SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 5, 2013

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. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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VIRGIL, QUENTIN L., PEOPLE v
783 KA 10-02371 06/17/2013 07/05/2013 (S32143)
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Total Cases Listed for this county = 1

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	729	KA 11-00523	05/22/2013	07/05/2013	(I02/0733)
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	643	KA 09-00318	05/16/2013	07/05/2013	(I2007-0988)
STERINA, CARLA C., PEOPLE v					
	667	KA 11-01412	05/17/2013	07/05/2013	(I2010-0100A)

Total Cases Listed for this county = 8

NIAGARA COUNTY **********

BELLRENG, BRETT v SICOLI & MASSARO, INC.,					
	445	CA 12-00798	04/04/2013	07/05/2013	(136613)
BELLRENG, BRETT v SICOLI & MASSARO, INC.,					
	444	CA 12-00797	04/04/2013	07/05/2013	(136613/4)
BERGES, JUDITH A. v PFIZER, INC.,					
	719	CA 12-01977	05/21/2013	07/05/2013	(142029)
ELDER, TYROME, PEOPLE v					
	713	KA 11-01385	05/21/2013	07/05/2013	(I2009-551)
STUBBS, JOANNE N. v CAPELLINI, III, JOHN A.					
	608	CA 12-01158	05/14/2013	07/05/2013	(134042)
STUBBS, JOANNE N. v CAPELLINI, III, JOHN A.					
	609	CA 12-01476	05/14/2013	07/05/2013	(134021)
STUBBS, JOANNE N. v FREETLY, RALPH J.					
	610	CA 12-01477	05/14/2013	07/05/2013	(134021)
ZETES, JAMES P. v STEPHENS, KELLY A.					
	407	CA 12-01500	04/02/2013	07/05/2013	(140150)
ZETES, JAMES P. v STEPHENS, KELLY A.					
	406	CA 12-01499	04/02/2013	07/05/2013	(140150)

Total Cases Listed for this county = 9

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 5, 2013 TERM

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
ONEIDA COUNTY					
BELSINGER, DEBORAH v M&M BOWLING & TROPHY SUPPLIES, INC.,	558	CA 12-01786	04/11/2013	07/05/2013	(CA2011-001095)
LUGG, TEVIEAE T., PEOPLE v	638	KA 12-01020	05/16/2013	07/05/2013	(S05-109)
MARTINEK, SHANNON v STATE OF NEW YORK,	581	CA 12-00701	05/13/2013	07/05/2013	(CA2011-001410)
RICH, JOHN C. v ORLANDO, GREG	521	CA 12-02114	04/09/2013	07/05/2013	(2009-001348)
SKINNER, TIMOTHY v STATE OF NEW YORK,	776	CA 12-00703	05/23/2013	07/05/2013	(CA2011-001409)
Total Cases Listed for this county = 5					
ONONDAGA COUNTY					
ALMONTE, KATHERINE M. v ALMONTE, ROBERT J.	607	CA 12-01300	05/14/2013	07/05/2013	(2009-M-0218)
DUBIEL, TIMOTHY J. v SCHAEFER, STACY L.	672	CAF 12-00645	05/17/2013	07/05/2013	(V-6377-10/10A)
HARLEYSVILLE INSURANCE CO. OF N.Y., v POTAMIANOS PROPERTIES, LLC,	701	CA 12-01416	05/20/2013	07/05/2013	(2011-2243)
JACKSON, ROBERT, PEOPLE v	645	KA 09-02070	05/16/2013	07/05/2013	(I2008-0821-2)
MIDDLETON, JOHN J. v TOWN OF SALINA,	604	CA 12-02364	05/14/2013	07/05/2013	(2007-6314)
SCHAEFER, MARCIA v SCHAEFER, STACY L.	673	CAF 12-00788	05/17/2013	07/05/2013	(V-05261-10, V-05262-10)
SMITH, CHRISTOPHER, PEOPLE v	642	KA 11-01705	05/16/2013	07/05/2013	(I07-0680-2)
STANLEY, MARQUIS, PEOPLE v	757	KA 10-00178	05/23/2013	07/05/2013	(I2009-0653-1)
WEAKFALL, JR., ANTHONY A., PEOPLE v	708	KA 12-00372	05/21/2013	07/05/2013	(I2009-0418-1)
WENDT, SCOT A. v BENT PYRAMID PRODUCTIONS, LLC,	448	CA 12-02120	04/04/2013	07/05/2013	(2170/2010)
Total Cases Listed for this county = 10					
ONTARIO COUNTY					
MARVIN, TAMMY L., PEOPLE v	692	KA 11-02029	05/20/2013	07/05/2013	(S11-DI-063)
Total Cases Listed for this county = 1					
OSWEGO COUNTY					
RASZL, ANDREA, PEOPLE v	596	KA 12-00532	05/14/2013	07/05/2013	(I11C-095)
Total Cases Listed for this county = 1					
SENECA COUNTY					
HAWLEY, JAMES v TOWN OF OVID,	450	CA 12-01957	04/04/2013	07/05/2013	(44162)
MASON, CURTIS, PEOPLE v	1300.1	KA 11-00715	11/26/2012	07/05/2013	(I10-018)
Total Cases Listed for this county = 2					
STEUBEN COUNTY					
ACCETTA, ANNE M. v SIMMONS, AFTON R.	676	CA 12-01654	05/17/2013	07/05/2013	(2011-1714CV)
BROOKS, MICHAEL v HARDIN, GEORGE P.					

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 5, 2013 TERM

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
	777	CA 12-01838	05/23/2013	07/05/2013	(100299)
GENEVA GENERAL HOSPITAL, v ASSESSOR OF TOWN OF GENEVA,					
	559	CA 12-01418	04/11/2013	07/05/2013	(2011-1041CV)
STATE OF NEW YORK, v ADKISON, HERSCHEL					
	603	CA 11-02166	05/14/2013	07/05/2013	(104,098)
THE EKELMANN GROUP, LLC, v STUART, W. DEAN					
	681	CA 12-02214	05/17/2013	07/05/2013	(2011-0686CV)
THE EKELMANN GROUP, LLC, v STUART, W. DEAN					
	682	CA 12-02215	05/17/2013	07/05/2013	(2011-0686CV)

Total Cases Listed for this county = 6

WAYNE COUNTY **********

LOUCKS, CAROLYN v KLIMEK, JR., M.D., WALDEMAR					
	477	CA 12-02125	04/05/2013	07/05/2013	(71113)
STATE OF NEW YORK, v SCHRAENKLER, LARRY					
	657	CA 11-02396	05/16/2013	07/05/2013	(CONF 1411)

Total Cases Listed for this county = 2

WYOMING COUNTY **********

HALSEY, CASEY J., PEOPLE v					
	730	KA 12-00648	05/22/2013	07/05/2013	(I6451)

Total Cases Listed for this county = 1

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

275

KA 10-01965

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD WILSON, ALSO KNOWN AS REGINALD M. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

REGINALD WILSON, DEFENDANT-APPELLANT PRO SE.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 12, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and criminal possession of stolen property in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and criminal possession of stolen property in the third degree (§ 165.50). In appeal No. 2, defendant appeals from an amended sentence directing him to pay restitution, including a 5% designated surcharge, in the amount of $1,491.78.

Defendant's contention in appeal No. 1 that the accomplice testimony adduced at trial was not sufficiently corroborated by independent evidence is unpreserved for our review (*see People v Demolaire*, 55 AD3d 621, 622, *lv denied* 11 NY3d 897; *cf. People v McGrath*, 262 AD2d 1043, 1043). In any event, defendant's contention is without merit. "New York's accomplice corroboration protection . . . requires only enough nonaccomplice evidence to assure that the accomplices have offered credible probative evidence that connects the accomplice evidence to the defendant" (*People v Caban*, 5 NY3d 143, 155 [internal quotation marks omitted]). Even the most "[s]eemingly insignificant matters may harmonize with the accomplice's narrative so as to provide the necessary corroboration" (*id.* [internal quotation marks omitted]). Here, defendant's accomplice testified that he assisted defendant in burglarizing the victim's home and stealing the

victim's car, and that testimony was corroborated by the testimony of other witnesses that defendant was seen driving the victim's stolen car the day after the burglary. Contrary to defendant's further contentions in appeal No. 1, the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, we reject defendant's contention in appeal No. 1 that the sentence of concurrent terms of incarceration is unduly harsh and severe, and we decline to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

In his main and pro se supplemental briefs, defendant contends with respect to appeal No. 1 that he was denied a fair trial by prosecutorial misconduct on summation. He concedes that he did not object to the alleged misconduct, however, and thus his contention has not been preserved for our review (*see People v Roman*, 85 AD3d 1630, 1631-1632, *lv denied* 17 NY3d 821). We conclude in any event that his contention is without merit (*see People v Hassem*, 100 AD3d 1460, 1461, *lv denied* 20 NY3d 1099). Also with respect to appeal No. 1, defendant failed to preserve for our review his contention in his pro se supplemental brief concerning the court's alibi charge (*see People v Melendez*, 16 NY3d 869, 870). In any event, that contention is without merit. Contrary to the further contention of defendant in appeal No. 1, raised in his pro se supplemental brief, defense counsel's failure to object to the prosecutor's allegedly improper remark during summation and to the alibi charge did not amount to ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Walker*, 50 AD3d 1452, 1453-1454, *lv denied* 11 NY3d 795, *reconsideration denied* 11 NY3d 931). Defendant's further contentions in his pro se supplemental brief that he was otherwise deprived of effective assistance of counsel and that he is entitled to a new trial in light of newly discovered exculpatory evidence are based on matters dehors the record and thus cannot be reviewed on direct appeal (*see People v Rohlehr*, 87 AD3d 603, 604; *People v Dawkins*, 81 AD3d 972, 972, *lv denied* 17 NY3d 794, *reconsideration denied* 17 NY3d 858).

We reject defendant's contention in appeal No. 2 that the People failed to meet their burden of establishing the amount of restitution by a preponderance of the evidence (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222). The victim testified at the restitution hearing and provided a detailed breakdown of the value of the stolen items as well as documents establishing the cost of replacing the ignition and locks on her vehicle, which was returned to her. In addition, the amount of restitution owed to the victim's insurance company, which was financially harmed by reimbursing the victim for a portion of the cost of changing the ignition and locks on her vehicle, was supported by the claim it submitted to the Genesee County Probation Department. It is immaterial that an employee of the insurance company did not testify at the restitution hearing because "[a]ny relevant evidence, not legally privileged, may be received [at

a restitution hearing] *regardless of its admissibility under the exclusionary rules of evidence*" (CPL 400.30 [4] [emphasis added]; *see Tzitzikalakis*, 8 NY3d at 221).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

1300.1/12
KA 11-00715

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS L. MASON, DEFENDANT-APPELLANT.

MARY J. FAHEY, SYRACUSE, 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 March 28, 2011. The judgment convicted defendant, upon a jury verdict, of official misconduct. The judgment was affirmed by order of this Court entered December 21, 2012 in a memorandum decision (101 AD3d 1659), and defendant on January 4, 2013 was granted leave to appeal to the Court of Appeals from the order of this Court (20 NY3d 1013), and the Court of Appeals on June 11, 2013 reversed the order and remitted the case to this Court for further consideration (___ NY3d ___).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed and the matter is remitted to Seneca County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: This case is before us upon remittal from the Court of Appeals (*People v Mason*, 101 AD3d 1659, *revd* ___ NY3d ___ [June 11, 2013]). We previously affirmed the judgment convicting defendant, following a second jury trial, of official misconduct (Penal Law § 195.00 [1]). Although defendant contended, inter alia, that the verdict following the first trial was "against the weight of the evidence," we interpreted that contention as a challenge to the verdict in the first trial on the ground of repugnancy or inconsistency (*Mason*, 101 AD3d at 1660-1661). We concluded that defendant's contention was not preserved for our review and that, in any event, the verdict was neither repugnant nor inconsistent (*id.* at 1661). The Court of Appeals determined that defendant's contention was a challenge to the weight of the evidence, and therefore reversed our order and remitted the matter to this Court for consideration of that contention (*Mason*, ___ NY3d at ___).

Upon remittitur, and viewing the evidence in light of the

elements of the crime of official misconduct as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349; *People v Rayam*, 94 NY2d 557, 563 n; *People v Vazquez*, 103 AD3d 460, 461), we conclude that the verdict in the first trial was not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). "[T]he fact that the jury acquitted defendant of [other] charge[s] does not warrant a different conclusion" (*People v Rodriguez*, 62 AD3d 460, 460, *lv denied* 13 NY3d 748; *see Rayam*, 94 NY2d at 561; *People v Saldano*, 104 AD3d 582, 582; *People v Mercado*, 102 AD3d 813, 813, *lv denied* 20 NY3d 1102).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00869

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD WILSON, ALSO KNOWN AS REGINALD M. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

REGINALD WILSON, DEFENDANT-APPELLANT PRO SE.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an amended sentence of the Genesee County Court (Robert C. Noonan, J.), rendered June 22, 2010. The amended sentence directed defendant to pay restitution.

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

Same Memorandum as in *People v Wilson* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01499

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

JAMES P. ZETES, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KELLY A. STEPHENS AND LUCAS A. STEPHENS,
DEFENDANTS,
COUNTY OF NIAGARA, JAMES VOUTOUR, IN HIS CAPACITY AS NIAGARA COUNTY SHERIFF, AND GUY FRATELLO, ALSO KNOWN AS G. FRATELLO, INDIVIDUALLY AND IN HIS CAPACITY AS NIAGARA COUNTY DEPUTY SHERIFF,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-APPELLANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (ADAM P. HATCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 31, 2012. The order, among other things, granted that part of the motion of defendants County of Niagara, James Voutour, and Guy Fratello seeking summary judgment dismissing plaintiff's complaint against them.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, false arrest, false imprisonment, and malicious prosecution. In appeal No. 1, plaintiff appeals and defendants County of Niagara, James Voutour, in his capacity as Niagara County Sheriff, and Guy Fratello, also known as G. Fratello, individually and in his capacity as Niagara County Deputy Sheriff (collectively, County defendants), cross-appeal from an order granting that part of the County defendants' motion for summary judgment dismissing the complaint against them, but denying that part of their motion for sanctions based upon plaintiff's alleged frivolous conduct. In appeal No. 2, defendants Kelly A. Stephens and Lucas A. Stephens (collectively, Stephens defendants) appeal from an order denying their motion for summary judgment dismissing the complaint against them.

We note at the outset that, with respect to appeal No. 1,

plaintiff has abandoned his second cause of action for abuse of process and his fifth cause of action for negligence against the County defendants (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Further, with respect to appeal No. 2, plaintiff concedes that his second cause of action and so much of his tenth cause of action that alleges that the Stephens defendants tortiously interfered with "present contractual relations" are not viable. We therefore modify the order in appeal No. 2 accordingly.

Regarding the remaining causes of action, we conclude that Supreme Court properly granted that part of the County defendants' motion for summary judgment dismissing the malicious prosecution cause of action (first cause of action) against them in appeal No. 1, and properly denied that part of the Stephens defendants' motion seeking the same relief in appeal No. 2. "The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*Broughton v State of New York*, 37 NY2d 451, 457, *cert denied* 423 US 929; *see Smith-Hunter v Harvey*, 95 NY2d 191, 195; *Nichols v Xerox Corp.*, 72 AD3d 1501, 1502). With respect to the first element, it is undisputed that defendants commenced a criminal proceeding against plaintiff by filing a misdemeanor information accusing him of stalking in the fourth degree. Further, with respect to the second element, neither the County defendants nor the Stephens defendants established that the criminal proceeding did not terminate in plaintiff's favor (*see Cantalino v Danner*, 96 NY2d 391, 395-396; *Smith-Hunter*, 95 NY2d at 195-197).

With respect to the third and fourth elements, however, the County defendants established that Fratello had probable cause to file the misdemeanor information and that he did not act with actual malice (*see Lyman v Town of Amherst*, 74 AD3d 1842, 1842; *Weiss v Hotung*, 26 AD3d 855, 856; *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132). "In the context of a malicious prosecution cause of action, probable cause 'consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty' " (*Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1470, quoting *Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670). It is well established that "information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest" (*Lyman*, 74 AD3d at 1843 [internal quotation marks omitted]). Actual malice "means that the defendant must have commenced the . . . criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 503; *see Putnam v County of Steuben*, 61 AD3d 1369, 1371, *lv denied* 13 NY3d 705; *Du Chateau*, 253 AD2d at 132).

Here, the County defendants submitted evidence that Kelly A. Stephens (hereafter, Stephens) told Fratello that plaintiff (1) frequently drove by her house and often slowed down or stopped in

front of the house; (2) took pictures of Stephens and the house; (3) made sexual comments to Stephens; and (4) threatened to damage Stephens's property. Stephens told Fratello that she feared for her safety and, according to Fratello, "[s]he was visibly upset and crying as she explained [plaintiff]'s conduct to [him]." After Fratello advised Stephens "multiple times" that making a false statement was punishable as a crime, Stephens provided a supporting deposition attesting to the above facts. Fratello averred in an affidavit that Stephens "appeared to be reliable and believable," and that he "had no reason to believe [that] anything [she] told [him] was false or inaccurate." He had never met Stephens or plaintiff prior to that date. Based upon the information Stephens provided, Fratello completed a misdemeanor information accusing plaintiff of stalking in the fourth degree. He had no further involvement in plaintiff's prosecution. Inasmuch as the County defendants established that Fratello had probable cause to file the misdemeanor information and that he did not act with actual malice, thereby negating two necessary elements of malicious prosecution, they met their initial burden on that part of their motion for summary judgment with respect to that cause of action.

In opposition to the County defendants' motion, plaintiff failed to raise an issue of fact with respect to probable cause or actual malice. Plaintiff submitted excerpts from Fratello's deposition in which he testified that he did not recall Stephens mentioning any disputes that she and her husband had with plaintiff concerning money or deed restrictions, and that he had not heard anything to that effect prior to that time. Plaintiff also submitted excerpts from Stephens's deposition, in which she testified that she did not recall mentioning to Fratello her disagreement with plaintiff over amounts allegedly owed to plaintiff for construction work that he performed. Plaintiff admitted at his own deposition that he had no reason to believe that Fratello was aware of plaintiff's claim that the Stephens defendants owed him $4,000 for construction work. Although plaintiff emphasizes alleged "inconsistencies" with respect to whether Fratello attempted to contact him before filing the misdemeanor information and speculates that Fratello "covered up his failure or intentional decision to not talk to the plaintiff by saying that he could not locate him," we conclude that such conjecture is insufficient to raise a question of fact whether Fratello "lacked probable cause to initiate the criminal proceeding or acted with malice in doing so" (*Weiss*, 26 AD3d at 856; *see Du Chateau*, 253 AD2d at 132).

With respect to the Stephens defendants, however, we agree with plaintiff that there are triable issues of fact whether Stephens had probable cause to file criminal charges against plaintiff and whether she acted out of malice (*see Nichols*, 72 AD3d at 1502). "A probable cause finding as to one [group of defendants] does not compel such a finding as to the other where the facts and circumstances known to each defendant may be different" (*Weiss*, 26 AD3d at 857 [internal quotation marks omitted]). Here, plaintiff submitted evidence suggesting that Stephens commenced the criminal proceeding against him out of spite or retaliation based upon his enforcement of alleged deed restrictions and his claim against the Stephens defendants for money

owed to him for construction work that he performed, and that Stephens provided incomplete or misleading information to Fratello (*see generally Nardelli*, 44 NY2d at 502-503). We thus conclude that there is a question of fact whether Stephens commenced the criminal proceeding against plaintiff "due to . . . something other than a desire to see the ends of justice served" (*id.* at 503; *see Nieminski v Cortese-Green*, 74 AD3d 1550, 1551).

With respect to the false arrest and false imprisonment causes of action, i.e., the third and fourth causes of action, respectively, we conclude that the court properly dismissed those causes of action against the County defendants in appeal No. 1, but that it also should have dismissed those causes of action against the Stephens defendants in appeal No. 2. We therefore further modify the order in appeal No. 2 accordingly. It is well settled that a plaintiff's appearance in court as a result of the issuance of a criminal summons or appearance ticket is insufficient to support a claim of false arrest or false imprisonment (*see Weiss*, 26 AD3d at 856; *see also Santoro v Town of Smithtown*, 40 AD3d 736, 737; *Nadeau v LaPointe*, 272 AD2d 769, 770-771), and here "the record establishes that plaintiff was never arrested or held in actual custody by any law enforcement agency as a result of the charge . . . filed against [him]" (*Weiss*, 26 AD3d at 856 [internal quotation marks omitted]; *see Du Chateau*, 253 AD2d at 132).

Regarding appeal No. 1 and specifically the causes of action asserted against only the County defendants, we conclude that, because the court properly dismissed plaintiff's causes of action for false arrest, false imprisonment, and malicious prosecution against the County defendants in appeal No. 1, the cause of action for negligent training and/or instruction (sixth cause of action) was likewise properly dismissed against them (*see Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 476; *cf. U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823). In any event, the County defendants established that Fratello did not "lack[] training in proper law enforcement techniques" (*Barr v County of Albany*, 50 NY2d 247, 258; *cf. Martinetti v Town of New Hartford Police Dept.*, 307 AD2d 735, 737), and plaintiff failed to raise an issue of fact concerning a lack of training (*see generally Panzera v Johnny's II*, 253 AD2d 864, 865). The court also properly dismissed plaintiff's 42 USC § 1983 cause of action (seventh cause of action) against the County defendants, which was premised upon the false arrest, false imprisonment, and malicious prosecution claims (*see generally Shopland v County of Onondaga*, 154 AD2d 941, 941). With respect to the County defendants' cross appeal in appeal No. 1, we conclude that, although the court properly dismissed the complaint in its entirety against the County defendants, the court did not abuse its discretion in denying that part of their motion seeking sanctions against plaintiff for frivolous conduct (*see generally Matter of Lodge Hotel, Inc. v Town of Erwin Planning Bd.*, 62 AD3d 1257, 1259; *Cammarata v Cammarata*, 61 AD3d 912, 913).

With respect to appeal No. 2 and specifically the causes of action asserted against the Stephens defendants only, we conclude that the court properly denied that part of their motion seeking to dismiss

the libel cause of action (eighth cause of action). Stephens's statement that plaintiff made "several threats toward[] [Stephens] and [her] residence," which was contained in her supporting deposition that she provided to the police, "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or [to] induce an evil opinion of him in the minds of right-thinking persons" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *rearg denied* 42 NY2d 1015, *cert denied* 434 US 969). Moreover, contrary to the contention of the Stephens defendants, proof of special damages is not required for libel on its face or libel per se (*see Rinaldi*, 42 NY2d at 379; *Nichols v Item Publs.*, 309 NY 596, 600-601; 1 NY PJI3d 3:23 at 224 [2012]).

We agree with the Stephens defendants, however, that the court should have dismissed the slander cause of action (ninth cause of action) against them, and we therefore further modify the order in appeal No. 2 accordingly. The two allegedly defamatory statements pleaded in the complaint do not constitute slander per se because they do not "charg[e] plaintiff with a serious crime" or "tend to injure [plaintiff] in his . . . trade, business or profession" (*Liberman v Gelstein*, 80 NY2d 429, 435; *see Warlock Enters. v City Ctr. Assoc.*, 204 AD2d 438, 438). Contrary to the contention of plaintiff, stalking in the fourth degree does not constitute a "serious crime" for purposes of slander per se (*see generally Liberman*, 80 NY2d at 436). "To be actionable as words that tend to injure another in his or her profession, the challenged statement must be more than a general reflection upon [the plaintiff]'s character or qualities. Rather, the statement must reflect on [the plaintiff's] performance or be incompatible with the proper conduct of [the plaintiff's] business" (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076; *see Liberman*, 80 NY2d at 436). Here, Stephens's alleged statements, at worst, reflect generally upon plaintiff's character or qualities, and do not relate to his occupation as a builder or developer (*see Liberman*, 80 NY2d at 436; *Warlock Enters.*, 204 AD2d at 438; *see also Kowalczyk v McCullough*, 55 AD3d 1208, 1211). Because the statements at issue do not constitute slander per se, plaintiff was required "to plead and prove special damages, i.e., the loss of something having economic or pecuniary value" (*Hassig v FitzRandolph*, 8 AD3d 930, 932 [internal quotation marks omitted]; *see Nasca v Sgro*, 101 AD3d 963, 965), and he failed to do so (*see Cammarata*, 61 AD3d at 913; *Hassig*, 8 AD3d at 932). Although plaintiff also relies upon statements Stephens allegedly made in various internet postings, CPLR 3016 (a) requires a plaintiff alleging libel or slander to set forth "the particular words complained of" in the complaint (*see Nieminski*, 74 AD3d at 1551), and here plaintiff did not include any of those statements in his complaint or in his bill of particulars.

Contrary to the further contention of the Stephens defendants, we conclude that the court properly denied that part of their motion seeking to dismiss the tenth cause of action insofar as it alleges tortious interference with prospective business relations. "To establish a claim for tortious interference with prospective business advantage, a plaintiff must demonstrate that (a) the plaintiff had business relations with a third party; (b) the defendant interfered

with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21; *see* PJI 3:57). As relevant here, a plaintiff is required to identify a specific customer that the plaintiff would have obtained "but for" the defendant's wrongful conduct (*see Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489; *Learning Annex Holdings, LLC v Gittelman*, 48 AD3d 211, 211; *Forken v CIGNA Corp.*, 234 AD2d 992, 993). Although many of plaintiff's assertions of interference are too vague to support a claim of tortious interference with prospective business relations, plaintiff testified at his deposition that a particular couple allegedly changed their minds about purchasing a lot in plaintiff's subdivision because of the conduct of the Stephens defendants. We conclude that such testimony is sufficient to raise a question of fact whether the Stephens defendants tortiously interfered with plaintiff's prospective business relations (*see generally Caprer v Nussbaum*, 36 AD3d 176, 204).

Finally, because several substantive causes of action against the Stephens defendants remain intact, we reject their contention that the court erred in refusing to dismiss the eleventh cause of action, seeking punitive damages against them (*cf. Sclar v Fayetteville-Manlius School Dist.*, 300 AD2d 1115, 1115, *lv denied* 99 NY2d 510; *see generally Mantione v Crazy Jakes, Inc.*, 101 AD3d 1719, 1719-1720).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

407

CA 12-01500

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

JAMES P. ZETES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KELLY A. STEPHENS AND LUCAS A. STEPHENS, DEFENDANTS-APPELLANTS, COUNTY OF NIAGARA, JAMES VOUTOUR, IN HIS CAPACITY AS NIAGARA COUNTY SHERIFF, AND GUY FRATELLO, ALSO KNOWN AS G. FRATELLO, INDIVIDUALLY AND IN HIS CAPACITY AS NIAGARA COUNTY DEPUTY SHERIFF, DEFENDANTS. (APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL, II, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 4, 2012. The order denied the motion of defendants Kelly A. Stephens and Lucas A. Stephens for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants Kelly A. Stephens and Lucas A. Stephens for summary judgment dismissing the second, third, fourth, and ninth causes of action and so much of the tenth cause of action as alleges tortious interference with contractual relations and as modified the order is affirmed without costs.

Same Memorandum as in *Zetes v Stephens* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

421

CA 12-01540

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE AND DAVID DENZ, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (STEPHEN W. KELKENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 8, 2012. The order, inter alia, awarded economic damages to twelve of the plaintiffs.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the total award for economic damages as follows: plaintiff Eugene Margerum - $288,445; plaintiff Joseph Fahey - $70,567; plaintiff Timothy Hazelet - $211,054; plaintiff Peter Kertzie - $41,638; plaintiff Peter Lotocki - $92,397; plaintiff Scott Skinner - $228,095; plaintiff Thomas Reddington - $64,455; plaintiff Timothy Cassel - $282,819; plaintiff Matthew S. Osinski - $46,171; plaintiff Mark Abad - $0; plaintiff Brad Arnone - $0; and plaintiff David Denz - $40,966, and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs, firefighters employed by defendant City of Buffalo Department of Fire (Fire Department), commenced this action alleging that defendants discriminated against them by allowing promotional eligibility lists created pursuant to the Civil Service Law to expire solely on the ground that plaintiffs, who were next in line for promotion, were Caucasian. Previously, we concluded that Supreme Court erred in granting plaintiffs' cross motion for partial summary judgment on liability and properly denied defendants' motion to dismiss the complaint, holding in part that, although the action taken by defendant City of Buffalo (City) was subject to strict scrutiny, plaintiffs had failed to establish "the absence of a compelling interest," particularly because " 'a

sufficiently serious claim of discrimination' may constitute a compelling interest to engage in race-conscious remedial action" (*Margerum v City of Buffalo*, 63 AD3d 1574, 1579). Shortly after we issued our decision, the United States Supreme Court decided *Ricci v DeStefano* (557 US 557), wherein it held that, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious discriminatory action" (*id.* at 585).

Following *Ricci*, we affirmed an order that, inter alia, granted those parts of plaintiffs' motion for partial summary judgment on liability with respect to the Fire Department and the City (hereafter, defendants), determining that defendants "did not have a strong basis in evidence to believe that they would be subject to disparate-impact liability if they failed to take the race-conscious action, i.e., allowing the eligibility lists to expire" (*Margerum v City of Buffalo*, 83 AD3d 1575, 1576). The court thereafter conducted a nonjury trial on the issue of damages, and defendants appeal from an order that awarded a total amount of $2,510,170 in economic damages and a total amount of $255,000 in emotional distress damages to the 12 remaining plaintiffs (hereafter, plaintiffs). We now conclude that the court's awards for emotional distress were proper, but we agree with defendants that the court erred with respect to its awards for economic damages.

Preliminarily, we conclude that the court did not err in determining that plaintiffs established that their damages were proximately caused by the City's failure to promote from the 2002 eligibility list. In our view, plaintiffs met their burden of establishing that they would have been promoted but for the City's action in allowing the promotion eligibility lists to expire and suffered economic damages because they were not promoted (*see e.g. County of Nassau v New York State Div. of Human Rights*, 123 AD2d 342, 343).

With respect to the amounts of damages, we note that, upon our review of the court's award of damages in this nonjury trial, we may "independently consider the probative weight of the evidence and the inferences that may be drawn therefrom, and grant the [relief] that we deem the facts warrant . . . This Court's authority, in this regard, extends to the making of appropriate damage awards" (*Walsh v State of New York*, 232 AD2d 939, 940; *see Blakesley v State of York*, 289 AD2d 979, 979, *lv denied* 98 NY2d 605). We conclude that each amount of damages awarded for emotional distress is reasonable. We further conclude with respect to economic damages, however, that the court applied the wrong burden of proof and erred in relying on assumptions not supported by the record.

With respect to the burden of proof, we note that the court erred in placing the burden of proof on defendants to establish plaintiffs' economic damages. Rather, a plaintiff seeking, e.g., damages for loss of future earnings must "provide evidence demonstrating the difference

between what he [or she] is now able to earn and what he [or she] could have earned" in the absence of discrimination (*Burdick v Bratt*, 203 AD2d 950, 951, *lv denied* 84 NY2d 801), although recovery for lost earning capacity may be based on future probabilities and is not limited to actual past earnings (*see Huff v Rodriguez*, 45 AD3d 1430, 1433). Although a plaintiff is not required to establish loss of earnings with absolute certainty, it is a "fundamental premise that loss of earnings or earning capacity must be established with reasonable certainty . . . and will be reduced if based upon mere speculation" (*Toscarelli v Purdy*, 217 AD2d 815, 818). The parties each presented expert testimony on the issue of economic damages, and the experts provided separate calculations for those plaintiffs who were on "injured on duty" (IOD) status. We conclude that the assumptions on which plaintiffs' expert relied are not fairly inferrable from the evidence, and thus his opinion concerning the non-IOD plaintiffs, which was based on speculation about their future job prospects, cannot support the awards made by the court. Instead, we conclude that the awards calculated by defendants' expert with respect to the nine non-IOD plaintiffs are accurately inferrable from the evidence, and we therefore adopt his calculations, as follows: plaintiff Eugene Margerum - $288,445; plaintiff Joseph Fahey - $70,567; plaintiff Timothy Hazelet - $211,054; plaintiff Peter Kertzie - $41,638; plaintiff Peter Lotocki - $92,397; plaintiff Scott Skinner - $228,095; plaintiff Thomas Reddington - $64,455; plaintiff Timothy Cassel - $282,819; and plaintiff Matthew S. Osinski - $46,171. We therefore modify the order accordingly.

Defendants also contend that the court erred in adopting the assumption of plaintiffs' expert that the IOD plaintiffs would have had an 85% chance of becoming permanently disabled, because he based his calculation on 12 months of injury reports rather than on disability data, and particularly because his initial calculation, which he changed when he realized that the tax-free nature of the IOD plaintiffs' benefits would erase the IOD plaintiffs' awards, assumed no likelihood of disability if the IOD plaintiffs had received promotions in 2006. We conclude that the weighted probability calculation of plaintiffs' expert was not established with the requisite "reasonable certainty" (*id.*), and that the court instead should have used the weighted probability calculation of defendants' expert to determine the economic damages of the IOD plaintiffs. Notably, all three IOD plaintiffs testified that they would not have been injured had they been promoted to lieutenant, and other plaintiffs testified that there was less probability of injury at higher ranks. Defendants' expert, using 15 years of disability retirement data, calculated that the risk of retiring on IOD status as a lieutenant was only 58.6% as much as that of a firefighter, a probability higher than the original assumption of plaintiffs' expert and higher than plaintiffs' testimonial probability, but consistent with plaintiffs' view that they would be much less likely to be injured as lieutenants. Because plaintiffs themselves testified that they would not have been injured and retired on IOD status had they been promoted, because plaintiffs' expert initially agreed with that testimony and changed his calculation only when it became clear that the tax equalization of his calculations would "wipe out the [IOD plaintiffs'] loss," and because the recalculated weighted probability of plaintiffs' expert relied only on injury data for a single year, not data relating

to actual disability retirements, we conclude that the IOD plaintiffs, through plaintiffs' own expert, did not establish their economic damages with reasonable certainty. Thus, the only competent proof in the record regarding the economic damages to the IOD plaintiffs is the calculation of defendants' expert, which awards no damages to plaintiffs Mark Abad and Brad Arnone and $40,966 to plaintiff David Denz. We therefore further modify the order accordingly.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

432

CA 12-02119

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

PINNACLE CHARTER SCHOOL, WILLIAM A. PRESTON, AS PARENT AND NATURAL GUARDIAN OF WILLIAM A. PRESTON, JR. AND DEONDRA PRESTON, INFANTS, TAMERA HOOD, AS PARENT AND NATURAL GUARDIAN OF JAYLIN JOHNSON, AN INFANT, ZAKEA WILLIAMS, AS PARENT AND NATURAL GUARDIAN OF TEARA WILLIAMS, TYREE WILLIAMS AND ANTOINE RUSHING, JR., INFANTS, AND ERIKA WATKINS, AS PARENT AND NATURAL GUARDIAN OF DIONA LYNNE WATKINS, AN INFANT,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, NEW YORK STATE EDUCATION DEPARTMENT AND JOHN B. KING, JR., IN HIS CAPACITY AS COMMISSIONER OF EDUCATION, DEFENDANTS-APPELLANTS-RESPONDENTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (LISA A. COPPOLA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered July 5, 2012. The order, among other things, granted plaintiffs' motion for a preliminary injunction and granted in part defendants' cross motion by dismissing the fourth cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion for a preliminary injunction, vacating the preliminary injunction, and granting defendants' cross motion in its entirety and dismissing the complaint, and as modified the order is affirmed without costs.

Memorandum: In April 2012 defendant Board of Regents of the University of the State of New York (Board of Regents) denied the application of plaintiff Pinnacle Charter School (Pinnacle) to renew its charter to operate a charter school in the City of Buffalo. Pinnacle and the individual plaintiffs, parents of infant children enrolled at Pinnacle, commenced this action seeking, inter alia, judgment declaring that the action of the Board of Regents was unconstitutional, and preliminary and permanent injunctions enjoining defendants from

enforcing the denial of the renewal application and permitting Pinnacle to continue operating as an authorized charter school. Plaintiffs allege, inter alia, that the decision of the Board of Regents was made in violation of their rights to due process, the requirements of the State Administrative Procedure Act and the rights of the individual plaintiffs' children to a sound basic education under the Education Article of the State Constitution (NY Const, art XI, § 1). Plaintiffs further allege that Education Law § 2852 (6) is unconstitutional to the extent that it limits judicial and administrative review of the Board of Regents' action. Finally, plaintiffs allege that employees of defendant New York State Education Department (Department) negligently misrepresented that Pinnacle's charter would likely be renewed and the school would remain open at the same time that the Department was preparing its recommendation to deny Pinnacle's application to renew its charter and close the school.

Supreme Court erred in granting plaintiffs' motion seeking a preliminary injunction enjoining enforcement of the Board of Regents' determination denying Pinnacle's application to renew its charter and permitting Pinnacle to operate as an authorized charter school, inasmuch as plaintiffs failed to demonstrate a likelihood of success on the merits with respect to any of their claims (*see Doe v Axelrod*, 73 NY2d 748, 750-751). To the contrary, the evidence establishes conclusively that plaintiffs have no cause of action. Thus, although the court properly granted defendants' cross motion to dismiss the complaint for failure to state a cause of action to the extent that it sought dismissal of the fourth cause of action, for negligent misrepresentation, we conclude that the court should have granted defendants' cross motion in its entirety and dismissed the complaint (*see generally Kaufman v International Bus. Machs. Corp.*, 97 AD2d 925, 926-927, *affd* 61 NY2d 930). We therefore modify the order accordingly.

The first and second causes of action allege, respectively, that the determination of the Board of Regents violated Pinnacle's due process rights under the State Constitution (NY Const, art I, § 6) and the Federal Constitution (US Const, 14th Amend, § 1). We agree with defendants that the New York Charter Schools Act (Education Law art 56) creates no constitutionally protected property interest in the renewal of a charter and thus that the first and second causes of action fail to state a cause of action (*see Matter of New Covenant Charter School Educ. Faculty Assn. v Board of Trustees of the State Univ. of N.Y.*, 30 Misc 3d 1205 [A], 2010 NY Slip Op 52287[U], *2 [Sup Ct, Albany County 2010]; *see generally Board of Regents of State Colls. v Roth*, 408 US 564, 577). Moreover, we note that Pinnacle's charter expressly provided that "[n]othing herein shall require the [Board of] Regents to approve a Renewal Application." Contrary to Pinnacle's further allegation, the limitation on administrative review set forth in Education Law § 2852 (6) does not effect an unconstitutional denial of due process inasmuch as Pinnacle has no constitutional right to an administrative appeal (*see Matter of Wong v Coughlin*, 138 AD2d 899, 901). Absent any indication that the Board of Regents acted illegally, unconstitutionally or in excess of its jurisdiction, moreover, the limitation on judicial review does not implicate Pinnacle's due process rights (*see Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78

NY2d 318, 323-324).

Contrary to the court's conclusion with respect to the third cause of action, alleging violation of the State Administrative Procedure Act, we agree with defendants that the Board of Regents was acting pursuant to its discretionary authority when it denied Pinnacle's renewal application, and it was not required to promulgate any rules pursuant to article 2 of the State Administrative Procedure Act with respect to its exercise of such authority (*see generally Matter of Alca Indus. v Delaney*, 92 NY2d 775, 777-778). Plaintiffs' contention that the Department's guidelines for charter renewal applications must be promulgated as rules pursuant to State Administrative Procedure Act § 202 was improperly raised for the first time in their reply papers (*see Keitel v Kurtz*, 54 AD3d 387, 391; *Sanz v Discount Auto*, 10 AD3d 395, 395). In any event, that contention lacks merit inasmuch as the guidelines are excluded from the Act's rulemaking requirement (*see* § 102 [2] [b] [iv]). The charter renewal process, moreover, is not an "adjudicatory proceeding" within the meaning of State Administrative Procedure Act § 102 (3), and thus the requirements of section 301 (3) are inapplicable.

With respect to the fifth cause of action, even assuming, arguendo, that the individual plaintiffs have standing to allege a violation of the Education Article on behalf of their children enrolled at Pinnacle based upon the alleged failure of the Buffalo School District to offer a sound basic education, we also agree with defendants that plaintiffs fail to state a cause of action for such violation (*see generally Paynter v State of New York*, 100 NY2d 434, 439). In any event, the renewal of Pinnacle's charter would not remedy the alleged violation of the Education Article.

Finally, with respect to plaintiffs' cross appeal, we conclude that the court properly granted that part of defendants' cross motion seeking dismissal of the fourth cause of action, for negligent misrepresentation, inasmuch as plaintiffs did not have a special or privity-like relationship with the Department such that it was required to impart correct information to plaintiffs (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180; *Sample v Yokel*, 94 AD3d 1413, 1414-1415).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

444

CA 12-00797

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

BRETT BELLRENG, PLAINTIFF,

V MEMORANDUM AND ORDER

SICOLI & MASSARO, INC., ET AL., DEFENDANTS.

SICOLI & MASSARO, INC., THIRD-PARTY PLAINTIFF,

V

GUARD CONSTRUCTION & CONTRACTING, CORP.,
THIRD-PARTY DEFENDANT.

GUARD CONTRACTING CORP., ALSO KNOWN AS GUARD CONSTRUCTION & CONTRACTING, CORP., FOURTH-PARTY PLAINTIFF-APPELLANT,

V

INNOVATIVE INSULATED SYSTEMS, INC., ALSO KNOWN AS INNOVATIVE INSULATION INC., FOURTH-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR FOURTH-PARTY PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR FOURTH-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 30, 2011. The order denied the motion of Guard Contracting Corp., also known as Guard Construction & Contracting, Corp. for partial summary judgment on the contractual indemnification cause of action in its fourth-party complaint.

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

Same Memorandum as in *Bellreng v Sicoli & Massaro, Inc.* ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

445

CA 12-00798

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

BRETT BELLRENG, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

SICOLI & MASSARO, INC. AND LOCKPORT CITY SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-RESPONDENTS-APPELLANTS.

SICOLI & MASSARO, INC., THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

GUARD CONSTRUCTION & CONTRACTING, CORP., THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

GUARD CONTRACTING CORP., ALSO KNOWN AS GUARD CONSTRUCTION & CONTRACTING, CORP., FOURTH-PARTY PLAINTIFF,

V

INNOVATIVE INSULATED SYSTEMS, INC., ALSO KNOWN AS INNOVATIVE INSULATION INC., FOURTH-PARTY DEFENDANT.

(APPEAL NO. 2.)

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 21, 2012. The order, inter alia, denied in part the cross motion of plaintiff for partial summary judgment on liability with respect to the Labor Law §§ 240 (1), 240 (3) and 241 (6) causes of action.

It is hereby ORDERED that the order so appealed from is

unanimously modified on the law by granting those parts of the motion of defendant-third-party plaintiff, Sicoli & Massaro, Inc., and defendant Lockport City School District Board of Education for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, and granting that part of the motion for summary judgment on the third-party complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell through a roof over the swimming pool at Lockport High School that was being renovated (project). Defendant Lockport City School District Board of Education (Board) hired defendant-third-party plaintiff, Sicoli & Massaro, Inc. (Sicoli), as the general contractor on the project. Sicoli entered into a subcontract with third-party-defendant-fourth-party plaintiff, Guard Contracting Corp., also known as Guard Construction & Contracting, Corp. (Guard), to remove the existing roof. Guard, in turn, subcontracted that work to fourth-party defendant, Innovative Insulated Systems, Inc., also known as Innovative Insulation, Inc. (Innovative). While performing work on the project, plaintiff, an Innovative employee, fell through the deteriorated gypsum roof decking onto a scaffold that had been erected inside the building to prevent debris from falling into the pool. At the time of his fall, plaintiff had unhooked his safety harness from the steel lifeline that had been placed on the roof. After plaintiff commenced this action for various Labor Law violations and common-law negligence, Sicoli commenced a third-party action against Guard seeking contractual indemnification. Guard then commenced a fourth-party action against Innovative for, inter alia, contractual and common-law indemnification.

As relevant to appeal No. 1, Guard moved for partial summary judgment on its contractual indemnification cause of action. Supreme Court denied Guard's motion, and Guard appeals.

As relevant to appeal No. 2, Sicoli moved for summary judgment dismissing the complaint in the main action and for summary judgment on its third-party complaint. We note that, although Sicoli's motion sought relief for Sicoli alone, the parties as well as the court treated the motion as if it had sought relief for Sicoli and the Board (collectively, defendants). We will do the same (*see generally* CPLR 2001). Plaintiff cross-moved for partial summary judgment on liability on the Labor Law §§ 240 (1), 240 (3) and 241 (6) causes of action, and Guard cross-moved for partial summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action. The court denied that part of defendants' motion and Guard's cross motion with respect to the Labor Law § 200 cause of action; denied that part of the motion and cross motions with respect to the Labor Law § 240 (1) cause of action; granted that part of defendants' motion and, in effect, denied that part of plaintiff's cross motion with respect to the Labor Law § 240 (3) cause of action; and granted that part of defendants' motion and Guard's cross motion and denied that part of plaintiff's cross motion with respect to the Labor Law § 241 (6) cause of action except insofar as it related to 12 NYCRR 23-1.16. Although the court did not explicitly rule on that part of defendants'

motion with respect to the common-law negligence cause of action, "the failure to rule is deemed a denial of that part of the motion" (*Bald v Westfield Academy & Cent. Sch.*, 298 AD2d 881, 882). The court denied that part of defendants' motion for summary judgment on the third-party complaint. Plaintiff appeals, and defendants and Guard cross-appeal.

Addressing first the issues raised in appeal No. 2, we conclude that, contrary to plaintiff's contention, the court properly granted that part of defendants' motion seeking summary judgment dismissing the Labor Law § 240 (3) cause of action. That section, which provides that "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use[,]" does not apply in this case because the roof decking through which plaintiff fell was not a scaffold (*cf. Caruana v Lexington Vil. Condominiums at Bay Shore*, 23 AD3d 509, 510).

We further conclude that the court properly denied those parts of defendants' motion and the cross motions of plaintiff and Guard with respect to the Labor Law § 240 (1) cause of action. It is well settled that, "[i]n order to prevail on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his or her injuries" (*Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 985). Here, plaintiff established that the safety equipment failed to provide proper protection by submitting his deposition testimony, wherein he stated that, although he could have been connected to the steel lifeline at the location where he fell, he was moving to a new work area, and he could not reach that new work area while connected to the lifeline (*see id.* at 985-986; *cf. Akins v Central N.Y. Regional Mkt. Auth.*, 275 AD2d 911, 912). We conclude, however, that plaintiff did not meet his initial burden with respect to the section 240 (1) cause of action inasmuch as his submissions raised triable issues of fact whether he had a good reason for disconnecting from the lifeline or whether his own actions in disconnecting from the lifeline were the sole proximate cause of his fall (*see Fajardo v Trans World Equities Co.*, 286 AD2d 271, 271; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40). For example, he submitted evidence that raised material issues of fact whether he was instructed to remain secured to a lifeline at all times. Further, insofar as plaintiff contends that he met his initial burden by establishing that his work surface collapsed, plaintiff's contention is belied by the abundant evidence in the record demonstrating that he was not permitted to stand on the roof decking. We also conclude that defendants and Guard did not meet their initial burdens with respect to the section 240 (1) cause of action because they failed to establish that plaintiff's actions were the sole proximate cause of the accident, i.e., that he knew or should have known that he was expected to use either multiple retractable lanyards or a safety rope in order to reach all areas of the roof (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We reject defendants' contention that the court erred in denying

that part of their motion with respect to the Labor Law § 241 (6) cause of action insofar as it is based upon a violation of 12 NYCRR 23-1.16. We conclude that 12 NYCRR 23-1.16 (b) applies to the facts of this case, even though plaintiff was not actually attached to the lifeline at the time of his fall, inasmuch as plaintiff testified at his deposition that the safety devices provided to him were inadequate for him to complete his work because they did not afford him access to the entire roof (*see Latchuck v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560).

We conclude, however, that the court erred in denying that part of defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, which were based on defendants' alleged supervision and control over plaintiff's work, and we therefore modify the order accordingly. The deposition testimony submitted by the parties established that Sicoli and the Board, at most, engaged in " 'monitoring and oversight of the timing and quality of work[,]' " which " 'is insufficient to raise a triable issue of fact with respect to supervision or control for the purposes of . . . Labor Law § 200' " and common-law negligence (*Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1476, *lv denied in part and dismissed in part* 17 NY3d 843; *see also Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1294-1295; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1581-1582; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156-1157).

We further conclude that the court erred in denying that part of defendants' motion for summary judgment on the third-party complaint, in which Sicoli sought contractual indemnification from Guard. We therefore further modify the order accordingly. Although a party is not entitled to summary judgment on a contractual indemnification claim where issues of fact remain whether the indemnitee was actively negligent (*see Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616; *Stanz v New York State Energy Research & Dev. Auth. [NYSERDA]*, 87 AD3d 1279, 1283), as addressed in our analysis with respect to plaintiff's Labor Law § 200 and common-law negligence causes of action, Sicoli established that it was not negligent as a matter of law (*see Nicholas v EPO-Harvey Apts., Ltd. Partnership*, 31 AD3d 1174, 1175-1176; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403). Additionally, the indemnification provision in the subcontract between Sicoli and Guard evinces a clear intent that Guard indemnify Sicoli for all damages arising out of the work subcontracted to Guard, regardless of who ultimately performed that work (*see generally Lipari v AT Spring, LLC*, 92 AD3d 502, 504-505).

Finally, we conclude with respect to appeal No. 1 that the court properly denied Guard's motion for partial summary judgment on its contractual indemnification cause of action against Innovative. The indemnification provision in the subcontract between Guard and Innovative requires indemnification only for damages that were caused by the negligent acts or omissions of Innovative or its subcontractors. Inasmuch as there are questions of fact whether Innovative was negligent, Guard's motion was properly denied (*see Guarnieri v Essex Homes of WNY*, 24 AD3d 1266, 1266-1267; *cf. Sheridan*

v Albion Cent. Sch. Dist., 41 AD3d 1277, 1279).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

448

CA 12-02120

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

SCOTT A. WENDT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BENT PYRAMID PRODUCTIONS, LLC,
ET AL., DEFENDANTS,
AND RIDGEWAY & CONGER, INC.,
DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RYAN MCPARLAND OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE PEARL LAW FIRM, P.A., PITTSFORD (JASON J. KANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), dated May 21, 2012. The order denied the motion of defendant Ridgeway & Conger, Inc. for summary judgment dismissing the complaint against it.

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 against defendant Ridgeway & Conger, Inc. is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for losses that he sustained as a result of failed financial investments. In the complaint, plaintiff advanced one cause of action against defendant Ridgeway & Conger, Inc. (Ridgeway), which plaintiff concedes sounds in common-law negligence, i.e., the negligent supervision of defendant Ronald H. Sirota (Sirota). Ridgeway moved for summary judgment dismissing the complaint against it, and Supreme Court denied the motion. We reverse.

We note as background that plaintiff retained defendant Strategic Financial Planning, Inc. (SFP) to provide him with investment advice. Sirota, who owned and operated SFP, was a registered representative of Ridgeway, a broker-dealer that is a member of the Financial Industry Regulatory Agency (FINRA), a self-regulatory industry organization. It is undisputed that, at all relevant times, Sirota's relationship with Ridgeway was that of an independent contractor. During the course of Sirota's association with Ridgeway, Sirota advised plaintiff to invest in certain security and investment vehicles that were not publicly traded. There is also no dispute that Ridgeway had no

knowledge of these outside business activities by Sirota, made no recommendations to plaintiff with respect thereto and received no compensation as a result thereof.

To establish a cause of action for common-law negligence, "a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries" (*Schindler v Ahearn*, 69 AD3d 837, 838 [internal quotation marks omitted]). "If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant" (*Mojica v Gannett Co., Inc.*, 71 AD3d 963, 965; *see Pulka v Edelman*, 40 NY2d 781, 782, *rearg denied* 41 NY2d 901). The issue whether one person owes a duty of care to "reasonably avoid injury" to another is a question of law for the courts (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8, *rearg denied* 72 NY2d 953). "In general, an entity has no duty to control a third party's conduct so as to prevent injury to another unless special circumstances exist in which the entity has sufficient authority and control over the conduct of that third party . . . Only then can a duty be imposed" (*Mojica*, 71 AD3d at 965).

Additionally, it is well settled that, "[o]rdinarily, a principal is not liable for the acts of independent contractors in that, unlike the master-servant relationship, principals cannot control the manner in which the independent contractors' work is performed" (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381, *rearg denied* 87 NY2d 862). Although there are exceptions to that general rule (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668, *rearg dismissed* 82 NY2d 825), we conclude that none apply to the circumstances presented here. Although plaintiff's claim sounds in negligent supervision, one of the recognized exceptions (*see Kleeman v Rheingold*, 81 NY2d 270, 274), it is well settled that "the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal" (*Goodwin v Comcast Corp.*, 42 AD3d 322, 323; *see Melbourne v New York Life*, 271 AD2d 296, 297). Ridgeway established its prima facie entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to plaintiff to supervise or control Sirota, an independent contractor, and that it could not be vicariously liable for the investment advice Sirota provided to plaintiff because it did not direct or control the provision of such advice (*see Mojica*, 71 AD3d at 965). In opposition to Ridgeway's prima facie showing, plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). We reject plaintiff's contention that industry standards or the rules and regulations of FINRA imposed a duty of care on Ridgeway sufficient to support a private cause of action under New York common law for negligent supervision (*see In re Apple REITs Litigation*, 2013 WL 1386202, * 15 n 12; *Richman v Goldman Sachs Group, Inc.*, 868 F Supp 2d 261, 275; *Weinraub v Glen Rauch Sec., Inc.*, 399 F Supp 2d 454, 462, *affd* 180 Fed Appx 233; *see also de Kwiatkowski v Bear, Stearns & Co., Inc.*, 306 F3d 1293, 1311).

We note that, contrary to plaintiff's contention advanced during

oral argument on appeal, our review of the record and the parties' briefs reveals that the issue of duty was not raised for the first time in defendant's reply brief; rather, that issue was clearly raised in the main brief of defendant. In light of our determination, we do not address Ridgeway's remaining contentions.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

450

CA 12-01957

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

JAMES HAWLEY, AS PARENT AND NATURAL GUARDIAN
OF SCOTT HAWLEY, AN INFANT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF OVID, DEFENDANT-APPELLANT.

LYNCH LAW OFFICE, PLLC, SYRACUSE, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (NICHOLAS DAVIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered June 4, 2012. The order denied the motion of defendant for, inter alia, summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, insofar as it alleges negligence based upon the nonfeasance of defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action on behalf of his son, who was injured while bicycling over a bridge located in the Town of Ovid (defendant), alleging various wrongful, negligent and careless acts and omissions of defendant. Specifically, plaintiff alleged in the bill of particulars, inter alia, that defendant failed to keep the bridge and road in a reasonably safe condition and that defendant created the "dangerous and/or unsafe condition." Defendant moved for dismissal of the complaint pursuant to CPLR 3211 (a) (7) and for summary judgment dismissing the complaint pursuant to CPLR 3212 on the respective grounds that plaintiff failed to plead and to prove that he provided to defendant prior written notice of a dangerous or defective condition on or near the bridge as required by Local Law No. 1. Plaintiff responded that he did not need to plead or provide prior written notice because it was plaintiff's contention that defendant affirmatively created the dangerous condition. Supreme Court concluded that the lack of notice defense did not apply here and denied defendant's motion in its entirety.

Prior written notice of a defective or unsafe condition of a road or bridge is a condition precedent to an action against a municipality that has enacted a prior notification law (*see Amabile v City of Buffalo*, 93 NY2d 471, 474). Where the municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of an exception to the rule, i.e., that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the municipality (*see Yarborough v City of New York*, 10 NY3d 726, 728). The affirmative negligence exception is "limited to work by the [municipality] that *immediately* results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [internal quotation marks omitted]). An omission on the part of the municipality "does not constitute affirmative negligence excusing noncompliance with the prior written notice requirement" (*Agrusa v Town of Liberty*, 291 AD2d 620, 621; *see Young v City of Buffalo*, 1 AD3d 1041, 1043, *lv denied* 2 NY3d 707).

We conclude that defendant met its initial burden of establishing as a matter of law that it did not receive prior written notice of any defective or dangerous condition on or near the bridge as required by Local Law No. 1 (*see Hall v City of Syracuse*, 275 AD2d 1022, 1023). Viewing the evidence in the light most favorable to plaintiff, as we must (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340), we conclude, however, that plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident (*see Benty v First Methodist Church of Oakfield*, 24 AD3d 1189, 1190; *Smith v City of Syracuse*, 298 AD2d 842, 843). We note that, insofar as plaintiff's complaint, as amplified by the bill of particulars, alleges negligence based upon defendant's nonfeasance, partial summary judgment should have been granted to defendant with respect to that claim because, absent prior written notice, a municipality cannot be held liable for failing to repair, inspect or maintain its roads and bridges (*see Price v Village of Phoenix*, 222 AD2d 1079, 1080). We therefore modify the order accordingly.

All concur except CENTRA, J.P., who dissents and votes to reverse the order in accordance with the following Memorandum: I respectfully dissent and would reverse the order and grant defendant's motion seeking, inter alia, summary judgment dismissing the complaint based on plaintiff's failure to comply with defendant's prior written notice law. Plaintiff commenced this action seeking damages for injuries sustained by his son (infant plaintiff) when infant plaintiff fell off his bicycle. Plaintiff alleged in the notice of claim that the infant plaintiff was injured "when his bicycle hit a large gap between the roadway and the steel deck" of a bridge. The infant plaintiff testified at his 50-h hearing and deposition that the gap caused the accident. Plaintiff does not dispute that defendant met its initial burden on the motion by establishing as a matter of law that it did not have prior written notice of the allegedly defective condition (*see Lastowski v V.S. Virkler & Son, Inc.*, 64 AD3d 1159, 1160-1161). The burden thus shifted to plaintiff to raise a triable issue of fact whether either of the two exceptions to the written notice requirement applied, i.e., that defendant "created the defect or hazard through an

affirmative act of negligence . . . [or that] a 'special use' confers a special benefit upon [defendant]" (*Amabile v City of Buffalo*, 93 NY2d 471, 474; *see Lastowski*, 64 AD3d at 1161). Only the affirmative negligence exception is at issue here.

I conclude that plaintiff failed to raise a triable issue of fact whether defendant created the dangerous condition. The evidence establishes that there was an expansion joint where the road meets the steel deck of the bridge, resulting in a gap. Over time, that gap has widened due to erosion, and wear and tear from vehicles. Indeed, plaintiff's expert noted that the gap had become "dangerously large due to gradual deterioration," and that the "crumbling has gradually occurred over years and is not a recent sudden failure." The affirmative negligence exception " 'is limited to work by [defendant] that immediately results in the existence of a dangerous condition' " (*Yarborough v City of New York*, 10 NY3d 726, 728). Inasmuch as the widening of the gap occurred over time, the affirmative negligence exception would not apply to the extent that plaintiff contends that the widened gap was a dangerous condition that caused the accident (*see id.*; *Young v City of Buffalo*, 1 AD3d 1041, 1043, *lv denied* 2 NY3d 707).

Further, plaintiff's reliance on a 2008 repaving project is misplaced. In 2008, defendant hired a contractor to apply a "cold mix pave" for six-tenths of a mile, starting at the bridge. After the job was completed, defendant's representative told the contractor that there was not enough crown in the road, so the contractor came back and applied a "one-inch overlay with a crown in it." To avoid any "lump/bump" next to the bridge, the contractor applied the overlay starting a little further back from the bridge. In my opinion, this repaving project did not create the gap in the bridge; it merely failed to *fix* the gap. Plaintiff therefore failed to raise a triable issue of fact whether defendant created the dangerous condition, as opposed to simply failing to repair it.

Plaintiff's expert further opined that the overlay "created a hump back from the eroded pavement . . . [, and] the hump propelled the bike into the eroded area and magnified the impact. This affirmative action of the faulty repair aggravated the defects to create a dangerous condition." I note that the infant plaintiff never testified that an alleged hump in the road caused the accident, and plaintiff did not allege any such dangerous condition in his notice of claim, complaint, or bill of particulars. In any event, I conclude that the affidavit of plaintiff's expert was insufficient to raise a triable issue of fact inasmuch as there was no showing that there was actually a "hump" in the road or that it constituted a defective or dangerous condition.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

477

CA 12-02125

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

CAROLYN LOUCKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WALDEMAR KLIMEK, JR., M.D. AND PENFIELD
OBSTETRICS & GYNECOLOGY, LLP,
DEFENDANTS-APPELLANTS.

BROWN & TARANTINO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GERARD A. STRAUSS, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered April 30, 2012. The order, insofar as appealed from, granted the motion of plaintiff insofar as it sought leave to renew and vacated an order striking the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for defendants' alleged medical malpractice in treating her following surgery to remove a fibroid tumor from her uterus. After plaintiff failed to respond to defendants' demand for a bill of particulars and other discovery demands, defendants moved to preclude plaintiff from submitting evidence in support of her claims unless she provided responses to defendants' discovery demands within seven days (*see* CPLR 3042, 3126). Plaintiff did not oppose the motion, and Supreme Court entered a conditional order of preclusion on June 30, 2011, providing that it would become absolute unless plaintiff responded to the outstanding discovery demands within 30 days of notice of entry of the order. When plaintiff did not provide responses within the 30-day time period, defendants moved to dismiss the complaint with prejudice based upon plaintiff's failure to comply with the conditional order of preclusion. Plaintiff again failed to oppose the motion, which the court granted by order entered October 13, 2011. On November 22, 2011, plaintiff moved for leave to "renew and/or reargue" defendants' motion to strike the complaint and, upon renewal and/or reargument, sought to vacate the order striking the complaint. The court granted plaintiff's motion insofar as it sought leave to renew and vacated the order striking the complaint. The court also implicitly vacated the conditional order of preclusion by permitting plaintiff to respond to defendants' discovery demands within 30 days of notice of entry of the

instant order. We affirm.

Contrary to the contention of defendants, we conclude that the court providently exercised its discretion in considering plaintiff's motion. Although plaintiff denominated her motion as one to renew and/or reargue pursuant to CPLR 2221, the court properly treated it as a motion to vacate a default order pursuant to CPLR 5015 (a) (1) (*see Kanat v Ochsner*, 301 AD2d 456, 457; *see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142-143). "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; *see Nulty v Wolff*, 291 AD2d 763, 764). "It is generally left to the sound discretion of . . . Supreme Court to determine what constitutes a reasonable excuse" (*Beizer v Funk*, 5 AD3d 619, 620; *see Remote Meter Tech. of NY, Inc. v Aris Realty Corp.*, 83 AD3d 1030, 1032; *Diaz v Ralph*, 66 AD3d 819, 820).

Here, we conclude that the court did not abuse its discretion in determining that plaintiff had a reasonable excuse for her default. "It is well established that the illness of an attorney may constitute a reasonable excuse for a default" (*Collins v Elbadawi*, 265 AD2d 850, 851; *see e.g. Imperato v Mount Sinai Med. Ctr.*, 82 AD3d 414, 415, *affd* 18 NY3d 871; *Goldstein v Meadows Redevelopment Co Owners Corp. I*, 46 AD3d 509, 511; *Weitzenberg v Nassau County Dept. of Recreation & Parks*, 29 AD3d 683, 684-685). In support of the motion, plaintiff's counsel averred that, from early 2010 until shortly before his motion to vacate the default order, he was suffering from recurring health issues stemming from two heart attacks, a serious infection requiring hospitalization, and uncontrolled Type II diabetes. According to counsel, those medical issues "affected [his] health in an ongoing manner and prevented [him] from diligently and timely responding to [defendants'] demands in this case." There is no evidence that counsel's neglect in this case was "willful, contumacious or manifested bad faith" (*Imperato*, 82 AD3d at 415). Particularly in light of New York's "strong public policy . . . [in favor of] disposing of cases on their merits" (*Goodwin v New York City Hous. Auth.*, 78 AD3d 550, 551), we conclude that "[w]here, as here, there is no evidence of willfulness, deliberate default, or prejudice to the defendants, the interest of justice is best served by permitting the case to be decided on its merits" (*Beizer*, 5 AD3d at 620).

Finally, we conclude that the court properly determined that plaintiff substantially complied with the requirement of establishing a meritorious claim by submitting an affirmation, rather than an affidavit, of a Florida expert who was not "authorized by law to practice" in New York (CPLR 2106; *see Sandoro v Andzel*, 307 AD2d 706, 707-708). The affirmation would have been sufficient to show merit had it been in proper evidentiary form. Thus, the court properly permitted plaintiff an opportunity to supply an affidavit from the Florida expert within 30 days of notice of entry of its order.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

521

CA 12-02114

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

JOHN C. RICH, DOING BUSINESS AS RICH HOME BUILDING & DEVELOPMENT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREG ORLANDO AND LISA ORLANDO, DEFENDANTS-RESPONDENTS.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

WILLIAM M. BORRILL, NEW HARTFORD (JEFFREY T. LOTTERMOSER, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered October 25, 2012. The order denied the motion of plaintiff for partial summary judgment dismissing defendants' counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted in part, the second and third counterclaims are dismissed, and the matter is remitted to Supreme Court, Oneida County, for further proceedings on the first counterclaim in accordance with the following Memorandum: Plaintiff appeals from an order denying his motion for partial summary judgment dismissing defendants' counterclaims. In 2003, the parties entered into a custom home building contract (contract), pursuant to which plaintiff agreed to build a home for defendants. The contract stated that the only warranty provided with respect to the home was the housing merchant implied warranty, which is set forth in General Business Law § 777-a. After defendants moved into their new home in 2004, plaintiff continued to work on the home by repairing certain purported defects in the construction. After defendants refused to pay the final amount alleged to be due under the contract, plaintiff commenced this action contending, inter alia, that defendants breached the contract and, in response, defendants asserted three counterclaims, for breach of the implied warranty, negligence, and fraud. Plaintiff moved for partial summary judgment dismissing the counterclaims, and he appeals from the order denying the motion in its entirety.

Although with respect to the first counterclaim, for breach of the housing merchant implied warranty, we agree with plaintiff that defendants failed to provide written notice of the alleged defects, which is a constructive condition precedent to asserting such a

counterclaim (*see* General Business Law § 777-a [4] [a]; *Harris v Whalen*, 90 AD3d 708, 708; *Trificana v Carrier*, 81 AD3d 1339, 1340; *Lantzy v Advantage Bldrs., Inc.*, 60 AD3d 1254, 1254-1255), plaintiff waived the written notice requirement by addressing the defects after receiving defendants' oral notification of those defects (*see Benfeld v Fleming Props., LLC*, 15 Misc 3d 1133[A], 2007 NY Slip Op 50970[U], *2; *Randazzo v Zylberberg*, 4 Misc 3d 109, 110; *cf. Lupien v Bartolomeo*, 5 Misc 3d 1025[A], 2004 NY Slip Op 51533[U], *9; *see generally Pesca v Barbera Homes, Inc.*, 35 Misc 3d 747, 760-761). We reject plaintiff's contention that written notice of the alleged defects was an express condition precedent that was bargained for by the parties and could therefore not be waived. Contrary to plaintiff's contention, the requirements of General Business Law § 777-a, including the written notice requirement, are implied in every contract for the sale of a new home as a matter of public policy (§ 777-a [5]) and thus may be applied by the courts "to do justice and avoid hardship" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691).

Plaintiff further contends that defendants failed to interpose their breach of warranty counterclaim within the applicable limitations period. Pursuant to General Business Law § 777-a, "if the builder makes repairs in response to a warranty claim under [subdivision 777-a (4) (a)], an action with respect to such claim may be commenced within one year after the last date on which such repairs [were] performed" (§ 777-a [4] [b]). A counterclaim is deemed to be interposed at the time the "claims asserted in the complaint were interposed," which in this case was May 6, 2009 (CPLR 203 [d]). The record establishes that plaintiff and his employees were working on repairing the alleged defects in the new home until May or June 2008. The record, however, does not conclusively establish the date on which plaintiff last performed repairs on the home with respect to each specific defect. Thus, Supreme Court erred in failing to order an immediate trial on that issue inasmuch as a limited trial would have been "appropriate for the expeditious disposition" of a substantial portion of this controversy (CPLR 3212 [c]). We therefore remit this matter to Supreme Court to decide that part of the motion for partial summary judgment dismissing the first counterclaim after an immediate trial on the statute of limitations issue (*see generally Matter of Bronx-Lebanon Hosp. Ctr. v Daines*, 101 AD3d 1431, 1434).

Finally, we agree with plaintiff that defendants' second and third counterclaims, sounding in negligence and fraud, should have been dismissed. It is well settled that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 86 AD3d 919, 919-920; *Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660). Here, defendants' counterclaims for negligence and fraud "are not viable because there is no duty owed by [plaintiff] that is independent of the contract" (*Gallup*, 82 AD3d at 1660). In any event, we further note that, inasmuch as attorney's fees "incurred in

carrying on a lawsuit" are generally not recoverable as damages without a specific contractual provision or statutory authority authorizing such a recovery, both of which are absent here, the third counterclaim should have been dismissed because "no cognizable claim for damages is alleged" (*Coopers & Lybrand v Levitt*, 52 AD2d 493, 496; *see also Gorman v Fowkes*, 97 AD3d 726, 727).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

558

CA 12-01786

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

DEBORAH BELSINGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M&M BOWLING & TROPHY SUPPLIES, INC., DOING BUSINESS AS VISTA LANES; VISTA LIQUORS, INC. AND MELVIN F. ALLEN, DEFENDANTS-RESPONDENTS.

JAMES R. MCCARL & ASSOCIATES, MONTGOMERY (JAMES R. MCCARL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered July 5, 2012. The order granted the motion of defendants for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion seeking summary judgment dismissing the claims for negligence and failure to warn and reinstating those claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she fell inside defendants' bowling alley. The accident occurred when plaintiff, after entering the building, unknowingly stepped down from a concrete step located immediately inside the doorway. There is a 4½-inch drop from the top of the step to the floor below. The second amended complaint, as amplified by the bill of particulars, alleges that defendants were negligent in, inter alia, permitting a dangerous condition to exist on the premises, namely, the cement step inside the doorway; failing to warn of the dangerous condition; and failing to provide adequate lighting for the entryway.

We conclude that Supreme Court erred in granting defendants' motion for summary judgment insofar as it sought dismissal of the negligence and failure to warn claims. We therefore modify the order accordingly. With respect to the negligence claim, we note that "[i]t 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), and "whether a dangerous or

defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]). Here, defendants failed to meet their initial burden of establishing as a matter of law that the step in question was not inherently dangerous (*see Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219; *see also Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533; *Eisenhart v Marketplace*, 176 AD2d 1220, 1220). Although defendants submitted evidence establishing that the relevant building codes were inapplicable and that defendants had never been issued a citation for the step or the entryway, compliance with such codes " 'does not necessarily preclude a jury from finding that the . . . [step or the entryway] was part of or contributed to any inherently dangerous condition existing in the area of [plaintiff's] fall' " (*Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032; *see Eisenhart*, 176 AD2d at 1220). Moreover, " '[c]ompliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof' " (*Hayes*, 100 AD3d at 1532, quoting *Miner v Long Is. Light. Co.*, 40 NY2d 372, 381).

We similarly conclude that defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law with respect to plaintiff's failure to warn claim (*see generally Barry v Gorecki*, 38 AD3d 1213, 1216). Although there was a sign on the door that read "Caution Step Down," defendants acknowledged that the sign would not be visible to someone for whom the door was being held open and, here, plaintiff alleges that her son was holding the door open for her. In any event, the sign was faded and accompanied by several other signs, thus potentially reducing its effectiveness. In addition, defendants did not paint or mark the step with bright colors or otherwise draw attention to it. Because defendants failed to meet their initial burden of proof with respect to the negligence and failure to warn claims, we need not consider the sufficiency of plaintiff's opposing papers with respect to those claims (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We further conclude, however, that defendants met their initial burden as a matter of law with respect to plaintiff's inadequate lighting claim (*see generally Stever v HSBC Bank USA, N.A.*, 82 AD3d 1680, 1680-1681, *lv denied* 17 NY3d 705). Specifically, defendants submitted evidence demonstrating that the lighting in the entryway complied with applicable industry standards and was otherwise adequate, and in opposition plaintiff failed to raise an issue of fact (*see generally Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418-419). The court therefore properly granted that part of defendants' motion for summary judgment dismissing that claim.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

559

CA 12-01418

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF GENEVA GENERAL HOSPITAL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR OF TOWN OF GENEVA, TOWN OF GENEVA,
BOARD OF ASSESSMENT REVIEW OF TOWN OF GENEVA,
COUNTY OF ONTARIO AND GENEVA CITY SCHOOL
DISTRICT, RESPONDENTS-RESPONDENTS.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (PAUL T. SHEPPARD OF COUNSEL), FOR PETITIONER-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (LEA T. NACCA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ASSESSOR OF TOWN OF GENEVA, TOWN OF GENEVA AND BOARD OF ASSESSMENT REVIEW OF TOWN OF GENEVA.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered May 22, 2012 in a proceeding pursuant to CPLR article 78 and RPTL article 7. The order granted the motion of respondents Assessor of the Town of Geneva, Town of Geneva, and Board of Assessment Review of Town of Geneva to dismiss the proceeding.

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

Memorandum: Petitioner commenced this hybrid CPLR article 78 and RPTL article 7 proceeding in order to challenge a 2011 property tax assessment in which it was denied a tax exemption with respect to a parcel of property it owns in the Town of Geneva, which property is located in a rural area south of its main hospital. The order appealed from granted the motion to dismiss the amended petition made by the Assessor of the Town of Geneva, the Town of Geneva, and the Board of Assessment Review of the Town of Geneva (respondents). As a preliminary matter, we note that respondents' assertion that certain contentions made by petitioner on appeal are unpreserved for our review lacks merit inasmuch as those contentions were adequately raised in Supreme Court. Nevertheless, we conclude that the court properly granted respondents' motion and dismissed the amended petition. We therefore affirm.

We reject petitioner's contention that the court erred by dismissing its amended petition insofar as it asserted claims pursuant to CPLR article 78. Article 7 of the RPTL "is the exclusive procedure

for review of property [tax] assessments 'unless otherwise provided by law' " (*Niagara Mohawk Power Corp. v City Sch. Dist. of City of Troy*, 59 NY2d 262, 268, quoting RPTL 700 [1]). Moreover, it is well settled that "proceeding[s] pursuant to CPLR article 78 [are] not the proper vehicle[s] for challenging the tax assessment[s], inasmuch as challenges to assessments on the grounds that they are illegal, irregular, excessive, or unequal[ ] are to be made in a certiorari proceeding under RPTL article 7" (*Matter of ViaHealth of Wayne v VanPatten*, 90 AD3d 1700, 1701 [internal quotation marks omitted]; *see Matter of Board of Mgrs. of Greens of N. Hills Condominium v Board of Assessors of County of Nassau*, 202 AD2d 417, 419, *lv denied* 83 NY2d 757). Unless the party challenging the tax assessment is asserting that " 'the taxing authority acted entirely without jurisdiction or that the tax itself is unconstitutional,' " which is not the case here, " 'the sole vehicle for review of a tax assessment is pursuant to [RPTL] article 7' " (*Matter of AES Somerset, LLC v Town of Somerset*, 24 AD3d 1263, 1264; *see Samuels v Town of Clarkson*, 91 AD2d 836, 837; *see also County of Erie v Danitz*, 100 AD2d 725, 725-726).

Petitioner further contends that respondents could not base their denial of a tax exemption for the subject parcel on the ground that petitioner's use of the property was in violation of the existing zoning restrictions because, inter alia, it had never been cited for or given notice of a zoning violation. We reject that contention. The fact that petitioner used the subject property for "hospital purposes" as that term is used in the RPTL is not contested (RPTL 420-a [5]). Nevertheless, a property owner who uses its property for exempt purposes in violation of an applicable zoning law is prohibited from receiving a tax exemption pursuant to RPTL 420-a (*see Congregation Or Yosef v Town of Ramapo*, 48 AD3d 731, 732, *lv denied* 10 NY3d 711; *Matter of Colella v Board of Assessors of County of Nassau*, 266 AD2d 286, 287, *revd on other grounds* 95 NY2d 401; *see also McGann v Incorporated Vil. of Old Westbury*, 293 AD2d 581, 584, *appeal dismissed* 98 NY2d 728, *reconsideration denied* 99 NY2d 532). It is immaterial whether petitioner had prior knowledge of the zoning violation. " 'Tax exemptions . . . are limitations of sovereignty and are strictly construed . . . If ambiguity or uncertainty occurs, all doubt must be resolved against the exemption' " (*Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y.*, 16 NY2d 222, 230; *see People v Brooklyn Garden Apts.*, 283 NY 373, 380). Thus, a zoning violation is a bar to receiving the benefit of a tax exemption even in the absence of an administrative finding, a citation, or the property owner's knowledge of such a violation. Here, the record establishes that the subject parcel was not zoned for hospital uses in the 2011 tax year, which provided respondents with a lawful basis on which to deny petitioner a tax exemption. We have considered petitioner's other contentions in support of its assertion that it was entitled to a property tax exemption for the subject parcel for the 2011 tax year and find them to be without merit.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

563

CA 12-00624

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF NATIONAL FUEL GAS DISTRIBUTION CORPORATION, PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF JAMESTOWN, RESPONDENT-DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOHN G. SCHMIDT, JR., OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 23, 2012 in a CPLR article 78 proceeding and declaratory judgment action. The order, among other things, denied the motion of respondent-defendant to vacate the stay/preliminary injunction granted on September 17, 2010.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action against respondent-defendant, the City of Jamestown (City), challenging the legality of section 175-3B of its Municipal Code (Code) on various grounds. The challenged section of the Code charges petitioner an annual fee of $26,000 to access its rights-of-way. According to petitioner, the annual fee is unconstitutional because, among other reasons, it bears no relation to the City's costs and instead constitutes an unlawful attempt to raise revenue. Although the City answered the initial petition/complaint, it failed to answer the amended petition/complaint, prompting petitioner to move for a default judgment. Supreme Court denied the motion but, as a condition of that denial, the court issued a preliminary injunction "temporarily enjoining" the City from enforcing section 175-3B of the Code against petitioner or from otherwise charging petitioner to access its rights-of-way. The City did not appeal from that order, which was entered in September 2010. Approximately 13 months later, in October 2011, the City moved pursuant to CPLR 6314 to vacate the preliminary injunction, contending that a recent amendment to section 175-3B gave petitioner all the relief it requests and thus constitutes a change of

circumstances that obviates the need for the preliminary injunction. The court denied the motion, and the City appeals. We affirm.

As a preliminary matter, we note that the City advances several contentions that challenge the court's authority to issue the preliminary injunction in the first instance. The City contends, for example, that petitioner failed to demonstrate irreparable harm and that, because the court had denied petitioner's request for a preliminary injunction at the outset of the proceeding/action, that decision was the law of the case that prohibited the court from later granting the same relief. Because the City did not appeal from the order issuing the preliminary injunction, however, the propriety of the initial issuance of the preliminary injunction "is not before us" (*Thompson v 76 Corp.*, 54 AD3d 844, 845; *see generally Cheng v Oxford Health Plans, Inc.*, 84 AD3d 673, 675; *Eades v Tadao Ogura, M.D., P.C.*, 185 AD2d 266, 267). Rather, the issue before us is whether the court properly refused to vacate the preliminary injunction based on the amendment to the City's Code.

On that issue, and contrary to the City's contention, the amendment does not afford petitioner all the relief it seeks in the amended petition/complaint. Although the amended Code affords petitioner an option of paying a per-use access fee, petitioner does not request that relief in its pleadings. The record makes clear that petitioner did not seek permission to obtain a permit every time it has to access the City's rights-of-way; instead, petitioner requested that the City be enjoined from charging it any fees "in excess of any constitutionally permissible fees" for excavating within the City's rights-of-way. Indeed, as the City acknowledged in its response to an interrogatory, it would be impractical and unduly costly for both parties if petitioner applied for an individual permit each time it seeks access to City property. We note that, if the City is correct that the amended Code affords petitioner all the relief that it seeks, there is no need to proceed further with this proceeding/action, and yet the City has not sought dismissal on that ground. We thus conclude that the City failed to establish the existence of " 'compelling or changed circumstances that render continuation of the injunction inequitable' " (*Thompson*, 54 AD3d at 846; *see Board of Trustees of Town of Huntington v W. Wilton Wood, Inc.*, 97 AD2d 781, 782-783, *lv dismissed* 61 NY2d 605, 904).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

576

CAF 12-01093

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF CLARENCE R. BROWN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHANNON TERWILLIGER AND MARY ANN TERWILLIGER,
RESPONDENTS-RESPONDENTS.

IN THE MATTER OF CLARENCE R. BROWN,
PETITIONER-APPELLANT,

V

KELLY FINNERTY, RESPONDENT-RESPONDENT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILDREN, WATERLOO.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 27, 2012. The order, among other things, denied the petitions for visitation.

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

Memorandum: Petitioner, an inmate serving a 15-year determinate sentence, commenced these consolidated proceedings pursuant to article 6 of the Family Court Act, seeking visitation with three of his children, but he subsequently withdrew his request for visitation with one of the children upon learning that she may suffer emotionally from visitation with him in prison. The mother and maternal grandmother of one of the two remaining children (hereafter, daughter) are the respondents in one proceeding, and the mother of the other child (hereafter, son) is the respondent in the other proceeding. At the conclusion of the joint fact-finding hearing, Family Court denied the petitions but allowed petitioner to communicate in writing with the two children. We affirm.

Although we recognize that the rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 91), we conclude that respondents rebutted the presumption by establishing by a

preponderance of the evidence that visitation with petitioner would be harmful to the children (*see id.*). A parent's failure to seek visitation with a child for a prolonged period of time is a relevant factor when determining whether visitation is warranted (*see Matter of Russell v Simmons*, 88 AD3d 1080, 1081; *Matter of Butler v Ewers*, 78 AD3d 1667, 1667), and, here, petitioner has never met the daughter or the son. In fact, before commencing these proceedings, petitioner did not seek visitation with either child. Thus, petitioner is "essentially a stranger to the child[ren]" (*Matter of Cole v Comfort*, 63 AD3d 1234, 1236, *lv denied* 13 NY3d 706).

In addition, the daughter's counselor testified in detail as to how visitation would be detrimental to her welfare (*see Matter of Lando v Lando*, 79 AD3d 1796, 1796, *lv denied* 16 NY3d 709; *Matter of Frank P. v Judith S.*, 34 AD3d 1324, 1324-1325). Although there was no similar expert testimony regarding the effect of visitation on the son, such testimony regarding the effect of visitation is not by itself determinative (*see Lando*, 79 AD3d at 1796-1797; *Matter of McCullough v Brown*, 21 AD3d 1349, 1349-1350), and there was sufficient other evidence to support the court's determination, such as testimony from the son's mother that he is afraid of seeing petitioner and has been placed in therapy since he learned of these proceedings.

In sum, "the propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Conklin v Hernandez*, 41 AD3d 908, 910 [internal quotation marks omitted]), and, here, there is a sound and substantial basis in the record to support the court's determination that visitation with petitioner is not in the children's best interests (*see Matter of Robert AA. v Colleen BB.*, 101 AD3d 1396, 1397-1399, *lv denied* 20 NY3d 860).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

581

CA 12-00701

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF SHANNON MARTINEK, CONSECUTIVE NO. 21915, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MEGAN E. DORR OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered March 16, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's commitment to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order determining, inter alia, that he is a dangerous sex offender requiring continued confinement in a secure treatment facility pursuant to Mental Hygiene Law article 10. We dismiss the appeal as moot because a subsequent order has been entered that continues petitioner's confinement for another year (*see Matter of State of New York v Grant*, 71 AD3d 1502, 1503; *see also Robles v Evans*, 100 AD3d 1455, 1455).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

596

KA 12-00532

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA RASZL, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MARK MOODY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 30, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the third degree.

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 of incarceration imposed to a definite sentence of seven months incarceration and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of stolen property in the third degree (Penal Law § 165.50), and sentencing her to an indeterminate term of incarceration of 2a to 7 years. As the People correctly concede, the sentence imposed is unduly harsh and severe, but we reject defendant's contention that probation would now be an illegal disposition (*see generally People v Becker*, 71 AD3d 1372, 1372). As a matter of discretion in the interest of justice, however, we modify the judgment of conviction by reducing the sentence imposed to a definite sentence of seven months incarceration (*see* CPL 470.15 [6] [b]; Penal Law § 70.00 [4]).

Contrary to defendant's further contention, the conviction of criminal possession of stolen property in the third degree is supported by legally sufficient evidence that the value of the stolen property exceeded $3,000 (*see generally* Penal Law § 165.50; *People v Bleakley*, 69 NY2d 490, 495). The value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (Penal Law § 155.20 [1]). We conclude that the record establishes that "the jury

ha[d] a reasonable basis for inferring, rather than speculating, that the value of the [stolen] property exceeded the statutory threshold" of $3,000 (*People v Pallagi*, 91 AD3d 1266, 1270 [internal quotation marks omitted]). Finally, defendant contends that defense counsel was ineffective because he failed to challenge the adequacy of the CPL 710.30 notice. We reject that contention. "It is well settled that '[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to "make a motion or argument that has little or no chance of success" ' " (*People v Johnson*, 81 AD3d 1428, 1428-1429, *lv denied* 16 NY3d 896, quoting *People v Caban*, 5 NY3d 143, 152). Here, the People filed a notice pursuant to CPL 710.30 indicating that a statement of defendant that was intended to be used at trial was attached to the notice, and there is no dispute that the written statement was attached thereto. Defendant was therefore furnished with notice that adequately set out the time and place and the sum and substance of her statement, and permitted her to intelligently identify it (*see generally People v Lopez*, 84 NY2d 425, 428; *People v Sumter*, 68 AD3d 1701, 1701, *lv denied* 14 NY3d 893). Thus, defense counsel's failure to move to preclude the statement on the ground of insufficient notice does not constitute ineffective assistance because such a motion would have had little or no chance of success (*see Caban*, 5 NY3d at 152).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

603

CA 11-02166

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

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

V MEMORANDUM AND ORDER

HERSCHEL ADKISON, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (LISA L. PAINE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered September 22, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a jury trial, that he is a detained sex offender who has a mental abnormality and determining, after a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility. Respondent contends that Supreme Court abused its discretion in denying his application for a mistrial because the court improperly curtailed voir dire resulting in the impanelment of juror No. 7, who made negative comments with respect to respondent during trial, and because those comments negatively influenced other jurors. We reject those contentions (*see generally People v Matt*, 78 AD3d 1616, 1617, *lv denied* 15 NY3d 954). We note at the outset that, "[a]lthough this Mental Hygiene Law article 10 proceeding is civil in nature and primarily governed by CPLR article 41" (*Matter of State of New York v Muench*, 85 AD3d 1581, 1581; *see* Mental Hygiene Law § 10.07 [b]), the Criminal Procedure Law governs the procedure for voir dire and the discharge of a juror (*see* Mental Hygiene Law § 10.07 [b]; CPL 270.15, 270.35 [1]). CPL 270.35 (1) provides in relevant part that the court must discharge a juror where he or she "has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial." Here, respondent's contention that the court erred in denying his motion for a mistrial is based upon his assertion that he was denied a fair trial by the court's improper curtailment of voir dire and

determination to discharge juror No. 7 rather than grant a mistrial, i.e., those acts governed by the Criminal Procedure Law. We therefore conclude that, in this case, CPL 280.10 (1) should likewise govern the standard to be used when determining whether a mistrial is warranted. That statute provides that the court must declare a mistrial if, "upon motion of the [respondent], . . . there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the [respondent] and deprives him [or her] of a fair trial" (*id.*).

With respect to respondent's contention concerning voir dire, we note that the court is vested with "broad discretion to control and restrict the scope of the [voir dire] examination" (*People v Boulware*, 29 NY2d 135, 140, *rearg denied* 29 NY2d 670, 749, *cert denied* 405 US 995). The record here establishes that the court did not abuse that discretion, and thus the court did not err in denying respondent's motion for a mistrial on that ground. Respondent's contention that a mistrial was warranted because the jurors remaining after juror No. 7 was discharged were so tainted by the negative comments of juror No. 7 is also without merit (*see People v Chatt*, 77 AD3d 1285, 1286, *lv denied* 17 NY3d 793; *People v Bassett*, 55 AD3d 1434, 1435, *lv denied* 11 NY3d 922). The court questioned each remaining juror individually and all of those jurors unequivocally expressed that they could continue to be fair and impartial. We conclude that the court's procedures were " 'sufficient to protect [respondent's] right to a fair trial' " (*Bassett*, 55 AD3d at 1435). Additionally, any failure on the part of the remaining jurors to "report [the negative statements of juror No. 7] did not amount to substantial misconduct" (*Chatt*, 77 AD3d at 1286).

Respondent's further contention that he was denied due process and a fair trial because the court conducted its inquiry and subsequent discharge of juror No. 7 outside of respondent's presence is without merit. Respondent had no right to be present while the court conducted an inquiry of juror No. 7 to determine whether that juror should be discharged pursuant to CPL 270.35 (*see People v Luchey*, 221 AD2d 936, 936, *lv denied* 87 NY2d 1021, *reconsideration denied* 88 NY2d 988).

Finally, we reject respondent's contention that petitioner failed to prove by clear and convincing evidence that he had a mental abnormality and that he was a dangerous sex offender requiring confinement. The expert testimony submitted at trial by petitioner constituted clear and convincing evidence that respondent was a "detained sex offender who suffers from a mental abnormality" (Mental Hygiene Law § 10.07 [d]). Additionally, the jury's verdict that respondent suffers from a mental abnormality "is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony" (*Matter of the State of New York v Chrisman*, 75 AD3d 1057, 1058). We conclude based upon the record that petitioner also proved by clear and convincing evidence that respondent was a dangerous sex offender requiring confinement, and the court did not err in crediting petitioner's expert testimony over respondent's expert testimony (*see Matter of State of New York v*

Harland, 94 AD3d 1558, 1559, *lv denied* 19 NY3d 801).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

604

CA 12-02364

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JOHN J. MIDDLETON AND JOAN M. MIDDLETON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF SALINA, DEFENDANT,
AND COUNTY OF ONONDAGA, DEFENDANT-RESPONDENT.

UAW LEGAL SERVICES PLAN, WOODBRIDGE, NEW JERSEY (ERIC N. AGLOW OF COUNSEL), AND UAW-CHRYSLER LEGAL SERVICES PLAN, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (KAREN A. BLESKOSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 21, 2012. The order, among other things, granted the motion of defendant County of Onondaga for summary judgment.

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

Memorandum: In this action to recover damages arising from a backup of sewage in their house, plaintiffs appeal from an order that, inter alia, granted the motion of the County of Onondaga (defendant) for summary judgment dismissing the complaint against it. Contrary to plaintiffs' contention, Supreme Court properly granted the motion.

In the complaint, as amplified by the bill of particulars and the notice of claim, plaintiffs allege, among other things, that defendant is liable under a negligence theory. In an action against a municipality such as defendant, it is "the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to [perform certain governmental functions], this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. This is an offshoot of the general proposition that '[t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally' " (*Valdez v City of New York*, 18 NY3d 69, 75). "The second principle relevant here relates not to an element of plaintiffs' negligence claim but to a defense

that [is] potentially available to [defendant]—the governmental function immunity defense . . . [T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions . . . [pursuant to which] '[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' " (*id*. at 75-76).

Thus, we begin our analysis by examining the "special duty issue in this case in recognition of the fact that, if plaintiffs cannot overcome the threshold burden of demonstrating that defendant owed the requisite duty of care, there will be no occasion to address whether defendant can avoid liability by relying on the governmental function immunity defense" (*id.* at 80). Contrary to plaintiffs' contention, they failed to establish that defendant owes them a special duty of care apart from any duty owed to the public in general.

In order for plaintiffs to establish that defendant owed a special duty to them, they were required to establish that defendant " 'voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefit[ted] from the duty' " (*McLean v City of New York*, 12 NY3d 194, 199). That burden has four elements, i.e., " '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' " (*id.* at 201, quoting *Cuffy v City of New York*, 69 NY2d 255, 260). Here, defendant met its initial burden on the motion by submitting evidence establishing that plaintiffs' alleged reliance upon representations allegedly made by defendant's agents was not justifiable (*see Estate of Scheuer v City of New York*, 10 AD3d 272, 273-274, *lv denied* 6 NY3d 708; *see generally Dabriel, Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 521-522), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In any event, even assuming, arguendo, that plaintiffs raised a triable issue of fact whether defendant owed a special duty to them, we conclude that the court properly determined that the "second principle" set forth in *Valdez*, i.e., the governmental function immunity defense (*id.* at 75), applied. Defendant established that it was engaged in a governmental function when it engaged in the allegedly negligent conduct, i.e., failing to install a check valve or similar anti-backflow device on plaintiffs' sewer line to prevent sewage from flowing backwards out of the sewer line and into plaintiffs' house. " 'Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach' " (*id.* at

79).

"Beyond the role the individual employee plays in the organization, the availability of governmental function immunity also turns on 'whether the conduct giving rise to the claim is related to an exercise of that discretion' . . . The defense precludes liability for a 'mere error of judgment' . . . but this immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making—i.e., 'the exercise of reasoned judgment which could typically produce different acceptable results' " (*id.* at 79-80). Thus, it has long been the rule that "[t]he duties of the municipal authorities in . . . determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion" (*Johnston v District of Columbia*, 118 US 19, 20-21; *see generally McCarthy v City of Syracuse*, 46 NY 194, 196). Plaintiffs' allegation that defendant was negligent in failing to correct the problem by installing an anti-backflow device concerns a discretionary action taken in the course of a governmental function because it "relate[s] only to the design of the system, for which [defendant] may not bear liability" (*Carbonaro v Town of N. Hempstead*, 97 AD3d 624, 625; *cf. Johnston v Town of Jerusalem*, 2 AD3d 1403, 1403-1404; *Biernacki v Village of Ravena*, 245 AD2d 656, 657). Defendant therefore met its initial burden on the motion with respect to the "second principle" of the test set forth in *Valdez*, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

605

CA 11-02161

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THE APPLICATION OF LOLA BANKS, PETITIONER-APPELLANT,

FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSONAL NEEDS AND PROPERTY MANAGEMENT OF CHARLIE B.H., AN ALLEGED INCAPACITATED PERSON, RESPONDENT.

MEMORANDUM AND ORDER

JOY A. KENDRICK, BUFFALO, FOR PETITIONER-APPELLANT.

PHILIP A. MILCH, BUFFALO, FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 27, 2011 in a proceeding pursuant to Mental Hygiene Law article 81. The order, insofar as appealed from, denied petitioner's request for additional counsel fees for Joy A. Kendrick, Esq.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the second ordering paragraph is vacated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In this proceeding pursuant to Mental Hygiene Law article 81, petitioner, the property guardian of a now-deceased incapacitated person, appeals from an order that, inter alia, denied petitioner's request for additional counsel fees. At the outset, we conclude that Supreme Court erred in determining that the rules embodied in 22 NYCRR part 36 govern the appointment of petitioner's attorney. Pursuant to 22 NYCRR 36.1 (b) (2) (i) (A), the rules embodied in part 36 "shall not apply to . . . the appointment of, or the appointment of any persons or entities performing services for, . . . a guardian who is a relative of . . . the subject of the guardianship proceeding" and, here, the record establishes that petitioner was the incapacitated person's third cousin. We also note that neither of the exceptions set forth in 22 NYCRR 36.1 (b) applies to this case (*see* 22 NYCRR 36.2 [c] [6], [7]).

We further conclude that the court erred in summarily denying petitioner's request for additional counsel fees. Instead, the court should have permitted petitioner to render a final report and to petition for judicial settlement thereof (*see* Mental Hygiene Law § 81.44 [f]), as well as to seek a determination on all administrative expenses, including counsel fees incurred in providing services to petitioner (*see generally Matter of Albert K. [D'Angelo]*, 96 AD3d 750,

752-753), before summarily concluding that petitioner's attorney is not entitled to compensation beyond the $28,845 that she has already been paid with respect to this matter. In view of our determination, we do not address petitioner's remaining contentions.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

607

CA 12-01300

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

KATHERINE M. ALMONTE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. ALMONTE, DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., OSWEGO (CARL L. SCHMIDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

DENNIS S. LERNER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered September 15, 2011. The judgment, inter alia, directed defendant to pay maintenance, temporary child support arrears, and temporary maintenance arrears.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of temporary maintenance arrears specified in the twelfth ordering paragraph to $1,875, and as modified the judgment is affirmed without costs.

Memorandum: Defendant appeals from a judgment of divorce that, inter alia, directed him to pay maintenance, temporary child support arrears, and temporary maintenance arrears. We reject defendant's contention that Supreme Court abused its discretion in setting the amount of maintenance; rather, "[t]he record establishes that the court appropriately considered [plaintiff's] 'reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors' set forth in Domestic Relations Law § 236 (B) (6) (a)" (*Frost v Frost*, 49 AD3d 1150, 1151, quoting *Hartog v Hartog*, 85 NY2d 36, 52). Contrary to defendant's further contention, the court also properly directed the amount of maintenance to increase at the time of the emancipation of the parties' youngest child. That event was an "imminent and measurable change" that was to occur less than six months following entry of the divorce judgment (*Majauskas v Majauskas*, 61 NY2d 481, 494). We agree with defendant, however, that the court erred in calculating the amount of arrears owed pursuant to a prior temporary order, which directed him to pay maintenance and child support. The amount designated as temporary child support arrears in the eleventh ordering paragraph of the judgment, $4,810, is included, incorrectly, within the amount designated as temporary maintenance arrears in the twelfth ordering paragraph of the judgment, $6,685. We therefore modify the judgment accordingly. Plaintiff

failed to take a cross appeal from the judgment and we thus do not address her contention that the court erred in failing to make the awards of child support and maintenance retroactive to the date of commencement of the action (*see Oliver v Oliver*, 70 AD3d 1428, 1430; *Brenner v Brenner*, 52 AD3d 322, 323).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

608

CA 12-01158

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JOANNE N. STUBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. CAPELLINI, III, DEFENDANT-RESPONDENT,
RALPH J. FREETLY AND ABF FREIGHT SYSTEM, INC.,
DEFENDANTS.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (CARLTON K. BROWNELL, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 21, 2012. The judgment dismissed the complaint against defendant John A. Capellini, III, upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for personal injuries she sustained in an automobile accident that occurred while she was traveling on the New York State Thruway in the Town of Hamburg, New York. Plaintiff's suit stems from three separate automobile accidents that occurred shortly after midnight on November 18, 2007. The facts are largely undisputed. The first accident involved defendant John A. Capellini, III, whose pickup truck and horse trailer slid on ice on a thruway overpass when he applied his brakes after seeing the brake lights of a vehicle ahead of him. When his truck came to a stop in the median, he observed that the horse trailer, which had detached from his truck, was blocking the left lane of the thruway. Capellini exited his vehicle and proceeded to warn other vehicles about the accident. He noticed for the first time while standing on the pavement that it was icy. The second accident involved defendant Ralph J. Freetly, an employee of defendant ABF Freight System, Inc. (ABF), who was driving a tractor trailer in the right lane of the thruway as he approached the Capellini accident. Freetly applied his brakes when he saw two tractor trailers stopped on the right shoulder with their flashing lights on and started to brake more firmly after seeing someone in front of the horse trailer waiving a flashlight. As he braked, the rear trailer of his truck slid and

struck one of the tractor trailers parked on the right shoulder, causing the contents of Freetly's trailer to spill onto the road. Freetly testified that he had not encountered any ice on the thruway from the time he passed the Pennsylvania border until the time he reached the overpass where Capellini's accident occurred. The third accident involved plaintiff, who has no recollection of the accident. A non-party witness testified that, as plaintiff was traveling over the overpass, plaintiff applied her brakes, and her vehicle spun around and struck the guardrail twice. The witness testified that he noticed that the overpass was icy, but that he could not see any ice even as he stood on it.

Following a trial, the jury returned a verdict finding that Capellini, Freetly and plaintiff were not negligent. ABF thus also was not negligent inasmuch as the basis for its liability was vicarious only. Thereafter, plaintiff moved pursuant to CPLR 4404 (a) to, inter alia, set aside the verdict as against the weight of the evidence and for a new trial. In appeal No. 2, plaintiff appeals from an order denying her motion. In appeal Nos. 1 and 3, plaintiff appeals from judgments that, inter alia, dismissed the complaint, respectively, against Capellini and against Freetly and ABF upon the jury verdict of no cause of action. We note at the outset that, inasmuch as the order in appeal No. 2 is subsumed in the judgments in appeal Nos. 1 and 3, we dismiss plaintiff's appeal from the order in appeal No. 2 (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435; *see also* CPLR 5501 [a] [1]).

In the remaining appeals, plaintiff contends that Supreme Court erred in denying her posttrial motion inasmuch as the verdict is against the weight of the evidence. We reject that contention. It is well established that "[a] motion to set aside a jury verdict of no cause of action should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964; *see Kuncio v Millard Fillmore Hosp.*, 117 AD2d 975, 976, *lv denied* 68 NY2d 608; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Here, there was no such preponderance of the evidence in favor of plaintiff. As an initial matter, we note that plaintiff raised for the first time in her reply brief the contention that the emergency doctrine was improperly charged at trial, and thus that contention is not properly before us (*see O'Sullivan v O'Sullivan*, 206 AD2d 960, 960-961). Additionally, we conclude that a fair interpretation of the evidence presented here would allow the jury to conclude that, (1) in appeal No. 1, Capellini did not know the overpass was icy, that his reactions before and after the accident were reasonable and that he was not negligent; and that, (2) in appeal No. 3, Freetly's conduct in slowing down as he approached the first accident and attempting to steer his vehicle clear of the horse trailer and the vehicles on the right shoulder was reasonable under the circumstances (*see generally DiSalvo v Hiller*, 2 AD3d 1386, 1387).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

609

CA 12-01476

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JOANNE N. STUBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. CAPELLINI, III, RALPH J. FREETLY AND ABF FREIGHT SYSTEM, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (CARLTON K. BROWNELL, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN A. CAPELLINI, III.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RALPH J. FREETLY AND ABF FREIGHT SYSTEM, INC.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 21, 2012. The order denied the motion of plaintiff to set aside a jury verdict.

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

Same Memorandum as in *Stubbs v Capellini* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

610

CA 12-01477

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JOANNE N. STUBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. CAPELLINI, III, DEFENDANT,
RALPH J. FREETLY AND ABF FREIGHT SYSTEM, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 28, 2012. The judgment dismissed the complaint against defendants Ralph J. Freetly and ABF Freight System, Inc., upon a jury verdict.

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

Same Memorandum as in *Stubbs v Capellini* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

617

KA 12-00572

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMMY SWIFT, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

SAMMY SWIFT, DEFENDANT-APPELLANT PRO SE.

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

RITA DAVE, BROOKLYN, FOR THE JEFFREY DESKOVIC FOUNDATION FOR JUSTICE, AMICUS CURIAE.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered October 28, 2010. The order, insofar as appealed from, denied the motion of defendant for additional DNA testing pursuant to CPL 440.30 (1-a).

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

Memorandum: Defendant appeals from an order that, inter alia, denied his pro se motion pursuant to CPL 440.30 (1-a) for additional DNA testing of certain items secured in connection with his conviction of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [1]). Defendant's conviction arose from the robbery and fatal beating of a 68-year-old victim in his home by defendant and two accomplices (*People v Swift*, 241 AD2d 949, 949, *lv denied* 91 NY2d 881, *reconsideration denied* 91 NY2d 1013). On appeal, we affirmed the judgment convicting defendant of those crimes (*id.*). At trial, one of defendant's accomplices testified that, after the attack, defendant wiped blood off of his arm onto a couch cushion. A forensic scientist testified that two bloodstains on the couch cushions contained samples of the victim's blood type (type A) as well as a mixture of type A and type O, defendant's blood type (*id.* at 949).

In 2007, defendant moved to vacate the judgment of conviction pursuant to CPL 440.10 and sought DNA testing of all of the evidence collected in the murder investigation (*People v Swift*, 66 AD3d 1439, *lv denied* 13 NY3d 911, *reconsideration denied* 14 NY3d 845). Because

of advancements in DNA testing, the People consented to the testing of certain items of evidence, including the blood-stained couch cushions and the victim's pants. The DNA test results indicated that the blood found at the crime scene was exclusively that of the victim (*id.* at 1440). County Court vacated defendant's judgment of conviction on that ground and we reversed, concluding that "the DNA test results are not 'of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' " (*id.*, quoting CPL 440.10 [1] [g]).

Defendant thereafter filed the motion at issue here seeking, inter alia, DNA testing of additional items of evidence, i.e., the victim's dentures, the victim's shirt, an afghan blanket, hypodermic needles, hair samples from the victim and defendant, and bloody footprints from the crime scene. We conclude that the court properly denied that part of the motion seeking testing with respect to those items "because defendant failed to establish that there was a reasonable probability that, had those items been tested and had the results been admitted at trial, the verdict would have been more favorable to defendant" (*People v Sterling*, 37 AD3d 1158, 1158; *see People v Kaminski*, 61 AD3d 1113, 1116, *lv denied* 12 NY3d 917; *see also People v Burr*, 17 AD3d 1131, 1132, *lv denied* 5 NY3d 760, *reconsideration denied* 5 NY3d 804). The two hypodermic needles collected from the crime scene were left by paramedics who treated the victim when he was found several days after the attack and, are therefore unrelated to the crime. With respect to the victim's dentures, there is no evidence that the victim bit his attacker or that the victim's dentures would otherwise contain the DNA of the attacker. As for the alleged "bloody footprints," there is no reference to crime scene footprints in the trial record or in the record before us. There is similarly no reference in the record to hair samples being taken from the victim or defendant, or to hair being collected from the crime scene. In any event, any hairs collected from the crime scene could have belonged to defendant, his accomplices, the victim, the victim's son who discovered his father after the attack, the paramedics or police who responded to the scene, or any number of other individuals who had been in the victim's apartment before the attack (*see People v Brown*, 36 AD3d 961, 962, *lv denied* 8 NY3d 920; *see also People v Workman*, 72 AD3d 1640, 1640, *lv denied* 15 NY3d 925, *reconsideration denied* 16 NY3d 838). With respect to the victim's shirt and the afghan blanket in which he apparently wrapped himself after the attack, we conclude that, although such items and, indeed, much of the crime scene were stained with blood, there is nothing to suggest that the blood belonged to anyone but the victim (*see People v Figueroa*, 36 AD3d 458, 459, *lv denied* 9 NY3d 843).

Even assuming, arguendo, that the requested items were subjected to DNA testing and that such testing revealed DNA that did not belong to either the victim or defendant, we further conclude that there still would be no reasonable probability that defendant would have received a more favorable verdict had those test results been introduced at trial (*see generally People v Pitts*, 4 NY3d 303, 311, *rearg denied* 5 NY3d 783; *People v King*, 38 AD3d 1066, 1067, *lv denied*

9 NY3d 877; *Brown*, 36 AD3d at 962). The primary evidence against defendant was the eyewitness testimony of his two accomplices, which was corroborated by the testimony of the accomplices' sister and evidence that the victim's wallet was recovered on the route leading from defendant's residence to his place of employment. That testimony would not have been impeached or controverted by evidence that the DNA of another individual was discovered at the victim's apartment (*see Brown*, 36 AD3d at 962).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

618

KA 11-01397

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERRY GRIGGS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

PERRY GRIGGS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered June 9, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to dismiss the indictment based upon alleged prosecutorial misconduct before the grand jury. According to defendant, the prosecutor improperly questioned him about his prior criminal convictions and failed to instruct the grand jurors properly with respect to the defense of temporary innocent possession. We reject defendant's contention. With respect to the alleged prosecutorial misconduct, we note that the prosecutor was entitled to cross-examine defendant on issues concerning his credibility (*see People v Thomas*, 213 AD2d 73, 76, *affd* 88 NY2d 821) and, because defendant's criminal record "clearly demonstrated his willingness to place his own interests above those of society, [it] was thus a proper subject for cross-examination" (*People v Burton*, 191 AD2d 451, 451, *lv denied* 81 NY2d 1011). With respect to the instruction on the defense of temporary innocent possession, we note that it is almost identical to the instruction set forth in the Pattern Jury Instructions (*see* CJI2d[NY] Temporary and Lawful Possession). Defendant raises several other contentions regarding the conduct of the prosecutor during the grand jury proceedings, but they are similarly without merit.

We reject defendant's further contention that the court erred in permitting defendant's ex-girlfriend to testify that she observed him in possession of the firearm in question on the night before his arrest. That testimony was relevant to defendant's defense of temporary innocent possession of the weapon. We agree with defendant, however, that the court erred in permitting his ex-girlfriend to testify concerning prior drug sales and acts of domestic violence. That testimony was not relevant to a material issue at trial and, furthermore, its probative value was outweighed by its prejudicial effect (*see generally People v Cass*, 18 NY3d 553, 559). Nevertheless, we conclude that the error is harmless (*see People v Bounds*, 100 AD3d 1523, 1524, *lv denied* 20 NY3d 1096; *People v Taylor*, 97 AD3d 1139, 1141, *lv denied* 19 NY3d 1029; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant, by his own admission, possessed the loaded firearm, and the only disputed issue at trial was whether the defense of temporary and innocent possession applied. Even assuming, arguendo, that the jurors accepted defendant's seemingly implausible claim that he wrestled the gun away from a man who was trying to rob him, we conclude that the defense of temporary innocent possession does not apply because defendant " 'made no effort to turn the [gun] over to the police' " after he obtained possession of it (*People v Ward*, 104 AD3d 1323, 1325; *see People v McCoy*, 46 AD3d 1348, 1349-1350, *lv denied* 10 NY3d 813). Instead, defendant hid the gun under a fence in a vacant lot and then remained silent while the police were searching the vacant lot, conduct that was "utterly at odds with any claim of innocent possession" (*McCoy*, 46 AD3d at 1350 [internal quotation marks omitted]).

Viewing the evidence in light of the elements of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). Indeed, our "independent review of the evidence reveals that a different verdict would have been unreasonable" (*People v Johnson*, 24 AD3d 803, 804; *see People v Peters*, 90 AD3d 1507, 1508, *lv denied* 18 NY3d 996; *see generally Bleakley*, 69 NY2d at 495).

We have reviewed the remaining contentions set forth in defendant's main and pro se supplemental briefs and conclude that none warrants modification or reversal.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

619

KA 12-01559

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES F. WEBB, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 2, 2012. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree and criminal contempt in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]) and dismissing the first count of the indictment and as modified the judgment is affirmed and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]) and four counts of criminal contempt in the second degree (§ 215.50 [3]), arising from defendant's violation of an order of protection directing him, inter alia, to refrain from communicating by telephone with his former girlfriend, the mother of defendant's child. We agree with defendant that the evidence is legally insufficient to support the conviction of criminal contempt in the first degree. Even assuming, arguendo, that the evidence is legally sufficient to establish that defendant repeatedly made telephone calls to his ex-girlfriend, we agree with him that the evidence is legally insufficient to establish that he intended by those calls to harass, annoy, threaten or alarm her, with no purpose of legitimate communication (*see* § 215.51 [b] [iv]; *People v VanDeWalle*, 46 AD3d 1351, 1353, *lv denied* 10 NY3d 845, *abrogated on other grounds People v Cajigas*, 19 NY3d 697, 701). Rather, the only inference to be drawn from the evidence is that defendant made the calls with the intent to discuss issues of child support and visitation, not to harass, annoy, threaten or alarm his ex-girlfriend. We therefore modify the judgment accordingly. We further conclude, however, that the evidence is legally sufficient to establish that

defendant intentionally disobeyed the order of protection by making four telephone calls to the former girlfriend over the course of eight days (*see People v Levi*, 55 AD3d 625, 625-626, *lv denied* 11 NY3d 926). The evidence is thus legally sufficient with respect to the conviction of criminal contempt in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part because we disagree with the majority that the evidence is legally insufficient to support defendant's conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]). We would therefore affirm the judgment.

"The standard for reviewing legal sufficiency in a criminal case is whether, '[v]iewing the evidence . . . in a manner most favorable to the prosecution and indulging in all reasonable inferences in the People's favor,' a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*People v Bueno*, 18 NY3d 160, 169, quoting *People v Ford*, 66 NY2d 428, 437). As relevant here, a person is guilty of criminal contempt in the first degree when, in violation of an order of protection of which the defendant has actual knowledge, he or she, "with intent to harass, annoy, threaten or alarm a person for whose protection such order was issued, repeatedly makes telephone calls to such person, whether or not a conversation ensues, with no purpose of legitimate communication" (Penal Law § 215.51 [b] [iv]). It is well established that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682), and a "jury is entitled to infer that a person intended the natural and probable consequences of his [or her] acts" (*id.* at 685). Where competing inferences may be drawn concerning a defendant's intent, those inferences, " ' if not unreasonable, are within the exclusive domain of the finders of fact' " (*Bueno*, 18 NY3d at 169, quoting *People v Barnes*, 50 NY2d 375, 381).

Here, viewing the evidence in the light most favorable to the People and according the People the benefit of every reasonable inference (*see People v Contes*, 60 NY2d 620, 621; *People v Soler*, 52 AD3d 938, 940, *lv denied* 11 NY3d 741), we conclude that the evidence is legally sufficient to establish that defendant committed the crime of criminal contempt in the first degree by repeatedly making telephone calls to his ex-girlfriend's residence in violation of a valid order of protection made for her benefit, of which defendant had actual knowledge, with the intent to harass or annoy her, and with no legitimate purpose (*see* Penal Law § 215.51 [b] [iv]; *People v Audi*, 88 AD3d 1070, 1072, *lv denied* 18 NY3d 856; *People v Richards*, 297 AD2d 610, 611, *lv denied* 99 NY2d 539). The evidence at trial established that defendant made five telephone calls to the victim within an eight-day period, and that three of those calls took place on a single day over the course of one hour. During the telephone calls,

defendant called the victim a "bitch" and a "whore," told her he did not intend to pay child support for their child, and threatened to embarrass her in the court proceeding commenced by the victim to enforce defendant's child support obligation (*see Soler*, 52 AD3d at 939-940). Notably, defendant had never paid child support to the victim despite the existence of a child support order, and thus his expressed intention to continue avoiding his child support obligation was not new or unexpected to the victim. The victim testified that, every time defendant called her, she told him not to do so, but that he continued to call her in contravention of her wishes and the order of protection (*see People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832). The victim further testified that she found the repeated telephone calls to be annoying and/or harassing.

Although defendant contends that the purpose of his telephone calls was not to harass or annoy the victim, but rather his purpose was to discuss child support, we conclude that the nature and circumstances of the telephone calls, combined with the evidence of defendant's "previous violent and abusive conduct toward the victim which precipitated the order of protection[], allow[ed] the jury to reasonably conclude that defendant's purpose in telephoning the victim was simply to 'harass, annoy, threaten or alarm' her and lacked any particular legitimate purpose" (*People v Tomasky*, 36 AD3d 1025, 1026, *lv denied* 8 NY3d 927, quoting Penal Law § 215.51 [b] [iv]; *see generally People v Alexander*, 50 AD3d 816, 817-818, *lv denied* 10 NY3d 955).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to all counts is against the weight of the evidence (*see People v Allman*, 280 AD2d 384, 384-385, *lv denied* 96 NY2d 797; *see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

627

CA 12-01410

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

EDWARD A. LEGARRETA, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA A.L. NEAL, M.D., AND TWENTY 20 EYE CARE AND AESTHETIC OCULOPLASTIC MEDICINE, PLLC, DEFENDANTS-APPELLANTS.

MELISSA NEAL, M.D., PLAINTIFF-APPELLANT,

V

EDWARD A. LEGARRETA, M.D., LEGARRETA EYE CENTER, AND SALLY LEGARRETA, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 19, 2011. The order, among other things, directed Melissa A.L. Neil, M.D. to produce a complete list of all of her patients including names, addresses and dates of treatment.

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

Same Memorandum as in *Legarreta v Neal* ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

628

CA 12-01411

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

EDWARD A. LEGARRETA, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA A.L. NEAL, M.D., AND TWENTY 20 EYE CARE AND AESTHETIC OCULOPLASTIC MEDICINE, PLLC, DEFENDANTS-APPELLANTS.

MELISSA NEAL, M.D., PLAINTIFF-APPELLANT,

V

EDWARD A. LEGARRETA, M.D., LEGARRETA EYE CENTER, AND SALLY LEGARRETA, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered January 25, 2012. The order, among other things, directed that the answer of defendants-appellants shall be stricken if a patient list was not produced by February 1, 2012.

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

Memorandum: These four appeals arise out of two consolidated actions. Edward A. Legarreta, M.D. commenced the first action against Melissa A.L. Neal, M.D. and Twenty 20 Eye Care and Aesthetic Oculoplastic Medicine, PLLC (Twenty 20) (collectively, defendants) seeking damages for, inter alia, Dr. Neal's alleged breach of her employment contract with Dr. Legarreta and misappropriation of trade secrets (hereafter, contract action). Dr. Neal thereafter commenced the second action against Dr. Legarreta, Sally Legarreta (Sally), who is Dr. Legarreta's wife, and the Legarreta Eye Center (collectively, Legarretas) seeking damages for, among other things, injuries she allegedly sustained as a result of an assault by Sally (hereafter, personal injury action). In appeal No. 1, defendants, as limited by their brief, appeal from an order insofar as it granted that part of Legarretas' motion seeking to compel defendants to produce a complete

list of all of Dr. Neal's patients in the contract action, and authorizations for the release of medical records relating to her neck, shoulder, arm, wrist, and hand in the personal injury action. In appeal No. 2, defendants, as limited by their brief, appeal from an order insofar as it granted that part of Legarretas' motion seeking an order striking defendants' answer in the contract action in the event that defendants failed to produce a complete patient list by February 1, 2012. In appeal No. 3, defendants appeal from an order and judgment that, inter alia, granted that part of Legarretas' motion for a default judgment against defendants in the contract action pursuant to the self-executing order in appeal No. 2. In appeal No. 4, Dr. Neal appeals from an order and judgment granting that part of the Legarretas' motion to strike her complaint in the personal injury action.

Initially, we note that appeal No. 1 must be dismissed inasmuch as the underlying order was superseded by the order in appeal No. 2 (*see Wall v Villa Roma Resort Lodges, Inc*., 299 AD2d 351, 351; *see generally Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051). With respect to the remaining appeals, CPLR 3126 provides that "[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just," including "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party" (CPLR 3126 [3]). "Generally, the nature and degree of the penalty to be imposed pursuant to CPLR 3126 against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court" (*Mahopac Ophthalmology, P.C. v Tarasevich*, 21 AD3d 351, 352; *see Kihl v Pfeffer*, 94 NY2d 118, 123; *Sugar Foods De Mexico v Scientific Scents, LLC*, 88 AD3d 1194, 1196; *Hill v Oberoi*, 13 AD3d 1095, 1096). The language in CPLR 3126 that "permits courts to fashion orders as are just . . . broadly empowers a trial court to craft a conditional order—an order that grants the motion and imposes the sanction unless within a specified time the resisting party submits to the disclosure" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [internal quotation marks omitted]; *see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:10).

We conclude with respect to appeal No. 2 that Supreme Court properly exercised its discretion in granting a conditional order striking the answer in the contract action unless defendants produced Dr. Neal's patient list by February 1, 2012 (*see Pugliese v Mondello*, 67 AD3d 880, 881, *lv dismissed* 14 NY3d 873). Dr. Legarreta first demanded the patient list in July 2011 and, despite two motions to compel, Dr. Neal failed to turn over her patient list. In a bench decision dated December 1, 2011, the court directed Dr. Neal to produce "a complete list of all of her patients, including names, addresses and dates of treatment, . . . by December 22, 2011," and specifically instructed the Legarretas that they could move to strike defendants' answer in the contract action in the event Dr. Neal failed to comply. That decision was reduced to an order entered December 19,

2011, i.e., the order in appeal No. 1 (hereafter, December 2011 order).

Defendants, however, failed to produce a patient list by the court-imposed deadline, and the Legarretas moved to strike defendants' answer based upon defendants' willful violation of the December 2011 order. In a bench decision dated January 12, 2012, the court determined that Dr. Neal intentionally violated the December 2011 order inasmuch as she provided no basis for her failure to produce the patient list. By order entered January 25, 2012, i.e., the order in appeal No. 2, the court directed that defendants' answer in the contract action would "be stricken immediately" if they did not produce the patient list "on or before February 1, 2012" (hereafter, January 2012 conditional order).

On February 1, 2012, the deadline set forth in the January 2012 conditional order, defendants sought a stay from a justice of this Court pending their appeal from the December 2011 order and the January 2012 "decision." Although a justice of this Court signed a temporary stay of enforcement, it thereafter became apparent that defendants had not filed a notice of appeal from the January 2012 conditional order and thus that this Court had no jurisdiction to grant relief with respect to that order (*see* CPLR 5519 [c]). Defendant's appeal from the December 2011 order had been rendered moot by the subsequent order, as noted above. Inasmuch as the temporary stay had no effect on the January 2012 conditional order, which was self-executing, defendants' answer was stricken when they failed to produce the patient list by February 1, 2012 (*see Gibbs*, 16 NY3d at 82-83*; Foster v Dealmaker, SLS, LLC*, 63 AD3d 1640, 1641, *lv denied* 15 NY3d 702; *Zouev v City of New York*, 32 AD3d 850, 850-851). Even assuming, arguendo, that the temporary stay extended the deadline for compliance with the conditional order, we conclude that the January 2012 conditional order became absolute when defendants failed to turn over the patient list immediately upon the expiration of the stay.

It is well established that, in order to "obtain relief from the dictates of a conditional order . . . , the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense" (*Gibbs*, 16 NY3d at 80). Here, defendants failed to establish a reasonable excuse for their failure to comply with the conditional order (*see Lee v Arellano*, 18 AD3d 620, 621; *cf. Zouev*, 32 AD3d at 850). Notably, defendants had almost seven months within which to comply with the Legarretas' demand for Dr. Neal's patient list. As noted above, the court first ordered Dr. Neal to turn over the patient list in December 2011. Instead of seeking an extension of time to comply with that order or a stay of enforcement thereof, defendants simply ignored the court-ordered deadline. With respect to the January 2012 conditional order, defendants did not produce the patient list as ordered by February 1, 2012 and, instead, waited until that date to make a defective stay application.

Although defendants contend that Dr. Neal's failure to turn over the patient list by February 1, 2012 was not willful or contumacious,

it is well settled that, "where a conditional order ha[s] previously been entered based on the court's findings that a party ha[s] caused delay and failed to comply with the court's discovery orders, the court [i]s not required to find that [the defaulting party]'s conduct in failing to comply with the conditional order was 'willful' " (*Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532, 533; *see Gibbs*, 16 NY3d at 82; Siegel, NY Prac § 367 at 608 [4th ed 2005]). In any event, the court here concluded that "the uncontradicted evidence shows that this time Dr. Neal's refusal to comply with the Court's order was indeed willful and contumacious."

Inasmuch as defendants failed to demonstrate a reasonable excuse for their violation of the conditional order, we conclude with respect to the order and judgment in appeal No. 3 that the court properly granted Legarretas' motion for entry of a default judgment against defendants on all of the remaining causes of action in the contract action (*see Keller*, 103 AD3d at 533; *Sugar Foods De Mexico*, 88 AD3d at 1196; *Callaghan v Curtis*, 48 AD3d 501, 502; *cf. Gibbs*, 16 NY3d at 83).

We conclude with respect to appeal No. 4 that the court did not abuse its discretion in striking Dr. Neal's complaint in the personal injury action based upon her failure to disclose prior treatment for injuries to her neck and left arm. It is well settled that "[w]hile the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the Supreme Court's discretion, striking a pleading is appropriate [only] where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Hill*, 13 AD3d at 1096 [internal quotation marks omitted]; *see Luppino v Mosey*, 103 AD3d 1117, 1119; *Hann v Black*, 96 AD3d 1503, 1504). "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders" (*Flynn v City of New York*, 101 AD3d 803, 805; *see Doherty v Schuyler Hills, Inc.*, 55 AD3d 1174, 1176). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*Hann*, 96 AD3d at 1504-1505 [internal quotation marks omitted]).

Here, we conclude that the Legarretas established that Dr. Neal's failure to disclose her prior treatment was willful or contumacious based upon her repeated failure to produce requested medical authorizations and defendants' overall pattern of noncompliance in both the contract and personal injury actions (*see Doherty*, 55 AD3d at 1176; *see generally Hann*, 96 AD3d at 1505; *Hill*, 13 AD3d at 1096). The Legarretas first requested authorizations for "all medical and hospital records relating to the physical condition of [Dr. Neal] as set forth in the plaintiff's complaint" in July 2011. After the Legarretas made a motion to compel, Dr. Neal produced authorizations that were limited to treatment she received after June 12, 2009, the date of the alleged assault. The Legarretas thereafter demanded production of "all of Dr. Neal's medical records, *without any kind of temporal limitation*, relating in any way to her neck and the arm, wrist and hand that are the subject of this action" (emphasis added).

The Legarretas noted in correspondence with counsel for defendants that "Dr. Neal obviously treated with other physicians prior to June 12, 2009, including physicians in the locations she lived in prior to coming to Buffalo in 2006, including . . . Pennsylvania . . . We need authorizations from all such physicians, without any kind of temporal limitation, relating in any way to her neck and the arm, wrist and hand that are the subject of this action."

When defendants failed to provide the requested authorizations, the Legarretas filed another motion to compel in November 2011 seeking to strike defendants' complaint in the personal injury action unless Dr. Neal produced "complete medical authorizations for each and every physician she has treated with regarding injuries to her neck, shoulder, arm, wrist and hand that [were] the subject of th[at] action." The court granted the Legarretas' motion and ordered Dr. Neal to produce authorizations for the disclosure of all of her "adult medical records, i.e.[,] after her 21st birthday," relating to any treatment of her neck, shoulder, arm, wrist, and hand, both before and after the incident. In response, Dr. Neal provided revised authorizations that were again limited to medical providers she treated with after the date of the incident. In a January 2012 affirmation, Dr. Neal averred that she had produced authorizations concerning "all medical records since [she] was 21 years of age for treatment related to [her] 'neck, shoulder, arm, wrist and hand.' " Further, in a January 2012 deposition, Dr. Neal unequivocally testified that she experienced no symptoms and sought no medical treatment with respect to her left shoulder, arm, wrist, or hand prior to the June 12, 2009 incident, including during the four years she attended medical school in Pennsylvania.

Notwithstanding Dr. Neal's assertion, the Legarretas requested medical authorizations for doctors she treated with in Pennsylvania. In May 2012, Dr. Neal's new attorney finally provided the requested authorizations. The medical records produced thereto revealed that, despite her sworn assertions to the contrary, Dr. Neal had indeed sought treatment for her neck and left arm prior to the incident at issue. In November 1996, Dr. Neal went to two different emergency rooms on three consecutive days after she was involved in a motor vehicle accident. Although Dr. Neal asserted that she simply "did not recall" those three hospital visits, we conclude that the court did not abuse its discretion in rejecting her excuse, particularly in light of a similar situation that occurred in 2011 in the contract action.

We thus conclude that the court did not abuse its discretion in determining that Dr. Neal's failure to reveal her prior injuries and her attempts to frustrate the Legarretas' access to relevant medical records was willful and contumacious, and that her alleged inability to recall those prior injuries did not constitute a reasonable excuse (*see Hill*, 13 AD3d at 1096; *see also Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208-209; *Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850, 852; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 94 AD3d 491, 492). The court therefore properly exercised its discretion in striking Dr. Neal's complaint in the personal injury

action (*cf. Hill*, 13 AD3d at 1096).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

629

CA 12-01412

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

EDWARD A. LEGARRETA, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA A.L. NEAL, M.D., AND TWENTY 20 EYE CARE AND AESTHETIC OCULOPLASTIC MEDICINE, PLLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered March 1, 2012. The order and judgment, among other things, granted that part of plaintiff's motion for entry of a default judgment.

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

Same Memorandum as in *Legarreta v Neal* ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

630

CA 12-01856

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

MELISSA NEAL, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD A. LEGARRETA, M.D., LEGARRETA EYE CENTER AND SALLY LEGARRETA, DEFENDANTS-RESPONDENTS. (APPEAL NO. 4.)

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered September 18, 2012. The order and judgment dismissed the complaint.

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

Same Memorandum as in *Legarreta v Neal* ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

631

CA 12-02238

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

DANIEL ELSTEIN, HILTON ENTERPRISES, INC.,
AND TRASON HILTON, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PHILLIPS LYTLE, LLP, ALBERT M. MERCURY,
DEFENDANTS-RESPONDENTS,
AND ALFRED D. SPAZIANO, DEFENDANT.

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

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 5, 2012. The order granted the motion of defendants Phillips Lytle, LLP, and Albert M. Mercury and dismissed the complaint against those defendants.

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

Memorandum: In this legal malpractice action, plaintiffs appeal from an order granting the motion of Phillips Lytle, LLP and Albert M. Mercury (defendants) seeking dismissal of the complaint against them as time-barred. Plaintiffs contend that Supreme Court erred in determining the accrual date of their action, for legal malpractice. We reject that contention. " 'A cause of action for legal malpractice accrues when the malpractice is committed' " (*Amendola v Kendzia*, 17 AD3d 1105, 1108; *see Glamm v Allen*, 57 NY2d 87, 93). "In most cases, this accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' " (*McCoy v Feinman*, 99 NY2d 295, 301, quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541). " 'What is important is when the malpractice was committed, not when the client discovered it' " (*id.*, quoting *Shumsky v Eisenstein*, 96 NY2d 164, 166). Here, the alleged malpractice occurred no later than 2003, when plaintiff Daniel Elstein completed his acquisition of plaintiff Hilton Enterprises, Inc. (Hilton) from defendant Alfred D. Spaziano. Indeed, there is no indication in the record that defendants represented plaintiffs after that date. This action was not commenced until approximately eight years later, on March 4, 2011, and is thus time-barred under the applicable three-year statute of limitations (*see* CPLR 214 [6]).

We reject plaintiffs' contention that they were unable to sue defendants for malpractice until March 7, 2008, when the judgment was entered against Hilton, inasmuch as that is when they sustained an actionable injury. As the Court of Appeals has made clear, a malpractice claim becomes actionable when the plaintiff's damages become "sufficiently calculable" (*McCoy*, 99 NY2d at 305; *see Ackerman*, 84 NY2d at 541-542), and, here, plaintiffs' damages arising from the alleged legal malpractice were sufficiently calculable in January 2007, when plaintiffs learned of the alleged malpractice, if not sooner.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

638

KA 12-01020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEVIEAE T. LUGG, DEFENDANT-APPELLANT.

REBECCA L. WITTMAN, UTICA, 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 19, 2005. The judgment convicted defendant, upon his plea of guilty, of rape 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 plea of guilty of rape in the second degree (Penal Law § 130.30 [1]). We note that defendant's challenges to the jurisdictional requirements of the waiver of indictment and the superior court information need not be preserved for our review (*see People v Boston*, 75 NY2d 585, 589 n 2; *People v Finch*, 96 AD3d 1485, 1486; *People v Waid*, 26 AD3d 734, 734-735, *lv denied* 6 NY3d 839), and those challenges are also not precluded by defendant's valid waiver of his right to appeal (*see Finch*, 96 AD3d at 1486; *People v Harris*, 267 AD2d 1008, 1009). Contrary to defendant's contention, however, the record establishes that he entered a valid waiver of indictment, and freely and voluntarily consented to be prosecuted by way of a superior court information (*see* CPL 195.10, 195.20; *People v Burney*, 93 AD3d 1334, 1334; *see generally People v Davis*, 84 AD3d 1645, 1646, *lv denied* 17 NY3d 815). Additionally, defendant's contention that the superior court information was jurisdictionally defective lacks merit (*see generally* CPL 200.15; *People v Menchetti*, 76 NY2d 473, 475).

Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by the valid waiver of appeal and is unpreserved for our review inasmuch as defendant did not move to withdraw the plea or vacate the judgment of conviction on that ground (*see People v Rios*, 93 AD3d 1349, 1349, *lv denied* 19 NY3d 966). Although the contention of defendant that his guilty plea was not knowingly, voluntarily and intelligently entered survives his waiver of the right to appeal, because defendant did not move to withdraw the

plea or to vacate the judgment of conviction on that ground, he failed to preserve that contention for our review (*see Burney*, 93 AD3d at 1334; *People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). Defendant's further contention that he was denied effective assistance of counsel does not survive either the plea of guilty or the waiver by defendant of the right to appeal because he failed to demonstrate that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that he entered the plea because of his attorney[']s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see Burney*, 93 AD3d at 1334).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

642

KA 11-01705

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER SMITH, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL 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 Onondaga County Court (Anthony F. Aloi, J.), dated June 23, 2011. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was convicted following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirmed defendant's conviction on appeal (*People v Smith*, 90 AD3d 1565, *lv denied* 18 NY3d 998). While his direct appeal was pending, defendant moved pursuant to CPL 440.10 (1) (g) to vacate the judgment of conviction on the ground of newly discovered evidence, to wit, an affidavit from his codefendant stating that defendant was not involved in the crimes. County Court denied the motion without a hearing, ruling that the affidavit did not constitute newly discovered evidence. We affirm.

It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that "there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence" (*People v Madison*, 106 AD3d 1490, 1492 [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950). Here, it is not probable that defendant

would receive a more favorable verdict at a retrial if the codefendant testified in accordance with his affidavit (*see People v Jackson*, 238 AD2d 877, 878, *lv denied* 90 NY2d 859). It is undisputed that defendant was driving the codefendant when the codefendant shot the victim, and no one else was in the car. Moreover, it is unclear whether a jury would credit, upon a retrial, the codefendant's exculpatory testimony in light of the fact that the codefendant already pleaded guilty to assault in the first degree, was the individual who shot and injured the victim, did not provide the exculpatory statement until years after the trial, and provided that statement while serving his sentence at the same correctional facility as defendant.

Additionally, defendant failed to meet his burden of establishing that such exculpatory evidence could not have been discovered before trial by the exercise of due diligence (*see Salemi*, 309 NY at 216; *see also People v Grotto*, 241 AD2d 785, 786-787, *lv denied* 90 NY2d 940). According to the codefendant, he refused to testify on defendant's behalf because he was angry with defendant for getting him arrested, and he was afraid of jeopardizing his plea deal and thus wanted to assert his Fifth Amendment rights. Defendant, however, never submitted an affidavit from his trial counsel affirming that counsel attempted to speak with the codefendant and that the codefendant refused to cooperate, nor did defendant explain his failure to do so (*see generally People v Ozuna*, 7 NY3d 913, 915). Moreover, although "the affidavit of a codefendant who had previously exercised his [Fifth] Amendment right not to testify may constitute newly discovered evidence" (*People v Beach*, 186 AD2d 935, 936), here the codefendant never actually exercised his Fifth Amendment rights. In any event, the codefendant's assertion in his affidavit that he would have exercised those rights due to his concerns regarding his plea deal is of no moment inasmuch as he had already pleaded guilty and received his sentence weeks before defendant was tried.

Finally, "[i]n order to constitute newly discovered evidence, such evidence must not merely impeach or contradict the former evidence . . . The rule recognizes that recantation evidence is inherently unreliable . . . and insufficient alone to warrant vacating a judgment of conviction" (*People v Thibodeau*, 267 AD2d 952, 953, *lv denied* 95 NY2d 805). During his plea colloquy, the codefendant stated that he acted in concert with another man, and it is undisputed that defendant was the only other man present during the crime. The codefendant did not explain in his affidavit why he was recanting what he initially stated during his plea colloquy, i.e., that defendant was involved in the crime. In light of the above, the court properly determined that the codefendant's affidavit does not constitute newly discovered evidence and therefore properly denied the CPL 440.10 motion without a hearing (*see Jackson*, 238 AD2d at 878-879).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

643

KA 09-00318

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHEQUAN L. NATHAN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 18, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). The conviction stemmed from a street corner fistfight involving a group of teenagers and other young adults during which a shot was fired from defendant's gun, striking and killing a 16-year-old victim. The People presented evidence at trial that, during the altercation, defendant intentionally aimed the gun at the victim and shot him. Although defendant did not deny that his gun discharged and struck the victim, defendant presented evidence that the gun accidentally discharged while he was using it as a club in an attempt to protect one of his friends by preventing one of the other participants, Kavin Rowe, from pulling a gun out of his waistband. Thus, at trial, defendant contended that his use of physical force was justified in defense of a third person (§ 35.15 [1]).

We reject defendant's contention on appeal that Supreme Court erred in instructing the jury that, before it considered the defense of justification, it had to "first decide whether or not the defendant had actually used physical force against [Rowe]" (*see generally People v Spinks*, 244 AD2d 921, 921-922). The isolated portions of the charge challenged by defendant did not improperly shift the burden of proof to defendant (*see generally id.* at 922). Further, when the instructions are viewed in their entirety, the charge was a correct statement of the law, and properly identified and framed a factual

issue for the jury (*see People v DiGuglielmo*, 258 AD2d 591, 592, *lv denied* 93 NY2d 923; *see generally People v Coleman*, 70 NY2d 817, 819). We reject defendant's further contention that the court erred in refusing to charge the jury with respect to the voluntariness of defendant's statements to the police. A court is required to provide a charge regarding the voluntariness of defendant's statements only if defendant raises that issue, and "evidence sufficient to raise a factual dispute [is] adduced either by direct or cross-examination" (*People v Cefaro*, 23 NY2d 283, 288-289; *see People v Medina*, 93 AD3d 459, 460, *lv denied* 19 NY3d 999). Inasmuch as defendant did not submit any evidence presenting a genuine question of fact as to the voluntariness of his statements, the court was not required to instruct the jury on that issue (*see People v White*, 27 AD3d 884, 886, *lv denied* 7 NY3d 764).

Defendant also contends that the court erred in denying his request for an adverse inference charge concerning the failure of the police to record defendant's interrogation. " '[T]his Court has repeatedly determined . . . that the failure to record a defendant's interrogation electronically does not constitute a denial of due process' . . . , and thus an adverse inference charge was not warranted" (*People v Holloway*, 71 AD3d 1486, 1487, *lv denied* 15 NY3d 774; *see People v McMillon*, 77 AD3d 1375, *lv denied* 16 NY3d 897). Finally, defendant's sentence is not unduly harsh or severe.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

645

KA 09-02070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 29, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence seized after the police stopped a vehicle in which he was a passenger because the police improperly stopped the vehicle. We reject that contention. "The People established the reliability and basis of knowledge of the informant who provided the police with information concerning defendant's drug activities . . . , and the police had reasonable suspicion to stop defendant's vehicle based on that information" (*People v Dwyer*, 73 AD3d 1467, 1468, *lv denied* 15 NY3d 851; *see People v Porter*, 101 AD3d 44, 47-48, *lv denied* 20 NY3d 1064).

Defendant's contentions that his trial attorney had a conflict of interest and that he was ineffective due to that conflict concern matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Pagan*, 12 AD3d 1143, 1144, *lv denied* 4 NY3d 766; *People v Dunn*, 261 AD2d 940, 941, *lv denied* 94 NY2d 822). Defendant's contention that evidence of his postarrest silence was improperly admitted is not preserved for our review (*see People v Tarbell*, 167 AD2d 902, 902, *lv denied* 77 NY2d 883). In any

event, "[a]though improper, the unsolicited reference to defendant's invocation of the right to [remain silent] does not constitute a 'pervasive pattern of misconduct so egregious as to deprive defendant of a fair trial' " (*People v Beers*, 302 AD2d 898, 899, *lv denied* 99 NY2d 652). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that his Sixth Amendment right to confront his accusers was violated by the admission in evidence of testimony concerning a latent fingerprint that was processed and photographed by a technician who did not testify at trial (*see generally Crawford v Washington*, 541 US 36, 50-54). We reject that contention. The technician who processed and photographed the fingerprint did not compare the latent print to the fingerprints of defendant or any other suspect. Thus, the technician's findings were not testimonial because the latent fingerprint, "standing alone, shed[s] no light on the guilt of the accused in the absence of an expert's opinion that the [latent fingerprint] match[es] a known sample" (*People v Rawlins*, 10 NY3d 136, 159; *see generally Williams v Illinois*, ___ US ___, ___, 132 S Ct 2221, 2243-2244; *People v Pealer*, 20 NY3d 447, 455). Moreover, the analyst who determined that the latent print matched one of defendant's fingerprints in fact testified at trial and was available for cross-examination. Therefore, defendant's right to confront witnesses against him was not violated (*see Rawlins*, 10 NY3d at 159; *People v Hamilton*, 66 AD3d 921, 922, *lv denied* 13 NY3d 907).

Defendant contends that he was denied the right to effective assistance of counsel because defense counsel failed to make a detailed motion for a trial order of dismissal at the close of the People's proof and failed to renew the motion at the close of defendant's proof. We reject that contention. Defendant failed to demonstrate that such a motion would have been meritorious, and "there is no denial of effective assistance based on the failure to 'make a motion or argument that has little or no chance of success' " (*People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Defendant further contends that he was denied a fair trial based on prosecutorial misconduct during summation. Defendant's contention is preserved for our review only in part, and in any event we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Caldwell*, 98 AD3d 1272, 1273, *lv denied* 20 NY3d 985 [internal quotation marks omitted]). Additionally, we conclude that the sentence is not unduly harsh or severe.

Finally, defendant correctly contends that the uniform sentence and commitment sheet incorrectly recites that he was convicted as a second felony offender rather than as a second felony drug offender

(*see* Penal Law § 70.71 [1] [b]), and the uniform sentence and commitment sheet must therefore be modified to correct the clerical error (*see People v Vasavada*, 93 AD3d 893, 894, *lv denied* 19 NY3d 978; *see generally People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

646

KA 11-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KURY SPENCER, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 13, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts) and failure to keep right.

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 [4]), defendant contends that he was denied a fair trial based on prosecutorial misconduct. We reject that contention. When defense counsel objected to a remark made by the prosecutor during his opening statement on the ground that it improperly shifted the burden of proof, County Court instructed the jury to disregard the comment, and the jury is presumed to have followed the court's instruction (*see People v Page*, 105 AD3d 1380, 1382). Additionally, we conclude that the isolated remark did not deprive defendant of a fair trial (*see People v Turgeon*, 8 AD3d 1109, 1109, *lv denied* 3 NY3d 682). Defendant also contends that the prosecutor engaged in misconduct by pursuing charges relating to two victims because the incidents involving those victims occurred in a different jurisdiction from the incident involving the third victim, but we conclude that defendant was not prejudiced thereby. The charges against defendant arose from his actions while he was operating a motor vehicle and where his vehicle almost struck the respective vehicles of the two victims at issue before colliding head-on with a third vehicle; defendant, however, was convicted of charges stemming only from the collision with the third vehicle. Moreover, the evidence with respect to the near collision with the first two vehicles would have been admissible in the trial on the charges with respect to the collision with the third vehicle (*see People v MacLean*, 48 AD3d 1215, 1215-1216, *lv denied* 10 NY3d 866, *reconsideration denied* 11 NY3d 790), and thus

there was no prejudice to defendant (*see generally People v Brown*, 83 NY2d 791, 794). The remarks by the prosecutor during his cross-examination of a defense witness, while inappropriate, did not deny defendant a fair trial inasmuch as the remarks were not aimed at defendant nor did they have any negative impact on him (*see People v Rodriguez*, 103 AD2d 121, 128-129). Although we agree with defendant that the prosecutor engaged in misconduct by referring to facts not in evidence, the court issued strong curative instructions that alleviated any prejudice (*see People v Stallworth*, 21 AD3d 1412, 1413, *lv denied* 6 NY3d 759).

Contrary to defendant's contention, the court did not abuse its discretion in denying his request to poll the jurors to determine whether they had knowledge of a story published during the trial about the case (*see People v Rivera*, 31 AD3d 790, 790-791, *lv denied* 7 NY3d 904; *see generally People v Shulman*, 6 NY3d 1, 32, *cert denied* 547 US 1043; *People v Williams*, 78 AD3d 160, 167, *lv denied* 16 NY3d 838). The court properly noted that conducting such an inquiry "could have the effect of focusing the jurors' attention on something that there was no indication any of them had seen" (*Williams*, 78 AD3d at 167). The court also properly denied defendant's motion for a *Frye* hearing inasmuch as the testimony of the People's expert "did not involve any novel procedures or innovative scientific theory" (*People v Garrow*, 75 AD3d 849, 852; *see generally People v Wernick*, 89 NY2d 111, 115-116). Instead, the expert's conclusions regarding intoxication by dextromethorphan, an ingredient in cough syrup, were based on basic principles of toxicology, which is a "well-established and accepted methodolog[y]" (*Nonnon v City of New York*, 88 AD3d 384, 394; *see Marso v Novak*, 42 AD3d 377, 378, *lv denied* 12 NY3d 704, *rearg denied* 12 NY3d 881).

Finally, defendant contends that he "was unconstitutionally punished for exercising his right to a trial by a judge who should have recused himself." To the extent that defendant contends that the court should have granted his recusal motion, we conclude that there was no abuse of discretion by the court (*see People v Shultis*, 61 AD3d 1116, 1117, *lv denied* 12 NY3d 929; *People v Brown*, 270 AD2d 917, 917-918, *lv denied* 95 NY2d 851; *see generally People v Moreno*, 70 NY2d 403, 405-406). Defendant failed to preserve for our review his contention that the sentence was vindictive (*see People v Hurley*, 75 NY2d 887, 888; *People v Irrizarry*, 37 AD3d 1082, 1083, *lv denied* 8 NY3d 946) and, in any event, that contention is also without merit (*see Irrizarry*, 37 AD3d at 1083). It is well settled that " '[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*id.*). The sentence is not unduly harsh or severe.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

650

CAF 12-01372

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

IN THE MATTER OF MELISSA A. FERRUSI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHARIFF K. JAMES, RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 22, 2012 in a proceeding pursuant to Family Court Act article 8. The order, among other things, granted the petition.

It is hereby ORDERED that said appeal from the order insofar as it concerns commitment to jail is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent father appeals from an order, inter alia, finding that he willfully violated an order of protection and committing him to a jail term of six months. The commitment was stayed for a period of six months on the condition that the father not violate the order of protection. Contrary to the father's contention, petitioner mother established by clear and convincing evidence that the father willfully violated the terms of the order of protection (*see Matter of Mary Ann YY. v Edward YY.*, 100 AD3d 1253, 1254). We also conclude that the father's challenge to the commitment is moot because that part of the order has expired by its own terms (*see Matter of Alex A.C. [Maria A.P.]*, 83 AD3d 1537, 1538; *see generally Matter of Julie A.C. v Michael F.C.*, 15 AD3d 1007, 1007). Finally, we conclude that the father was not denied effective assistance of counsel. The father failed to meet his burden of demonstrating that the alleged failures of his counsel resulted in actual prejudice (*see Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

651

CA 12-01858

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

DASZ, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MERITOCRACY VENTURES, LTD., ARTHUR N. BAILEY,
U.S. COMMERCIAL HABITAT CO.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FIDELITY NATIONAL LAW GROUP, NEW YORK CITY (VANESSA R. ELLIOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN, AND FAHRINGER & DUBNO, NEW YORK CITY (HERALD PRICE FAHRINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 14, 2011. The order denied plaintiff'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.

Memorandum: Plaintiff commenced this foreclosure action after Meritocracy Ventures, Ltd. (Meritocracy), Arthur N. Bailey, and U.S. Commercial Habitat Co. (Commercial Habitat) (collectively, defendants) defaulted on a note executed by Bailey in his individual capacity and as the sole shareholder of Meritocracy and on a mortgage executed by Bailey as the president and sole shareholder of Meritocracy. Meritocracy transferred the mortgaged properties to Commercial Habitat.

We agree with plaintiff that Supreme Court erred in denying its motion for summary judgment on the complaint. Plaintiff met its initial burden by submitting the note and mortgage together with an affidavit of nonpayment (*see I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029; *Rochester Community Sav. Bank v Smith*, 172 AD2d 1018, 1019, *appeal dismissed* 78 NY2d 909, *rearg dismissed* 78 NY2d 1005, *rearg granted and lv denied* 79 NY2d 887; *see also Overseas Private Inv. Corp. v Nam Koo Kim*, 69 AD3d 1185, 1187, *lv dismissed* 14 NY3d 935).

"The burden then shifted to defendants to attempt to defeat

summary judgment by production of evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[] and [mortgage]" (*I.P.L. Corp.*, 202 AD2d at 1029; *see Rochester Community Sav. Bank*, 172 AD2d at 1019). Bailey admitted in his affidavit that he signed the note and mortgage without first reading them, but asserted that only the signature pages of the documents were made available to him on the day he signed them and that the attorney who prepared the note and mortgage fraudulently misrepresented their contents. It is well settled that " '[a] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents' " (*Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 788; *see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 11; *Pimpinello v Swift & Co.*, 253 NY 159, 162-163). Moreover, "[a] signer's duty to read and understand that which it signed is not diminished merely because [the signer] was provided with only a signature page" (*Vulcan Power Co. v Munson*, 89 AD3d 494, 495, *lv denied* 19 NY3d 807 [internal quotation marks omitted]; *see M&T Bank v HR Staffing Solutions, Inc.* [appeal No. 2], 106 AD3d 1498, 1499).

Defendants have failed to proffer a valid excuse as to why the complete documents could not have been procured prior to their signing, and we conclude that the failure of Bailey, who we note is an attorney and a sophisticated party, to read the note and mortgage before signing them "prevents him from establishing justifiable reliance, an essential element of fraud in the execution" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266, *lv dismissed* 12 NY3d 748; *see Morby v Di Siena Assoc.*, 291 AD2d 604, 605-606; *see generally Verstreate v Cohen*, 242 AD2d 862, 863; *Chase Lincoln First Bank v Mark Homes*, 170 AD2d 995, 995). In addition, we further note that the signature page of the mortgage that Bailey admits signing states that it is a mortgage (*see M&T Bank*, 106 AD3d at 1500).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

653

CA 12-02356

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

EVELYN M. GRAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ASTON B. WILLIAMS, M.D., DEFENDANT-RESPONDENT.

HAGELIN KENT LLC, BUFFALO (MICHAEL T. HAGELIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered July 30, 2012. The judgment, insofar as appealed from, granted that part of the motion of defendant for summary judgment dismissing plaintiff's third cause of action.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, that part of defendant's motion for summary judgment seeking dismissal of the third cause of action is denied and that cause of action is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of a colonoscopy performed by defendant, during which the rectosigmoid junction of plaintiff's colon was perforated. The perforation was not immediately noticed, and plaintiff underwent emergency surgery the next day to rectify the resulting medical problems. Plaintiff subsequently asserted three causes of action, for negligent performance of the colonoscopy, negligent post-procedure care, and lack of informed consent. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted that part of the motion with respect to the cause of action for lack of informed consent. Following a trial on the remaining causes of action, a jury found no negligence on the part of defendant.

As a preliminary matter, we note that the order from which plaintiff appeals was subsumed in the final judgment, from which no appeal was taken. In the exercise of our discretion we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see Cowley v Kahn*, 298 AD2d 917, 918; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5520 [c]).

We agree with plaintiff that the court erred in granting that

part of defendant's motion for summary judgment dismissing the cause of action for lack of informed consent. "To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908; *see* Public Health Law § 2805-d [1], [3]). We conclude that defendant met his initial burden of establishing his entitlement to judgment as a matter of law by submitting deposition testimony, medical records, and an expert report, which demonstrated that he informed plaintiff of the risks associated with the procedure, as well as plaintiff's signed written consent form, which confirmed her understanding of those risks (*see* Public Health Law § 2805-d [1]; *Lynn G. v Hugo*, 96 NY2d 306, 309). We reject plaintiff's contention that defendant's submissions in support of his motion were based solely upon habit evidence (*see generally Rivera v Anilesh*, 8 NY3d 627, 633-635). Contrary to plaintiff's further contention, we conclude that defendant's submissions were sufficient to establish his entitlement to summary judgment inasmuch as they address each factual allegation contained in plaintiff's bill of particulars (*cf. Payne v Buffalo Gen. Hosp.* [appeal No. 1], 96 AD3d 1628, 1630).

We agree with plaintiff, however, that the court erred in concluding that she failed to raise a triable issue of fact on the ground that she did not submit an expert's affidavit establishing that a reasonably prudent person in her position would have declined the procedure planned and performed by defendant had she received a qualitatively sufficient explanation of its risks. Contrary to the court's conclusion, expert testimony concerning what a reasonable person would have done in plaintiff's position is not necessary to maintain a cause of action premised upon lack of informed consent (*see Hugh v Ofodile*, 87 AD3d 508, 509*; Andersen v Delaney*, 269 AD2d 193, 193; *see generally* Public Health Law § 2805-d [3]). Here, we conclude that plaintiff's affidavit addressing that element was sufficient to raise a triable issue of fact (*see James v Greenberg*, 57 AD3d 849, 850). We further conclude that the affidavit of plaintiff's expert was sufficient to raise a triable issue of fact with respect to the qualitative insufficiency of the consent (*see Johnson v Jacobowitz*, 65 AD3d 610, 613-614, *lv denied* 14 NY3d 710; *cf. Evans v Holleran*, 198 AD2d 472, 474). We therefore reverse the judgment insofar as appealed from and deny defendant's motion to the extent it seeks summary judgment dismissing the cause of action for lack of informed consent.

Finally, plaintiff's contention that the dismissal of the cause of action for lack of informed consent materially prejudiced her ability to try the remaining causes of action is not properly before this Court inasmuch as she limited her notice of appeal to issues related to the cause of action for lack of informed consent (*see State Farm Mut. Auto. Ins. Cos. v Jaenecke*, 81 AD3d 1474, 1474-1475, *lv denied* 17 NY3d 701). In any event, plaintiff failed to provide a transcript of the trial, thus rendering the record insufficient for this Court to determine that issue on the merits (*see generally Mergl*

v Mergl, 19 AD3d 1146, 1147).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

657

CA 11-02396

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

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

V MEMORANDUM AND ORDER

LARRY SCHRAENKLER, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (LISA L. PAINE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered October 25, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, respondent appeals from an order confining him to a secure treatment facility upon a jury verdict determining that he had a mental abnormality and a determination by Supreme Court, after a dispositional hearing, that respondent was a dangerous sex offender requiring confinement. On appeal, respondent contends the court erred in denying his motion to preclude evidence of a 1991 offense because the charges were dismissed and the file was sealed. We reject that contention (*see Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563, 1563-1564). In August 1991, respondent was arrested and charged with endangering the welfare of a child. Although that charge ultimately was dismissed and the record sealed, respondent was questioned about that charge during his discussions with petitioner's expert psychologists. Those experts relied on the underlying facts of the 1991 charge in forming their opinions that respondent suffered from a mental abnormality and each testified that such evidence was considered reliable in their profession (*see generally Matter of State of New York v Motzer*, 79 AD3d 1687, 1688). Evidence of prior crimes is commonly admissible in article 10 proceedings because it is probative of whether a designated felony was sexually motivated and whether a respondent has a mental abnormality (*see Matter of State of New York v Shawn X.*, 69 AD3d 165, 171-172, *lv denied* 14 NY3d 702), and evidence of uncharged crimes likewise is admissible in article 10

proceedings because "Mental Hygiene Law article 10 does not limit the proof to acts that resulted in criminal convictions when considering the issue of mental abnormality" (*Matter of State of New York v Timothy J.J.*, 70 AD3d 1138, 1143).

Contrary to respondent's further contention, petitioner met its burden of proving by clear and convincing evidence that respondent is a detained sex offender who suffers from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control his behavior, that confinement in a secure treatment facility is required (*see* Mental Hygiene Law § 10.07 [d]; *Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473-1474, *lv denied* 17 NY3d 702), and there is no basis upon which to disturb the court's determination in that regard (*see Matter of State of New York v Harland*, 94 AD3d 1558, 1559, *lv denied* 19 NY3d 810).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

667

KA 11-01412

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLA C. STERINA, DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (MICHAEL P. SCHIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Frances A. Affronti, J.), rendered March 15, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and assault 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 her upon a jury verdict of two counts each of burglary in the first degree (Penal Law § 140.30 [2], [3]) and assault in the second degree (§ 120.05 [2], [6]). We reject defendant's contention that Supreme Court erred in refusing to charge criminal trespass in the second degree (§ 140.15 [1]) as a lesser included offense of burglary in the first degree (§ 140.30 [2], [3]). Contrary to defendant's contention, there is no reasonable view of the evidence to support the theory that she unlawfully entered the victim's dwelling, but did not intend to commit a crime therein (*see* § 140.30; *People v Santos*, 101 AD3d 427, 428, *lv denied* 20 NY3d 1103; *People v Clarke*, 233 AD2d 831, 832, *lv denied* 89 NY2d 1010, *reconsideration denied* 90 NY2d 856; *see generally People v Glover*, 57 NY2d 61, 63-64). The evidence established that defendant and her accomplices broke down the door, entered the house armed with one or more baseball bats, and immediately attacked the victim's son (*see People v Massey*, 45 AD3d 1044, 1046, *lv denied* 9 NY3d 1036). To the extent that defendant contends that she was entitled to the lesser included charge because there is a reasonable view of the evidence that she did not enter the victim's house, that assertion is unpreserved (*see People v McCoy*, 91 AD3d 537, 537-538). In any event, that contention lacks merit inasmuch as both criminal trespass in the second degree and burglary in the first degree require entry into a dwelling (*see* §§ 140.15 [1]; 140.30).

As defendant correctly concedes, her challenge to the legal sufficiency of the evidence with respect to the crime of burglary in the first degree is unpreserved for our review inasmuch as she failed to renew her motion for a trial order of dismissal after presenting evidence (*see People v Lugo*, 87 AD3d 1403, 1404, *lv denied* 18 NY3d 860). In any event, that contention is without merit. Contrary to defendant's contention, the People established that she entered a dwelling, i.e., the victim's home, which is a necessary element of burglary in the first degree (*see* Penal Law § 140.30; *People v Prince*, 51 AD3d 1052, 1053-1054, *lv denied* 10 NY3d 938). The entry element of burglary is satisfied "when a person intrudes within a [dwelling], no matter how slightly, with any part of his or her body" (*People v King*, 61 NY2d 550, 555; *see People v Cleveland*, 281 AD2d 815, 816, *lv denied* 96 NY2d 900). Here, several witnesses unequivocally testified that defendant and another assailant entered the foyer of the victim's home after breaking down the door, and a recording of the contemporaneous 911 call made by the victim's sister indicates that she told the 911 operator that the assailants were "inside the house" (*see generally Prince*, 51 AD3d at 1054; *People v Rivera*, 301 AD2d 787, 788, *lv denied* 99 NY2d 631). Indeed, the victim specifically identified the location where she observed defendant and the other assailant striking her son, which was several feet inside the house. With respect to the intent element, it is well settled that, "in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry . . . [C]ontemporaneous intent is required" (*People v Gaines*, 74 NY2d 358, 363). A defendant's intent to commit a crime "may be inferred from the circumstances of the entry" (*id.* at 362 n 1; *see People v Mitchell*, 254 AD2d 830, 831, *lv denied* 92 NY2d 984; *Clarke*, 233 AD2d at 832). Here, we conclude that the violent nature of defendant's entry into the home, including breaking down the door, forcing her way into the house, and immediately attacking the occupants, sufficiently establishes her intent to commit a crime at the time of entry (*see Massey*, 45 AD3d at 1046; *Clarke*, 233 AD2d at 832). Contrary to the further contention of defendant, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence on the issue of identification (*see People v Dark*, 104 AD3d 1158, 1158; *People v Carr*, 99 AD3d 1173, 1174, *lv denied* 20 NY3d 1010; *People v Mobley*, 49 AD3d 1343, 1345, *lv denied* 11 NY3d 791; *see generally People v Bleakey*, 69 NY2d 490, 495). Although a different verdict would not have been unreasonable in light of, inter alia, defendant's testimony that she did not participate in the attack, "[t]he jury's resolution of credibility and identification issues is entitled to great weight" (*People v Kelley*, 46 AD3d 1329, 1331, *lv denied* 10 NY3d 813 [internal quotation marks omitted]), and we cannot conclude on this record that the jury failed to give the evidence the weight it should be accorded (*see Mobley*, 49 AD3d at 1345; *Kelley*, 46 AD3d at 1331). Notably, four witnesses, including the victim, testified that defendant was one of the assailants.

Defendant failed to preserve for our review her contention that she was denied a fair trial by prosecutorial misconduct on summation

(*see* CPL 470.05 [2]; *People v Wiley*, 104 AD3d 1314, 1314), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to the further contention of defendant, we conclude that the court did not abuse its discretion in denying without a hearing her posttrial motion to set aside the verdict pursuant to CPL 330.30 (3) inasmuch as "defendant failed to show that the allegedly new evidence could not have been discovered earlier in the exercise of reasonable diligence" (*People v Robertson*, 302 AD2d 956, 958, *lv denied* 100 NY2d 542; *see People v Archie*, 78 AD3d 1560, 1561, *lv denied* 16 NY3d 856). The purportedly new evidence consisted of affidavits from defendant and two other witnesses who alleged that defendant's mother paid two other women to attack the victims. Defendant, however, admitted that her mother informed her of those alleged facts over a year prior to trial.

Finally, the sentence is not unduly harsh or severe.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

668

KA 11-01579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERSHEL J. TWOGUNS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 29, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, failure to drive on right side of road, following too closely and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting defendant's omnibus motion insofar as it sought dismissal of counts two and three of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), resisting arrest (Penal Law § 205.30), and two traffic infractions, defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking dismissal of the indictment on the ground that the arresting police officer lacked authority to arrest defendant outside the geographical area of the officer's employment. We agree in part with defendant and therefore grant that part of his omnibus motion with respect to counts two and three of the indictment, which charge defendant with the traffic infractions.

The authority of a police officer to arrest an individual for a "petty offense" is limited to circumstances in which the officer "has reasonable cause to believe that such person has committed such offense in his or her presence" (CPL 140.10 [1] [a]), and "only when . . . [s]uch offense was committed or believed by him or her to have been committed within the geographical area of such police officer's employment or within one hundred yards of such geographical area" (CPL 140.10 [2] [a]). The term "petty offense" is defined as "a violation

or a traffic infraction" (CPL 1.20 [39]). Here, the arresting officer is employed by the Village of Gowanda, and it is undisputed that the arrest did not take place within 100 yards of the village limits. Thus, we conclude that the officer exceeded his jurisdictional authority when he arrested defendant for committing the traffic infractions, and the court should have granted defendant's motion insofar as it sought dismissal of those counts.

We further conclude, however, that the court properly refused to dismiss counts one and four of the indictment, charging defendant with felony driving while intoxicated and resisting arrest, respectively. Pursuant to CPL 140.10 (3), a police officer may arrest a person for a crime, as opposed to a petty offense, "whether or not such crime was committed within the geographical area of such police officer's employment, and he or she may make such arrest within the state, regardless of the situs of the commission of the crime." Thus, the fact that defendant was arrested outside the Village of Gowanda does not bar prosecution of the crimes charged in the indictment.

Although defendant contended in his motion papers that counts one and four of the indictment must be dismissed as fruit of the poisonous tree, he has since abandoned that contention and now contends only that the officer lacked reasonable suspicion to stop his vehicle. We reject that contention. The arresting officer testified at the pretrial hearing that he received an anonymous telephone call from someone at the Iroquois Gas Station. According to the caller, there was a man at the gas station who had exited a vehicle and was stumbling around as if he were drunk. The caller provided a description of the vehicle and identified its license plate number. When the officer arrived at the gas station several minutes later, he observed a vehicle pulling into the roadway that matched the description provided by the caller. In addition, the vehicle's license plate number was the same as that provided by the caller. The vehicle, upon entering the roadway, crossed over the center line in violation of Vehicle and Traffic Law § 1120 (a), and then pulled up closely behind another vehicle in the same lane of traffic, in violation of Vehicle and Traffic Law § 1129 (a). The officer then activated his emergency lights and stopped the vehicle. We conclude that the specific nature of the anonymous call, when combined with the officer's first-hand observations, provided the requisite reasonable suspicion to stop defendant's vehicle (*see generally People v Moss*, 89 AD3d 1526, 1527, *lv denied* 18 NY3d 885; *People v Jeffery*, 2 AD3d 1271, 1272).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

672

CAF 12-00645

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

IN THE MATTER OF TIMOTHY J. DUBIEL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STACY L. SCHAEFER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered June 23, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner increased visitation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph in its entirety, and by directing in the fifth ordering paragraph that respondent, rather than petitioner, shall have parenting time on Labor Day weekend each year and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, granted petitioner father increased visitation with the parties' two children and, in appeal No. 2, she appeals from an order that, inter alia, awarded petitioners therein, the maternal grandparents (grandparents), visitation with the children. With respect to appeal No. 1, we conclude that, contrary to the mother's contention, the father established a change in circumstances warranting a modification of the access provisions in the parties' separation agreement (*cf. Griffin v Griffin*, 104 AD3d 1270, 1271). " '[A] change in circumstances may be demonstrated by, inter alia, . . . interference with the noncustodial parent's visitation rights and/or telephone access' " (*Goldstein v Goldstein*, 68 AD3d 717, 720), and the record here establishes that the mother interfered with the father's telephone communications with the children.

Contrary to the mother's further contention, we conclude that Family Court properly determined that it was in the children's best interests to increase the father's visitation with them (*see Matter of Swett v Balcom*, 64 AD3d 934, 935-936, *lv denied* 13 NY3d 710; *Matter of Wallace B.O. v Christine R.S.-O.*, 12 AD3d 1057, 1057-1058). We agree with the mother, however, that the court abused its discretion with respect to certain aspects of the revised visitation schedule (*see*

generally Matter of Mathewson v Sessler, 94 AD3d 1487, 1489-1490, *lv denied* 19 NY3d 815). The court abused its discretion in granting the father parenting time "each and every weekday morning that school is in session before school if he is able to exercise such parenting time and ensure that the children are transported to school." That award, which is contained in the fourth ordering paragraph of the order, is not in the children's best interests because it creates instability for them and is likely to increase tensions between the parents as a result of the almost daily transfer of the children. We therefore modify the order in appeal No. 1 accordingly.

We further agree with the mother that the remaining provisions of the fourth ordering paragraph are ambiguous, confusing, and unnecessary. The remainder of that paragraph provides that "[t]he father shall be entitled to arrange for before or after school childcare. The parents shall share decision-making regarding the minor children; however, if the parents disagree as to a major decision regarding the children's before or after school child-care arrangements or any type of childcare needed, it is ordered that the father's decision shall control in this area." It is not clear what constitutes a "major decision" with respect to childcare, and we conclude that each parent should be responsible for making childcare arrangements during his or her respective parenting time. We therefore further modify the order in appeal No. 1 accordingly.

In addition, we agree with the mother that the court abused its discretion in awarding the father both Memorial Day and Labor Day weekends every year. We therefore further modify the order in appeal No. 1 by directing in the fifth ordering paragraph that the mother, rather than the father, shall have parenting time on Labor Day weekend each year.

With respect to appeal No. 2, the mother conceded at trial that the grandparents had standing to seek visitation pursuant to Domestic Relations Law § 72 (1). In any event, we conclude that the grandparents established "a prima facie case of standing to seek visitation with the subject child[ren]" inasmuch as they demonstrated "the existence of a sufficient relationship with the child[ren] to warrant the intervention of equity" (*Matter of Gray v Varone*, 101 AD3d 1122, 1123; *see generally Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182-183). The record establishes that the grandparents regularly visited with the children before the mother ceased permitting such visits. In addition, the grandmother provided full-time daycare for the children before they reached school-age, took the children to pre-kindergarten, and engaged in activities with them after school, and the grandfather attended the children's school activities. We agree with the mother, however, that the order awarding visitation to the grandparents should be modified to avoid conflict with the parents' order of custody and visitation. We therefore modify the order in appeal No. 2 by vacating that part of the first ordering paragraph directing that the grandparents' monthly Sunday visitation take place during the mother's parenting time and inserting in place thereof a direction that the grandparents' monthly visitation occur during the father's parenting time in odd-numbered months and during the mother's

parenting time in even-numbered months. We conclude that the modification is in the best interests of the children inasmuch as it will prevent any conflict with Mother's day or Father's day and will distribute the grandparents' monthly visitation evenly between the parents.

Finally, we agree with the mother that the court abused its discretion in awarding the grandparents one summer weekend of visitation during the mother's parenting time because it deprived the mother of "significant 'quality time' " with the children (*Cesario v Cesario*, 168 AD2d 911, 911; *see also Chamberlain v Chamberlain*, 24 AD3d 589, 592-593). The order in appeal No. 1 provides that the parents shall alternate physical custody of the children on a weekly basis from July 1 until August 25, beginning with the father's parenting time. Thus, the mother receives only three weekends with her children during the summer, one of which must be shared with the grandparents to accommodate their monthly Sunday visitation. Awarding the grandparents a summer weekend of visitation during the mother's parenting time results in the mother having only one full weekend with the children in the summer and effectively gives the grandparents more weekend time with the children in the summer than the mother, an arrangement that we conclude is not in the children's best interests. We therefore further modify the order in appeal No. 2 by vacating that part of the first ordering paragraph directing that the grandparents have one summer weekend of visitation during the mother's parenting time.

We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

673

CAF 12-00788

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

IN THE MATTER OF MARCIA SCHAEFER AND GEORGE SCHAEFER, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

STACY L. SCHAEFER, RESPONDENT-APPELLANT, AND TIMOTHY JOHN DUBIEL, RESPONDENT. (APPEAL NO. 2.)

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT.

LISA M. FAHEY, EAST SYRACUSE, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered July 14, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted visitation to petitioners.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph directing that petitioners' monthly Sunday visitation take place during the parenting time of respondent Stacy L. Schaefer and inserting in place thereof a direction that petitioners' monthly visitation take place during the parenting time of respondent Timothy John Dubiel in odd-numbered months and during the parenting time of respondent Stacy L. Schaefer in even-numbered months, and by vacating that part of the first ordering paragraph directing that petitioners have one summer weekend of visitation during the parenting time of respondent Stacy L. Schaefer, and as modified the order is affirmed without costs.

Same Memorandum as in *Matter of Dubiel v Schaefer* (___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

676

CA 12-01654

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

ANNE M. ACCETTA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AFTON R. SIMMONS, DEFENDANT-RESPONDENT.

LAW OFFICE OF JACOB P. WELCH, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 14, 2012. The order denied the motion of plaintiff for a default judgment and granted the cross motion of defendant to compel plaintiff to accept the answer as timely.

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

Memorandum: In this personal injury action arising from a motor vehicle accident, plaintiff appeals from an order that denied her motion for a default judgment and granted defendant's cross motion seeking, inter alia, to compel plaintiff to accept service of the late answer. Contrary to plaintiff's contention, Supreme Court did not abuse its discretion in denying the motion and granting the cross motion.

It is well settled that " '[p]ublic policy favors the resolution of a case on the merits, and a court has broad discretion to grant relief from a pleading default if there is a showing of merit to the defense, a reasonable excuse for the delay and it appears that the delay did not prejudice the other party' " (*Case v Cayuga County*, 60 AD3d 1426, 1427, *lv dismissed* 13 NY3d 770). Furthermore, "[t]he determination whether an excuse is reasonable lies within the sound discretion of the motion court" (*Lauer v City of Buffalo*, 53 AD3d 213, 217; *see Armele v Moose Intl.*, 302 AD2d 986, 987). Here, defendant met her burden with respect to a meritorious defense by demonstrating that there is factual support for her defenses (*see generally Davidson v Straight Line Contrs., Inc.*, 75 AD3d 1143, 1144; *Evolution Impressions, Inc. v Lewandowski*, 59 AD3d 1039, 1040).

Contrary to plaintiff's further contention, defendant provided a

reasonable excuse for the delay in serving an answer. Defendant submitted evidence establishing that she notified her insurer that an action had been commenced against her, but the insurance company's representative misunderstood the conversation and took no action to begin the process of providing an attorney to represent her. The insurer promptly provided an attorney after defendant sent it a copy of the complaint, however, and also attempted to contact plaintiff's attorney regarding the matter. In addition, the attorney sent the answer to plaintiff's attorney within 40 days after the deadline for timely service had passed. We agree with defendant that she thereby demonstrated a reasonable excuse for her default, "which resulted from the inadvertence of [defendant]'s liability insurer" (*Hayes v R.S. Maher & Son*, 303 AD2d 1018, 1018; *see Dodge v Commander*, 18 AD3d 943, 945; *see generally Crandall v Wright Wisner Distrib. Corp.*, 59 AD3d 1059, 1059-1060). Insofar as we indicated in our decision in *Smolinski v Smolinski* (13 AD3d 1188, 1189) that " 'an excuse that the delay in appearing or answering was caused by the defendant's insurance carrier is insufficient' " to establish a reasonable excuse for a delay in answering, it is no longer to be followed. Rather, the determination whether delay caused by an insurer constitutes a reasonable excuse for a default in answering lies "in the discretion of the court in the interests of justice" (*Castillo v Garzon-Ruiz*, 290 AD2d 288, 290; *see* CPLR 2005). Finally, we conclude that plaintiff failed to establish that she sustained any prejudice from the brief delay (*see generally Case*, 60 AD3d at 1427).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

681

CA 12-02214

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

THE EKELMANN GROUP, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

W. DEAN STUART, ALSO KNOWN AS WARREN DEAN STUART, MARGO J. STUART, CRYSTAL VALLEY FARMS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

THE SNAVELY LAW FIRM, PAINTED POST (MICHAEL WEGMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (J. ERIC CHARLTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered August 14, 2012. The order, inter alia, granted the motion of plaintiff for summary judgment against defendants W. Dean Stuart, also known as Warren Dean Stuart, Margo J. Stuart and Crystal Valley Farms.

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

Same Memorandum as in *The Ekelmann Group, LLC v Stuart* ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

682

CA 12-02215

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

THE EKELMANN GROUP, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

W. DEAN STUART, ALSO KNOWN AS WARREN DEAN STUART, MARGO J. STUART, CRYSTAL VALLEY FARMS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

THE SNAVELY LAW FIRM, PAINTED POST (MICHAEL WEGMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (J. ERIC CHARLTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered September 18, 2012. The order, among other things, appointed a referee.

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

Memorandum: Defendant W. Dean Stuart, also known as Warren Dean Stuart (Stuart), was variously the mortgagor, borrower, or debtor on several mortgages and promissory notes that were assigned to National Loan Investors, L.P. (NLI) in 1996. All of those documents were subsequently consolidated into a single note and single mortgage (collectively, loan documents) in 2006, at which time defendants Margo J. Stuart and Crystal Valley Farms also became obligated thereunder, together with Stuart (collectively, defendants). Defendants often defaulted on their obligations under the loan documents, and NLI entered into "forbearance agreements" with defendants or was otherwise lenient in enforcing the terms of the loan documents. In 2011 the loan documents were assigned to plaintiff, which thereafter entered into subordination agreements with various parties regarding payments those parties owed to defendants. Plaintiff thereafter commenced this foreclosure action alleging in a single cause of action that defendants were in default on the loan documents.

In appeal No. 1, defendants appeal from an order that, inter alia, granted plaintiff's motion for partial summary judgment on liability against defendants, struck defendants' answer and affirmative defenses, dismissed defendants' counterclaims, and denied

defendants' two cross motions to the extent that defendants sought to amend the answer or sought summary judgment dismissing the amended complaint. In appeal No. 2, defendants appeal from an order that incorporated by reference the order in appeal No. 1 and in addition, inter alia, appointed a referee to ascertain and compute the amounts due upon the loan documents. We dismiss the appeal from the order in appeal No. 1 (*see generally Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051), and affirm the order in appeal No. 2.

We conclude that Supreme Court properly granted plaintiff's motion seeking, inter alia, partial summary judgment on liability against defendants. Plaintiff "established [its] prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of a default" (*Ferri v Ferri*, 71 AD3d 949, 949), and defendants failed "to demonstrate the existence of a triable issue of fact regarding a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, *lv dismissed* 91 NY2d 1003; *see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 183, *rearg denied* 57 NY2d 674; *see generally Ferlazzo v Riley*, 278 NY 289, 292).

Contrary to defendants' contention, a letter dated April 21, 2011 from plaintiff's counsel to Empire Pipeline, Inc. (Empire), one of the parties with whom plaintiff had entered into a subordination agreement temporarily curtailing any payments from Empire to defendants, did not raise a triable issue of fact whether plaintiff had violated its duty of good faith and fair dealing and intentionally interfered with Stuart's contract with Empire. That contention is premised on defendants' assumption that NLI had previously waived all defaults and was estopped from demanding strict compliance with the loan documents. We note, however, that plaintiff failed to establish that there was anything in the letter sufficient to constitute a valid waiver of defaults or to estop plaintiff from commencing this foreclosure action (*see Nassau Trust Co.*, 56 NY2d at 185-187). We conclude that defendants' other contentions premised on the letter of April 21, 2011 are also without merit, and defendants have thus failed to demonstrate the existence of a triable issue of fact regarding a defense to the foreclosure action based on that letter (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject the contentions of defendants that the subordination agreements improperly affected their interests or violated public policy and that the alleged reduction in the value of the mortgaged premises was a complete defense to the foreclosure action (*see Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 404). We reject the further contention of defendants that the terms of the note were unconscionable as enforced by plaintiff on the ground that NLI "duped" defendants into signing the note by affording them numerous years of unusually lenient treatment. Defendants have thus failed to demonstrate a triable issue of fact based on the subordination agreements or the terms of the note (*see generally*

Zuckerman, 49 NY2d at 562).

Contrary to defendants' contention, we conclude that plaintiff did not waive entitlement to the default interest rate based on NLI's continued acceptance of late payments. Even if NLI or plaintiff had waived entitlement to the default interest rate, that waiver would not affect plaintiff's entitlement to summary judgment; it would affect only the amount due to plaintiff in foreclosure, which the referee appointed by the court will calculate (*see Shufelt v Bulfamante*, 92 AD3d 936, 937). In any event, the note contains a provision explicitly stating that the failure of NLI or any other holder of the note to exercise an available right or remedy will not constitute a waiver of that right or remedy, and that the note may be "changed" only by an agreement in writing signed by the party against whom such an agreement is sought to be enforced. We reject defendants' contention that the account statements issued by NLI to defendants, which did not apply the default interest rate, constituted a written amendment under that provision of the note, thus giving rise to a waiver. A waiver must be "clear, unmistakable and without ambiguity" (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [internal quotation marks omitted]), and we conclude that the account statements do not meet that standard. Finally, we conclude that defendants do not have standing to assert the defense that plaintiff failed to give proper notice under RPAPL 1303 (*see generally NYCTL 1996-1 Trust v King*, 13 AD3d 429, 430).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

685

KA 09-02473

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE C. BRADLEY, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 3, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying his motion to suppress the firearm that he was charged with possessing. Specifically, defendant contends that the police unlawfully stopped him while he was walking his miniaturized motorbike on the sidewalk, and that the firearm must be suppressed as a result of that unlawful stop. We reject that contention. At the suppression hearing, a police officer testified that he stopped defendant because defendant was riding the motorbike in the road without a helmet. When the officer asked defendant whether he had any identification, defendant answered, “no,” and took a step back, whereupon the officer reached toward defendant in an attempt to frisk him. Before the officer could detain him, however, defendant ran away and, during his flight, punched another officer who had joined in the pursuit. Defendant was soon apprehended and found to be in possession of a loaded firearm, 20 bags of marihuana, and more than $2,000 in cash.

During a break in the suppression hearing, defendant learned that the police had inadvertently sold his motorbike at auction. The sale took place approximately four months after defendant’s arrest and two months before the suppression hearing. When the suppression hearing resumed, defendant’s uncle testified that the motorbike was inoperable on the day of defendant’s arrest, thereby calling into question the

officer's hearing testimony that defendant had been riding the motorbike without a helmet. In rebuttal, the People called another police officer as a witness, who testified that she saw defendant riding the same motorbike in the road 5 to 10 minutes before he was stopped and that, after defendant was taken into custody, she started the motorbike and "revved the engine." The court then permitted defendant to take the stand as the final witness. Defendant testified that the motorbike would not start on the day in question and that he was pushing it on the sidewalk to his house from his uncle's house, where it had been stored since it had broken down. The court denied defendant's suppression motion, stating that its decision was based on the testimony that it found to be credible.

In support of his contention that the stop was unlawful, defendant contends that the court should have drawn a permissive adverse inference against the People due to the failure of the police to preserve the motorbike. At the suppression hearing, however, defendant did not request a permissive adverse inference; instead, defendant asked the court to preclude any testimony at the hearing about the motorbike and to strike any such testimony that had already been given. In the alternative, defendant asked the court to assume that the condition of the motorbike was as defendant alleged, i.e., inoperable. Thus, defendant's contention that the court should have drawn a permissive adverse inference is unpreserved for our review (*see* CPL 470.05 [2]).

In any event, even assuming, arguendo, that defendant requested the court to draw an adverse inference, and that the court erred in failing to do so (*see People v Handy*, 20 NY3d 663, 669-670), we conclude that such error is harmless (*see People v Blake*, 105 AD3d 431, 431). We note that, in his motion papers, defendant's attorney stated that a suppression hearing was warranted because defendant, when detained by the police, was "sitting on the front lawn of a home on Reynolds Street" with several of his friends. Although defense counsel knew at the time that the police had claimed to have stopped defendant for riding the motorbike without a helmet, he did not assert that the motorbike was inoperable or that defendant was walking it on the sidewalk when approached by the police. It was only after defendant learned that the motorbike had been sold at auction that defendant asserted that the motorbike was inoperable. Under those circumstances, and considering that the court evidently credited the testimony of the police officers (*see generally People v Prochilo*, 41 NY2d 759, 761), we conclude that there is no reasonable possibility that the court would have found the stop to have been unlawful even if it had drawn a permissive adverse inference against the People (*see generally People v Crimmins*, 36 NY2d 230, 237).

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

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

690

KA 11-01761

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG BURROUGHS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CRAIG BURROUGHS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 19, 2011. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (two counts), sodomy in the third degree (two counts), rape in the first degree and rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of rape in the third degree under count six of the indictment, sodomy in the first degree under counts one and three of the indictment, and sodomy in the third degree under counts two and four of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), rape in the third degree (§ 130.25 [2]), and two counts each of sodomy in the first degree (former § 130.50 [1]) and sodomy in the third degree (former § 130.40 [2]). We agree with defendant that Supreme Court erred in denying his omnibus motion to the extent that it sought to dismiss as time-barred all counts of the indictment except that charging rape in the first degree.

The facts relevant to this issue are not in dispute. On December 10, 2002, the victim was raped and sodomized by a stranger who dragged her into the woods while she was walking to school. Following the attack, the victim was taken to the hospital where a rape kit was performed. The rape kit yielded a DNA profile of the male perpetrator, and that profile was entered in the statewide DNA databank in January 2003. Although defendant’s DNA profile had been

in the statewide databank since 1998, he did not become a suspect until January 2008, when the Division of Criminal Justice Services notified local authorities that defendant's DNA profile matched that of the perpetrator.

For reasons that are unclear from the record, the police did not arrest defendant until more than two years later, on February 25, 2010, which was more than seven years after the crimes at issue were committed. An indictment was later filed charging defendant with rape in the first and third degrees, and two counts each of sodomy in the first and third degrees. Notably, although the crimes of sodomy in the first and third degree had in 2003 been renamed criminal sexual act in the first and third degree, respectively, that change in nomenclature was not retroactive and did not apply to defendant, who was thus properly charged with sodomy rather than criminal sexual act (*see* L 2003, ch 264, § 72 [eff Nov. 1, 2003]). In his omnibus motion, defendant sought, inter alia, dismissal of all of the charges on the ground that they were untimely because he was not charged within the applicable statute of limitations. The court denied the motion, and defendant was later found guilty of all counts of the indictment.

With respect to the merits, we note that, in 2002, when the crimes were committed, the statute of limitations for the charged offenses was five years (*see* CPL 30.10 former [2] [b]). Because he was not charged until more than seven years later, defendant raised a facially viable statute of limitations defense, and the burden thus shifted to the People to prove beyond a reasonable doubt that the statute of limitations was tolled or otherwise inapplicable (*see People v Kohut*, 30 NY2d 183, 186; *People v Dickson*, 133 AD2d 492, 494-495; *see also People v Knobel*, 94 NY2d 226, 229). We conclude that the People satisfied their burden with respect to the charge of rape in the first degree. As the People correctly contend, the legislature amended CPL 30.10 in 2006 so as to abolish the statute of limitations for four sex offenses, including rape in the first degree and criminal sexual act in the first degree (*see* L 2006, ch 3, § 1). The amendment applied not only to crimes committed after its effective date of June 23, 2006, but also to offenses that were not yet time-barred (*see* L 2006, ch 3, § 5 [a]). Because the charge of rape in the first degree against defendant was not time-barred when the amendment took effect, the amendment applied to count five of the indictment, charging rape in the first degree.

Contrary to the People's contention, however, the 2006 amendment to CPL 30.10 did not apply to sodomy in the first degree, as charged in counts one and three of the indictment. Although, as noted, the amendment abolished the statute of limitations for criminal sexual act in the first degree, it made no mention of sodomy in the first degree (*see* L 2006, ch 3, § 1). The legislature had therefore, perhaps unwittingly, kept the statute of limitations for sodomy in the first degree at five years. In 2008, the legislature corrected the apparent oversight by again amending CPL 30.10, this time by striking "criminal sexual act in the first degree" from the list of offenses for which the statute of limitations was abolished and substituting in its place the phrase "a crime defined or formerly defined in section 130.50 of

the penal law" (L 2008, ch 467, § 1; *see* CPL 30.10 [2] [a]). The legislative history of the 2008 amendment explicitly acknowledges that the 2006 amendment had not eliminated the statute of limitations for acts of first degree sodomy committed before November 1, 2003, i.e., the effective date of the non-retroactive nomenclature change (*see* Senate Introducer Mem in Support, Bill Jacket, L 2008, ch 467 at 9; Letter from State Assembly Member, July 28, 2008, Bill Jacket, L 2008, ch 467 at 7). The statute, as amended in 2008, abolished the statute of limitations for crimes of sodomy in the first degree committed after the effective date of August 5, 2008 and for those crimes that were not yet time-barred as of that date (*see* L 2008, ch 476, § 2). The sodomy charges against defendant, however, had expired under the former five-year statute of limitations approximately nine months before the effective date of the 2008 amendment, and thus those charges are time-barred despite the amendment. Additionally, we note that it is well established that a change to the statute of limitations may not be retroactively applied to revive charges that are already time-barred (*see Stogner v California*, 539 US 607, 609-621; *People ex rel. Reibman v Warden of County Jail at Salem*, 242 App Div 282, 286).

The People's alternative contention that the statute of limitations on all counts was tolled until 2006 pursuant to CPL 30.10 (4) (a) (ii) because "the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence" is also without merit. According to the People, defendant's identity as the perpetrator was not known until 2006. It is undisputed, however, that defendant's DNA profile had been in the statewide databank since 1998, and the People offer no explanation as to why his identity could not have been ascertained sooner by the exercise of reasonable diligence, especially given that the perpetrator's DNA was entered into the databank in January 2003 (*cf. People v Bradberry*, 68 AD3d 1688, 1689-1690, *lv denied* 14 NY3d 838). We thus conclude that the People failed to prove beyond a reasonable doubt that the tolling provision of CPL 30.10 (4) (a) applies (*see People v Landy*, 125 AD2d 703, 704-705, *lv denied* 69 NY2d 882). The court therefore erred in refusing to dismiss as untimely those counts of the indictment charging defendant with sodomy in the first degree, sodomy in the third degree, and rape in the third degree, and we modify the judgment of conviction accordingly. The court otherwise properly denied the motion.

In light of the above analysis, we need not address defendant's contention that the sodomy counts were rendered duplicitous by the victim's trial testimony. We reject defendant's further contention that the evidence is legally insufficient to prove his identity as the rapist (*see generally People v Bleakley*, 69 NY2d 490, 495). The People's expert testified at trial that defendant's DNA matched the DNA obtained from the victim's rape kit and that the odds that the DNA from the rape kit came from someone other than defendant were 1 in 49.9 billion. In addition, defendant admitted at trial that he was not incarcerated and was living in Buffalo on December 10, 2002, the date on which the crimes were committed, and that he did not have a twin brother, who is the only person who could have shared his DNA.

Although the victim was unable to identify defendant at trial, i.e, she testified that her attacker ordered her not to look at him, the DNA evidence alone "established defendant's identity beyond a reasonable doubt" (*People v Harrison*, 22 AD3d 236, 236, *lv denied* 6 NY3d 754; *see People v Rush*, 242 AD2d 108, 110, *lv denied* 92 NY2d 860, *reconsideration denied* 92 NY2d 905; *see also People v Knight*, 280 AD2d 937, 937-938, *lv denied* 96 NY2d 864). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Although we agree with defendant that he should not have been shackled when he testified before the grand jury, we conclude that reversal on that basis is not warranted. As the People correctly contend, the prosecutor's cautionary instructions to the grand jurors, which forbade them from drawing any negative inferences from the shackling, "were sufficient to dispel any potential prejudice" to defendant (*People v Muniz*, 93 AD3d 871, 872, *lv denied* 19 NY3d 965, *reconsideration denied* 19 NY3d 1028; *see People v Gilmore*, 12 AD3d 1155, 1156; *People v Pennick*, 2 AD3d 1427, 1427-1428, *lv denied* 1 NY3d 632; *People v Felder*, 201 AD2d 884, 885, *lv denied* 83 NY2d 871). Moreover, the evidence presented to the grand jury was overwhelming, and it cannot be said that defendant's improper shackling amounted to an "instance[] where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice[d] the ultimate decision reached by the [g]rand [j]ury" such that dismissal of the indictment is warranted (*People v Huston*, 88 NY2d 400, 409; *cf. People v Buccina*, 62 AD3d 1252, 1254, *lv denied* 12 NY3d 913; *see generally People v Clyde*, 18 NY3d 145, 153-154).

We reject defendant's contention that his sentence is unduly harsh and severe. Although the court imposed the maximum period of imprisonment for rape in the first degree, namely, a determinate term of 25 years, plus five years of postrelease supervision (*see* Penal Law §§ 70.02 [1] [a]; 70.06 [6] [a]; 70.45 former [2]; 130.35 [1]), we perceive no basis in the record to modify that sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that defendant has an extensive criminal history, which includes six prior felony convictions, and that in the instant matter he brutally raped a 15-year-old girl who was on her way to school.

Having reviewed defendant's remaining contentions, including those raised in his pro se supplemental brief, we conclude that none warrants reversal or further modification of the judgment of conviction.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

691

KA 11-00065

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL D. COOK, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Monroe County Court (Patricia D. Marks, J.), dated November 22, 2010. The order, insofar as appealed from, granted that part of the omnibus motion of defendant seeking to suppress certain physical evidence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of the omnibus motion to suppress certain physical evidence is denied, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress physical evidence seized from behind the storefront area of premises that were searched pursuant to a search warrant. On August 26, 2009, a court issued a warrant authorizing the search of "1304 Dewey Avenue, Rochester, NY." The warrant application was obtained based upon information that defendant was producing counterfeit checks at that address. Both the warrant and the application therefor identified the premises by setting forth the address and by describing the location in detail as, inter alia, "a business store front style building that has a predominantly glass front." The items to be searched for and seized included "computers, . . . peripheral accessories . . . , software, data files, . . . disks, . . . or other computer storage media related to the making of, possession of Counterfeit Checks or counterfeit commercial instruments . . . as well as any and all check stock paper or paper used to produce checks and any computer software used in the production of checks." The warrant was executed the same day it was issued and items described in the warrant were seized during the search. Several officers involved in the warrant's execution testified at the suppression hearing that some of the evidence seized was found in a series of interconnected rooms located behind the

storefront area of the subject premises.

We agree with the People that County Court erred in suppressing evidence seized from behind the storefront area of the property. The Federal and State Constitutions provide that warrants shall not be issued except "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized" (US Const 4th Amend; NY Const, art I, § 12; *see People v Fulton*, 49 AD3d 1223, 1223-1224; *People v Henley*, 135 AD2d 1136, 1136, *lv denied* 71 NY2d 897). "Particularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized" (*People v Nieves*, 36 NY2d 396, 401). Nevertheless, that "does not mean that hypertechnical accuracy and completeness of description must be attained but rather, [it means] from the standpoint of common sense . . . that the descriptions in the warrant and its supporting affidavits [must] be sufficiently definite to enable the searcher to identify the persons, places or things that the [court] has previously determined should be searched or seized" (*id.*).

We agree with the People that the warrant sufficiently described the premises to be searched (*see generally Nieves*, 36 NY2d at 401). Although "a warrant to search a subunit of a multiple occupancy structure is void if it fails to describe the subunit to be searched and . . . describes [only] the larger structure" (*Henley*, 135 AD2d at 1136), here the series of interconnected rooms were not "subunits," but were instead part of the single rental unit comprising 1304 Dewey Avenue. Moreover, we conclude that the purpose of the language in the warrant describing the property as a "business store front style building" was to identify and describe the premises; that language was not intended to limit the scope of the search to only the storefront area of the premises. Thus, the officers executing the warrant did not exceed the scope of the warrant by seizing items from the rooms behind the storefront area. Contrary to the court's conclusion, the hearing testimony established that the areas where items were seized, although separate from the storefront area, were part of the property authorized to be searched (*see generally People v Marshall*, 13 NY2d 28, 32-33; *People v Brito*, 11 AD3d 933, 935, *appeal dismissed* 5 NY3d 825; *People v Watson*, 254 AD2d 701, 701, *lv denied* 92 NY2d 1055; *People v Santarelli*, 148 AD2d 775, 775-776). We therefore reverse the order insofar as appealed from and deny defendant's omnibus motion to the extent that it sought suppression of physical evidence seized from behind the storefront area.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

692

KA 11-02029

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAMMY L. MARVIN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NEAL P. MCCLELLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 19, 2011. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated (two counts), a class D felony.

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

Memorandum: On appeal from a judgment convicting her, following a guilty plea, of two counts of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [ii]), defendant contends that County Court improperly imposed a three-year conditional discharge in order to impose a one-year ignition interlock period, and that her double jeopardy rights were violated when the court sentenced her to a conditional discharge sentence that extends two years beyond the imposition of the ignition interlock system portion of her sentence. Defendant failed to preserve those contentions for our review (*see People v Dexter*, 104 AD3d 1184, 1184-1185). In any event, defendant's contention lacks merit. Penal Law § 65.05 (3) (a) requires that the period of the conditional discharge in the case of a felony shall be three years, while Vehicle and Traffic Law § 1193 (1) (c) (iii) requires that the ignition interlock device condition shall be for a period not less than six months but not exceeding the duration of the conditional discharge, and the court complied with those statutes (*see People v Vidaurrazaga*, 100 AD3d 664, 665).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

698

CA 12-02298

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

RACHELLE MALBORY, PLAINTIFF,

V MEMORANDUM AND ORDER

DAVID CHEVROLET BUICK PONTIAC, INC.,
CHRISTEN SMITH, DEFENDANTS-APPELLANTS,
AND MATTIE MALBORY, DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT J. MULLINS, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 29, 2012. The order granted the motion of defendant Mattie Malbory for, inter alia, summary judgment dismissing the complaint and cross claims against her.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained while she was a passenger in a vehicle driven by her mother, Mattie Malbory (defendant). That vehicle was involved in a collision with a vehicle driven by defendant Christen Smith and owned by defendant David Chevrolet Buick Pontiac, Inc. (collectively, Smith defendants), who now appeal from an order granting defendant's motion for, inter alia, summary judgment dismissing the complaint and cross claims against her. We affirm. It is well settled that a driver who has the right-of-way is entitled to anticipate that drivers of other vehicles will obey the traffic laws requiring them to yield (*see Liskiewicz v Hameister*, 104 AD3d 1194, 1194-1195). Here, it is undisputed that the vehicle driven by defendant was traveling at a lawful rate of speed and had the right-of-way, and the Smith defendants failed to raise an issue of fact whether defendant had an opportunity to avoid the accident (*see id.* at 1195).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

701

CA 12-01416

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

POTAMIANOS PROPERTIES, LLC, DEFENDANT-APPELLANT.

HARRIS & PANELS, SYRACUSE (PETER P. PANELS OF COUNSEL), FOR DEFENDANT-APPELLANT.

NELSON LEVINE deLUCA & HAMILTON, LLC, NEW YORK CITY (STEVEN P. NASSI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 20, 2012. The judgment granted the motion of plaintiff for summary judgment, denied the cross motion of defendant for summary judgment and declared that the claimed loss of defendant is not covered by the subject insurance policy.

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

Memorandum: In this declaratory judgment action arising from a dispute over insurance coverage, defendant appeals from a judgment that, inter alia, granted plaintiff's motion for summary judgment and declared that the loss claimed by defendant is not covered by the subject insurance policy. We now affirm. Defendant obtained insurance from plaintiff to cover a commercial building that it owns in Syracuse. The policy in question contains a "Water Exclusion Endorsement" (endorsement) that excludes coverage for damage caused by "[m]udslide or mudflow," as well as "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces; [or] . . . [b]asements, whether paved or not." Under the terms of the endorsement, the exclusion applies "regardless of whether [the loss] is caused by an act of nature or is otherwise caused." The endorsement further provides that, "if any of the [listed occurrences] results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage."

While the policy was in effect, defendant's building sustained damage when an underground water supply line ruptured. The water line measured six inches in diameter and provided water to the building's

sprinkler system. The water pressure resulting from the rupture, in combination with the washing away of the soil adjacent to the building, caused a large section of the building's concrete block foundation wall to fall inward, thereby permitting water, mud, and debris to flow into and fill the basement. Upon receiving notice of the claim by defendant, plaintiff conducted an investigation and denied coverage for defendant's loss. Plaintiff thereafter commenced this action seeking a declaration that the policy excludes coverage for defendant's loss.

Initially, we reject defendant's contention that plaintiff is bound by the coverage provided under a prior version of the policy (*cf. Janes v New York Cent. Mut. Ins. Co.*, 281 AD2d 982, 982-983). Plaintiff established that the version of the policy effective at the time of the loss contained an enclosure notifying defendant of the changes in the water exclusion endorsement, and thus defendant is bound by the terms of the present form of that endorsement (*see Byron v Liberty Mut. Ins. Co.*, 63 AD2d 710, 710, *lv denied* 45 NY2d 712; *see also* Insurance Law § 3425 [d] [3]; 2 Couch, Insurance § 27:78 [3d ed]).

We agree with plaintiff that the court properly determined that coverage for defendant's loss is excluded under the policy. Affording the unambiguous terms in the policy their plain and ordinary meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267; *Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66), we conclude that plaintiff established its entitlement to judgment as a matter of law by establishing that the policy does not provide coverage for defendant's loss (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, because the loss arose when water from "under the ground" pressed on and flowed through the building's foundation walls into the basement, coverage is precluded under the endorsement (*see generally Neuman v United Servs. Auto. Assn.*, 74 AD3d 925, 925-926; *Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1379-1380).

Contrary to defendant's further contention, that portion of the endorsement providing coverage where an excluded occurrence results in "sprinkler leakage" does not apply, inasmuch as the ruptured pipe did not cause the sprinkler to leak; rather, water from the ruptured pipe caused part of the foundation wall to fall inward, thus flooding the basement. Furthermore, the exclusion pertaining to "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces; [or] . . . [b]asements" applies even though the loss resulted from a ruptured pipe rather than from a natural phenomenon. The endorsement expressly provides that its exclusions are applicable regardless of whether the occurrence is "caused by an act of nature or is otherwise caused" (*cf. Cantanucci v Reliance Ins. Co.*, 43 AD2d 622, 623, *affd* 35 NY2d 890; *Novick v United Servs. Auto. Assn.*, 225 AD2d 676, 677). The other sections of the policy, referred to by defendant for the first time on appeal and thus not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), are, in any event, inapplicable to the

loss at issue.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

704

CA 12-02344

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

ANGEL WILLIAMS AND EMERY G. BULLUCK, JR.,
PLAINTIFFS-RESPONDENTS,

V ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered October 3, 2012. The order, among other things, denied defendant's motion to amend its answer.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

705

CA 12-02360

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

ANGEL WILLIAMS AND EMERY G. BULLUCK, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Shirley Troutman, J.), entered October 3, 2012. The judgment granted the motion of plaintiffs for summary judgment, declared that defendant is obligated to indemnify plaintiff Emery G. Bulluck, Jr., and directed that a judgment be entered in favor of plaintiff Angel Williams and against defendant in the amount of $122,036.86.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, defendant's motion for leave to amend its answer is granted, and plaintiffs' motion for summary judgment on the amended complaint and for a declaratory judgment is denied.

Memorandum: Plaintiffs commenced this action pursuant to Insurance Law § 3420 (a) (2) seeking a monetary judgment for damages in the underlying negligence action that plaintiff Angel Williams commenced against plaintiff Emery G. Bulluck, Jr. based upon injuries inflicted on her by Bulluck in his home. Bulluck's home was allegedly insured by defendant (property). With respect to the underlying action, defendant had disclaimed coverage on the grounds that Bulluck's assaultive conduct was intentional and that it was not provided with timely notice of the incident, but nevertheless agreed to provide him a defense. Williams and Bulluck settled the underlying action for the policy limit. In its answer, defendant asserted affirmative defenses alleging, inter alia, that the policy does not provide coverage because the incident is not an "occurrence" within the meaning of the policy and plaintiffs failed to provide reasonably prompt notice of the incident, and that Bulluck's intentional actions

are excluded from coverage. Following depositions of Bulluck and his mother, the owner of the property, defendant moved for leave to amend its answer to add affirmative defenses alleging, inter alia, that there is no coverage under the policy because Bulluck is not "an insured" under the policy and that, inasmuch as the owner did not live at the property, the incident did not occur at an insured location. Plaintiffs moved for summary judgment in the amount of the judgment in the underlying action and for a declaration that defendant is required to provide coverage to Bulluck. Supreme Court denied defendant's motion seeking leave to amend the answer on the ground that defendant was estopped from alleging that there was no coverage on the bases set forth in the proposed amendment because such an amendment would cause undue prejudice to plaintiffs. The court also granted plaintiffs' motion in its entirety, and thereby declared that defendant was obligated to indemnify Bulluck and granted judgment to Williams in the amount of $122,036.86. We reverse.

It is well established that " '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*Inter-Community Mem. Hosp. of Newfane v Hamilton Wharton Group, Inc.*, 93 AD3d 1176, 1178; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Here, the court denied leave to amend the answer on the ground that Williams had negotiated the settlement in the underlying action with the understanding that defendant was disclaiming coverage on the bases set forth in its disclaimer letter, and the court determined that "[t]o alter the playing field now, after several years of litigation and a judgment, with known strategies and positions in mind, would constitute unfair surprise to the [p]laintiffs and unduly prejudice them." Although the determination whether to deny a motion for leave to amend a pleading rests within the court's sound discretion, we conclude that, on these facts, the court abused its discretion in denying defendant's motion (*see Holst v Liberatore*, 105 AD3d 1374, 1374).

Because it is undisputed that the named insured, Bulluck's mother, did not live at the property and that Bulluck lived alone at the time of the incident, we conclude that the proposed amendment is " 'not patently lacking in merit' " (*Inter-Community Mem. Hosp. of Newfane*, 93 AD3d at 1178). We note that, if defendant establishes its proposed affirmative defense that the claim falls outside the scope of the policy's coverage, it would have no duty to provide a timely notice of disclaimer to Bulluck, the purported insured, on that basis (*see Progressive Northeastern Ins. Co. v Farmers New Century Ins. Co.*, 83 AD3d 1519, 1520; *see generally Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189). Additionally, we conclude that the court erred in determining that Williams would suffer prejudice as a result of the proposed amendment. " 'Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided *had the original pleading contained the proposed amendment*' " (*Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396, quoting *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [emphasis added]; *see Ward v City of*

Schenectady, 204 AD2d 779, 781). Here, the alleged prejudice would not have been avoided had the original answer contained the proposed amendment. "[T]he fact that an amended pleading may defeat a party's cause of action is not a sufficient basis for denying [a] motion to amend" (*Matter of Gagliardi v Board of Appeals of Vil. of Pawling*, 188 AD2d 923, 923, *lv denied* 81 NY2d 707).

We further conclude that the court erred in determining that defendant is estopped from asserting that there is no coverage under the policy on the grounds set forth in the proposed amendment. "The doctrine of estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party[, here, Bulluck,] relied to [his] detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on 'the loss of the right to control [his] own defense' " (*Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1182). Here, although defendant provided Bulluck with a defense, it had expressly disclaimed coverage and reserved its right to assert further grounds for noncoverage (*cf. United States Fid. & Guar. Co. v New York, Susquehanna & W. Ry. Corp.*, 275 AD2d 977, 978; *see generally Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 699). We therefore conclude that defendant is not estopped from asserting a lack of coverage on the grounds set forth in the proposed amendment. Thus, we conclude that the court erred in granting summary judgment to Williams and declaring that defendant was obligated to indemnify Bulluck.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

708

KA 12-00372

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY A. WEAKFALL, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 24, 2009. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2]). Defendant, who was 15 years old, physically abused his girlfriend's 20-month-old daughter over the course of several weeks. On November 21, 2008, he beat the child for approximately one hour and then left her alone for several hours in the residence, where she died from multiple blunt force traumatic injuries.

County Court properly denied defendant's motion to suppress his statements to the police that were made while he was questioned for approximately one hour before being advised of his *Miranda* rights. Due to the initial statements of the child's mother and defendant that a babysitter was responsible for the child's death, the police treated defendant as a witness. During that one-hour period, "the questioning was investigative, not accusatory" (*People v Centano*, 76 NY2d 837, 838) and, according to the testimony of a police witness at the suppression hearing, defendant was "free to leave the unlocked interview room at any time" (*see id.*; *cf. People v Lee*, 96 AD3d 1522, 1526). The atmosphere of the interview was not "coercive" (*Centano*, 76 NY2d at 838), and the interview was approximately one hour in duration (*see People v Cordato*, 85 AD3d 1304, 1309-1310, *lv denied* 17 NY3d 815). As soon as defendant admitted his involvement, the police treated him as a suspect, read defendant his *Miranda* rights, and complied with the procedural protections of CPL 120.90 (7) and Family Court Act § 305.2. We thus agree with the suppression court that

defendant was not "in custody" during that one-hour period for purposes of *Miranda*, CPL 120.90 (7), or Family Court Act § 305.2 (*see Centano*, 76 NY2d at 837-838; *People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963).

By pleading guilty, defendant forfeited his present challenge to the sufficiency of the evidence before the grand jury (*see People v Plunkett*, 19 NY3d 400, 405-406; *People v Hansen*, 95 NY2d 227, 233; *People v Kazmarick*, 52 NY2d 322, 326). Defendant failed to preserve for our review his further contention that the court violated the terms of the plea bargain by stating at sentencing that the parole board should consider defendant's age and the nature of the crime (*see* CPL 470.05 [2]). In any event, defendant's contention is without merit because the court's statement "is not binding on the State Board of Parole" (*People v Van Luc*, 222 AD2d 1111, 1112, *lv denied* 87 NY2d 1026; *see* Executive Law § 259-i [2] [c] [A]).

Defendant's bargained-for sentence of a term of incarceration of 13 years to life is not unduly harsh or severe. Defendant's claim regarding the voluntariness of his plea is not preserved for our review because defendant did not move to withdraw his plea or move to vacate the judgment of conviction (*see People v Rosado*, 70 AD3d 1315, 1315, *lv denied* 14 NY3d 892). In any event, the record demonstrates that defendant's plea was knowing, voluntary, and intelligent (*see People v Seeber*, 4 NY3d 780, 781-782). Contrary to the further contention of defendant, the court properly denied his motion to transfer the action to Family Court because the People did not consent to the transfer (*see* CPL 210.43 [1] [b]). Also contrary to defendant's contention, the court was not required to conduct a hearing on the issue whether the action should be transferred to Family Court (*see* CPL 210.43 [3]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

713

KA 11-01385

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYROME ELDER, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 21, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted robbery in the first degree (two counts), criminal possession of a weapon in the second degree and criminal use of a firearm 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 murder in the second degree (Penal Law § 125.25 [3]), criminal possession of a weapon in the second degree (§ 265.03 [3]), criminal use of a firearm in the second degree (§ 265.08 [2]), and two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [3], [4]). Defendant failed to preserve for our review his contention that County Court erred in failing to charge the jury that a prosecution witness was an accomplice to certain of the crimes as a matter of law and that his testimony therefore required corroboration (*see People v Taylor*, 57 AD3d 1518, 1518, *lv denied* 12 NY3d 822; *People v Smith-Merced*, 50 AD3d 259, 259, *lv denied* 10 NY3d 939). In any event, even assuming, arguendo, that the prosecution witness was an accomplice as a matter of law, we conclude that his testimony was sufficiently corroborated by, inter alia, defendant's admissions to another individual who was not involved in the crimes (*see People v Taylor*, 87 AD3d 1330, 1331, *lv denied* 17 NY3d 956). We likewise reject defendant's further contention that he was denied effective assistance of counsel based on his attorney's failure to request that charge, inasmuch as it is well settled that an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152).

We also reject defendant's contention that the court erred in admitting as a dying declaration exception to the hearsay rule the testimony of a prosecution witness that, after being shot in the inner thigh, the victim stated, "I got robbed" and "I got shot." The People presented evidence establishing that, when the witness arrived at the scene, the victim was bleeding heavily from a femoral artery wound, his clothes were soaked in blood from the waist down, and he was inhaling and exhaling very hard. The victim stated to the witness, "I'm gonna die, I'm gonna die"; he then became totally unresponsive and, shortly thereafter, he died. Thus, we conclude that the court properly determined that the victim's statements were made with "a sense of impending death, with no hope of recovery" (*People v Nieves*, 67 NY2d 125, 132; *see also People v Walsh*, 222 AD2d 735, 737, *lv denied* 88 NY2d 855).

We reject the further contention of defendant that his admissions to other individuals were not sufficiently corroborated (*see* CPL 60.50; *People v Smielecki*, 77 AD3d 1420, 1421-1422, *lv denied* 15 NY3d 956). The testimony of the Medical Examiner that the victim died from a gunshot wound and the victim's statements that he was "shot" and "robbed" satisfy the minimal corroboration requirement of CPL 60.50 that some "additional proof that the offense[s] charged [have] been committed" be presented (*see People v Lipsky*, 57 NY2d 560, 571, *rearg denied* 58 NY2d 824; *Smielecki*, 77 AD3d at 1422).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second degree inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error[s]" asserted on appeal (*People v Gray*, 86 NY2d 10, 19). We reject defendant's contention that the evidence is legally insufficient to support the conviction of the remaining crimes inasmuch as there is a "valid line of reasoning and permissible inferences" to lead reasonable persons to the conclusion reached by the jury based on the evidence presented at trial (*People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and giving the appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, 1782-1783, *lv denied* 15 NY3d 805), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we have examined defendant's remaining contention and conclude that it lacks merit.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

719

CA 12-01977

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JUDITH A. BERGES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PFIZER, INC., DEFENDANT-RESPONDENT.

TRONOLONE & SURGALLA, P.C., BUFFALO (GERARD A. STRAUSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, NEW YORK CITY (MARA CUSKER GONZALEZ OF COUNSEL), AND HARRIS BEACH PLLC, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 29, 2011. The order, inter alia, granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff appeals from an order granting the motion of defendant to dismiss the action based on the failure of plaintiff to comply with defendant's demand for service of a complaint pursuant to CPLR 3012 (b) and denying her amended cross motion to compel defendant to accept late service of her complaint. We affirm. "To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854 [internal quotation marks omitted]). Even assuming, arguendo, that plaintiff provided a reasonable excuse for her delay in serving the complaint, we conclude that Supreme Court properly determined that she failed to establish a meritorious cause of action (*see generally Fasano v J.C. Penney Corp.*, 59 AD3d 1102, 1102; *Kordasiewicz*, 26 AD3d at 855). A meritorious cause of action may be established by way of "an affidavit of merit containing evidentiary facts sufficient to establish a prima facie case" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905; *see Tonello v Carborundum Co.*, 91 AD2d 1169, 1170, *affd* 59 NY2d 720, *rearg denied* 60 NY2d 587). "It must be of a type which would defeat a motion for summary judgment on the ground that there is no issue of fact" (*Tonello*, 91 AD2d at 1170). Although plaintiff is correct that a verified pleading may be accepted in lieu of an affidavit of merit (*see* CPLR 105 [u]; *A & J Concrete Corp. v Arker*, 54 NY2d 870, 872;

Kordasiewicz, 26 AD3d at 855), here the verified complaint sets forth conclusory assertions that are insufficient to establish a meritorious cause of action (*see Wellington v Weber*, 193 AD2d 1111, 1112; *see generally Weis v Weis*, 138 AD2d 968, 969). In addition, " 'the averments of a lay plaintiff cannot serve as the essential showing of the merit . . . where, as here, the averments include matters not within the ordinary experience and knowledge of laypersons' " (*Kordasiewicz*, 26 AD3d at 855), and plaintiff improperly submitted a physician's affidavit of merit for the first time in reply (*see Siculan v Koukos*, 74 AD3d 946, 947). In any event, the physician's affidavit was devoid of any evidentiary facts or detail regarding plaintiff's causes of action.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

721

CA 12-02345

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

VINCENT GRASSO AND MICHELLE GRASSO, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF KATLYN GRASSO, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID FINN, DEFENDANT-RESPONDENT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 24, 2012. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly sustained by plaintiff Vincent Grasso (Vincent) and plaintiffs' infant daughter in a motor vehicle accident. Plaintiffs appeal from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint on the ground that neither Vincent nor plaintiffs' daughter sustained a serious injury within the meaning of the four categories of Insurance Law § 5102 (d) set forth in plaintiffs' bill of particulars. We affirm. Specifically, with respect to the permanent loss of use category of serious injury, defendant established that neither Vincent nor plaintiffs' daughter sustained a "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 297). With respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, defendant established that some of the injuries sustained by Vincent and plaintiffs' daughter had resolved (*see generally Gaddy v Eyler*, 79 NY2d 955, 957-958), and that the remainder were merely mild, minor or slight (*see generally Dufel v Green*, 84 NY2d 795, 798). Finally, with respect to the 90/180-day category, defendant established that neither Vincent nor plaintiffs' daughter was prevented "from performing substantially all of the material acts which constitute [his or her] usual and customary daily activities" for at least 90 out of the 180

days immediately following the accident (§ 5102 [d]; *see generally Perl v Maher*, 18 NY3d 208, 220). In response, plaintiffs failed to raise a triable issue of fact with respect to any of those categories of serious injury (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In light of our determination, we do not address plaintiffs' remaining contentions.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

729

KA 11-00523

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY D. MCFARLAND, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (David D. Egan, J.), entered January 19, 2011. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following Memorandum: We granted defendant leave to appeal from the order denying his CPL article 440 motion to vacate the judgment convicting him following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that he is entitled to vacatur of the judgment pursuant to CPL 440.10 (1) (h) because defense counsel failed to prepare adequately for trial and failed to move to suppress evidence obtained from defendant's cellular telephone. We reject that contention and conclude that Supreme Court properly denied defendant's motion to the extent that the motion was based on CPL 440.10 (1) (h) without conducting a hearing (*see* CPL 440.10 [2] [c]; 440.30 [2]).

We conclude, however, that defendant's motion may have merit to the extent that it was based on CPL 440.10 (1) (g) (*see generally People v Salemi*, 309 NY 208, 215, *cert denied* 350 US 950). That section permits vacatur of a judgment of conviction on the ground that new evidence has been discovered since the entry of a judgment, which could not have been produced at trial with due diligence "and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]). "A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court . . . The 'court must

make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' " (*People v Deacon*, 96 AD3d 965, 967, *appeal dismissed* 20 NY3d 1046).

Several years after defendant's conviction and exhaustion of his direct appeal, defendant's appellate counsel received in the mail an affidavit from a person to whom a third party had allegedly confessed to shooting and killing the victim. The author of the affidavit averred that, on two occasions, he had informed investigators about the third party's statements. Contrary to the People's contention, we conclude that there are questions of fact whether the new evidence, i.e., the statements of the nontestifying third party, would have been admissible at trial as declarations against penal interest (*see generally* CPL 440.10 [1] [g]).

"[B]efore statements of a nontestifying third party are admissible [at trial] as a declaration against penal interest, the proponent must satisfy the court that four prerequisites are met: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction, or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability" (*People v Brensic*, 70 NY2d 9, 15; *see People v Ennis*, 11 NY3d 403, 412-413, *cert denied* ___ US ___ [May 18, 2009]; *Deacon*, 96 AD3d at 968). "Even if th[o]se criteria are met, the statement cannot be received in evidence [at trial] unless it is also supported by independent proof indicating that it is trustworthy and reliable" (*Ennis*, 11 NY3d at 412-413).

We agree with defendant that where, as here, the declarations exculpate the defendant, they "are subject to a more lenient standard, and will be found 'sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement might be true' " (*Deacon*, 96 AD3d at 968, quoting *People v Settles*, 46 NY2d 154, 169-170). That is because " '[d]epriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense' " (*id.*).

Although the People contend that there is no evidence that the third party is unavailable, we conclude that, inasmuch as the statements attributed to the third party implicate him in a murder, there is a likelihood that, if called to testify at a trial, he would assert his Fifth Amendment privilege against self-incrimination and thus become unavailable (*see Ennis*, 11 NY3d at 412-413). We reject the People's contention that there is no competent evidence independent of the declaration to assure its trustworthiness and reliability (*see generally Brensic*, 70 NY2d at 15). The evidence at trial and in the record on this appeal establishes a reasonable possibility that the nontestifying third party had a motive to murder

the victim. Defendant and the third party went to a residence where the third party had a confrontation with the victim. Defendant, the third party and the victim then went onto the porch of the residence. The People's main witness at trial testified that, in her quick glance out of a window, she saw defendant holding an unknown object in his hand and tussling with the victim, but other witnesses testified that they heard the victim pleading with the third party by name seconds before they heard a gunshot.

Inasmuch as the People submitted an affidavit from an investigator contesting the assertion that investigators were informed of the statements made by the nontestifying third party, we conclude that there are issues of fact concerning the reliability of the newly discovered evidence. We therefore remit the matter to Supreme Court to conduct a hearing to determine whether the third party is unavailable and, if so, whether there is "competent evidence independent of the declaration to assure its trustworthiness and reliability" (*Brensic*, 70 NY2d at 15).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

730

KA 12-00648

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASEY J. HALSEY, DEFENDANT-APPELLANT.

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

CASEY J. HALSEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered April 21, 2011. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Wyoming County Court for further proceedings in accordance with the following Memorandum: On appeal 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]), defendant contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel based upon the failure of defense counsel to either facilitate his testimony before the grand jury or to move to dismiss the indictment pursuant to CPL 190.50 (5) (c) based upon the alleged violation of his right to testify before the grand jury. That contention "does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Dean*, 48 AD3d 1244, 1245, *lv denied* 10 NY3d 839 [internal quotation marks omitted]; *see People v Ruffin*, 101 AD3d 1793, 1794).

Defendant contends in his main brief that County Court's misstatement of his possible sentence, in the event that he violated the terms of his conditional discharge, as 4½ years of incarceration rather than four years rendered the plea coerced per se and therefore involuntary. Although defendant's contention that his plea was

involuntary survives his waiver of the right to appeal (*see People v Jackson*, 85 AD3d 1697, 1698, *lv denied* 17 NY3d 817; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794), he failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Harrison*, 4 AD3d 825, 826, *lv denied* 2 NY3d 740). In any event, considering the plea colloquy as a whole, we conclude that the inaccurate information defendant received regarding his possible sentencing exposure did not render the plea involuntary (*see generally People v Garcia*, 92 NY2d 869, 870-871). We have considered the remaining contention in defendant's main brief and conclude that it is unpreserved (*see* CPL 470.05 [2]) and that, in any event, it is without merit.

In his pro se supplemental brief, defendant contends that the court erred in sentencing him as a first felony drug offender rather than a second felony drug offender. We agree. Where it is apparent that a defendant has a prior felony conviction, "the People were required to file a second felony offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender" (*People v Griffin*, 72 AD3d 1496, 1497; *see People v Scarbrough*, 66 NY2d 673, 674, *revg* 105 AD2d 1107 *on dissenting mem of Boomer, J.*; *People v Martinez*, 213 AD2d 1072, 1072). " '[I]t is illegal to sentence a known predicate felon as a first offender' " (*Griffin*, 72 AD3d at 1497; *see People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001; *Martinez*, 213 AD2d at 1072). Here, the People filed a second felony offender statement at the time of the indictment, but the court did not sentence defendant as a second felony offender. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing in compliance with CPL 400.21.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

744

CA 12-02363

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ.

ROBERT D. MOORE AND SUSAN MYOTT, AS EXECUTRIX FOR THE ESTATE OF WILLIAM S. MYOTT, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD S. JOHNSON, DAVID P. MACKOWIAK AND KEVIN WYSTUP, DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JEFFREY F. REINA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered March 13, 2012. The order denied the motion of defendants for summary judgment dismissing the complaint and for an award of damages on their counterclaim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for summary judgment dismissing the complaint to the extent that it sought damages for undistributed goodwill, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, Robert D. Moore and William S. Myott, originally commenced this action against their former partners in an accounting firm, seeking an accounting and damages for undistributed goodwill of the partnership. We note at the outset that William S. Myott thereafter died, and his wife, as executrix of his estate, was substituted for him as a party. We nevertheless refer to Robert D. Moore and William S. Myott, where applicable, as the plaintiffs herein. In their answer, defendants asserted a counterclaim alleging that, upon the voluntary dissolution of the partnership, plaintiffs were overpaid for their share of the partnership's net assets. Following discovery, defendants moved for summary judgment dismissing the complaint and for an award of damages on their counterclaim. Supreme Court denied the motion in its entirety, and defendants now appeal.

We agree with defendants that the court should have dismissed the complaint insofar as it sought damages for the partnership's undistributed goodwill. At the time of dissolution, the partnership

consisted of five accountants, i.e., plaintiffs and defendants (collectively, partners), who operated out of two offices in different locations. Plaintiffs worked in the Jamestown office and owned a 48.4% equity interest in the partnership, while defendants worked in the Fredonia office and owned the remaining 51.6% equity interest. On May 4, 2006, the partners voted unanimously to dissolve the partnership. Upon dissolution, plaintiffs each received a cash distribution of $48,412 from the partnership. None of the partners received payment for the partnership's goodwill. Plaintiffs thereafter formed a new partnership, and they continued to work out of the same office in Jamestown. Defendants also formed a new partnership and stayed in the same office in Fredonia. In March 2008, almost two years after the partnership dissolved, plaintiffs demanded that defendants pay them for their share of the partnership's goodwill. Plaintiffs also requested an accounting of the partnership's financial records. Defendants refused to pay anything to plaintiffs for goodwill, and plaintiffs therefore commenced this action.

"The term 'goodwill' represents an elusive concept, but is broadly defined as 'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices' " (*Dawson v White & Case*, 88 NY2d 666, 670-671 n 2; *see Spaulding v Benenati*, 57 NY2d 418, 424 n 3). " 'Good will, when it exists as incidental to the business of a partnership, is presumptively an asset to be accounted for like any other by those who liquidate the business' " (*Dawson*, 88 NY2d at 671, quoting *Matter of Brown*, 242 NY 1, 6). "The course of dealing, however, can stamp it with a different quality. Partners may contract that good will, though it exist[s], shall not 'be considered as property or an asset of the co-partnership' " (*Brown*, 242 NY at 6). "The contract may 'be expressly made,' or it may 'arise by implication, from other contracts and the acts and conduct of the parties' " (*id.*).

Here, even assuming, arguendo, that the partners' course of dealings or partnership agreement provided that goodwill is a distributable asset of the partnership, we conclude that defendants met their initial burden on that part of the motion for summary judgment dismissing the complaint to the extent it sought damages for undistributed goodwill. Indeed, defendants established that there is no goodwill to distribute because the partnership has been dissolved and no longer exists. In the circumstances presented here, it is incomprehensible that the partnership's goodwill could survive the demise of the partnership, and the Court of Appeals decision in *Dawson* does not suggest otherwise. In *Dawson*, although the Court of Appeals indicated that a dissolving partnership may have distributable goodwill, the partnership in that case was dissolved but was immediately reformed with the same partners, minus one, with the same

firm name, using the same offices and servicing the same clients. Thus, in essence, the partnership was dissolved in name only. Here, in contrast, the *same* partnership did not reform after dissolution. Instead, two entirely new partnerships were formed. Thus, plaintiffs failed to raise an issue of fact with respect to the existence of goodwill after the dissolution of the partnership (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore conclude that the court erred in denying that part of defendants' motion for summary judgment dismissing the complaint insofar as it sought damages for undistributed goodwill, and we modify the order accordingly.

Finally, we reject defendants' further contention that the court should have granted that part of their motion for summary judgment on the counterclaim. Even assuming, arguendo, that defendants met their initial burden on that part of the motion, we conclude that plaintiffs raised myriad issues of fact in opposition thereto (*see generally Zuckerman*, 49 NY2d at 562).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

749

CA 12-01683

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ.

APRYL CALACI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIED INTERSTATE, INC., ALLIED INTERSTATE, LLC AND IQOR US INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

REED SMITH LLP, NEW YORK CITY (CASEY D. LAFFEY OF COUNSEL), AND UNDERBERG & KESSLER LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF KENNETH HILLER, PLLC, AMHERST (KENNETH R. HILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered May 26, 2012. The order, among other things, granted the motion of plaintiff for judgment on liability based on defendants' default and for an inquest on damages, and denied the amended motion of defendants to dismiss the complaint and compel arbitration.

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

Same Memorandum as in *Calaci v Allied Interstate, Inc*. ([appeal No. 2] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

750

CA 12-01684

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ.

APRYL CALACI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIED INTERSTATE, INC., ALLIED INTERSTATE, LLC AND IQOR US INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

REED SMITH LLP, NEW YORK CITY (CASEY D. LAFFEY OF COUNSEL), AND UNDERBERG & KESSLER LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF KENNETH HILLER, PLLC, AMHERST (KENNETH R. HILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered August 24, 2012. The order denied the motion of defendants to vacate the default order entered May 26, 2012.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendants' motion is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendants appeal from an order that, inter alia, granted plaintiff's motion for judgment on liability based on defendants' default and for an inquest on damages, and denied defendants' amended motion to dismiss the complaint and to compel arbitration. In appeal No. 2, defendants appeal from a subsequent order denying their motion to vacate the order in appeal No. 1. We note at the outset that the appeal from the order in appeal No. 1 must be dismissed because no appeal lies from an order entered on default (*see* CPLR 5511; *Johnson v McFadden Ford*, 278 AD2d 907, 907). It is undisputed that there was indeed a default; defendants' amended motion to dismiss, served in lieu of an answer, was procedurally defective because their attorneys failed to obtain a request for judicial intervention (RJI) prior to serving the motion. We agree with defendants in appeal No. 2, however, that Supreme Court abused its discretion in denying their motion to vacate the default order in appeal No. 1.

To establish an excusable default under CPLR 5015 (a) (1), the defaulting party must proffer a reasonable excuse for the default as well as a meritorious defense to the action or proceeding (*see Matter of Clinton County [Miner]*, 39 AD3d 1015, 1016; *Matter of Jefferson*

County, 295 AD2d 934, 934). In determining whether to vacate an order entered on default, "the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Moore v Day*, 55 AD3d 803, 804; *see Puchner v Nastke*, 91 AD3d 1261, 1262; *Kahn v Stamp*, 52 AD2d 748, 749).

Here, defendants established that their default was due to the failure of their attorneys to obtain an RJI before serving the amended motion to dismiss, which was otherwise timely. The court erred in rejecting that excuse on the ground that "law office failure is not an excuse that is accepted by the Court of Appeals." It is well established that law office failure may be excused, in the court's discretion, when deciding a motion to vacate a default order (*see* CPLR 2005; *Raphael v Cohen*, 62 NY2d 700, 701; *Alternative Automotive v Mowbray*, 101 AD2d 715, 715). With respect to other relevant factors, we note that defendants had contested plaintiff's claims in federal court for more than a year before this action was recommenced in Supreme Court, and their attorneys had filed timely notices of appearances in Supreme Court and had been communicating with plaintiff's attorney before the answer was due. We further note that plaintiff was not prejudiced by defendants' inadvertent default, and that the extent of the delay was minimal. Indeed, defendants moved to vacate the default order six days after the court rendered its decision from the bench granting plaintiff's motion and three days before the default order was entered.

We further conclude that, contrary to plaintiff's contention, defendants proffered a meritorious defense to the complaint, which alleges a single cause of action under the Telephone Consumer Protection Act of 1991 (47 USC § 227, as added by Pub L 102-243, 105 US Stat 2394; *see* 47 CFR 64.1200 *et seq.*). Defendants submitted, inter alia, an affidavit of merit from an employee of Capital One Services, LLC, an affiliate and service provider to Capital One Bank (USA) N.A. (hereafter, Capital One), who averred that he personally had reviewed Capital One's records and attached plaintiff's online credit card application. According to the employee, the records established that plaintiff had given Capital One her home telephone number and, pursuant to a "Customer Agreement," had consented to receiving telephone calls at that number. If the employee's averments are true, then defendants, as representatives of Capital One, may have at least a partial defense to the complaint. Considering "the strong public policy in favor of resolving cases on the merits" (*Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574, *appeal dismissed* 3 NY3d 703; *see Lauer v City of Buffalo*, 53 AD3d 213, 217), we conclude that the court abused its discretion in denying defendants' motion to vacate the default order. We therefore reverse the order in appeal No. 2, and grant defendants' motion.

Inasmuch as the court granted plaintiff's motion in appeal No. 1, the court had no occasion to rule upon defendants' amended motion to dismiss the complaint and to compel arbitration. Under the circumstances of this case, we remit the matter to Supreme Court to

address defendants' amended motion.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

757

KA 10-00178

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS STANLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered November 24, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of reckless endangerment in the first degree under count two of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the first degree (§ 120.25). Contrary to defendant's contention, the second showup identification procedure was "not so unnecessarily suggestive as to create a substantial likelihood of misidentification" (*People v Duuvon*, 77 NY2d 541, 545 [internal quotation marks omitted]). That identification procedure occurred within an hour of the crime and " 'at or near' " the intersection where defendant was observed shooting a handgun (*People v Blunt*, 71 AD3d 1380, 1381, quoting *Duuvon*, 77 NY2d at 544; *see People v Clark*, 262 AD2d 1051, 1051, *lv denied* 93 NY2d 1016). Moreover, the fact that defendant was placed in handcuffs and positioned between officers on a sidewalk did not render the identification procedure unduly suggestive (*see People v Siler*, 45 AD3d 1403, 1403, *lv denied* 10 NY3d 771; *People v Ponder*, 19 AD3d 1041, 1043, *lv denied* 5 NY3d 809; *People v Cortez*, 221 AD2d 255, 256). We reject defendant's related contention that the verdict with respect to the crime of criminal possession of a weapon in the second degree is against the weight of the evidence owing to the People's failure to prove beyond a reasonable doubt that he was the individual who possessed the handgun. Viewing the evidence in light of the elements

of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that he was deprived of effective assistance of counsel because defense counsel failed to request a jury instruction with respect to eyewitness identification testimony or to call an expert witness to testify on that subject. We conclude that defendant has not demonstrated "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [internal quotation marks omitted]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we further conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation (*see People v Young*, 100 AD3d 1427, 1428, *lv denied* 20 NY3d 1105; *see also* CPL 470.05 [2]). In any event, "[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence . . . Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial" (*People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975 [internal quotation marks omitted]).

We agree with defendant, however, that the verdict with respect to reckless endangerment in the first degree is against the weight of the evidence. "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct [that] creates a grave risk of death to another person" (Penal Law § 120.25). The evidence at trial established only that defendant stood on a street corner and fired up to five shots from a handgun. The People "presented no evidence that any person . . . 'was in or near the line of fire' " so as to create a grave risk of death to any such person (*People v Scott*, 70 AD3d 978, 979, *lv denied* 15 NY3d 778, 809; *see also People v Payne*, 71 AD3d 1289, 1291, *lv denied* 15 NY3d 777; *cf. generally People v Summerville*, 22 AD3d 692, 692, *lv denied* 6 NY3d 759; *see generally People v Feingold*, 7 NY3d 288, 294; *People v Suarez*, 6 NY3d 202, 214). Consequently, we modify the judgment by reversing that part convicting defendant of reckless endangerment in the first degree and dismissing that count of the indictment. In light of our determination with respect to that count of the indictment, we need not consider defendant's remaining contention regarding that count. Finally, the sentence is not unduly harsh or

severe.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

768

CAF 11-01910

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF PAMELA A. BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH PATTERSON, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA FISHER SWANSON, ATTORNEY FOR THE CHILDREN, AUGUSTA, GEORGIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered July 20, 2011 in a proceeding pursuant to Family Court Act article 6. The order directed that respondent's visitation with the children shall be supervised.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Chautauqua County, for further proceedings on the amended petition in accordance with the following Memorandum: We agree with respondent-appellant (respondent) in appeal Nos. 1 and 2 that Family Court erred in relieving his assigned counsel after the modification petition, which sought full legal custody of the three children at issue, was amended to seek only a modification of respondent's visitation (amended petition). While this appeal was pending, we held that respondents in visitation proceedings are entitled to assigned counsel (*see Matter of Wright v Walker*, 103 AD3d 1087, 1088, citing *Matter of Samuel v Samuel*, 33 AD3d 1010, 1010-1011; *Matter of Wilson v Bennett*, 282 AD2d 933, 934). We therefore reverse the orders in appeal Nos. 1 and 2, pursuant to which respondent was afforded only supervised visitation with his two biological sons, and only supervised visitation with his stepson, respectively, and we remit the matter in each appeal to Family Court for further proceedings on the amended petition. In view of our determination, we dismiss as academic respondent's appeal from the order in appeal No. 3, which denied respondent's subsequent motion to vacate the orders in appeal Nos. 1 and 2 (*see Carlson v Carlson*, 248 AD2d 1026, 1028).

Finally, respondent's contention with respect to the court's dismissal of his violation petition is not properly before us inasmuch as " '[n]o appeal lies from a mere decision' " (*Meenan v Meenan*, 103 AD3d 1277, 1278; *see Kuhn v Kuhn*, 129 AD2d 967, 967; *see also* CPLR

5512 [a]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

769.1

CAF 12-02131

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF PAMELA A. BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH PATTERSON, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

SANDRA FISHER SWANSON, ATTORNEY FOR THE CHILDREN, AUGUSTA, GEORGIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered November 2, 2012 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to vacate orders of supervised visitation.

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

Same Memorandum as in *Matter of Brown v Patterson* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

769

CAF 11-01916

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF PAMELA A. BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH PATTERSON, RESPONDENT-APPELLANT,
AND ALAINNA BROWN, RESPONDENT.
(APPEAL NO. 2.)

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

SANDRA FISHER SWANSON, ATTORNEY FOR THE CHILD, AUGUSTA, GEORGIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 29, 2011 in a proceeding pursuant to Family Court Act article 6. The order directed that respondent Ralph Patterson's visitation with the child shall be supervised.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Chautauqua County, for further proceedings on the amended petition in accordance with the same Memorandum as in *Matter of Brown v Patterson* ([appeal No. 1] ___ AD3d ___ [July 5, 2013]).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

775

CA 12-01726

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

ELIZABETH COSTANZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT,
AND JILL T. ROSAGE, AS ADMINISTRATRIX OF
THE ESTATE OF PAUL L. ROSAGE, DECEASED,
DEFENDANT-APPELLANT.

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 21, 2012. The order denied the motion of defendant Jill T. Rosage, as Administratrix of the Estate of Paul L. Rosage, deceased, for summary judgment dismissing the complaint against her.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was struck by a vehicle operated by Paul L. Rosage (decedent). Decedent's vehicle hit the driver's side of plaintiff's vehicle when plaintiff, after stopping at a stop sign, drove the vehicle through the intersection and into the path of decedent's vehicle. Decedent had the right-of-way at the intersection inasmuch as he was not subject to any traffic control devices.

Jill T. Rosage (defendant), as administratrix of decedent's estate, moved for summary judgment dismissing the complaint against her. We conclude that Supreme Court properly denied defendant's motion inasmuch as she failed to meet her initial burden of establishing her entitlement to judgment as a matter of law (*see generally Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853). Defendant's motion was largely based on the affidavit of an expert reconstructionist. We conclude, however, that the affidavit is speculative and conclusory inasmuch as the expert failed to submit the data upon which he based his opinions. The affidavit thus lacks an adequate factual foundation and is of no probative value (*see Lillie v*

Wilmorite, Inc., 92 AD3d 1221, 1222; *see also Schuster v Dukarm*, 38 AD3d 1358, 1359). Because defendant otherwise failed to meet her initial burden on the motion, there is no need to consider the sufficiency of plaintiff's submissions in opposition to the motion (*see Winegrad*, 64 NY2d at 853).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00703

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF TIMOTHY SKINNER, CONSECUTIVE NO. 126970, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT
TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH, AND NEW YORK STATE DIVISION OF
PAROLE, RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (CRAIG P. SCHLANGER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered March 9, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's commitment to a secure treatment facility.

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

Memorandum: Petitioner was previously deemed to be a dangerous sex offender requiring civil confinement and was committed to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Petitioner now appeals from an order, entered after an evidentiary hearing, continuing his confinement in a secure treatment facility (*see* § 10.09 [h]). We affirm. We reject petitioner's contention that Supreme Court failed to "state in its decision 'the facts it deem[ed] essential' to its determination" (*Matter of Jose L. I.*, 46 NY2d 1024, 1025, quoting CPLR 4213 [b]). "To comply with CPLR 4213 (b), a court need not set forth evidentiary facts, but it must state those ultimate facts essential to its decision" (*Matter of Erika G.*, 289 AD2d 803, 804). Here, the court's "decision, despite its brevity, fully complies" with section 4213 (b) (*Vance Metal Fabricators v Widell & Son*, 50 AD2d 1062, 1063). Specifically, the decision sets forth the court's finding that petitioner continues to suffer from "a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not

confined to a secure treatment facility" (§ 10.03 [e]).

We reject petitioner's further contention that respondents failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring continued confinement (*see generally Matter of State of New York v High*, 83 AD3d 1403, 1403, *lv denied* 17 NY3d 704; *Matter of State of New York v Motzer*, 79 AD3d 1687, 1688). While there was conflicting expert testimony with respect to the need for petitioner's continued confinement, "[t]he trier of fact [was] in the best position to evaluate the weight and credibility of conflicting expert . . . testimony," and here the record supports the court's determination to credit the opinion of respondents' expert over that of petitioner's expert (*Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394).

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

777

CA 12-01838

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

MICHAEL BROOKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE P. HARDIN, DEFENDANT,
MICHAEL COMSTOCK AND F T WELL SUPPORT, LLC,
DEFENDANTS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (LAURIE A. GIORDANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered May 17, 2012. The order denied the motion of defendants Michael Comstock and F T Well Support, LLC, for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Michael Comstock and F T Well Support, LLC is granted and the amended complaint is dismissed against them.

Memorandum: Plaintiff and defendant George P. Hardin own adjacent properties, and the border between the properties is a natural stream. In 2005, Hardin hired Michael Comstock and F T Well Support, LLC (defendants) to perform work on his property, including removing debris from the stream to prevent it from flooding onto his property. In the amended complaint, plaintiff alleged that, in the process of completing that work, defendants trespassed upon his property; constructed a leach field on Hardin's property, which resulted in a continuing trespass of effluent into the streambed on plaintiff's property; and either negligently or intentionally removed a number of trees. Plaintiff also asserted a cause of action against defendants under RPAPL 861.

We conclude that Supreme Court erred in denying defendants' motion for summary judgment seeking to dismiss the amended complaint against them. With respect to the claims in the first and second causes of action for negligence or trespass relating to the removal of trees, we conclude that defendants met their initial burden of establishing as a matter of law that they did not remove any trees on plaintiff's property and thus could not be liable for those claims,

nor could they be liable for tree removal pursuant to RPAPL 861 (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition, plaintiff failed to raise a triable issue of fact whether defendants were the parties responsible for the trees that were removed (*cf. Kempa v Town of Boston*, 79 AD3d 1747, 1749; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to plaintiff's claim of trespass based on the entry by defendants onto his property to perform work, we conclude that defendants established they did not work on plaintiff's property, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Defendants likewise met their initial burden of establishing as a matter of law that their work on Hardin's leach field did not affect the stream, and plaintiff failed to raise a triable issue of fact (*see generally id.*).

Finally, we reject plaintiff's contention that defendants may be held vicariously liable for the wrongful actions of Hardin, who was also an employee of defendants at the relevant times herein. Defendants established as a matter of law that Hardin was not acting in the capacity of an employee for purposes of the work done at his home (*see generally Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). We therefore reverse the order and grant defendants' motion for summary judgment dismissing the amended complaint against them.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02371

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN L. VIRGIL, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 19, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [1]), defendant contends that the waiver of the right to appeal is not valid and that the sentence is unduly harsh and severe. Although defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because Supreme Court "failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration . . . , and there was no specific sentence promise at the time of the waiver" (*People v Ravarini*, 96 AD3d 1700, 1701, *lv denied* 20 NY3d 1014; *see People v Kelly*, 96 AD3d 1700, 1700). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00730

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DARRIN J. LEBLANC, DEFENDANT-APPELLANT.

CURRIER LAW FIRM, P.C., AUBURN (REBECCA CURRIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 16, 2013 and by the attorneys for the parties on May 13 and 20, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: July 5, 2013

Frances E. Cafarell
Clerk of the Court