELLA A. LANDIS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RICHARD GIACINTO, SHULTS & SHULTS ATTORNEYS,
AND DAVID A. SHULTS, ESQ., DEFENDANTS-RESPONDENTS.

EDWARD J. DEGNAN, CANISTEO, FOR PLAINTIFFS-APPELLANTS.

SHULTS AND SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), DEFENDANTS-RESPONDENTS PRO SE, AND FOR DEFENDANT-RESPONDENT RICHARD GIACINTO.

Appeal from an order of the Supreme Court, Steuben County (Joseph D. Valentino, J.), entered February 18, 2010. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion and reinstating the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, to recover the down payment held in escrow that was paid by defendant Richard Giacinto when he entered into a contract to purchase real estate from plaintiffs. We agree with plaintiffs that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint, and we therefore modify the order accordingly. A seller in a real estate transaction may be entitled to keep a down payment where a buyer willfully defaults on the contract (*see Lawrence v Miller*, 86 NY 131, 139-140; *see also Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378). Here, the contract contained a mortgage contingency clause, and we conclude that there is a triable issue of fact whether Giacinto engaged in good faith efforts to obtain a mortgage (*see Balkhiyev v Sanders*, 71 AD3d 611, 612-613; *Katz v Simon*, 216 AD2d 270, 271-272; *Zwirn v Goodman*, 206 AD2d 360, 361-362).

We further conclude, however, that the court properly denied plaintiffs' cross motion for, inter alia, summary judgment on the third cause of action, alleging that plaintiffs are entitled to retain the down payment held in escrow, inasmuch as there are triable issues of fact with respect to Giacinto's breach of the real estate contract

(*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiffs' contention that the evidence submitted regarding an alleged mortgage commitment from IndyMac Bank establishes that Giacinto breached the contract as a matter of law. We reject plaintiffs' further contention that Giacinto breached the contract by providing late notice of his inability to secure financing. The contract did not specify a date by which Giacinto was required to provide such notice, and he therefore was afforded a reasonable time to do so (*see Big Apple Meat Mkt. v Frankel*, 276 AD2d 657, 658).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

716

CA 10-02280

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, AND GREEN, JJ.

WILLIAM G. SWAVELY, AS EXECUTOR OF THE ESTATE
OF LORRAINE M. SWAVELY, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZHANDONG ZHOU, M.D., AND CARDIAC SURGERY
ASSOCIATES OF CNY, P.C., DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (GEORGE F. MOULD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 25, 2010 in a medical malpractice action. The judgment dismissed the complaint upon a jury verdict of no cause of action.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the post-trial motion is granted, the verdict is set aside, the complaint is reinstated and a new trial is granted.

Memorandum: Plaintiff, as executor of the estate of his mother (decedent), appeals from an order in this medical malpractice action denying his motion pursuant to CPLR 4404 (a) seeking to set aside the jury verdict as inconsistent and against the weight of the evidence. Decedent died after the right ventricle of her heart was lacerated during a pericardial window procedure (hereafter, surgery) performed by Zhandong Zhou, M.D. (defendant). The jury determined that defendant was negligent but that his negligence was not a substantial factor in causing decedent's death. We note at the outset that the order was subsumed in the final judgment, from which no appeal was taken. In the exercise of our discretion, however, we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see Cowley v Kahn*, 298 AD2d 917; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5520 [c]).

Turning to the merits, we conclude that Supreme Court erred in denying plaintiff's motion. According to plaintiff, defendant was negligent in performing the surgery inasmuch as he "tore the decedent's right ventricle[,] leading to massive bleeding, cardiac

arrest and anoxic brain damage." Plaintiff presented expert testimony to support that allegation, and defendant countered with contrary expert testimony. In finding that defendant was negligent, the jury presumably credited the testimony of plaintiff's expert on that issue and, here, "the issues of negligence and proximate cause were so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Rubin v Pecoraro*, 141 AD2d 525, 527). We therefore conclude that the verdict could not have been reached upon any fair interpretation of the evidence because defendant's negligence necessarily contributed to the death of decedent (*see Ahr v Karolewski*, 32 AD3d 805, 806-807; *see also Brenon v Tops Mkts*. [appeal No. 2], 289 AD2d 1034, *lv denied* 98 NY2d 605). Although one of plaintiff's expert witnesses testified concerning several distinct acts performed or omitted by defendant during the surgery, plaintiff established a single instance of malpractice, i.e., the negligent performance of the surgery, during which defendant punctured decedent's heart and thereby caused her death. Thus, "[t]he jury's findings that the defendant . . . departed from accepted medical practice in performing surgery on [decedent], but that the departure was not a proximate cause of [decedent's death], was against the weight of the evidence since the issues are so inextricably interwoven as to make it logically impossible to find a departure without also finding proximate cause" (*Lader v Sherman*, 58 AD3d 809, 809; *see Calderon v Irani*, 296 AD2d 778, 778-779).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

717

CA 10-02322

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

DORIS BAITY, ET AL.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

GENERAL ELECTRIC COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (S. PAUL BATTAGLIA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 18, 2010. The order denied the motion of defendant for summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking to recover for damages to their property arising from the discharge of toxic chemicals into the ground from an industrial plant formerly operated by defendant, as well as medical monitoring costs associated therewith. Plaintiffs asserted causes of action for, inter alia, negligence, public nuisance and trespass. Defendant contends on appeal that Supreme Court erred in denying its motion for summary judgment dismissing the second amended complaint, and plaintiffs contend on their cross appeal that the court erred in denying their cross motion for partial summary judgment on the issue of the source of the groundwater contamination of their real property. We affirm.

Before 1968, defendant used trichloroethylene (TCE) to clean metal parts at its plant and disposed of the waste containing TCE by placing it in unlined earthen evaporation pits. It is undisputed that plaintiffs' drinking water wells were contaminated with TCE and its degradation products, i.e., dichloroethylene and vinyl chloride. Groundwater at defendant's plant site was also found to contain TCE. According to plaintiffs, their last exposure to any of those toxins occurred in the year 2000. It is also undisputed that plaintiffs have not to date manifested any disease as a result of their alleged exposure to the toxins. In addition, the parties agree that the

toxins are rapidly excreted by the human body and thus cannot be detected in plaintiffs' bodies by any recognized scientific or medical test or examination. Nevertheless, with respect to that part of its motion for summary judgment dismissing the claims for medical monitoring costs, defendant assumed, without conceding, that plaintiffs had been exposed to the toxins through the use of their contaminated water wells. Defendant's expert toxicologist also assumed but did not concede that TCE, "in a sufficient dose, might pose a carcinogenic risk to humans."

In support of its motion, defendant relied on language that appears in our decision in *Allen v General Elec. Co.* (32 AD3d 1163) in contending that plaintiffs "must establish both that [they were] in fact exposed to the disease-causing agent and that there is a rational basis for [their] fear of contracting the disease" (*id.* at 1165 [internal quotation marks omitted]; *see Abusio v Consolidated Edison Co. of N.Y.*, 238 AD2d 454, 454-455, *lv denied* 90 NY2d 806). Defendant, however, offered no affirmative evidence establishing that plaintiffs' alleged exposure to TCE was not capable of causing cancer or that plaintiffs were not exposed to sufficient levels of TCE to cause cancer (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448, *rearg denied* 8 NY3d 828). Indeed, defendant merely asserted, e.g., that "plaintiffs cannot and do not have admissible proof," and that "plaintiffs[] have insufficient evidence."

We conclude that the court properly denied that part of defendant's motion for summary judgment dismissing the claims for medical monitoring costs. We note at the outset that plaintiffs do not seek damages for emotional distress based upon their "fear of developing cancer" (*Wolff v A-One Oil*, 216 AD2d 291, 292, *lv dismissed* 87 NY2d 968; *see Conway v Brooklyn Union Gas Co.*, 189 AD2d 851). Rather, plaintiffs' "theory of liability [for medical monitoring damages] grows out of the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body[,] setting in motion the forces [that] eventually result in disease" (*Askey v Occidental Chem. Corp.*, 102 AD2d 130, 136). Under that theory, "defendant is liable for 'reasonably anticipated' consequential damages [that] may flow later from that invasion although the invasion itself is 'an injury too slight to be noticed at the time it is inflicted' " (*id.*; *see Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 300-301). Thus, contrary to defendant's contention, in order to establish its entitlement to judgment as a matter of law dismissing the claims for medical monitoring costs, defendant was required to "establish with a degree of reasonable medical certainty through expert testimony . . . that such expenditures are [not] 'reasonably anticipated' to be incurred by reason of [plaintiffs'] exposure" to TCE (*Askey*, 102 AD2d at 137). To the extent that our decision in *Allen* holds otherwise, it is no longer to be followed.

It is well established that "[a] moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent[s'] proof" (*Orcutt v*

American Linen Supply Co., 212 AD2d 979, 980; *see Swimm v Bratt*, 15 AD3d 976, 977). Here, defendant failed to submit any evidence establishing to a reasonable degree of medical certainty that the costs of future medical monitoring are not reasonably likely to be incurred as a result of plaintiffs' exposure to TCE (*cf. Hellert v Town of Hamburg*, 50 AD3d 1481, 1482, *lv denied* 11 NY3d 702).

We reject defendant's further contention that the court erred in denying that part of its motion for summary judgment dismissing the "claim" for punitive damages. First, although the complaint alleges reckless conduct sufficient to support an award of punitive damages, it does not in fact assert such a claim. Second, in any event, defendant failed to submit evidence entitling it to that relief inasmuch as, with respect thereto, defendant submitted only an attorney's affidavit containing a conclusory footnote, which had no evidentiary value. Third, we note that the determination whether a plaintiff is entitled to an award of punitive damages "should 'reside in the sound discretion of the original trier of the facts,' " i.e., at the time of trial (*Fordham-Coleman v National Fuel Gas Distrib. Corp.*, 42 AD3d 106, 114, quoting *Nardelli v Stamberg*, 44 NY2d 500, 503).

We reject defendant's contention that its disposal of TCE on its property prior to 1968 was not negligent as a matter of law and thus that the court should have granted that part of its motion for summary judgment dismissing the negligence cause of action. The statements of defendant's experts that defendant "comported with industry standards [do] not establish as a matter of law that [defendant] was not negligent" (*Gardner v Honda Motor Co.*, 214 AD2d 1024, 1024; *see Trimarco v Klein*, 56 NY2d 98, 106-107). Moreover, "[i]rrespective of the absence of a statutory [or regulatory] obligation, [defendant] remain[ed] subject to [its] common-law duty" (*Jacqueline S. v City of New York*, 81 NY2d 288, 293, *rearg denied* 82 NY2d 749; *see also Mercogliano v Sears, Roebuck & Co.*, 303 AD2d 566). Inasmuch as defendant failed to submit sufficient evidence establishing its entitlement to judgment as a matter of law, the court properly denied that part of the motion with respect to the negligence cause of action, regardless of the sufficiency of plaintiffs' opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We reject defendant's further contention that the court erred in denying that part of its motion for summary judgment dismissing the cause of action for trespass. We conclude that there are triable issues of fact whether defendant had "good reason to know or expect" that the toxins would pass from its industrial plant to plaintiffs' property (*Phillips v Sun Oil Co.*, 307 NY 328, 331; *see Hilltop Nyack Corp. v TRMI Holdings*, 264 AD2d 503, 505).

With respect to that part of defendant's motion for summary judgment dismissing the public nuisance cause of action, it is well settled that the seepage of chemical wastes into a public water supply constitutes a public nuisance (*see generally Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568, *rearg denied* 42 NY2d 1102; *State of New York v Monarch Chems.*, 90 AD2d 907). Nevertheless, "[a] public nuisance is actionable by a private person

only if it is shown that the person suffered special injury beyond that suffered by the community at large" (*532 Madison Ave. Gourmet Foods v Finlandia Center, Inc.*, 96 NY2d 280, 292, *rearg denied* 96 NY2d 938). We conclude that defendant failed to meet its burden of establishing that the contamination of plaintiffs' private water wells did not constitute a special injury beyond that suffered by the public at large (*see Booth v Hanson Aggregates N.Y., Inc.*, 16 AD3d 1137, 1138).

We reject defendant's contention that the court erred in considering the opposing affidavits of plaintiffs' experts, i.e., a geography professor with 25 years of experience in researching historical waste management practices and water pollution, and an environmental attorney with over 35 years of experience in drinking water supply contamination litigation and enforcement of the Clean Water Act through employment with the United States Environmental Protection Agency between 1973 and 1986. "It is within the sound discretion of the trial court to determine whether a witness [is qualified] as an expert[,] and that determination should not be disturbed 'in the absence of serious mistake, an error of law or abuse of discretion' " (*Saggese v Madison Mut. Ins. Co.*, 294 AD2d 900, 901, quoting *Werner v Sun Oil Co.*, 65 NY2d 839, 840). Contrary to defendant's contention, "[t]he expert[s'] qualifications go to the weight rather than the admissibility of" the opinions in their affidavits (*Williams v Halpern*, 25 AD3d 467, 468).

Finally, we conclude that the court properly denied plaintiffs' cross motion for summary judgment on the issue of the source of the contamination. The papers before the court on that issue "presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" (*Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

804.1

CAF 10-02330

PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF PIETRO RUSSO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE CARMEL, RESPONDENT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-RESPONDENT.

ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR HANNAH R.R.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered October 28, 2010 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted petitioner permission to travel to Italy with the child.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the restriction that the trip shall occur in the spring of 2011 and by instead providing that the trip shall not occur between the dates of December 23 through December 26, no matter the year in which the trip occurs, and as modified the order is affirmed without costs.

Memorandum: Petitioner father commenced this proceeding seeking joint custody and expanded visitation, and respondent mother cross-petitioned to reduce the father's overnight visitation. The parties thereafter entered into a stipulation resolving those issues, however, and they agreed that Family Court would rule on the father's request to travel to Italy with the parties' child to visit the father's parents and other relatives who reside there. The mother now contends that the court erred in permitting the father to travel to Italy for a period of not more than 15 days on 60 days' notice to the mother. Although the mother is correct that the court failed to set forth the facts it deemed essential in permitting the child to travel with the father to Italy (*see* CPLR 4213 [b]), the record is sufficient to enable us to make those findings (*see Matter of Dubuque v Bremiller*, 79 AD3d 1743). We thus reject the mother's contention that the matter must be remitted to Family Court to make those findings (*cf. Matter of Rocco v Rocco*, 78 AD3d 1670).

The record establishes that, although the father's visitation

with the child is limited to a maximum of 48 hours at a given time, the father has a close bond with her and, during visitation, he prepares her meals, bathes her, administers medication as necessary and takes her on outings. Further, the mother did not express any concerns that the father would abscond with the child (*cf*. *Matter of Ish-Shalom v Wittmann*, 19 AD3d 493, 494; *see generally Puran v Murray*, 37 AD3d 472). Instead, the mother opposed the father's request on the ground that the two-year-old child had never been away from the mother for more than 48 hours and would be in an unfamiliar environment with relatives who were unknown to the child. We conclude that the mother's concerns in opposition to the request do not warrant a denial of the father's request. Indeed, we conclude that it is in the best interests of the child to travel with the father to Italy to meet her extended family (*see generally Puran*, 37 AD3d 472). Inasmuch as the order provides that the trip shall occur in the spring of 2011 and this Court stayed the order, we modify the order by vacating that restriction. We further modify the order to provide that the trip shall not occur between the dates of December 23 and December 26, without regard to the year in which the trip occurs.

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

829

KA 09-00514

PRESENT: SMITH, J.P., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. CHICHERCHIA, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 8, 2008. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, criminal sexual act in the first degree and sexual abuse in the first degree (three counts).

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, predatory sexual assault against a child (Penal Law § 130.96), defendant contends that County Court erred in failing to grant his request to proceed pro se. We reject that contention. A defendant has the right to self-representation (*see* NY Const, art I, § 6; CPL 210.15 [5]), and he or she may invoke that right "provided [that]: (1) the request is unequivocal and timely asserted[;] (2) there has been a knowing and intelligent waiver of the right to counsel[;] and (3) the defendant has not engaged in conduct [that] would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17; *see People v Tabor*, 48 AD3d 1096). Although defendant's request to proceed pro se was timely, inasmuch as it was made "prior to the prosecution's opening statement" (*McIntyre*, 36 NY2d at 18), the request was not unequivocal because it was made after defendant's request for new counsel was denied (*see People v Caswell*, 56 AD3d 1300, 1301-1302, *lv denied* 11 NY3d 923, 12 NY3d 781, *cert denied* ___ US ___, 129 S Ct 2775; *People v McClam*, 297 AD2d 514, *lv denied* 99 NY2d 537).

We reject defendant's further contention that the court erred in failing sua sponte to order a competency hearing (*see People v Tortorici*, 92 NY2d 757, 765-766, *cert denied* 528 US 834; *People v Morgan*, 87 NY2d 878, 879-880; *People v Garrasi*, 302 AD2d 981, 982-983,

lv denied 100 NY2d 538). The court "had the opportunity to interact with and observe defendant . . ., [and thus] the court had adequate opportunity to properly assess defendant's competency" (*People v Bolarinwa*, 258 AD2d 827, 831, *lv denied* 93 NY2d 1014; *see Garrasi*, 302 AD2d at 982-983). "Moreover, [we] note[] that defense counsel did not request a hearing and, as it has been observed, [defense] counsel was in the best position to assess defendant's capacity and request an examination" pursuant to CPL 730.30 (*People v Ferrer*, 16 AD3d 913, 914, *lv denied* 5 NY3d 788; *see People v Gelikkaya*, 84 NY2d 456, 460).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

838

KA 10-01054

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESUS TORRES, DEFENDANT-APPELLANT.

STEVEN J. GETMAN, OVID, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered April 12, 2010. The judgment convicted defendant, upon a jury verdict, of assault 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 assault in the third degree (Penal Law § 120.00 [2]), defendant contends that County Court erred in refusing to instruct the jury on the defense of justification. We reject that contention. There is no reasonable view of the evidence that defendant reasonably believed that physical force was necessary to defend himself from what he reasonably believed to be "the use or imminent use of unlawful physical force" (§ 35.15 [1]; *see People v Lewis*, 13 AD3d 208, 209, *affd* 5 NY3d 546; *Matter of Y.K.*, 87 NY2d 430, 433-434; *see generally People v Butts*, 72 NY2d 746, 750).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court

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

839

KA 08-01499

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GARNER, JR., DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 10, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of one count of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his plea was not knowingly, intelligently and voluntarily entered and thus that Supreme Court erred in denying his motion to withdraw the plea. We reject that contention. "Permission to withdraw a guilty plea rests solely within the court's discretion . . ., and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, *lv denied* 92 NY2d 1053). During the plea colloquy, defendant admitted forcibly stealing the victim's property while his accomplice displayed a firearm, and he acknowledged that he discussed the plea with defense counsel and understood the plea proceedings. Defendant's contention that he was pressured into accepting the plea is belied by his statements during the plea proceedings (*see People v Beaty*, 303 AD2d 965, *lv denied* 100 NY2d 559). In addition, defendant's conclusory and unsubstantiated claim of innocence is belied by his admissions during the plea colloquy (*see People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912), and his claim that he was under "duress" and has no recollection of the plea do not require vacatur of the plea (*see People v Alexander*, 97 NY2d 482, 486). Thus, we conclude that defendant's plea was knowingly, intelligently and voluntarily entered (*see generally People v Singletary*, 51 AD3d 1334, *lv denied* 11 NY3d 741).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant's contention "survives his guilty plea only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance" (*People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404), and that is the case here (*see People v Balanean*, 55 AD3d 1353, *lv denied* 11 NY3d 895). "To the extent that defendant contends that defense counsel was ineffective because he coerced defendant into pleading guilty, that contention is belied by defendant's statement during the plea colloquy that the plea was not the result of any threats, pressure or coercion" (*People v Campbell*, 62 AD3d 1265, 1266, *lv denied* 13 NY3d 795).

Entered: July 8, 2011

Patricia L. Morgan
Clerk of the Court