SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 27, 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, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

825

TP 13-00333

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF DEBBIE SOIS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

DEBBIE SOIS, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James P. Punch, A.J.], entered February 19, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

826

KA 11-02124

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO PITTMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Richard C. Kloch, Sr., A.J.), rendered January 7, 2011. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree, attempted murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). We previously reversed the judgment convicting defendant of those crimes and granted a new trial (*People v Pittman*, 49 AD3d 1166), and defendant now appeals from the judgment following the retrial.

We reject defendant's contention that Supreme Court erred in failing sua sponte to order a further competency hearing immediately before trial (*see generally People v Tortorici*, 92 NY2d 757, 765-766, *cert denied* 528 US 834). After the judgment was reversed and before the new trial was conducted, defendant was found to be an incapacitated person within the meaning of CPL article 730, but he was later found to be competent and the matter was scheduled for trial. Shortly before trial, based in part upon defendant's history of decompensating after he voluntarily ceased taking his antipsychotic medication when he was placed in jail, the court directed a new evaluation to determine defendant's capacity to assist in his defense. Of the two psychiatrists who evaluated defendant, one found that he was not an incapacitated person but the other was unable to render a firm opinion due to defendant's refusal to cooperate with the

evaluation process. At a court appearance shortly before the scheduled trial date, although both the prosecutor and defense counsel agreed that it "would be prudent to ask . . . for a hearing" because the psychiatrists did not agree that defendant was not an incapacitated person, defendant informed the court that he was competent and agreed to cooperate with an evaluation by the second psychiatrist. After that interview, the second psychiatrist also found that defendant was not incapacitated, and the court concluded that a hearing was not necessary due to the agreement among the psychiatrists.

"[I]t is perfectly well settled that a trial court is entitled to give weight to the findings of competency derived from the ordered examinations" (*People v Ferrer*, 16 AD3d 913, 914, *lv denied* 5 NY3d 788, citing *People v Morgan*, 87 NY2d 878, 880). Inasmuch as the court determined that no hearing was necessary based upon the opinions of both psychiatrists that defendant was not an incapacitated person, and neither party requested a hearing at that time, there was no need for a hearing (*see* CPL 730.30 [2]), and the court properly directed that "the criminal action against the defendant . . . proceed" (*id.*).

Contrary to defendant's further contention, the court did not err in denying his challenge for cause to two prospective jurors. Although those prospective jurors may have initially expressed "a state of mind that [was] likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]), they ultimately both gave an "unequivocal assurance that they [could] set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614; *see People v Brandi E.*, 105 AD3d 1341, 1343; *People v Gladding*, 60 AD3d 1401, 1402, *lv denied* 12 NY3d 925). Defendant failed to preserve for our review his contention that the court erred in allowing a sworn juror to remain on the jury, inasmuch as defendant did not object to the court's inquiry of that juror or seek to discharge the juror (*see People v Dennis*, 91 AD3d 1277, 1279, *lv denied* 19 NY3d 995; *People v Rufus*, 56 AD3d 1175, 1176, *lv denied* 11 NY3d 930). In any event, the court properly concluded that the juror was not "grossly unqualified to serve in the case" (CPL 270.35 [1]; *see People v Wolff*, 103 AD3d 1264, 1266, *lv denied* 21 NY3d 948; *People v Telehany*, 302 AD2d 927, 928).

Next, as defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence, because his motion for a trial order of dismissal was not specifically directed at the issues raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the evidence is legally sufficient to support the conviction with respect to all of the charges (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, 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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the court did not err

in admitting in evidence the testimony of a witness that defendant fired a weapon at the witness at the start of the incident from which these charges arose. Defendant objected to the witness' testimony on the ground that it was not relevant to the charges remaining in the indictment because he was acquitted in the first trial of attempting to murder that witness, and that any probative value of the evidence was outweighed by its prejudicial effect. We reject that contention. The Court of Appeals has "reaffirmed the well-established rules that evidence is relevant if it has any tendency in reason to prove any material fact and that all relevant evidence is admissible at trial unless admission violates some exclusionary rule" (*People v Alvino*, 71 NY2d 233, 241 [internal quotation marks omitted]). Thus, "where evidence of a prior uncharged crime contains more probative value than risk of prejudice to the defendant, the evidence is admissible" (*People v Chase*, 85 NY2d 493, 502). Here, the court properly determined that the evidence was highly probative on the issues of defendant's possession of a loaded weapon and his intent to use it unlawfully against another, i.e., elements of crimes charged in the indictment at the retrial, and that its probative value outweighed its potential for prejudice (*see Alvino*, 71 NY2d at 241; *People v Stubinger*, 87 AD3d 1316, 1316-1317, *lv denied* 18 NY3d 862; *see generally People v Delarosa*, 84 AD3d 832, 833-834, *lv denied* 17 NY3d 815).

We reject the further contention of defendant that his statutory right to be present during a material stage of the trial was violated (*see generally* CPL 310.30). Contrary to defendant's contention, "[t]he absence of a notation in the record indicating that defendant was present is not sufficient to demonstrate that he was not present" (*People v Martin*, 26 AD3d 847, 848, *affd sub nom. People v Kissoon*, 8 NY3d 129; *see People v Foster*, 1 NY3d 44, 48). Based upon the record before us, we conclude that defendant "failed to come forward with substantial evidence to rebut the presumption of regularity that attaches to all criminal proceedings" (*People v Andrew*, 1 NY3d 546, 547).

Contrary to defendant's additional contention, he was not deprived of a fair trial by the admission of evidence of prior uncharged criminal conduct, which was contained in his statement to the police. Although evidence of a defendant's past uncharged criminal behavior is not admissible to show defendant's general predisposition to criminal conduct (*see People v Molineux*, 168 NY 264, 291-293), the evidence of defendant's prior criminal conduct was properly admitted because it was relevant to a material aspect of the People's direct case (*see id.* at 293-294). Furthermore, defendant cannot claim any surprise with respect to the evidence inasmuch as it was included in the People's CPL 710.30 notice and was introduced at the first trial on these charges (*cf. People v Matthews*, 68 NY2d 118, 122-123).

Defendant failed to preserve for our review his additional contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention is without

merit. The majority of the prosecutor's comments on summation to which defendant objects on appeal were within the " 'broad bounds of rhetorical comment permissible in closing argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and any comments that were arguably improper were not so egregious as to deprive defendant of a fair trial (*see People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998; *People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906; *People v Walker*, 234 AD2d 962, 963, *lv denied* 89 NY2d 1042). We have considered defendant's remaining contentions regarding alleged prosecutorial misconduct and conclude that they are without merit.

Defendant's contention that the court failed to apprehend or exercise its discretion when sentencing him is not supported by the record (*see People v McCray*, 78 AD3d 1595, 1595; *People v Moon*, 43 AD3d 1379, 1380, *lv denied* 9 NY3d 1036; *cf. People v Schafer*, 19 AD3d 1133, 1133). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

827

KA 08-00648

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYREE ALEXANDER, DEFENDANT-APPELLANT.

O'CONNELL AND ARONOWITZ, ALBANY (STEPHEN R. COFFEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 16, 2005. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, he was not denied his constitutional right to proceed pro se. Defendant sought to proceed pro se because he believed that his assigned counsel did not spend enough time both with him and in researching the case. After County Court ordered defense counsel to spend the afternoon with defendant preparing for trial, defendant did not again seek to proceed pro se. We conclude that defendant's request to proceed pro se was made in the context of a claim expressing his dissatisfaction with his attorney and was not unequivocal (*see People v Gillian*, 8 NY3d 85, 88; *People v Caswell*, 56 AD3d 1300, 1301-1302, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781). "In any event, . . . defendant abandoned his request by subsequently acting in a manner indicating his satisfaction with counsel" (*People v Jackson*, 97 AD3d 693, 694, *lv denied* 20 NY3d 1100; *see Gillian*, 8 NY3d at 88).

Defendant's contention that the court erred in allowing the seven-year-old victim to give sworn testimony is not preserved for our review (*see People v Dickens*, 48 AD3d 1034, 1034-1035, *lv denied* 10 NY3d 958). In any event, the court did not abuse its discretion in admitting that testimony inasmuch as the witness demonstrated sufficient intelligence and capacity, and further demonstrated that

she understood the nature of an oath, i.e., she "appreciate[d] the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished" (CPL 60.20 [2]; *see People v Beckwith*, 289 AD2d 956, 958, *amended on rearg* 303 AD2d 1054; *see generally People v Nisoff*, 36 NY2d 560, 565-566). The court properly determined that the presumption of incompetency was overcome (*see People v Hetrick*, 80 NY2d 344, 349; *People v Morales*, 80 NY2d 450, 452-453; *People v Schroo*, 87 AD3d 1287, 1289, *lv denied* 19 NY3d 977).

Defendant next contends that the evidence is legally insufficient to establish that he had sexual contact with the victim. Defendant failed to preserve that contention for our review inasmuch as he failed to renew his motion for trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, 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 Bleakley*, 69 NY2d at 495).

We reject the contention of defendant that he received ineffective assistance of counsel. Defendant failed to establish the absence of a strategic reason for defense counsel's failure to exercise any challenges during voir dire (*see generally People v Benevento*, 91 NY2d 708, 712; *People v Turck*, 305 AD2d 1072, 1073, *lv denied* 100 NY2d 566). Defendant also failed to establish the absence of a strategic reason for defense counsel's failure to call any witnesses at the *Huntley* hearing, or any witnesses other than defendant at trial (*see generally Benevento*, 91 NY2d at 712). Inasmuch as the court did not abuse its discretion in permitting the victim to testify, defense counsel's failure to object to the admission of that testimony cannot be considered ineffective assistance of counsel (*see People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857). Contrary to defendant's contention, the record establishes that defense counsel adequately cross-examined the witnesses at trial and presented a cogent defense. In fact, we note that defense counsel's cross-examination of the witnesses raised some inconsistencies in their testimony, and defendant relies on those inconsistencies in contending that the verdict is against the weight of the evidence. Defendant failed to establish the absence of a strategic reason for the fact that defense counsel did not move for a mistrial or seek a curative instruction after an outburst by the mother of the victim during the testimony of the victim's sister (*see generally Benevento*, 91 NY2d at 712). Inasmuch as a motion for a mistrial would have had "little or no chance of success," defense counsel's failure to seek that relief cannot be considered ineffective assistance (*Stultz*, 2 NY3d at 287).

Finally, the sentence is not unduly harsh or severe, particularly

in light of defendant's past criminal conduct.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

828

KA 12-00501

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. FEIDNER, DEFENDANT-APPELLANT.

KELIANN M. ARGY-ELNISKI, ORCHARD PARK, 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 December 22, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant's contention that he was denied effective assistance of counsel does not survive his guilty plea because "[t]here is 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 Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]). Even assuming, arguendo, that defendant purported to preserve for appellate review his challenge to the legal sufficiency of the evidence, we would not entertain that challenge on this appeal from the judgment entered upon his guilty plea; indeed, "it would be logically inconsistent to permit a defendant to enter a plea of guilty based on particular admitted facts, yet to allow that defendant contemporaneously to reserve the right to challenge on appeal the sufficiency of those facts to support a conviction, had there been a trial" (*People v Plunkett*, 19 NY3d 400, 405-406). Moreover, we agree with the People that defendant's challenge to the weight of the evidence is "inapplicable" inasmuch as he was convicted upon his plea of guilty, rather than upon a verdict following a trial (*cf. People v Danielson*, 9 NY3d 342, 349). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

829

KA 11-02358

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN MCCUTCHEON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 17, 2011. The judgment convicted defendant, upon a nonjury verdict, of attempted burglary in the second degree and criminal mischief 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 nonjury verdict of, inter alia, attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that he was denied effective assistance of counsel because his then-girlfriend and the mother of his child, who was also the complainant and a key prosecution witness, paid his attorney's fees. We reject that contention. Because defendant apprised Supreme Court of the potential conflict of interest, we agree with defendant that the court "had a duty . . . to conduct an inquiry 'to ascertain, on the record, whether [defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation' " (*People v Conte*, 71 AD3d 1448, 1449, quoting *People v Lombardo*, 61 NY2d 97, 102; *see People v Carncross*, 14 NY3d 319, 327). Although the court failed to conduct that inquiry, we nevertheless conclude that defendant was not denied effective assistance of counsel inasmuch as he failed to show "that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892 [internal quotation marks omitted]; *see People v Sanchez*, 21 NY3d 216, 223; *People v Hurlbert*, 81 AD3d 1430, 1431, *lv denied* 16 NY3d 896). Indeed, the record establishes that defense counsel thoroughly cross-examined the witness and elicited testimony concerning her criminal history and drug use, as well as her admission that she never saw

defendant attempt to enter the house. Further, defense counsel introduced complainant's letters to defendant, in which she stated that she loved defendant and wanted him home with her and their child.

Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

830

KA 11-01482

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL H., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an adjudication of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 25, 2011. Defendant was adjudicated a youthful offender upon his plea of guilty of robbery in the first degree.

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

Same Memorandum as in *People v Jamal H.* ([appeal No. 2] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

831

KA 11-01483

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL H., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Francis A. Affronti, J.), entered May 25, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant does not raise any contentions with respect to the adjudication in appeal No. 1, and we therefore deem abandoned any such contentions (*see generally People v Bridgeland*, 19 AD3d 1122, 1123). It is undisputed that Supreme Court originally had agreed that it would adjudicate defendant a youthful offender in connection with his plea of guilty on the indictment in appeal No. 2 as well as in connection with his plea of guilty on the indictment in appeal No. 1 but that, at sentencing, the court determined that it was not able to comply with its original sentence promise with respect to the indictment in appeal No. 2. The court vacated defendant's pleas in connection with both indictments. Defendant thereafter again pleaded guilty to, inter alia, the indictment in appeal No. 2.

"As a matter of law and strong public policy, a sentencing promise made in conjunction with a plea is conditioned upon 'its being lawful and appropriate in light of the subsequent presentence report or information obtained from other reliable sources' " (*People v Hicks*, 98 NY2d 185, 188; *see People v Herber*, 24 AD3d 1317, 1318, *lv denied* 6 NY3d 814). Contrary to defendant's contention, "the court's reliance on the presentence report for its determination that

defendant would not be afforded youthful offender status 'constitutes an adequate explanation for the denial of defendant's request for such status' " (*People v Wargula*, 86 AD3d 929, 930, *lv denied* 17 NY3d 862). The presentence report "included mitigating and aggravating factors, [and therefore] adequately explained the court's reasons for denying youthful offender status on the instant indictment" (*People v DePugh*, 16 AD3d 1083, 1084). To the extent that defendant contends that the court was aware of all of the information contained in the presentence report at the time it agreed to adjudicate defendant a youthful offender, we note that not all of the aggravating factors that are contained in the presentence report otherwise appear on the record. Thus, we are unable to review defendant's contention that the court abused its discretion in determining that it could not comply with the original plea agreement because it was apprised of those factors during a pre-plea conference.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

832

KA 11-01558

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN M. SWANK, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, JOHNSTOWN, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETTIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered February 24, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree (two counts) and unlawfully dealing with a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, rape in the second degree (Penal Law § 130.30 [1]), defendant contends that the verdict is against the weight of the evidence based on his own testimony, the testimony of the victim, and the lack of evidence supporting the victim's testimony. Specifically, defendant contends that the victim's testimony is not credible because her trial testimony was internally inconsistent and was also inconsistent with her statements to the police and her grand jury testimony. 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). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801; *see generally Bleakley*, 69 NY2d at 495).

Defendant failed to seek immunity for a witness that he called to testify at a hearing on his CPL article 330 motion, and he thus failed to preserve for our review his further contention that the prosecutor abused his discretion "when he refused to request that [the witness] be granted immunity from prosecution" (*see generally People v*

Callicut, 101 AD3d 1256, 1262 n 4, *lv denied* 20 NY3d 1096; *People v Norman*, 40 AD3d 1130, 1131, *lv denied* 9 NY3d 925; *People v Grimes*, 289 AD2d 1072, 1073, *lv denied* 97 NY2d 755). In any event, that contention is without merit inasmuch as the decision of a District Attorney to request immunity for a witness is discretionary " 'and not reviewable unless the District Attorney acts with bad faith to deprive a defendant of his or her right to a fair trial' " (*People v Bolling*, 24 AD3d 1195, 1196, *affd* 7 NY3d 874; *see generally* CPL 50.30), and here there was no showing of bad faith (*see People v Adams*, 53 NY2d 241, 247-248). Furthermore, the witness's testimony "could have been produced at trial with the exercise of due diligence, and it was not of 'such character as to create a probability that had such evidence been received at the trial the verdict would have been favorable to the defendant' " (*People v Broadnax*, 52 AD3d 1306, 1308, *lv denied* 11 NY3d 830, quoting CPL 330.30 [3]).

Defendant failed to seek dismissal of a sworn juror on the ground that she was grossly unqualified, and thus he also failed to preserve for our review his contention that County Court erred in refusing to grant that relief (*see generally People v Hicks*, 6 NY3d 737, 739). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to move to disqualify the juror as grossly unqualified. It is " 'incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709), and defendant failed to make such a showing here, particularly in light of the indications in the record that the juror in question was the only juror who was of the opinion that defendant should not be convicted.

Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

833

KA 11-01826

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELISHA R. SWAIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 26, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends that County Court erred in refusing to suppress identification testimony arising from an unduly suggestive showup identification procedure. We reject that contention. The showup identification procedure took place within 30 minutes of the robbery, in proximity to where the robbery occurred and "in the context of a continuous, ongoing investigation," which was sufficient to establish that the showup procedure was reasonable under the circumstances (*People v Brisco*, 99 NY2d 596, 597; *see People v Lewis*, 97 AD3d 1097, 1098, *lv denied* 19 NY3d 1103; *People v Jacob*, 94 AD3d 1142, 1144, *lv denied* 19 NY3d 962). The showup was not rendered unduly suggestive by the victim's observation of portions of the police investigation or the fact that defendant was in the presence of police officers when the victim identified him (*see People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800; *People v Grant*, 77 AD3d 558, 558, *lv denied* 16 NY3d 831). Contrary to defendant's further contention, the court did not err in limiting defendant's cross-examination of the victim concerning his observations of defendant at the time of the robbery. The purpose of a *Wade* hearing is "to test identification testimony for taint arising from official suggestion during 'police-arranged confrontations between a defendant and an eyewitness' " (*People v Dixon*, 85 NY2d 218, 222, quoting *People v*

Gissendanner, 48 NY2d 543, 552), and the court did not abuse its discretion in refusing to permit defendant to cross-examine the victim on an issue that was not material to that inquiry (*see generally People v Bryant*, 73 AD3d 1442, 1443, *lv denied* 15 NY3d 850; *People v Snell*, 234 AD2d 986, 986, *lv denied* 89 NY2d 1015).

Finally, we reject defendant's contention that the court erred in refusing to suppress physical evidence seized from his basement following a warrantless search of the house where he resided with his mother. After the police accompanied defendant into the house so that he could retrieve his jacket and boots, defendant's mother verbally consented to the search of the house, led the officers into the basement, and signed a written consent to search the premises. The record establishes that the mother freely and voluntarily consented to the search of the residence (*see People v Santiago*, 41 AD3d 1172, 1173-1174, *lv denied* 9 NY3d 964; *People v Adams*, 244 AD2d 897, 898, *lv denied* 91 NY2d 887).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

834

CA 13-00382

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

APRIL WALRADT, PLAINTIFF-APPELLANT,

V ORDER

BATAVIA FAMILY DENTAL AND STEVEN SOKOLOVSKIY, D.D.S., DEFENDANTS-RESPONDENTS.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (RYAN C. WOODWORTH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (SCOTT D. PIPER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered June 15, 2012. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

835

CA 12-02371

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND PERADOTTO, JJ.

JONATHAN ABBOTT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VITO WILLIAM LUCCHETTI, JR., THE MACREPORT.NET, INC., MARCELLUS GROUP, LLC, MARCELLUS GROUP CONSTRUCTION, LLC, JA SPA, LLC, SONO PIZZA & PASTA FACTORY, INC., CROWN MILL RESTORATION DEVELOPMENT, LLC AND MACREPORT.NET MEDIA PUBLISHING, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNY & KENNY, PLLC, SYRACUSE (JUSTIN D. HOWLAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 29, 2012. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the amended complaint and denied the motion of defendants for a stay.

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

Same Memorandum as in *Abbott v Lucchetti* ([appeal No. 3] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

838

CA 12-02159

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

DAVID SHUMWAY AND CATHY SHUMWAY,
PLAINTIFFS-APPELLANTS,

V ORDER

JUSTIN KELLEY, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (John M. Curran, J.), entered March 12, 2012. The order denied the motion of plaintiffs to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

839

CA 12-02160

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

DAVID SHUMWAY AND CATHY SHUMWAY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JUSTIN KELLEY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (John M. Curran, J.), entered October 23, 2012. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by David Shumway (plaintiff) at work when defendant, plaintiff's coworker, collided with him. At trial, the jury concluded that defendant was acting within the course and scope of his employment at the time of the accident, thus rendering workers' compensation plaintiffs' sole remedy (*see generally Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543-544). Supreme Court properly denied plaintiffs' motion for judgment notwithstanding the verdict or, alternatively, to set aside the verdict as against the weight of the evidence and for a new trial.

We reject plaintiffs' contention that they are entitled to judgment notwithstanding the verdict inasmuch as it cannot be said that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see Jaoude v Hannah*, 104 AD3d 1272, 1274). Defendant testified that there was a lot of joking and playing around in the auto shop workplace, including pranks among the employees. Although defendant testified that their employer "frowned on" physical contact between employees, he also testified that the employees commonly would throw snowballs at each other and nudge someone who was pouring oil or antifreeze into a vehicle, to make him

or her spill it. Defendant testified that the incident in question occurred when he intended to "nudge" plaintiff's arm as he walked quickly or ran past him, in response to a prank by plaintiff earlier that day, when plaintiff poked him in the ribs while he was on the telephone with a customer. That afternoon, defendant intended to make contact only with plaintiff's arm, but his momentum caused his chest to contact plaintiff's back, which resulted in plaintiff's fall. Defendant was not reprimanded by his employer as a result of the incident, and plaintiffs did not submit any evidence that defendant's conduct was in violation of the workplace rules. Based on that evidence, the jury could conclude that defendant's conduct was common in the workplace and within the scope of his employment (*cf. Johnson v Del Valle*, 98 AD3d 1290, 1291). Contrary to plaintiffs' further contention, the verdict is not against the weight of the evidence and thus plaintiffs are not entitled to a new trial inasmuch as it cannot be said that "the preponderance of the evidence in favor of [plaintiffs] 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 generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Plaintiffs contend that the jury instruction was erroneous and resulted in juror confusion. We reject that contention. The court issued an instruction in accordance with PJI 2:218 and supplemented that instruction based on our prior decision in this case (*Shumway v Kelley*, 60 AD3d 1457, 1458-1459) and the cases we cited therein. We conclude that the court's charge " 'accurately stated the law as it applie[d] to the facts in this case' " (*Gerbino v Tinseltown USA*, 13 AD3d 1068, 1071). The court properly rejected plaintiffs' use of juror affidavits in an attempt to impeach the verdict (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 460). "The policy reasons behind the rule [against such use of juror affidavits] are to prevent 'the posttrial harassing of jurors for statements which might render their verdicts questionable' and to avoid the chaos that a contrary rule would create" (*id.*). Inasmuch as there was no error in reporting the verdict and the record does not demonstrate substantial confusion among the jurors, the two exceptions to the general rule prohibiting jurors from impeaching their own verdict, plaintiffs may not use the juror affidavits in an attempt to impeach the verdict (*see Porter v Milhorat*, 26 AD3d 424, 424).

We have considered plaintiffs' remaining contentions and conclude that they are without merit.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

840

CA 12-01794

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

VAN SHARMA, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE A. CHAMBERLAIN, DEFENDANT-RESPONDENT.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BECKERMAN AND BECKERMAN, LLP, ROCHESTER (GERALD BECKERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 7, 2012. The order, among other things, precluded plaintiff from offering evidence in opposition to defendant's counterclaims.

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

Memorandum: Plaintiff commenced this action seeking the imposition of a constructive trust in rental premises owned by defendant and leased and maintained by plaintiff, as well as an accounting of funds received by defendant and the return of certain funds to plaintiff. Defendant asserted counterclaims alleging, inter alia, that plaintiff withheld monies from him relating to the rental premises, and served a notice to produce on plaintiff. Plaintiff did not serve a responsive pleading with respect to the counterclaims nor did plaintiff respond to the notice to produce, and defendant moved to compel disclosure. Supreme Court granted defendant's motion to compel and issued a conditional order of preclusion with respect to the complaint and the counterclaims. Defendant did not receive a response to the notice to produce, and subsequently moved for dismissal of the complaint and judgment in the amount sought on his counterclaims based on plaintiff's default or, alternatively, for summary judgment on his counterclaims. Plaintiff in turn moved to vacate the default on the ground that it had provided the responses in compliance with the preclusion order and they had been lost in the mail. The court granted judgment on the counterclaims based on plaintiff's "default in pleading," and following a hearing the court also granted defendant's motion insofar as it sought dismissal of the complaint based on plaintiff's failure to provide a timely and sufficient response to the notice to produce. We affirm.

Plaintiff's contention that the court erred in failing to hold an

inquest to determine the amount of damages sought in the counterclaims is not preserved for our review and, in any event lacks merit. An inquest was not required inasmuch as defendant sought a sum certain, and plaintiff was precluded from introducing any evidence in opposition to defendant's computation (*see* CPLR 3215 [a]; *see also Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730). Plaintiff likewise failed to preserve for our review its contentions regarding the scope of the preclusion order inasmuch as plaintiff did not oppose defendant's motion to compel (*see Howard Rosengarten, P.C. v Hott*, 49 AD3d 328, 328-329; *see also Congleton v United Health Servs. Hosps.*, 67 AD3d 1148, 1150). Even assuming, arguendo, that plaintiff timely responded to the notice to produce, we conclude that the court neither abused nor improvidently exercised its discretion in determining that plaintiff's responses were insufficient (*see Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1745).

Contrary to plaintiff's further contention, the court properly determined that the proffered defense of law office failure was without merit. Plaintiff's contention that its response to the notice to produce was lost in the mail was not corroborated and therefore did not constitute " 'a reasonable excuse for the default' " (*Hann v Morrison*, 247 AD2d 706, 707; *cf. Papandrea v Acevedo*, 54 AD3d 915, 916*; Cole v Delcamp*, 288 AD2d 850, 851). We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

841

CA 12-02372

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND PERADOTTO, JJ.

JONATHAN ABBOTT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VITO WILLIAM LUCCHETTI, JR., THE MACREPORT.NET, INC., MARCELLUS GROUP, LLC, MARCELLUS GROUP CONSTRUCTION, LLC, JA SPA, LLC, SONO PIZZA & PASTA FACTORY, INC., CROWN MILL RESTORATION DEVELOPMENT, LLC AND MACREPORT.NET MEDIA PUBLISHING, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNY & KENNY, PLLC, SYRACUSE (JUSTIN D. HOWLAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 29, 2012. The order denied the motion of defendants to stay discovery and for a protective order.

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

Same Memorandum as in *Abbott v Lucchetti* ([appeal No. 3] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

842

CA 13-00248

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF ANITA STOUDYMIRE,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
HONORABLE MICHAEL F. MCKEON,
RESPONDENTS-RESPONDENTS.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (MICHAEL D. GADARIAN OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN W. MCCONNELL, OFFICE OF COURT ADMINISTRATION, NEW YORK CITY (SHAWN KERBY OF COUNSEL), FOR RESPONDENT-RESPONDENT HONORABLE MICHAEL F. MCKEON.

Appeal from an order and judgment (one paper) of the Supreme Court, Cayuga County (Joseph D. Valentino, J.), entered July 30, 2012. The order and judgment dismissed the petition.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court (*Stoudymire v New York State Div. of Human Rights*, 36 Misc 3d 919, 2012 NY Slip Op 22210).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

843

CA 13-00299

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

JUDITH CIRIFALCO AND SALVATORE A. CIRIFALCO, PLAINTIFFS-RESPONDENTS,

V ORDER

U.S.I. BUILDING SERVICES, INC., DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID P. FELDMAN, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 9, 2012. The order denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 12, 2013, and filed in the Niagara County Clerk’s Office on August 22, 2013,

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

845

CA 12-01990

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF BAKER HALL, DOING BUSINESS
AS BAKER VICTORY SERVICES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF LACKAWANNA ZONING BOARD OF APPEALS
AND CITY OF LACKAWANNA, RESPONDENTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 25, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted in part the petition and annulled the determination of respondent City of Lackawanna Zoning Board of Appeals.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent City of Lackawanna Zoning Board of Appeals (ZBA) that a residential treatment facility (RTF) proposed by petitioner is not a permitted use in the mixed residential (MR) district in which petitioner sought to construct it. We conclude that Supreme Court properly granted the petition to that extent. Although "[t]he interpretation by a zoning board of its governing code is generally entitled to great deference by the courts . . . , an interpretation that runs counter to the clear wording of a [code] provision is given little weight" (*Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467-1468 [internal quotation marks omitted]). Here, the ZBA's determination that the proposed RTF is not permitted in an MR district is contrary to the clear wording of Lackawanna City Code (City Code) § 230-80 and the sections of the multiple residence law that are incorporated by reference therein (*see generally Matter of McGrath v Town of Amherst Zoning Bd. of Appeals*, 94 AD3d 1522, 1523-1524, *lv denied* 19 NY3d 809).

Finally, we note that, inasmuch as petitioner did not take a

cross appeal from the judgment, it is precluded from obtaining the affirmative relief it seeks (*see Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1148; *see generally Hecht v City of New York*, 60 NY2d 57, 61).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

846

CA 12-02373

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND PERADOTTO, JJ.

JONATHAN ABBOTT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CROWN MILL RESTORATION DEVELOPMENT, LLC,
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (JUSTIN D. HOWLAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 29, 2012. The order, insofar as appealed from, denied the motion of defendant to vacate the judgment and dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by granting the motion in part and vacating the default judgment only insofar as it awarded damages in a specified amount and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for a new assessment of damages in accordance with the following Memorandum: The plaintiff in appeal Nos. 1 through 3 commenced a Labor Law and common-law negligence action (underlying action) against Crown Mill Restoration Development, LLC (Crown Mill), a defendant in appeal Nos. 1 and 2 and the defendant in appeal No. 3, seeking damages for injuries he allegedly sustained when he fell from a ladder while working on premises owned by Crown Mill. After Crown Mill failed to appear at a damages inquest, Supreme Court entered a default judgment against Crown Mill. Plaintiff thereafter commenced an action seeking to enforce the judgment against the defendants in appeal Nos. 1 and 2 (hereafter, defendants), including Crown Mill's owner, Vito William Lucchetti, Jr., and various other entities owned by Lucchetti, based upon a theory of piercing the corporate veil (enforcement action). Defendants moved to dismiss the amended complaint in the enforcement action for failure to state a cause of action, contending that the exclusivity provisions of the Workers' Compensation Law precluded recovery against them, and they sought to stay discovery pending the determination of the motion. Crown Mill thereafter moved to vacate the default judgment in the underlying action, contending, inter alia, that it had a reasonable excuse for

its default, i.e., law office failure, and several meritorious defenses, including that the Workers' Compensation Law barred recovery against it. In appeal No. 1, defendants appeal from an order that, inter alia, denied their motion to dismiss the amended complaint in the enforcement action except as to defendant Marcellus Group, LLC and, in appeal No. 2, they appeal from an order denying their motion for a stay of discovery and for a protective order in the same action. In appeal No. 3, Crown Mill appeals from an order that, inter alia, denied its motion to vacate the default judgment and to dismiss the amended complaint in the underlying action.

Addressing first appeal No. 3, we conclude that the court properly denied Crown Mill's motion insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (1) because Crown Mill failed to establish a reasonable excuse for its default (*see generally Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1755, *lv denied* 20 NY3d 862; *Fremming v Niedzialowski*, 93 AD3d 1336, 1336). Although "[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 Diaz v Diaz*, 71 AD3d 947, 948) and the court may under appropriate circumstances accept law office failure as a reasonable excuse for a default (*see Lauer*, 53 AD3d at 217; *Montefiore Med. Ctr. v Hartford Acc. & Indem. Co.*, 37 AD3d 673, 673-674; *Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760, 761), a pattern of willful default or neglect should not be excused as law office failure (*see Santiago v New York City Health & Hosp. Corp.*, 10 AD3d 393, 394; *Shouse v Lyons*, 265 AD2d 901, 902; *see also Edwards v Feliz*, 28 AD3d 512, 513). Further, a party's failure to retain counsel when provided sufficient time in which to do so does not constitute a reasonable excuse for a default (*see Diaz*, 71 AD3d at 948; *City of New York v Simmonds*, 172 AD2d 1081, 1081; *Mauro v Mauro*, 148 AD2d 684, 685).

Here, the damages inquest was initially scheduled for March 2008, and then adjourned to July 2008. On the day before the scheduled inquest, Crown Mill filed a chapter 7 bankruptcy petition, thus automatically staying the underlying action. Plaintiff, the court, and Crown Mill's own attorneys, who did not represent Crown Mill with respect to the bankruptcy and were named as creditors, were not advised of the petition until the morning of the inquest. After the bankruptcy petition was dismissed in December 2008 based on Crown Mill's failure to cooperate with the bankruptcy trustee, Crown Mill's attorneys sought permission to withdraw as counsel based upon a conflict of interest, i.e., Crown Mill's failure to pay for legal services rendered. The court granted the motion on Crown Mill's default, providing in its order that Crown Mill had 30 days from the date of service of the order with notice of entry within which to obtain new counsel and to notify the court thereof. During the nearly five months between the order relieving its attorneys and the rescheduled inquest date, Crown Mill did not communicate with the court regarding any attempt to retain new counsel, nor did it seek an adjournment of the inquest date (*cf. Russo v Tolchin*, 35 AD3d 431, 435). Rather, Lucchetti met with an attorney two business days before the inquest to discuss her possible representation of Crown Mill at

the inquest. According to Lucchetti, Crown Mill's former attorneys told him that the inquest was scheduled for September 23, 2009 when in fact the scheduled date was two days earlier, although nothing in the record substantiates that assertion, and the court in its written decision indicated that its file contains no notation of an appearance in court on that date (*see Morris v Metropolitan Transp. Auth.*, 191 AD2d 682, 683; *cf. Hageman*, 25 AD3d at 761). Notably, Crown Mill waited until January 2012, more than two years after its default and 11 months after service of the judgment, to seek to vacate the default (*see Marrero v Crystal Nails*, 77 AD3d 798, 799; *Shouse*, 265 AD2d at 902; *cf. Russo*, 35 AD3d at 435). Moreover, as the court noted, Crown Mill's failure to appear at the inquest was not an isolated incident but, rather, such failure was the continuation of a lengthy pattern of delay and neglect (*see e.g. Marrero*, 77 AD3d at 799; *Bennett v Nardone*, 276 AD2d 854, 855, *lv dismissed* 96 NY2d 754; *cf. Montefiore*, 37 AD3d at 673). We thus conclude that the court providently exercised its discretion in determining that Crown Mill failed to provide a reasonable excuse for its default (*see Shouse*, 265 AD2d at 902). Because Crown Mill failed to establish a reasonable excuse for the default, we need not determine whether it had a potentially meritorious defense to the underlying action (*see Fremming*, 93 AD3d at 1336-1337; *Diaz*, 71 AD3d at 948).

We further conclude that the court properly denied Crown Mill's motion insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (3), on the grounds of fraud or misrepresentation (*see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68; *VanZandt v VanZandt*, 88 AD3d 1232, 1233). Crown Mill failed to meet its burden of establishing fraud, misrepresentation, or other misconduct on the part of plaintiff sufficient to entitle it to vacatur of the judgment (*see U.S. Bank N.A. v Allen*, 102 AD3d 955, 955; *Matter of Shere L. v Odell H.*, 303 AD2d 1023, 1024; *see generally VanZandt*, 88 AD3d at 1233).

Under the circumstances of this case and "in the interests of substantial justice" (*Woodson*, 100 NY2d at 68), however, we deem it appropriate to exercise "our broad discretionary power" to grant in part the motion to vacate the default judgment only insofar as it awarded damages in a specified amount and to remit the matter to Supreme Court for a new assessment of damages following an inquest (*Piatt v Horsley*, 108 AD3d 1188, 1189; *see Quigley v Coco's Water Café, Inc.*, 43 AD3d 1132, 1133; *Monette v Bonsall*, 29 AD2d 839, 840). We agree with Crown Mill that the additional evidence it presented in support of its motion raised an issue whether the damages awarded to plaintiff after the inquest were excessive (*see Quigley*, 43 AD3d at 1133). We therefore modify the order in appeal No. 3 accordingly, and we remit the matter to Supreme Court for a new assessment of damages following an inquest before a different justice (*see generally id.*; *Monette*, 29 AD2d at 840).

Turning next to appeal No. 1, we conclude that the appeal must be dismissed. The amended complaint seeks judgment against defendants in the amount of the judgment in the underlying action against Crown Mill

based upon a theory of piercing the corporate veil and, based on our determination in appeal No. 3, the award of damages in that specified amount is vacated and the matter is remitted for a new assessment of damages. In the interest of judicial economy, however, we note that the court properly denied defendants' motion, with the exception of one defendant, seeking to dismiss the amended complaint in the enforcement action for failure to state a cause of action. It is well settled that, "[w]hen reviewing a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 1367, *lv denied* 17 NY3d 704; *see Williams v Beemiller, Inc.*, 100 AD3d 143, 148, *amended on rearg* 103 AD3d 1191). "A plaintiff seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff . . . Factors to be considered in determining whether [a corporation] has abused [that] privilege . . . include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*McCloud v Bettcher Indus., Inc.*, 90 AD3d 1680, 1681 [internal quotation marks omitted]). " 'A decision to pierce the corporate veil is a fact-laden decision' " (*Dromgoole v T-Foots, Inc.*, 309 AD2d 1186, 1187).

Here, plaintiff alleged, inter alia, that defendants Marcellus Group, LLC (Marcellus Group), Marcellus Group Construction, LLC (Marcellus Construction), Ja Spa, LLC (Ja Spa) and Crown Mill are solely owned by Lucchetti; that Lucchetti was chief executive officer, chairman of the board of directors, president, principal executive officer, principal accounting and financial officer, and 92% shareholder of defendant MacReport.Net, Inc. (MacReport); and that Crown Mill, Marcellus Group, Marcellus Construction, Ja Spa, MacReport, and defendants Sono Pizza & Pasta Factory, Inc. (Sono Pizza) and MacReport.Net Media Publishing, Inc. (Mac Media) shared administrative offices and utilized common equipment, and that the same employees performed clerical, administrative, accounting and executive duties for all the corporations. Plaintiff further alleged that Lucchetti (1) failed to adhere to corporate formalities, failed to keep adequate records concerning governance and financial accounting, and failed to retain sufficient earnings from corporate operations to meet financial obligations before distributing those earnings to himself; (2) "completely dominated" and intentionally undercapitalized Crown Mill; and (3) conducted the business of Crown Mill "in disregard of its formalities in a manner that suited [his] own personal convenience." We conclude that plaintiff's allegations are sufficient to survive a CPLR 3211 motion (*see generally Williams*, 100 AD3d at 148; *10 Ellicott Sq. Ct. Corp.*, 81 AD3d at 1367).

Finally, with respect to appeal No. 2, defendants sought an automatic stay of discovery or a protective order staying discovery pending determination of their motion to dismiss the enforcement

action. The court ruled on defendants' motion, and thus the appeal from the order denying the requested relief must be dismissed as moot (*see generally Tennant v Bristol Labs., Div. of Bristol-Myers Co.*, 155 AD2d 936, 936).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

847

KA 12-00847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDAN J. RHODES, DEFENDANT-APPELLANT.

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

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a resentence of the Allegany County Court (Thomas P. Brown, J.), rendered February 10, 2012. Defendant was resentenced upon his conviction of robbery in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by reducing the sentence of incarceration imposed for robbery in the first degree to a determinate term of incarceration of 12 years and as modified the resentence is affirmed.

Memorandum: Defendant was convicted following a plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]) and was sentenced to, inter alia, a determinate term of incarceration of 12 years and was ordered to pay restitution. On the appeal from that judgment, we vacated the sentence on the grounds that restitution had not been a part of the plea agreement and County Court erred in failing to conduct a hearing to determine the amount of restitution (*People v Rhodes*, 91 AD3d 1280, 1281, *lv granted* 19 NY3d 1028). We remitted the matter to County Court "to impose the promised sentence or to afford defendant the opportunity to withdraw his plea" (*id.*). On remittal, the court resentenced defendant to, inter alia, a determinate term of incarceration of 15 years. On this appeal from the resentence, defendant contends that the increased sentence of incarceration was impermissibly vindictive, and we agree.

"In order to ensure that defendants are not being penalized for exercising their right to appeal, 'a presumption of [institutional] vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences . . . than were imposed after their initial convictions' " (*People v Hilliard*, 49 AD3d 910, 914, *lv denied* 10 NY3d 959, quoting *People v Young*, 94 NY2d 171, 176, *rearg denied* 94 NY2d 876; *see generally People v Van Pelt*, 76 NY2d 156, 159-160). "The threshold issue in evaluating whether a resentence is

vindictive is whether the resentence is more severe than that originally imposed" (*People v Cahill*, 46 AD3d 1455, 1456, *lv denied* 11 NY3d 830; *see People v Rogers*, 56 AD3d 1173, 1174, *lv denied* 12 NY3d 787; *see generally Van Pelt*, 76 NY2d at 159-160). In order to justify an increased sentence, a court must set forth its reasons, and " '[t]hose reasons must be based upon objective information *concerning identifiable conduct on the part of the defendant occurring* ***after*** *the time of the original sentencing proceeding' "* (*Van Pelt*, 76 NY2d at 159 [additional emphasis added]).

The court here justified the increase in the term of incarceration by stating that defendant was "*still* not taking full responsibility for [his] actions, and [was] minimizing the serious nature of th[e] crime" (emphasis added). We reject that justification. Although defendant admitted the facts of the crime during his plea allocution, the original presentence investigation report (PSR) indicated that defendant asserted his innocence, questioned the veracity of the prosecutor's witnesses and apparently lied about how he came into possession of the firearm when he was interviewed for that report. The original PSR also noted that defendant had been the subject of numerous disciplinary infractions while he was in custody pending the resolution of the criminal proceeding. When he appeared for sentencing, defendant admitted that he had a drug problem, that he had "made a lot of mistakes" and that he suffered from bipolar disorder.

Following our remittal, the court ordered an update to the PSR. During his interview for that report, defendant again admitted his conduct but questioned whether he deserved the 12-year sentence of incarceration that the court had previously imposed. The updated PSR also noted that defendant had not had any disciplinary infractions since his original sentence was imposed. In our view, "[t]he record is devoid of any objective information sufficient to rebut the presumption of vindictiveness that arose from the court's imposition of a sentence greater than that imposed after the initial conviction" (*People v Jenkins*, 38 AD3d 566, 567-568, *lv denied* 8 NY3d 986; *see Rogers*, 56 AD3d at 1174-1175; *People v Moye*, 4 AD3d 488, 489, *lv denied* 2 NY3d 803). We therefore modify the resentence by reducing the sentence of incarceration imposed for robbery in the first degree to a determinate term of 12 years.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

848

KA 12-00428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERTO R. LOPEZ, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 (Anthony F. Aloi, J.), rendered December 14, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

850

KA 12-00899

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLIE EPPS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 23, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant contends that Supreme Court erred in enhancing his sentence without affording him the opportunity to withdraw his plea (*see People v Selikoff*, 35 NY2d 227, 241, *cert denied* 419 US 1122) and that his waiver of the right to appeal does not foreclose him from raising that contention. We agree with defendant that the waiver of the right to appeal does not encompass his contention regarding the alleged enhanced sentence (*see People v Joyner*, 19 AD3d 1129, 1129; *People v Lighthall*, 6 AD3d 1170, 1171, *lv denied* 3 NY3d 643). Defendant, however, failed to preserve that contention for our review because he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see Joyner*, 19 AD3d at 1129; *People v Webb*, 299 AD2d 955, 955, *lv denied* 99 NY2d 565), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

851

KA 09-01582

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. BRUMFIELD, DEFENDANT-APPELLANT.

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

MICHAEL S. BRUMFIELD, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 27, 2009. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a weapon in the second degree, attempted criminal possession of a weapon in the third degree, obstructing governmental administration in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts two through five of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]), obstructing governmental administration in the second degree (§ 195.05) and resisting arrest (§ 205.30). Defendant's contention in his main and pro se briefs that the evidence is legally insufficient to support the conviction of those counts is preserved for our review only insofar as it relates to the crimes of attempted criminal possession of a weapon in the second and third degrees (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, 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, and thus we reject defendant's contention to that effect (*see generally Bleakley*, 69 NY2d at 495). Defendant also contends in his pro se supplemental brief

that count two of the indictment, charging attempted criminal possession of a weapon in the second degree, was jurisdictionally defective because the People did not negate the "home or place of business" exception (§ 265.03 [3]). We reject that contention. That exception is inapplicable where, as here, a defendant "has been previously convicted of any crime" (§ 265.02 [1]; *see* § 265.03 [3]). We note that the People properly alleged defendant's prior conviction in a special information filed with the indictment (*see* CPL 200.60).

Defendant further contends in his main brief that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 210.20 (1) (c) because he was denied his right to testify before the grand jury. We agree. Defendant served the People with "a notice requesting appearance before [the] grand jury" pursuant to CPL 190.50 (5) (b) and appeared at the appropriate time and place. After the People presented defendant with a waiver of immunity form, defendant deleted three paragraphs from that form and then signed the form before a notary public. Defendant refused to sign the waiver of immunity form without any deletions, and the People did not permit defendant to testify before the grand jury.

CPL 190.50 (5) provides that, if a defendant serves upon the People a notice of his intent to testify before the grand jury, appears at the appropriate time and place, and signs and submits to the grand jury "a waiver of immunity pursuant to [CPL] 190.45," the defendant "must be permitted to testify before the grand jury" (CPL 190.50 [5] [b]; *see* CPL 190.50 [5] [a]). In the event that the defendant complies with those procedures and is thereafter not permitted to testify, the appropriate remedy is dismissal of the indictment (*see* CPL 190.50 [5] [c]). The parties do not dispute that defendant complied with the first two requirements of the statute. The only dispute is whether defendant signed "a waiver of immunity pursuant to section 190.45" (CPL 190.50 [5] [b]). CPL 190.45 (1) provides that a waiver of immunity "is a written instrument" in which a person who is to testify before the grand jury stipulates that he or she "waives [the] privilege against self-incrimination and any possible or prospective immunity to which he [or she] would otherwise become entitled, pursuant to [CPL] 190.40, as a result of giving evidence in such proceeding." Here, the paragraphs in the waiver of immunity form that defendant left intact stated that defendant waived his privilege against self-incrimination and any immunity to which he would otherwise be entitled pursuant to CPL 190.40. Thus, defendant signed a waiver of immunity form that complied with the requirements of CPL 190.45 (1) and was therefore required to be permitted to testify before the grand jury (*see* CPL 190.50 [5] [b]). It is well settled that a defendant's statutory right to testify before the grand jury " 'must be scrupulously protected' " (*People v Smith*, 87 NY2d 715, 721, quoting *People v Corrigan*, 80 NY2d 326, 332). We conclude that, because defendant complied with the requirements of CPL 190.50 (5) but was nevertheless denied his right to testify before the grand jury, the court erred in denying defendant's motion to dismiss the indictment. We therefore reverse the judgment of conviction, grant the motion, and dismiss the indictment without prejudice to the People to re-present any appropriate charges under counts two through five of

the indictment to another grand jury (*see generally People v Pattison*, 63 AD3d 1600, 1601, *lv denied* 13 NY3d 799).

In view of our determinations, we do not address defendant's remaining contentions raised in his main and pro se supplemental briefs.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

852

KA 11-00684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM THEALL, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., 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 November 18, 2010. 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: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends, inter alia, that his waiver of the right to appeal is invalid and that his plea was not knowingly, voluntarily or intelligently entered because the factual allocution negated his intent to kill, which is an essential element of the crime to which he pleaded guilty. It is well settled that a contention that a guilty plea is not knowing, voluntary and intelligent survives a valid waiver of the right to appeal (*see People v Cloyd*, 78 AD3d 1669, 1670, *lv denied* 16 NY3d 857; *People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760; *see generally People v Seaberg*, 74 NY2d 1, 10). Defendant, however, "failed to preserve that contention for our review by moving to withdraw the plea or to vacate the judgment of conviction" (*Trinidad*, 23 AD3d at 1061; *see Cloyd*, 78 AD3d at 1670). "Contrary to defendant's contention, this case does not fall within the rare exception to the preservation rule" (*Trinidad*, 23 AD3d at 1061; *see generally People v Lopez*, 71 NY2d 662, 666). "Although the initial statements of defendant during the factual allocution may have negated the essential element of his intent to cause death, his further statements removed any doubt regarding that intent" (*Trinidad*, 23 AD3d at 1061; *see Cloyd*, 78 AD3d at 1670). In any event, County Court "conducted the requisite further inquiry to ensure that defendant understood the nature of the charge and that the plea was intelligently entered" (*People v Glasper*, 46 AD3d 1401, 1402, *lv denied* 10 NY3d 863).

Even assuming, arguendo, that the waiver of the right to appeal is invalid (*see People v Keiser*, 100 AD3d 927, 928, *lv denied* 20 NY3d 1062; *see also People v Bradshaw*, 76 AD3d 566, 569, *affd* 18 NY3d 257), we would nevertheless reject defendant's contention that the sentence is unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

853

KA 09-02028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEMON JONES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM 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 Monroe County Court (Richard A. Keenan, J.), dated August 26, 2009. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to vacate the sentence imposed upon his conviction of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We reject defendant's contention that the sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]). Contrary to the contention of defendant, we conclude that he was properly adjudicated a persistent felony offender. With respect to the sufficiency of County Court's order, we agree with defendant that the court's statement that it denied defendant's motion "for the reasons set forth in the People's response" was insufficient to satisfy the requirements of CPL 440.30 (7) (*see generally People v Isaacs*, 71 AD3d 1162, 1162; *People v Williams*, 184 AD2d 608, 608; *cf. People v Watkins*, 79 AD3d 1648, 1648-1649, *lv denied* 16 NY3d 800). We nevertheless conclude that the record is sufficient to enable us to intelligently review the order denying defendant's motion (*see People v Dover*, 294 AD2d 594, 595, *lv denied* 98 NY2d 767; *People v Neely*, 219 AD2d 444, 446, *lv denied* 88 NY2d 1023; *see generally* CPL 470.15 [1]). We therefore decline to hold the matter and to remit it for a statement in accordance with CPL 440.30 (7), particularly in light of the fact that the County Court judge who originally heard the motion has since retired (*see Dover*, 294 AD2d at 594).

With respect to the merits, the persistent felony offender statute (Penal Law § 70.10), permits a sentencing court to impose the prison term authorized for a class A-1 felony (a minimum of 15 to 25 years and a maximum of life) upon a defendant who is convicted of a felony after having been previously convicted of two or more felonies, as defined by the statute (*see* §§ 70.00 [2] [a]; [3] [a] [i]; 70.10 [1] [a], [2]; *People v Vincent*, 105 AD2d 468, 469; *see also Griffin v Mann*, 156 F3d 288, 290-291). The statute defines a "previous felony conviction" as "a conviction of a felony in this state, *or of a crime in any other jurisdiction, provided: (i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor*; and (ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and (iii) that the defendant was not pardoned on the ground of innocence; and (iv) that such conviction was for a felony offense other than persistent sexual abuse" (§ 70.10 [1] [b] [emphasis added]). Once it has been determined that a defendant is a persistent felony offender, the court may sentence defendant as such "when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (§ 70.10 [2]; *see Griffin*, 156 F3d at 290-291).

Here, it is undisputed that defendant was "sentence[d] to a term of imprisonment in excess of one year" on each of the two federal convictions at issue (Penal Law § 70.10 [1] [b] [i]). Thus, under the plain language of the statute, the federal convictions qualify as "previous felony conviction[s]" within the meaning of section 70.10 (1) (b) (*see People v Griffin*, 168 AD2d 972, 972, *lv denied* 77 NY2d 906). Defendant, however, contends that we should impose a requirement that foreign felonies used to support persistent felony offender status must have a New York equivalent. We reject that contention. Defendant primarily relies upon cases interpreting the second felony offender statute, which contains a different definition of a predicate felony (*see Griffin*, 156 F3d at 290; *compare* § 70.06 [1] [b] [i] *with* § 70.10 [1] [b] [i]). Under the second felony offender statute, in order to constitute a "predicate felony conviction," "[t]he conviction must have been in this state of a felony, *or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized* <u>*and is authorized in this state*</u> irrespective of whether such sentence was imposed" (§ 70.06 [1] [b] [i] [emphases added]).

As the Court of Appeals explained in *People v Gonzalez* (61 NY2d 586), "[f]or purposes of sentencing [under the second felony offender statute], a prior out-of-State conviction is a predicate felony conviction in New York when the foreign conviction carries with it a sentence of imprisonment in excess of one year *and a sentence in excess of one year is also authorized for the offense in this State . . . Because New York only permits terms of imprisonment in excess of one year for felony convictions, the statute requires that the conviction be for a crime whose elements are equivalent to those of a*

New York felony" (*id.* at 589 [emphasis added]; *see People v Muniz*, 74 NY2d 464, 467; *see also People v Iliff*, 96 AD3d 974, 975).

The persistent felony offender statute, however, contains no language requiring that the underlying out-of-state conviction be for a crime that would constitute a felony in New York, i.e., "an offense for which a sentence to a term of imprisonment in excess of one year may be imposed" (Penal Law § 10.00 [5]), or that the elements of the foreign crime be equivalent to the elements of a New York crime (*see* § 70.10 [1] [b] [i]). Rather, as noted by the Second Circuit in upholding the constitutionality of the persistent felony offender statute, "[s]ection 70.10 (1) (b) does not distinguish among felony convictions that arise under federal, New York State, or out-of-state law. Thus, if *the acts constitute a felony under federal or another state's law, they will be deemed a felony for purposes of persistent offender status under [s]ection 70.10 even if there is no counterpart felony in New York law*. By contrast, under [s]ection 70.06, the underlying acts of a federal or out-of-state felony must be recognized as a felony in New York to qualify as a predicate felony" (*Griffin*, 156 F3d at 290 [emphasis added]; *see People v Ortiz*, 180 Misc 2d 783, 789).

Further, the legislative history of the persistent felony offender statute reflects that the drafters specifically considered and rejected the contention advanced by defendant (*see Griffin*, 156 F3d at 291). According to the drafters, "*[u]nder the proposed provision a conviction of a 'crime' in any other jurisdiction will be counted, irrespective of whether such crime would have been a felony in this state*. The test would be whether the offender was actually imprisoned under a sentence with a term in excess of one year or under a commuted death sentence. Pursuant to existing law, the test is whether the crime would have been a felony in New York State. This is an extremely difficult rule to administer. It involves a myriad of complex distinctions and, moreover, it may often mandate rejection of substance for highly technical reasons . . . *It is true that the proposed test permits the court to base a persistent offender sentence upon a prior out of state conviction for an act which, if committed here, would be a misdemeanor or would not even be a crime*. But there is certainly nothing unjust or illogical in permitting the court to consider the prevailing norms in the jurisdiction where the act was committed . . . *Moreover, certain serious Federal crimes are not crimes under the laws of this State. The discretionary feature allows the court to weigh the substance of the foreign conviction and consider all of the circumstances. This will provide fairness to the offender and protection for the public*" (Staff Notes of Temp St Commn on Rev of Penal Law and Crim Code, 1964 Proposed NY Penal Law [Study Bill, 1964 Senate Intro 3918, Assembly Intro 5376] § 30.10 at 285 [emphases added]).

Although defendant cites several cases from the Third Department that support his contention that foreign felonies used to support persistent felony offender status must have a New York equivalent (*see People v Trudo*, 153 AD2d 993, 994-995; *People v Gill*, 109 AD2d 419,

420-422; *see also People v Morton*, 48 AD2d 58, 59-60), we decline to follow those cases. The Third Department cases trace back to *Morton* (48 AD2d at 59), in which that court held that a former version of the second felony offender statute—Penal Law § 70.06 (former [1] [b] [i])—was unconstitutional as applied to the defendant because it denied him equal protection and resulted in the delegation of legislative authority to other jurisdictions in violation of article III, § 1 of the New York State Constitution. That version of the statute provided in pertinent part that, "to be a predicate felony, a prior conviction in a jurisdiction other than New York must have been for an offense for which a term of imprisonment in excess of one year or a sentence of death was authorized, irrespective of whether such sentence was imposed" (*Morton*, 48 AD2d at 59-60; *see People v Parker*, 41 NY2d 21, 23 n 2). The Third Department reasoned that the application of that definition would deprive defendants with prior out-of-state convictions of equal protection because, if those defendants were convicted of "unusual" or arcane crimes in other jurisdictions, such as vagrancy or blasphemy, the former version of the second felony offender statute would mandate second felony offender status for defendants later convicted of a New York felony (*Morton*, 48 AD2d at 60). According to the court, that result "would be purely arbitrary and without a basis in reason," and the court noted that, "had defendant fortuitously performed these very same earlier acts in the State of New York, he would still be entitled to first offender status upon his sentencing for his subsequent New York felony conviction" (*id.*). The Third Department thus declared Penal Law § 70.06 unconstitutional "insofar as it provides that the extent of punishment for a convicted New York felon is dependent upon the authorized sentence for an offense of which he has previously been convicted in another jurisdiction" (*id.*).

After *Morton*, Penal Law § 70.06 was amended to include language requiring that the foreign predicate conviction must be for acts that would constitute a felony under New York law (L 1975, ch 784, § 1; *see Parker*, 41 NY2d at 27). Shortly thereafter, however, the Court of Appeals in *Parker* (41 NY2d at 24) effectively overruled *Morton*, holding that former subdivision (1) of section 70.06 of the Penal Law was constitutional as applied to the defendant, and that the amendment was not "constitutionally mandated" (*id.* at 27). Specifically, the Court of Appeals held that "the imposition of second felony offender status upon individuals convicted in other jurisdictions of crimes which in such other jurisdictions warrant [a] sentence of imprisonment in excess of one year is rationally related to the valid governmental aim of treating habitual offenders more severely than first time offenders" (*id.* at 25). The Court reasoned that "[t]he [l]egislature, in enacting the challenged provision, exercised its considered judgment to provide that the seriousness of a crime should be determined by the severity of the sentence and the norms prevailing in the jurisdiction in which a crime was committed . . . The possible disparity of treatment between prior New York offenders vis-a-vis prior out-of-State offenders does not vitiate the legislative decision that an individual who has previously elected to violate the criminal standards of the society in which he [or she] was found should be treated as an habitual offender" (*id.* at 26).

In sum, under the clear and unambiguous language of Penal Law § 70.10 (1) (b) (i), a "previous felony conviction" for purposes of the persistent felony offender statute includes "a crime in any other jurisdiction, provided . . . that a sentence to a term of imprisonment in excess of one year . . . was imposed therefor." Here, defendant was convicted in federal court of two crimes—knowingly making false statements on a Bureau of Alcohol, Tobacco & Firearms form (18 USC § 924 [a] [1] [A]) and being a convicted felon in possession of a firearm (18 USC § 922 [g])—and a sentence of imprisonment of 18 months was imposed for each conviction. Inasmuch as "defendant received a sentence in excess of one year on each of [the federal] convictions[,] they were properly considered for persistent felony offender adjudication" (*Griffin*, 168 AD2d at 972). We therefore affirm the denial of defendant's motion to set aside his sentence.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

854

KAH 12-00565

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES SMITH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

THE STRODS LAW FIRM, AUBURN (LISA A. BLAIR OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 21, 2011 in a proceeding pursuant to CPLR article 70. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. In support thereof, he contended, inter alia, that he was improperly sentenced as a persistent violent felony offender, the evidence is legally insufficient to support the conviction of sodomy in the first degree (Penal Law former § 130.50 [1]), and he was denied his right to effective assistance of counsel. We conclude that Supreme Court properly denied the petition. Those contentions could have been raised on direct appeal or by a motion pursuant to CPL article 440, and thus habeas corpus relief is unavailable (*see People ex rel. Donato v Kirkpatrick*, 73 AD3d 1450, 1451, *lv denied* 15 NY3d 707; *People ex rel. Mills v Poole*, 55 AD3d 1289, 1290, *lv denied* 11 NY3d 712).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

855

CA 12-01981

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

GAIL VANDERBROOK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EMERALD SPRINGS RANCH, EMERALD SPRINGS RANCH, LLC, JOYCE DE VALINGER AND THOMAS DE VALINGER, DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHETERSON & PHETERSON, ROCHESTER (PAUL D. VACCA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered September 7, 2011. The order, among other things, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries she sustained while riding a horse on a guided trail ride at defendant Emerald Springs Ranch, LLC (Ranch), which is a business operated by defendant Joyce De Valinger (hereafter, defendant). During the ride, the horse brushed up against a tree, plaintiff was unable to push away from the tree, and the tree caught plaintiff's leg allegedly injuring her leg and hip.

Supreme Court properly denied the motion of defendants for summary judgment dismissing the complaint. Defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law on the issues of the horse's vicious propensity and defendants' knowledge of that propensity (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). It is well settled that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446). "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447). In support of their motion, defendants submitted the deposition

testimony of plaintiff, wherein she testified that defendant and a guide employed by the Ranch instructed plaintiff to push off of the trees if the horse walked too closely to the trees on the single-file woodland trail. Defendants also submitted the deposition testimony of defendant, in which she admitted that she told her guides to instruct riders to push off of the trees if the horses rode too closely to them. Consequently, defendants' evidence raised a question of fact whether they knew of the horse's propensity to walk too closely to the trees, which was the behavior that allegedly caused plaintiff's injury.

Additionally, defendants failed to establish their entitlement to summary judgment dismissing the complaint on the ground that plaintiff executed a release of liability. Even assuming, arguendo, that defendants conclusively demonstrated that plaintiff executed the release, we conclude that, under these circumstances, where the riding lesson was ancillary to the recreational activity of horseback riding, General Obligations Law § 5-326 renders the release void as against public policy (*see generally Tiede v Frontier Skydivers, Inc.*, 105 AD3d 1357, 1358-1359).

Finally, defendants failed to establish as a matter of law that plaintiff assumed the risk of horseback riding. Horseback riding "[p]articipants will not be deemed to have assumed unreasonably increased risks" (*Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1566, 1567). Here, defendants submitted evidence that raised a question of fact whether they unreasonably increased the risks of horseback riding by using a bitless bridle on their horses, which did not provide plaintiff with the ability to control the horse, and by failing to give plaintiff, who was a novice rider, adequate instructions on how to control the horse (*see generally id.* at 1568). Defendants' failure to make the required prima facie showing of entitlement to judgment as a matter of law mandates the denial of their motion regardless of the sufficiency of plaintiff's opposing papers (*see generally Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

858

CA 13-00081

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

IN THE MATTER OF CHRISTOPHER CAPPON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS CARBALLADA, COMMISSIONER, NEIGHBORHOOD
AND BUSINESS DEVELOPMENT OF CITY OF ROCHESTER,
AS SUCCESSOR TO JULIO VASQUEZ, COMMISSIONER,
COMMUNITY DEVELOPMENT OF CITY OF ROCHESTER,
RESPONDENT-APPELLANT.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR RESPONDENT-APPELLANT.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Monroe County (John J. Ark, J.), entered April 18, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated Rochester City Code § 90-16 (A) (2) (d), which requires owners of rental properties to obtain a valid certificate of occupancy (CO) within a period of 90 days prior to the expiration or termination of an existing CO. Supreme Court granted the petition, concluding that the CO code provisions of the City of Rochester (City) require owners of rental property to effectively consent to an unconstitutional warrantless search. We agree with respondent that the court erred in granting the petition. We therefore reverse the judgment and dismiss the petition.

We have previously upheld as constitutional the City's CO requirement as well as its procedure for issuing judicial warrants for inspections of premises in cases where the City has failed to obtain the consent of the homeowners or tenants (*see Matter of City of Rochester [449 Cedarwood Terrace]*, 90 AD3d 1480, 1482-1483, *appeal dismissed* 19 NY3d 937; *Arrowsmith v City of Rochester*, 309 AD2d 1201, 1201-1202). Petitioner concedes that the laws at issue are valid on

their face, but contends that the determination that he violated City Code § 90-16 (A) (2) (d) is unconstitutional because, as a result of the determination, he will be required to consent to a warrantless inspection of his property or risk prosecution and fines. That contention, however, was specifically considered and rejected by this Court in *Matter of Burns v Carballada* (101 AD3d 1610, 1611-1612), which involved facts nearly identical to those herein. The petitioners in *Burns* commenced a CPLR article 78 proceeding seeking to annul two determinations of the Municipal Code Violations Bureau finding that they violated City Code § 90-16 (A) (2) (d), the same provision at issue here, by owning rental property that was occupied without a valid CO (*id.* at 1610). In the *Burns* petition, like the petition in this case, petitioners asserted, inter alia, that the determinations that they failed to comply with the City Code CO provision violated the Fourth Amendment and article I, § 12 of the New York State Constitution (*id.*). Specifically, petitioners contended that the City's CO inspection and warrant system was unconstitutional as applied to them because it prevented them from obtaining a CO without first consenting to a warrantless search of their properties (*id.* at 1611-1612). We rejected that contention and stated that, "[u]nder the City's ordinance, . . . an inspection can take place either upon consent *or* upon the issuance of a warrant (*see* City Charter § 1-11). On the record before us, petitioners have not shown that they were actually penalized for refusing to allow an inspection inasmuch as there is no evidence that they ever applied for a CO and thereafter refused to consent to the required inspection of their properties" (*id.* at 1612).

Here, petitioner was charged by appearance ticket with violating City Code § 90-16 (A) (2) (d) after the CO for a rental property that he owned expired and he failed to renew it. Contrary to the contention of petitioner, he was not penalized for refusing to consent to an inspection of his property (*see Burns*, 101 AD3d at 1612). Although petitioner is correct that the issuance or renewal of a CO requires an inspection of the relevant premises (*see* § 90-16 [G] [1]), the record establishes that petitioner did not apply for a new CO prior to receipt of the appearance ticket and thus the inspection requirement was never triggered. It therefore cannot be said that petitioner was penalized for refusing to consent to an inspection that, in fact, the City never requested (*see Burns*, 101 AD3d at 1612). In any event, section 1-11 of the City Charter specifically provides that "[w]hen applying for a license, permit, certificate or other City approval which calls for an inspection, a person shall have the right to decline to consent to the inspection." The City may then apply for an inspection warrant to conduct the required inspection (*see id.*; *see also Matter of Brockport Sweden Prop. Owners Assn. v Village of Brockport*, 81 AD3d 1416, 1418; *see generally Camara v Municipal Court of the City and County of San Francisco*, 387 US 523, 540).

The cases cited by petitioner are inapposite inasmuch as the ordinances at issue in those cases explicitly or implicitly required property owners to submit to warrantless inspections of their property (*see Sokolov v Village of Freeport*, 52 NY2d 341, 345-346; *Town of Brookhaven v Ronkoma Realty Corp.*, 154 AD2d 665, 666; *People v*

Northrup, 106 Misc 2d 440, 441, *mod on other grounds* 53 NY2d 689). Here, by contrast, the City Code and Charter require *either* owner consent *or* a judicial warrant to inspect property for code compliance (*see Burns*, 101 AD3d at 1612; *see also Pashcow v Town of Babylon*, 53 NY2d 687, 688; *McClean v City of Kingston*, 57 AD3d 1269, 1271, *appeal dismissed* 12 NY3d 848; *Stender v City of Albany*, 188 AD2d 986, 987, *appeal dismissed* 81 NY2d 1006).

We further agree with respondent that the court erred in granting the petition based upon an interpretation of City Charter § 1-23 that would render that provision unconstitutional. It is well established that legislative enactments are afforded a "presumption of constitutionality," and that reviewing courts must "avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided and to uphold the legislation if any uncertainty about its validity exists" (*Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585; *see Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 593; *LaValle v Hayden*, 98 NY2d 155, 161). Because, as the court itself recognized, there is an "obvious" constitutional interpretation of the City Charter provision at issue, the court erred insofar as it granted the petition based upon an alternative, unconstitutional interpretation of that provision (*see generally People v Correa*, 15 NY3d 213, 233).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

860

CA 13-00332

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF HSBC BANK USA (FORMERLY MARINE MIDLAND BANK) AND FRANKLIN J. ELY (DECEASED), AS CO-TRUSTEES UNDER ARTICLE 6A OF THE WILL OF JAMES ELY FOR JAMES ELY, JR., DECEASED, FOR THE PERIOD COVERING MAY 31, 1968 TO SEPTEMBER 7, 2006.

ORDER

HSBC BANK USA, N.A., PETITIONER-RESPONDENT;

MICHELE T.K. ELY AND GENESEE VALLEY TRUST COMPANY, OBJECTANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered September 25, 2012. The order granted the motion of petitioner for summary judgment dismissing all objections to an amended accounting.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision by the Surrogate (*Matter of HSBC Bank USA [Ely]*, 37 Misc 3d 875, 2012 NY Slip Op 22284).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

863

CA 13-00217

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

RUTH ANN PANZICA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. FANTAUZZI, INDIVIDUALLY AND
DOING BUSINESS AS FANTAUZZI FUNERAL HOME,
FANTAUZZI FUNERAL HOME, DEFENDANTS-APPELLANTS,
AND VILLAGE OF FREDONIA, DEFENDANT.

LAW OFFICES OF LAURIE G. ODGEN, BUFFALO (DANIEL J. CAFFREY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (RICHARD T. TUCKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 3, 2012. The order denied the motion of defendants-appellants for summary judgment.

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 defendants Michael R. Fantauzzi, individually and doing business as Fantauzzi Funeral Home, and Fantauzzi Funeral Home is dismissed.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she slipped and fell on an icy public sidewalk in front of defendant Fantauzzi Funeral Home (hereafter, funeral home), which is located in defendant Village of Fredonia (Village). Defendant Michael R. Fantauzzi, individually and doing business as Fantauzzi Funeral Home, is the owner of the funeral home. Michael R. Fantauzzi and the funeral home (collectively, defendants) moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion, and defendants appeal. We reverse the order, grant defendants' motion, and dismiss the complaint against them.

"Unless a statute or ordinance '*clearly imposes liability* upon' an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk" (*Smalley v Bemben*, 12 NY3d 751, 752, quoting *Roark v Hunting*, 24 NY2d 470, 475). Here, there is no question that "the terms of the [Village] Code do not clearly subject landowners to such liability" (*id.*; *see* Fredonia Village Code §§ 240-3, 240-13).

Further, we agree with defendants that they established as a matter of law that they did not derive a special use from the public sidewalk and that plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Under the special use doctrine, a landowner whose property abuts a public sidewalk may be liable for injuries that are caused by a defect in the sidewalk when the municipality has given the landowner permission to "interfere with a street solely for private use and convenience in no way connected with the public use" and the landowner fails to maintain the sidewalk in a reasonably safe condition (*Zarnoch v Williams*, 83 AD3d 1373, 1374, *lv denied* 17 NY3d 708 [internal quotation marks omitted]). "A special use is typically characterized by the installation of some object in the sidewalk or street or some variance in the construction thereof" (*id.* [internal quotation marks omitted]; *see Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311). Here, defendants established that the sidewalk was unencumbered by the installation of any objects or by other variances in construction, and plaintiff submitted no evidence that "the sidewalk was constructed in a special manner for the benefit of the abutting owner or occupier" (*Schiavone v Palumbo*, 177 AD2d 1045, 1046 [internal quotation marks omitted]; *cf. Williams v Patrick*, 30 AD3d 1059, 1059-1060).

Finally, defendants established that their snow removal efforts "did not create or exacerbate a dangerous condition" on the public sidewalk (*Rak v Country Fair, Inc.*, 38 AD3d 1240, 1241 [internal quotation marks omitted]; *see also Williams*, 30 AD3d at 1060), and plaintiff failed to raise an issue of fact in opposition. A landowner whose property abuts a public sidewalk is liable for a dangerous condition on the sidewalk only if the hazard is created by artificial means, not by the natural accumulation of ice or snow on a public sidewalk (*see Rader v Walton*, 21 AD3d 1409, 1410). Mere speculation as to the cause of the icy condition is insufficient to raise an issue of fact (*see Romero v ELJ Realty Corp.*, 38 AD3d 263, 264; *Hall v Gaston*, 255 AD2d 1009, 1009), as are conclusory allegations of negligence (*see Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338). Although plaintiff's submissions indicated the presence of ice on the sidewalk where she fell, there was no suggestion of the manner in which defendants allegedly created or exacerbated that icy condition. Plaintiff's theory seems to have been that the ice accumulated naturally as a result of winter conditions and that defendants failed to ameliorate the natural accumulation of ice. Plaintiff, however, has not raised a question of fact whether defendants created or exacerbated a dangerous condition inasmuch as she failed to establish that the hazard was created by artificial means (*see Rader*, 21 AD3d at 1410).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

865

CA 13-00129

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

EVA E. DUNLOP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAINT LEO THE GREAT R.C. CHURCH,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KATIE L. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 28, 2012. The order, insofar as appealed from, denied the motion of defendant Saint Leo the Great R.C. Church to dismiss the action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and the action against defendant Saint Leo the Great R.C. Church is dismissed.

Memorandum: Plaintiff commenced this personal injury action by filing a summons with notice on the last day of the relevant statute of limitations. In response, Saint Leo the Great R.C. Church (defendant) mailed to plaintiff's counsel a notice of appearance and demand for the complaint pursuant to CPLR 3012 (b). When plaintiff failed to comply with defendant's demand for the complaint, defendant moved to dismiss the action. Supreme Court denied the motion, and defendant appeals.

We conclude that the court erred in denying the motion. "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]). Here, plaintiff failed to meet her burden with respect to either prong of that test. Concerning the first part of the test, plaintiff asserted that she delayed in filing the complaint because she did not receive defendant's demand for the complaint. In our view, that excuse is not reasonable (*see Imperiale v Prezioso*, 4 Misc 3d 716, 719-720). Service of the demand for the complaint was complete upon

mailing (*see* CPLR 2103 [b] [2]), and defendant's submission in support of its motion of a proper affidavit of service of the demand entitled it to the presumption that a proper mailing occurred (*see Kihl v Pfeffer*, 94 NY2d 118, 122). We agree with defendant that plaintiff's mere denial of receipt of the demand was insufficient to rebut that presumption (*see id.*; *Engel v Lichterman*, 62 NY2d 943, 944–945; *cf. Vita v Heller*, 97 AD2d 464, 464-465). Even assuming, arguendo, that nonreceipt of the demand was a reasonable excuse, we conclude that plaintiff failed to establish a meritorious cause of action with a verified complaint or an affidavit of merit, and thus dismissal of the action is required (*see* CPLR 3012 [b]; *Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

866

CA 12-02275

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

BURT G. RAMOS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY P. HUGHES, DEFENDANT-APPELLANT.

JOHN F. PRESCOTT, JR., DEPEW, FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS DIGATI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 19, 2012. The order, among other things, granted that part of the motion of plaintiff seeking dismissal of defendant's fourth and fifth counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking dismissal of the fourth and fifth counterclaims and reinstating those counterclaims and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking partition of real property owned by the parties. In his answer, defendant asserted various counterclaims, including for breach of an unwritten domestic partnership agreement (fourth and fifth counterclaims). Thereafter, plaintiff moved, inter alia, to dismiss the counterclaims. As relevant to this appeal, Supreme Court granted that part of the motion seeking dismissal of the fourth and fifth counterclaims.

We agree with defendant that he asserted legally cognizable counterclaims for breach of a domestic partnership agreement. On a motion to dismiss pursuant to CPLR 3211, pleadings are to be liberally construed (*see Leon v Martinez*, 84 NY2d 83, 87; *see also* CPLR 3026). The court is to "accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*id.* at 88 [internal quotation marks omitted]; *see Parker v Leonard*, 24 AD3d 1255, 1256). With respect to domestic partnership agreements, "New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though

they were not living together . . . , provided only that illicit sexual relations were not 'part of the consideration of the contract' " (*Morone v Morone*, 50 NY2d 481, 486). Additionally, there is no statutory requirement that such a contract be in writing (*see id*. at 488). We conclude that here defendant sufficiently pleaded counterclaims for breach of a domestic partnership agreement and that the court therefore erred in dismissing the fourth and fifth counterclaims (*see id.* at 485-488). Thus, we modify the order accordingly.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

867

TP 13-00379

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

IN THE MATTER OF RANDOLPH STEWART, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 27, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 121.11 (7 NYCRR 270.2 [B] [22] [ii]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]), 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling], 121.11 (7 NYCRR 270.2 [B] [22] [ii] [third-party call]), and 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visitation violation]). Respondent correctly concedes in response to petitioner's contention that the determination that petitioner violated inmate rule 121.11 is not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 121.11 (*see Matter of Vasquez v Goord*, 284 AD2d 903, 903-904), and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see generally Matter of Edwards v Fischer*, 87 AD3d 1328, 1330).

Inasmuch as the record establishes that petitioner has served his administrative penalty, the appropriate remedy is expungement of all references to the violation of that rule from his institutional record (*see Matter of Delgado v Hurlburt*, 279 AD2d 734, 735 n). Further, because the penalty has been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Maybanks v Goord*, 306 AD2d 839, 840).

Contrary to petitioner's further contention, the determination that he violated the remaining inmate rules is supported by substantial evidence, including transcripts of petitioner's telephone conversations, confidential testimony, and confidential documentary evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner failed to exhaust his administrative remedies with respect to his contention that he was denied the opportunity to call a witness, inasmuch as he failed to raise that contention in his administrative appeal, " 'and this Court has no discretionary authority to reach that contention' " (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

869

KA 12-01954

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HARLEY D. DUBOIS, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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 July 26, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (two counts), grand larceny in the fourth degree (two counts), criminal mischief in the third degree and endangering the welfare of a child.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

872

KA 09-00579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENDELL PHILLIPS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 9, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that Supreme Court erred in instructing the jury on accessorial liability with respect to criminal possession of a weapon in the second degree (*see* CPL 470.05 [2]), 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]). Defendant also 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]" now asserted on appeal (*People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. Defendant contends that the evidence is legally insufficient to establish that he possessed a loaded firearm outside of his home or place of business (*see* Penal Law § 265.03 [3]), and that such possession was knowing and unlawful. Defendant, however, admitted to the police that he sold the gun at issue to his accomplice and hid the gun on the night of the shooting upon the accomplice's request, and the People presented evidence establishing that defendant's DNA was found on both the gun and the bandana wrapped around the gun. The People also presented evidence

establishing that defendant told the police that the house where the gun was located was his accomplice's house; he never told the police that it was his home and, indeed, there is no evidence to support that inference. Further, 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 reject defendant's further contention that the verdict is against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

873

KA 09-00175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD DASHER, ALSO KNOWN AS WILLIAM DASHER,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

BERNARD DASHER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 9, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We reject defendant's contention that Supreme Court erred in refusing to suppress his statements to the police. The evidence presented at the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights. Contrary to defendant's contention, the record of the suppression hearing does not establish that he was under the influence of medication at the time he waived those rights "to the degree of mania, or of being unable to understand the meaning of his statements" (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885; *People v Marvin*, 68 AD3d 1729, 1729, *lv denied* 14 NY3d 842). We reject defendant's contention that medically-induced intoxication requires application of the police-induced intoxication rule set forth in *Schompert* (19 NY2d at 305-307), and instead conclude that medically-induced intoxication should be evaluated under the self-intoxication standard referenced above (*see id.*; *see also People v Adams*, 26 NY2d 129, 137, *cert denied* 399 US 931). Contrary to the

contention of defendant in his pro se supplemental brief, we conclude that he was not denied his right to testify before the grand jury (*see People v Ballard*, 13 AD3d 670, 671, *lv denied* 4 NY3d 796; *see also People v Parker*, 63 AD3d 537, 537).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

874

KA 12-00279

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. ETTLEMAN, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), 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 January 12, 2012. The judgment convicted defendant, upon a jury verdict, of robbery 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 robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that he was denied a fair trial based on prosecutorial misconduct. Specifically, defendant contends that the prosecutor made several comments during the trial regarding accomplice liability, whereas the indictment charged defendant only as a principal. Because defendant did not object to any of the comments, his contention concerning them is unpreserved for our review (*see* CPL 470.05 [2]). In any event, we perceive no ground for reversal based on those comments. "It is well established that liability as a principal or an accomplice is not an element of the crime charged and that the People may charge defendant as a principal but establish his guilt as an accomplice" (*People v Coble*, 94 AD3d 1520, 1521, *lv denied* 19 NY3d 995 [internal quotation marks omitted]; *see People v Sarita*, 77 AD3d 555, 556, *lv denied* 16 NY3d 800). Moreover, "there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769; *see People v Staples*, 19 AD3d 1096, 1097, *lv denied* 5 NY3d 810).

Here, the prosecutor stated prior to trial that he might pursue a theory of accomplice liability, and his comments during the trial reflected that possibility. In response to the prosecutor's pretrial comment, County Court properly stated that it would wait to see how the proof "play[ed] out" before deciding whether to instruct the jury on accomplice liability. The court ultimately did not charge that

theory to the jury. Instead, the court, in accordance with the indictment, instructed the jury that, in order to find defendant guilty of robbery in the second degree under Penal Law § 160.10 (1), the People must prove beyond a reasonable doubt that defendant forcibly stole property from another person while "aided by another person actually present." That instruction was proper, and the jury is presumed to have followed it (*see People v Bibbes*, 98 AD3d 1267, 1269-1270, *lv denied* 20 NY3d 931).

In any event, even assuming, arguendo, that the prosecutor engaged in misconduct by referring to accomplice liability at trial, we conclude that defendant was not prejudiced thereby. Indeed, the prosecutor's comments regarding accomplice liability "could not have been interpreted by the jury as an instruction on the law, since the prosecutor had previously stated that the Judge would instruct them on the law" (*People v Rosenblitt*, 198 AD2d 382, 383, *lv denied* 82 NY2d 902; *see People v Delphin*, 26 AD3d 343, 343, *lv denied* 6 NY3d 893).

For similar reasons, we reject defendant's further contention that he was deprived of effective assistance of counsel based on defense counsel's failure to object to the prosecutor's allegedly improper comments (*see generally People v Santiago*, 101 AD3d 1715, 1717, *lv denied* 21 NY3d 946). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see People v Martinez*, 73 AD3d 1432, 1433, *lv denied* 15 NY3d 807; *see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crime 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 People v Bleakley*, 69 NY2d 490, 495). The victim testified that defendant approached him outside a bar late at night and asked him for directions to the nearest hotel. Defendant was with his daughter at the time. When the victim pointed down the street, defendant punched him in the face, knocking him to the ground, whereupon someone reached into his pocket and took his wallet. Although the victim did not see who took the wallet, defendant and his daughter were the only other people in the vicinity. The bartender observed the victim on the ground and defendant and his daughter running away. The bartender gave chase and, upon catching defendant, asked him why he had struck the victim, who was employed at the bar. In response, defendant claimed that the victim had attempted to hit him. Defendant then made a movement as if he were going to reach inside his jacket, and the bartender reacted by grabbing him. While the two men were scuffling, a police officer arrived and, after clarifying what had occurred, arrested defendant.

When questioned by the police, defendant admitted that he struck the victim but denied taking his wallet, which was never recovered. Although she was not arrested, defendant's daughter was at the police station with defendant. When it became clear to his daughter that

defendant was not going to be released from police custody, she telephoned a relative and made arrangements to be picked up at the police station. The daughter, however, did not wait at the police station to be picked up. Instead, she left on her own and was later observed at the scene of the crime. The daughter's return to the crime scene under those circumstances gives rise to a "permissible inference[]" that could have led the jury to conclude that she may have known where the wallet was located and that she may have put it in that location (*Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, we conclude that the circumstantial evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant committed the robbery while aided by his daughter (*see generally Bleakley*, 69 NY2d at 495). Because no one else was in the vicinity when the robbery occurred, it was either defendant or his daughter who took the victim's wallet. If defendant did not take the wallet, as he repeatedly stated to the police, it follows that his daughter must have taken it. That conclusion is supported by the fact that defendant's daughter was seen running from the fallen victim with defendant and then returned to the crime scene later that night even though she had made arrangements to be picked up at the police station by a relative. We further conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Sterina*, 108 AD3d 1088, 1090; *People v Mobley*, 49 AD3d 1343, 1345, *lv denied* 11 NY3d 791; *see generally Bleakley*, 69 NY2d at 495).

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

878

CA 12-01550

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

IN THE MATTER OF THE APPLICATION OF MAUREEN BOSCO, EXECUTIVE DIRECTOR, OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

ORDER

FOR AN ORDER AUTHORIZING INVOLUNTARY TREATMENT OF LOUIS M., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (ELIZABETH S. FORTINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 9, 2012. The order authorized the administration of medication to respondent.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 15 and 20, 2013,

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

879

CA 12-01237

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

MELISSA MANISCALCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP MANISCALCO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 26, 2012 in a divorce action. The order, inter alia, ratified the court's memorandum decision, with modifications.

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

Same Memorandum as in *Maniscalco v Maniscalco* ([appeal No. 2] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

880

CA 12-01238

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

MELISSA MANISCALCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP MANISCALCO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 28, 2012 in a divorce action. The judgment, inter alia, equitably distributed the marital assets of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the duration of maintenance to four years from April 3, 2012 and deleting from the third ordering paragraph of the order granted June 25, 2012 that is incorporated therein the language “any property, including but not limited to cash accounts, bank accounts, stocks, mutual funds” and “M&T bank accounts” and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, defendant appeals from an order entered prior to the judgment of divorce and, in appeal No. 2, defendant appeals from the judgment of divorce. We note at the outset that appeal No. 1 must be dismissed inasmuch as the order in that appeal is subsumed in the final judgment of divorce (*see Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810; *see also Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988). We affirm the judgment in appeal No. 2 in all but two respects. First, we conclude that the maintenance award is excessive. Based on the statutory factors (*see* Domestic Relations Law § 236 [B] [6] [a]; *see also Hartog v Hartog*, 85 NY2d 36, 51), and under the circumstances of this case, we modify the judgment by reducing the duration of maintenance to four years from April 3, 2012, i.e., the date of the Matrimonial Referee’s decision (*see generally Smith v Smith*, 79 AD3d 1643, 1644; *Burroughs v Burroughs*, 269 AD2d 765, 765). Second, we conclude that Supreme Court abused its discretion in sequestering defendant’s cash, bank accounts, stocks and mutual funds (*cf.*

Brinckerhoff v Brinckerhoff, 53 AD3d 592, 593; *Adler v Adler*, 203 AD2d 81, 81). We thus further modify the judgment accordingly.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

881

CA 12-02346

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

MICRO-LINK, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PHILLIPS NIZER LLP, NEW YORK CITY (DAVID A. PELLEGRINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCRACKEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 8, 2012. The order, among other things, denied the amended motion of plaintiff for summary judgment and granted defendant summary judgment on its counterclaim.

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

Memorandum: Plaintiff commenced this action seeking payment based on a performance contract pursuant to which plaintiff managed a wastewater treatment plant on defendant's behalf. Supreme Court (Curran, J.) previously granted in part defendant's motion to dismiss the amended complaint by dismissing in part the first cause of action, for breach of contract, and the second cause of action, for an account stated, and on a prior appeal, this Court modified that order by denying the motion in its entirety and reinstating those causes of action in their entirety (*Micro-Link, LLC v Town of Amherst*, 73 AD3d 1426). Plaintiff thereafter moved for, inter alia, summary judgment on the first two causes of action and defendant cross-moved for summary judgment dismissing the amended complaint, among other relief. In appeal No. 1, plaintiff appeals from an order of Supreme Court (Michalek, J.) denying its amended motion for summary judgment, denying defendant's "[cross] motion for summary judgment on plaintiff's claims . . . as moot," and purportedly granting defendant's "[cross] motion for summary judgment on its counterclaim." In appeal No. 2, plaintiff appeals from a judgment of the same court entered on defendant's counterclaim in the amount of $251,442.67. Because that part of the order in appeal No. 1 purportedly granting defendant's "[cross] motion for summary judgment on its counterclaim" is subsumed in the judgment in appeal No. 2, we dismiss plaintiff's

appeal from that part of the order in appeal No. 1 concerning the counterclaim (*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]).

With respect to appeal No. 1, the court properly denied that part of plaintiff's amended motion seeking summary judgment on the cause of action for an account stated. " 'An account stated represents an agreement between the parties reflecting an amount due on a prior transaction . . . An essential element of an account stated is an agreement with respect to the amount of the balance due' " (*Seneca Pipe & Paving Co., Inc. v South Seneca Cent. Sch. Dist.*, 83 AD3d 1540, 1541). Here, plaintiff failed to meet its initial burden on the motion of establishing the existence of an account stated inasmuch as plaintiff's own submissions contain evidence of defendant's repeated objections to plaintiff's invoices and disputes between the parties with respect to the provisions of the contract relating to plaintiff's compensation (*see Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413; *Construction & Mar. Equip. Co. v Crimmins Contr. Co.*, 195 AD2d 535, 535). Furthermore, the court properly concluded in appeal No. 1 that plaintiff's own submissions raise triable issues of fact whether it is entitled to further compensation pursuant to those contractual provisions, and thus the court also properly denied that part of plaintiff's amended motion seeking summary judgment on the cause of action for breach of contract (*see Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v County of Niagara*, 91 AD3d 1287, 1287-1288).

The court erred, however, in denying that part of plaintiff's amended motion seeking summary judgment dismissing the counterclaim based upon defendant's lack of legal capacity to sue (*see* CPLR 3211 [a] [3]), and we therefore vacate the money judgment in appeal No. 2 entered on defendant's counterclaim and modify the order entered February 8, 2012 accordingly. The counterclaim is "in effect a separate and distinct action brought by defendant[] against plaintiff" (*New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77, 80), and defendant does not have capacity to assert that counterclaim except upon a resolution of its Town Board (*see* Town Law § 65 [1]; *Town of Claverack v Brew*, 277 AD2d 807, 809; *Town of Thompson v Alleva*, 76 AD2d 1022, 1022, *appeal dismissed* 53 NY2d 839). Defendant's Town Board declined to adopt a proposed resolution that would have authorized defendant to initiate an action against plaintiff, as well as a second proposed resolution that would have authorized a counterclaim. Thus, defendant's Town Board had expressly withheld authorization for the counterclaim at the time defendant interposed the counterclaim (*cf. Town of Caroga v Herms*, 62 AD3d 1121, 1123, *lv denied* 13 NY3d 708, *rearg denied* 13 NY3d 931). Although defendant's Town Board adopted a resolution purporting to authorize the counterclaim retroactively, more than two years after defendant interposed its counterclaim, we conclude that the counterclaim cannot "be legitimized through an after-the-fact[,] or *nunc pro tunc*, legislative enactment" (*Town of Hempstead v Board of Appeals of Town of Hempstead*, 15 Misc 3d 1116[A], 2007 NY Slip Op 50706[U], *3 [Sup

Ct, Nassau County 2007], citing *Bright Homes, Inc. v Weaver*, 7 AD2d 352, 358, *affd* 6 NY2d 973; *Mohrmann v Kob*, 291 NY 181, 186).

Finally, we note that, in any event, the court erred in granting summary judgment to defendant on the counterclaim inasmuch as defendant did not request that relief in its cross motion and, apart from the issue of capacity, "[t]he counterclaim was not a 'subject' of [plaintiff's amended] motion for summary judgment" (*Ajay Glass & Mirror Co., Inc. v AASHA G.C., Inc.*, 90 AD3d 1615, 1616-1617; *see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430; *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

882

CA 12-02347

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

MICRO-LINK, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PHILLIPS NIZER LLP, NEW YORK CITY (DAVID A. PELLEGRINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCRACKEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered March 22, 2012. The judgment awarded defendant money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated without costs, and the order entered February 8, 2012 is modified on the law by granting plaintiff's amended motion in part and dismissing the counterclaim.

Same Memorandum as in *Micro-Link, LLC v Town of Amherst* ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

883

CA 13-00148

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

DAVID D. ZOECKLER, SR. AND DIANA ZOECKLER,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 118689.)

PETRONE & PETRONE, P.C., UTICA (MARK O. CHIECO OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

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

Appeal from an order of the Court of Claims (Christopher J. McCarthy, J.), entered September 13, 2012. The order, among other things, granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Memorandum: After obtaining permission from the Court of Claims to file a late claim against defendant, claimants served their claim on the Attorney General by regular mail instead of by certified mail, return receipt requested, as required by Court of Claims Act § 11. Defendant's answer raised the defense that the court lacked, inter alia, subject matter jurisdiction based on claimants' improper service, and defendant later moved to dismiss the claim on that ground. Claimants opposed the motion and cross-moved for an order deeming the service corrected or disregarded pursuant to CPLR 2001. The court granted defendant's motion and denied claimants' cross motion, and we now affirm.

Court of Claims Act § 11 (a) (i) provides that a party seeking to file a claim against the State of New York must serve a copy of the claim upon the Attorney General by certified mail, return receipt requested. It is well settled that "nothing less than strict compliance with the jurisdictional requirements of the Court of Claims Act is necessary" (*Kolnacki v State of New York*, 8 NY3d 277, 281, *rearg denied* 8 NY3d 994; *see generally Lepkowski v State of New York*, 1 NY3d 201, 206-207; *Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724). Inasmuch as the claim herein was served by regular mail, the court was deprived of subject matter jurisdiction and thus

properly dismissed the claim (*see Spaight v State of New York*, 91 AD3d 995, 995; *Filozof v State of New York*, 45 AD3d 1405, 1406; *Rodriguez v State of New York*, 307 AD2d 657, 657; *see generally Finnerty v New York State Thruway Auth.*, 75 NY2d 721, 723).

Contrary to claimants' contention, defendant's motion to dismiss on the ground of improper service, made approximately 20 months after service of its answer, was not precluded by the 60-day waiver provision of CPLR 3211 (e). The failure to comply with the service requirements in the Court of Claims Act "result[s] not in a failure of personal jurisdiction, . . . but in a failure of subject matter jurisdiction[,] which may not be waived" (*Finnerty*, 75 NY2d at 723). Contrary to claimants' further contention, the court properly denied their cross motion to correct or disregard the defect in service inasmuch as CPLR 2001 may not be used to correct a jurisdictional defect (*see Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 947, *lv dismissed in part and denied in part* 100 NY2d 548; *see also Matter of Miller v Waters*, 51 AD3d 113, 117; *Suarez v State of New York*, 193 AD2d 1037, 1038; *see generally Ruffin v Lion Corp.*, 15 NY3d 578, 581-582).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

885

OP 13-00321

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

IN THE MATTER OF ELIZABETH RESZKA, PETITIONER,

V MEMORANDUM AND ORDER

COUNCILMAN JOSEPH A. COLLINS, RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (TERESA A. BAILEY OF COUNSEL), FOR PETITIONER.

JOSEPH A. COLLINS, RESPONDENT PRO SE.

Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department on February 19, 2013) for the removal of respondent from the public office of Councilman for the Town of Hamburg.

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

Memorandum: Petitioner commenced this original proceeding pursuant to Public Officers Law § 36 seeking the removal of respondent as a council member of the Town Board of the Town of Hamburg. In his answer, respondent denied the allegations of wrongdoing and sought, inter alia, dismissal of the petition. Public Officers Law § 36 " 'was enacted to enable a town or village to rid itself of an unfaithful or dishonest public official' " (*Matter of Salvador v Ross*, 61 AD3d 1163, 1164), but "[r]emoval of an official from office . . . generally will not be granted [in the absence] of self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust" (*Matter of Jones v Filkins*, 238 AD2d 954, 954 [internal quotation marks omitted]; *see Matter of Hedman v Town Bd. of Town of Howard*, 56 AD3d 1287, 1287-1288).

The verified petition herein sets forth instances of conflicts of interest and self-dealing by respondent, an attorney with a legal practice in Hamburg. Specifically, petitioner alleged that respondent "continue[d] a previously filed Notice of Claim" against the Town of Hamburg (Town) on behalf of a legal client after taking office, had a complaint of harassment filed against him by an employee of the Town, had "repeatedly filed frivolous actions" against the Town, and posted flyers "advertising [respondent's] legal practice." We conclude, however, that respondent conclusively refuted those allegations, and petitoner failed to present evidence to the contrary to raise a

triable issue of fact (*see generally Hedman*, 56 AD3d at 1288; *Matter of Izzo v Lynn*, 271 AD2d 801, 802). Likewise, petitioner alleged that respondent had "repeatedly appeared" in the Town's Justice Court on behalf of his clients, but respondent conclusively refuted that allegation by submitting the affidavit of a Town Justice who averred that respondent had not appeared in the Town's Justice Court "after taking his elected position." Again, petitioner presented no evidence to the contrary (*see Hedman*, 56 AD3d at 1288; *Matter of Young v Costantino*, 281 AD2d 988, 988).

Petitioner further alleged that respondent filed a notice of defect against the Town on behalf of a client and sent an email to all Town employees regarding their personnel benefits. Even assuming, arguendo, that respondent had engaged in such conduct, we conclude that it does not constitute the type of conduct that would warrant removal from office. That is, petitioner's allegations do not "demonstrate 'unscrupulous conduct[,] . . . gross dereliction of duty[,]' " or " 'a pattern of misconduct and abuse of authority' " (*Matter of McCarthy v Sanford*, 24 AD3d 1168, 1169; *see Salvador*, 61 AD3d at 1164). Finally, although petitioner alleged that respondent should not have circulated an email to a Town employee facing disciplinary charges, there is no indication that it was a "confidential correspondence" that should not have been sent to that Town employee.

We therefore dismiss the petition, and we conclude that respondent is not entitled to costs or sanctions as requested in his answer.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

887

CA 12-01799

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

KATHERINE ZUFALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KARL ZUFALL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JOAN WARREN, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Robert C. Noonan, A.J.), entered March 8, 2012 in a divorce action. The judgment, among other things, ordered defendant to pay spousal maintenance to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating from the eighth decretal paragraph the language "until Plaintiff reaches the age of sixty-two" and substituting therefor the language "for a term of seven years from the date of commencement of the action, or until Plaintiff" and reducing defendant's net child support obligation to $504.85 per month, and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, defendant husband appeals from a judgment of divorce entered following a nonjury trial that, inter alia, awarded plaintiff wife maintenance and child support and, in appeal No. 2 he appeals from an order directing him to pay a portion of plaintiff's attorney fees. We reject defendant's contention in appeal No. 1 that Supreme Court erred in awarding maintenance to plaintiff in the amount of $150 per week, but we agree with defendant that the duration of maintenance is excessive. We therefore modify the judgment in appeal No. 1 accordingly.

The parties were married for 21 years and have five children, one of whom is emancipated. During the marriage, plaintiff was primarily a homemaker, raising the parties' children while defendant worked as a correction officer. Shortly before this action was commenced, defendant retired at the age of 50 after 25 years of service with the State of New York, leaving a job that paid him in excess of $90,000 annually. He now receives pension benefits of $2,798 per month. Although able-bodied, defendant does not presently work. Plaintiff,

on the other hand, has been determined by the Social Security Administration to be 50% disabled, and she receives partial Social Security disability benefits of $622 per month plus workers' compensation benefits of $400 per month. She also works 20 hours per week as a bartender, earning $5 per hour plus tips. Pursuant to the parties' prenuptial agreement, the validity of which is not challenged by plaintiff on appeal, the court did not award plaintiff any interest in defendant's pension or in the marital residence, which defendant obtained prior to the marriage, notwithstanding the fact that defendant paid the mortgage on that property during the marriage with marital funds.

Considering the statutory factors enumerated in Domestic Relations Law § 236 (B) (6) (a) — particularly, the length of the marriage; the income and property of the parties, including the marital property distributed by the court; and the present and future earning capacity of the parties — we conclude that the court did not abuse its discretion in awarding weekly maintenance to plaintiff in the amount of $150 (*see Almonte v Almonte*, 108 AD3d 1056, 1056-1057; *Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810). With respect to the duration of maintenance, however, we agree with defendant that the court's award is excessive insofar as the court ordered defendant to pay maintenance until plaintiff turns 62, i.e., for approximately 18 years. We conclude that a term of seven years from the date of commencement of the action "should afford the plaintiff a sufficient opportunity to become self-supporting" (*Jaramillo v Jaramillo*, 108 AD3d 651, 653; *see generally Smith v Smith*, 79 AD3d 1643, 1644; *Palestra v Palestra*, 300 AD2d 288, 289).

We reject defendant's related contention in appeal No. 1 that the court erred in failing to order that maintenance shall cease if plaintiff cohabits with another man. Pursuant to Domestic Relations Law § 248, defendant may move to terminate maintenance on the ground that plaintiff is "habitually living with another man and holding herself out as his wife," and defendant cites no authority for the proposition that the court must include such a provision in the judgment of divorce.

Defendant also challenges the court's award of child support in appeal No. 1. His primary contention in that regard is that the court erred in failing to deduct the amount he pays in maintenance from his gross income before calculating the parties' respective child support obligations. We reject that contention. "Where, as here, there [is] no provision for an adjustment of child support upon the termination of maintenance, . . . there [is] no basis for the court to deduct maintenance from [the] defendant's income in determining the amount of child support" (*Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1211 [internal quotation marks omitted]; *see Schmitt v Schmitt*, 107 AD3d 1529, 1529-1530; *Salvato v Salvato*, 89 AD3d 1509, 1509-1510).

Although not raised on appeal, we note that defendant's net child support obligation must be reduced based on a mathematical error in the calculation thereof. The court determined that, based on the parties' respective adjusted gross incomes, defendant must pay child

support of $807.48 per month for the three unemancipated children residing primarily with plaintiff, while plaintiff must pay $302.63 per month for the one unemancipated child residing with defendant. Although we agree that those are the correct child support awards for each party, the judgment inaccurately provides that defendant owes a net amount of $540.85 per month in child support. The correct amount is $504.85, and we therefore further modify the judgment accordingly. We reject defendant's remaining challenges in appeal No. 1 to the child support award.

Defendant further contends in appeal No. 1 that the court erred in awarding plaintiff half of the funds in his deferred compensation account. According to defendant, the court improperly presumed that all of the funds in that account accumulated during the marriage, and he therefore contends that we should remit the matter to Supreme Court to determine the "marital share" of that account as distinguished from his "separate property share." There is no merit to that contention. Pursuant to a statutory presumption, "all property, unless clearly separate, is deemed marital property," and the burden rests with the titled spouse to rebut that presumption (*DeJesus v DeJesus*, 90 NY2d 643, 652; *see Fields v Fields*, 65 AD3d 297, 308, *affd* 15 NY3d 158, 162, *rearg denied* 15 NY3d 819; *see also* Domestic Relations Law § 236 [B] [1] [c]; [d]). "The party seeking to rebut that presumption must adequately trace the source of the funds" (*Pullman v Pullman*, 176 AD2d 113, 114, *lv dismissed* 89 NY2d 914); otherwise, the court may properly treat the funds as marital property (*see Sarafian v Sarafian*, 140 AD2d 801, 804-805). Here, it does not appear from the record that defendant offered any evidence establishing the amounts he contributed to his deferred compensation account before or during the marriage. Thus, he failed to meet his burden of establishing that any of the funds in that account are separate property, and we therefore conclude that the court properly presumed that the entire account constitutes marital property subject to equitable distribution.

Finally, we reject defendant's contention in appeal No. 2 that the court abused its discretion in ordering him to pay a portion of plaintiff's attorney fees (*see Gallagher v Gallagher*, 93 AD3d 1311, 1314, *lv dismissed in part and denied in part* 19 NY3d 1022).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

888

CA 12-01800

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

KATHERINE ZUFALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KARL ZUFALL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JOAN WARREN, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Robert C. Noonan, A.J.), entered May 23, 2012 in a divorce action. The order directed defendant to pay a portion of plaintiff's attorney fees.

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

Same Memorandum as in *Zufall v Zufall* ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

889

TP 12-01227

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

IN THE MATTER OF HAROLD MILTON, PETITIONER,

V MEMORANDUM AND ORDER

LINDA JOYCE, DIRECTOR, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, AND NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENTS.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], entered July 3, 2012) to review a determination of respondents. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded.

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

Memorandum: Petitioner, an employee of respondent New York State Office of Children and Family Services, commenced this CPLR article 78 proceeding challenging the determination denying his request to amend to unfounded an indicated report of child abuse and to seal that amended report. The report was based on petitioner's physical altercation with a 16-year-old resident at a secure residential facility. We reject petitioner's contention that the determination denying his request, made after a fair hearing, is not supported by substantial evidence. "At an administrative expungement hearing, a report of child [abuse or] maltreatment must be established by a fair preponderance of the evidence[, and o]ur review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner[']s application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774-1775, *lv denied* 15 NY3d 705 [internal quotation marks omitted]; *see Matter of Saporito v Carrion*, 66 AD3d 912, 912). We conclude based on this record that the determination is supported by substantial

evidence (*see* Social Services Law § 422 [8] [c] [ii]; *see also* former § 412-a [1] [a] [i]; former 18 NYCRR 433.2). We reject petitioner's further contention that he was denied effective assistance of counsel at the fair hearing (*see generally Matter of Mangus*, 68 AD3d at 1774; *Matter of Abramson v New York State Dept. of Motor Vehs.*, 302 AD2d 885, 886).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

890.1

KA 12-01643

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

FRANK VANALST, ALSO KNOWN AS SHAUN JOHNSON,
DEFENDANT-RESPONDENT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR APPELLANT.

HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRANCE J. HOFFMANN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered April 9, 2012. The appeal was held by this Court by order entered February 8, 2013, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (103 AD3d 1227).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 23, 2013 and by the attorneys for the parties on May 23 and August 19, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

891

TP 13-00295

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF LAMONT WALKER, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

LAMONT WALKER, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered February 8, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

892

KA 11-02361

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN J. HAWKINS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (KATHLEEN ANN HART OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered October 17, 2011. The judgment, among other things, revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

893

KA 11-02264

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVINE WORTHY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 23, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree (two counts) and endangering the welfare of a child.

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 following a nonjury trial of two counts of criminal contempt in the first degree (Penal Law § 215.51 [c]) and one count of endangering the welfare of a child (§ 260.10 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, following the same nonjury trial, of two counts each of criminal contempt in the first degree (§ 215.51 [c]) and criminal contempt in the second degree (§ 215.50 [3]). All of the criminal contempt convictions arise from defendant's multiple violations of a no-contact order of protection issued for the benefit of his girlfriend, who is also the mother of his child. We reject defendant's contention that the evidence is legally insufficient to establish that he intended to violate the order of protection. A copy of the order of protection was served on defendant in court, where he was advised of its principal terms, including the meaning of "no-contact," and the evidence conclusively establishes that defendant violated the order of protection with respect to each count. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant knew of the existence of the order of protection and intentionally violated it" (*People v Harris*, 72 AD3d 1492, 1492, *lv denied* 15 NY3d 774; *see generally People v Bleakley*, 69 NY2d 490,

495). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*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).

We reject defendant's further contention that his interview with a Child Protective Services (CPS) caseworker was "so pervaded by governmental involvement" that it constituted state action in violation of his right to counsel (*People v Ray*, 65 NY2d 282, 286; *cf. People v Wilhelm*, 34 AD3d 40, 46-48; *People v Greene*, 306 AD2d 639, 640-641, *lv denied* 100 NY2d 594). In any event, any error in admitting defendant's statements to the CPS caseworker is harmless because, "[i]n light of the totality of the evidence, there is no reasonable possibility that the error affected [County Court's] verdict" (*People v Douglas*, 4 NY3d 777, 779; *see generally People v Lopez*, 16 NY3d 375, 386-387; *People v Doll*, 98 AD3d 356, 367). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

894

KA 11-02118

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVINE WORTHY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 23, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree (two counts) and criminal contempt in the second degree (two counts).

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

Same Memorandum as in *People v Worthy* ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

896

KA 10-00720

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASPER L. CAMPBELL, DEFENDANT-APPELLANT.

PETER J. PULLANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, A.J.), rendered November 18, 2008. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's conviction arose out of the seizure by the police of a handgun from the floor of a vehicle in which defendant was a passenger. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 343, 349), we conclude that "the verdict, based on the applicability of the automobile presumption . . . , is not against the weight of the evidence" (*People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742; *see People v Dunnigan*, 1 AD3d 930, 931-932, *lv denied* 1 NY3d 627; *People v Tutt*, 194 AD2d 575, 575-576, *lv denied* 82 NY2d 760; *see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

897

KAH 11-02615

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANK DUDLEY, PETITIONER-APPELLANT,

V ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), dated August 25, 2011 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

899

KA 09-01313

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIANA VARGAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 19, 2009. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). We reject defendant's contention that the oral and written statements she made to police investigators should have been suppressed because she was in custody at the time those statements were made. County Court's determination after a *Huntley* hearing that defendant was not in custody at that time will not be disturbed unless it is clearly erroneous (*see People v Schroo*, 87 AD3d 1287, 1288, *lv denied* 19 NY3d 977). Here, the court's decision to credit the testimony of the police investigator over that of defendant is entitled to deference (*see People v Shaw*, 66 AD3d 1417, 1417-1418, *lv denied* 14 NY3d 773), and the record supports the court's conclusion that defendant was not in custody because a reasonable person in defendant's position, innocent of any crime, would have believed that he or she was free to leave (*see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *see generally People v Morales*, 281 AD2d 182, 182, *lv denied* 96 NY2d 922). Defendant voluntarily accompanied the police investigators to their unmarked vehicle that was parked in front of her home and voluntarily answered questions (*see Yukl*, 25 NY2d at 591). Defendant was informed that she was free to leave, the vehicle doors were unlocked and could be opened by her at any time, the entire interview lasted slightly under an hour, she was not handcuffed, and she never asked to leave (*see People v Weakfall*, 108 AD3d 1115, 1115-1116; *see also People v Wilbert*, 192 AD2d 1109, 1109-1110, *lv denied* 81 NY2d 1082; *People v Anderson*, 145 AD2d 939, 939-940, *lv denied* 73

NY2d 974).

We reject defendant's further contention that she was denied effective assistance of counsel at the *Huntley* hearing. Defendant was provided meaningful representation inasmuch as the facts and circumstances relevant to the determination of whether defendant was in custody when she was questioned were brought to the court's attention (*see People v Baldi*, 54 NY2d 137, 150; *see generally People v Centano*, 76 NY2d 837, 838; *People v Johnson*, 91 AD2d 327, 330, *affd* 61 NY2d 932; *People v Arcese*, 148 AD2d 460, 461, *lv denied* 74 NY2d 661), and mere speculation that a more vigorous cross-examination might have undermined the credibility of the People's witness is insufficient to establish that defense counsel was ineffective (*see People v Wittman*, 103 AD3d 1206, 1207, *lv denied* 21 NY3d 915).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

900

CAF 12-01218

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ALAZAYA I.B., JAVONTE W.G.,
MAREYAH A.B. AND NORMAN J.B.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

MATTHEW J.B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

DEBORAH R. GARDINER, WATERTOWN, FOR PETITIONER-RESPONDENT.

ASHLEY N. LYON, ATTORNEY FOR THE CHILD, ADAMS.

LISA WELDON, ATTORNEY FOR THE CHILDREN, WATERTOWN.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 25, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

901

CAF 12-01271

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF KAYDEN M.B.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

MATTHEW J.B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

DEBORAH R. GARDINER, WATERTOWN, FOR PETITIONER-RESPONDENT.

LISA WELDON, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 25, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

902

CAF 12-01216

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF CHRISTY M. BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND WOLFGRAM, RESPONDENT-APPELLANT.

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

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (MICHAEL J. PERSONTE OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered May 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the parties' three children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, awarded petitioner mother sole custody of the parties' three children. The father contends that Family Court erred in awarding sole custody to the mother while giving him only alternate weekend visitation. We reject that contention, and conclude that the award of sole custody to the mother has a sound and substantial basis in the record (*see Matter of McLeod v McLeod*, 59 AD3d 1011, 1011). The father's contention that the Attorney for the Children failed to advocate for the childrens' position regarding custody and visitation and thus failed to provide them with effective representation is not preserved for our review (*see Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707) and, in any event, is without merit (*see generally Matter of Venus v Brennan*, 103 AD3d 1115, 1116-1117). Contrary to the father's further contention, the court did not abuse its discretion in allowing testimony at the hearing concerning events that predated the prior custody order. It is well settled that, in determining the best interests of the children, the court is vested with broad discretion with respect to the scope of proof to be adduced (*see Matter of Stukes v Ryan*, 289 AD2d 623, 624). Finally, also contrary to the father's contention, the delay between the conclusion of the hearing and the issuance of the court's decision, by itself, does not require reversal

(*see Matter of Brady v Brady*, 216 AD2d 660, 661; *Matter of Hartman v Hartman*, 214 AD2d 780, 782).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

903

CAF 12-01205

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF RICHARD W. WHITE, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMANDA WILCOX, RESPONDENT-RESPONDENT.

TERESA M. PARÉ, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

TERESA M. PARÉ, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

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

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

Appeals from an amended order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered June 11, 2012 in a proceeding pursuant to Family Court Act article 5. The amended order dismissed the paternity petition.

It is hereby ORDERED that said appeals from the amended order insofar as it sua sponte granted relief are unanimously dismissed and the amended order is affirmed without costs.

Memorandum: The petitioner in appeal No. 1 appeals from an amended order that, inter alia, granted the motion of the respondent in appeal No. 1, i.e., the mother of the subject child, to dismiss the petitioner's paternity petition with respect to the child. The Attorney for the Child (AFC) appeals separately from that amended order, in which Family Court also sua sponte granted other relief. Appeal Nos. 2 and 3 are from two further orders in which the court also sua sponte granted relief. We note at the outset that appeal Nos. 2 and 3, as well as those parts of the appeals from the amended order in appeal No. 1 in which the court sua sponte granted relief, must be dismissed. It is well settled that " '[n]o appeal lies as of right from an order [that] does not decide a motion made on notice,' " and the appellants have not sought leave to appeal (*Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, 1088, *lv denied* 10 NY3d 710; *see Sholes v Meagher*, 100 NY2d 333, 335; *Mohler v Nardone*, 53 AD3d 600, 600).

With respect to that part of appeal No. 1 that is properly before

us, petitioner and the AFC contend that the court was required to apply the doctrine of equitable estoppel to bar the mother from denying that petitioner is the father of the subject child. We reject that contention. "[T]he Court of Appeals has recently reiterated that a nonbiological, nonadoptive parent does not have standing to seek visitation when a biological parent who is fit opposes it, and that equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent" (*Matter of Palmatier v Dane*, 97 AD3d 864, 865; *see Debra H. v Janice R.*, 14 NY3d 576, 589-597, *rearg denied* 15 NY3d 767, *cert denied* ___ US ___, 131 S Ct 908; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 656-657). It is well settled "that parentage under New York law derives from biology or adoption" (*Debra H.*, 14 NY3d at 593), and that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in [custody situations] otherwise fraught with the risk of 'disruptive . . . battles' . . . over parentage as a prelude to further potential combat over custody and visitation" (*id.* at 593-594). As the Court of Appeals has stated, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (*id.* at 596).

The remaining contentions of the AFC in appeal No. 1, insofar as they are properly before us, are without merit.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

904

CAF 12-01419

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF TERESA M. PARÉ, ESQ., ATTORNEY FOR THE CHILD, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD W. WHITE, JR., RESPONDENT-APPELLANT, AND AMANDA WILCOX, RESPONDENT-RESPONDENT. (APPEAL NO. 2.)

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

TERESA M. PARÉ, ATTORNEY FOR THE CHILD, CANANDAIGUA, PETITIONER-APPELLANT PRO SE.

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered June 15, 2012 in a proceeding pursuant to Family Court Act article 6. The order terminated the guardianship of respondent Richard W. White, Jr.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Same Memorandum as in *Matter of White v Wilcox* ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

905

CAF 12-01421

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF RICHARD W. WHITE, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMANDA WILCOX, RESPONDENT-RESPONDENT.

TERESA M. PARÉ, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 3.)

TERESA M. PARÉ, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

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

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered June 15, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Same Memorandum as in *Matter of White v Wilcox* ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

908

CAF 12-01141

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ALAZAYA I.B., JAVONTE W.G.,
MAREYAH A.B. AND NORMAN J.B.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STORMIE A.G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DEBORAH R. GARDINER, WATERTOWN, FOR PETITIONER-RESPONDENT.

ASHLEY N. LYON, ATTORNEY FOR THE CHILD, ADAMS.

LISA WELDON, ATTORNEY FOR THE CHILDREN, WATERTOWN.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 25, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had abused her children.

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

Memorandum: We affirm the order in each appeal. We write only to note that it was error to include in each order language delegating Family Court's authority to modify visitation to petitioner, the counselors for the subject children and the Attorneys for the Children, but the issue is moot because the orders have expired (*see Matter of Leah S.*, 61 AD3d 1402, 1402; *see also Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1491, *lv denied* 17 NY3d 708).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

909

CAF 12-01142

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF KAYDEN M.B.

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

STORMIE A.G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DEBORAH R. GARDINER, WATERTOWN, FOR PETITIONER-RESPONDENT.

LISA WELDON, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 25, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected her child.

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

Same Memorandum as in *Matter of Alazaya I.B.* (*Stormie A.G.*) ([appeal No. 1] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

913

CA 12-02162

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

ROY T. PEMBERTON AND LYNETTE PEMBERTON,
PLAINTIFFS-APPELLANTS,

V ORDER

KALEIDA HEALTH, DEFENDANT-RESPONDENT.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR OLIVERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 8, 2012. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

916

TP 13-00235

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF CHARLIE CHILDS, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF LITTLE FALLS AND CITY OF LITTLE FALLS FIRE AND POLICE BOARD, RESPONDENTS.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR PETITIONER.

MARK CURLEY, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Herkimer County [Normal I. Siegel, A.J.], entered January 25, 2013) to review a determination of respondents. The determination terminated the benefits petitioner was receiving pursuant to General Municipal Law § 207-a.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent City of Little Falls Fire and Police Board that adopted the decision and recommendation of the Hearing Officer and terminated the benefits petitioner had been receiving pursuant to General Municipal Law § 207-a as a result of injuries that he purportedly sustained in the course of his work as a firefighter. On March 18, 2005, petitioner injured his neck and was disabled from work. He was receiving benefits pursuant to section 207-a until 2010, when respondent City of Little Falls appointed a hearing officer and commenced an administrative proceeding to determine whether petitioner's section 207-a benefits should be terminated.

Contrary to petitioner's contention, respondents properly terminated his benefits upon establishing that his disability from work was not causally related to his job duties (*see generally Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499; *Matter of Tancredi v Town of Harrison/Vil. of Harrison Police Dept.*, 72 AD3d 832, 834). Contrary to petitioner's further contention, we conclude that the Hearing Officer's determination that petitioner's disability was not causally related to his job duties is supported by substantial

evidence (*see Matter of Clouse v Allegany County*, 46 AD3d 1381, 1381-1382; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Although petitioner presented evidence to the contrary, "[t]he Hearing Officer was entitled to weigh the parties' conflicting medical evidence and to assess the credibility of witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Clouse*, 46 AD3d at 1382, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75; *see Matter of Miserendino v City of Mount Vernon*, 96 AD3d 946, 947).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

917

KA 12-00607

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY THOUSAND, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered February 21, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that she is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court did not err in assessing 15 points in the risk assessment instrument based on her failure to accept responsibility for her sex offense and her "negative removal" from sex offender treatment due to her refusal to participate in that treatment. With respect to defendant's failure to accept responsibility, we conclude that, "while defendant's guilty plea could be viewed as an initial step toward acceptance of responsibility" (*People v Chilson*, 286 AD2d 828, 828, *lv denied* 97 NY2d 655), her refusal to participate in sex offender treatment "indicates a failure of genuine acceptance of responsibility" (*People v Arvelo*, 77 AD3d 452, 452, *lv denied* 16 NY3d 703).

With respect to her refusal to participate in sex offender treatment, we reject defendant's contention that she should not have been assessed any points for that refusal because she was too embarrassed to discuss her offense in a group setting. "[T]he risk assessment guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment" (*People v Kearns*, 68 AD3d 1713, 1714; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15-16 [2006]). While there may be times when defendants have legitimate reasons for

refusing to participate in treatment, courts should consider those reasons only when determining whether to exercise their discretion to grant downward departures (*see Kearns*, 68 AD3d 1713-1714). Here, defendant did not seek a downward departure and, in any event, we conclude that defendant's alleged embarrassment is not a legitimate reason to refuse to participate in sex offender treatment.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

918

KA 09-02651

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARTHOLOMEW SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 11, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and rape 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 murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and rape in the first degree (§ 130.35 [1]). Contrary to defendant's contention, Supreme Court did not err in denying his motion seeking severance of those counts of the indictment relating to the rape of the first victim from those counts relating to the murder of a second victim six months later. "To effect a severance[, defendant] must either demonstrate that the counts were not joinable under the statutory criteria . . . or seek a discretionary severance" (*People v Lane*, 56 NY2d 1, 7). Offenses are joinable if, inter alia, proof of either offense would be material and admissible as evidence-in-chief at the trial of the other offense (*see* CPL 200.20 [2] [b]). Defendant was indicted for murder in the first degree under the theory that he killed the second victim in the course of committing the crime of criminal sexual act in the first degree, i.e., forcible anal sexual conduct (*see* Penal Law §§ 125.27 [1] [a] [vii]; 130.50 [1]). We conclude that evidence with respect to the rape count was material and admissible to establish defendant's intent to have forcible anal sexual conduct with the second victim (*see People v Wise*, 46 AD3d 1397, 1398-1399, *lv denied* 10 NY3d 872; *People v Matuszak*, 32 AD3d 1347, 1348; *People v White*, 27 AD3d 387, 388, *lv denied* 6 NY3d 899; *see generally People v Kelley*, 46 AD3d 1329, 1331-1332, *lv denied* 10 NY3d 813). Each victim lived in the same apartment building that defendant lived in at the time of the respective crimes,

and defendant knew both victims. DNA testing showed that defendant's sperm was found in the second victim's anal cavity, but defendant told the police that he and the second victim had consensual sex. Defendant had also told the police that he and the first victim had consensual sex. Further, the first victim told defendant's girlfriend immediately following the rape that defendant had threatened to strangle her with a string or thin rope, and the cause of death of the second victim was strangulation with a shoe string. Thus, inasmuch as the offenses were properly joinable under CPL 200.20 (2) (b), the court lacked discretion to sever them (*see People v Bongarzone*, 69 NY2d 892, 895; *People v Webb*, 60 AD3d 1291, 1293, *lv denied* 12 NY3d 930).

We reject defendant's contention that the court erred in admitting in evidence statements of the first victim after the rape as excited utterances. The court concluded that "[t]he statements were made while the victim was under the stress of the event" (*People v Vigliotti*, 270 AD2d 904, 904, *lv denied* 95 NY2d 839, *reconsideration denied* 95 NY2d 970; *see People v Powell*, 288 AD2d 5, 5-6, *lv denied* 97 NY2d 732), and we perceive no basis to disturb that determination (*see People v Davis*, 87 AD3d 1332, 1335, *lv denied* 18 NY3d 858, *reconsideration denied* 18 NY3d 956). Defendant further contends that he was denied a fair trial by prosecutorial misconduct during the cross-examination of defendant and during summation. Most of the instances of alleged misconduct are not preserved for our review (*see People v Haynes*, 104 AD3d 1142, 1144) and, in any event, we conclude that "any improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364, *lv denied* 6 NY3d 753 [internal quotation marks omitted]). We further conclude that defendant was not denied effective assistance of counsel by defense counsel's failure to object to certain conduct of the prosecutor (*see People v Gaston*, 100 AD3d 1463, 1465).

Defendant contends that there was legally insufficient evidence that he committed criminal sexual act in the first degree, an essential element of murder in the first degree as charged to the jury (*see* Penal Law § 125.27 [1] [a] [vii]). By not renewing his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit inasmuch as the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), establishes that the second victim was found naked; defendant's semen was in her anal cavity; she had been strangled from behind; she had blunt trauma to the face and defensive wounds on her hand; and she had DNA consistent with defendant under her fingernails. We therefore conclude that the evidence was legally sufficient to establish that defendant committed anal sexual conduct by forcible compulsion (*see* § 130.50 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, viewing the evidence in light of the elements of murder in the first degree and rape in the first 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 (*see generally*

Bleakley, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

919

KA 11-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM BENNEFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

ADAM BENNEFIELD, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 27, 2009. Defendant was resentenced upon his conviction of attempted kidnapping in the second degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Bennefield* ([appeal No. 2] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

920

KA 12-01043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM BENNEFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ADAM BENNEFIELD, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 16, 2012. The resentence contained a sentence previously imposed.

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

Memorandum: Defendant was convicted upon his plea of guilty of, inter alia, two counts of attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20). In appeal No. 1, defendant appeals from a resentence on those counts and, in appeal No. 2, he appeals from a subsequent resentence. Consistent with the plea agreement, Supreme Court initially sentenced defendant to concurrent determinate terms of imprisonment of 15 years without imposing a period of postrelease supervision (PRS). Defendant appealed from the judgment of conviction but did not raise the failure of the court to impose PRS in his brief, and we affirmed (*People v Bennefield* [appeal No. 1], 306 AD2d 911). The Department of Corrections and Community Supervision (DOCCS) later administratively adjusted defendant's sentence to include a period of PRS, prompting defendant to file a motion pursuant to CPL 440.10 seeking to vacate his plea as involuntary based on the court's failure to advise him of the PRS requirement. In response, the People acknowledged that DOCCS lacked authority to impose PRS and asked the court to resentence defendant to the original sentence without PRS pursuant to Penal Law § 70.85. The court denied defendant's motion to vacate his plea and resentenced him as proposed by the People. Defendant then moved pursuant to CPL 440.20 to set aside the resentence on the ground that the court failed to ask whether he wished to make a statement before the original sentence was

reimposed, as required by CPL 380.50 (1). The court granted that motion and resentenced defendant once again to the original sentence without a period of PRS.

We note at the outset that appeal No. 1 must be dismissed because the initial resentencing was superseded by the subsequent resentencing in appeal No. 2 (*see People v Motley* [appeal No. 3], 56 AD3d 1158, 1158-1159). With respect to appeal No. 2, defendant contends in his main and pro se supplemental briefs that the court should have vacated his plea. According to defendant, his plea was involuntarily entered because he was not informed prior to the plea that a period of PRS was required for attempted kidnapping in the second degree. Defendant did not, however, appeal from the order denying his motion to vacate his plea, and the only issues that are properly before us on this appeal are those relating to the legality of the resentence. Apparently recognizing this procedural hurdle, defendant asks us to treat his appeal as if it were from the order denying his CPL 440.10 motion, but we perceive no basis upon which to do so.

We further conclude that in appeal No. 2 the court properly resentenced defendant pursuant to Penal Law § 70.85 to the original sentence without imposing a period of PRS. The statute permits the sentencing judge, with the consent of the People, to "re-impose the originally imposed determinate sentences of imprisonment without any term of post-release supervision." The statute was enacted to "avoid the need to vacate guilty pleas under [*People v*] *Catu* [(4 NY3d 242)] when defendants are not properly advised of mandatory terms of postrelease supervision" (*People v Rucker*, 67 AD3d 1126, 1127; *see People v Verhow*, 83 AD3d 1528, 1528; *People v Williams*, 82 AD3d 1576, 1577, *lv denied* 17 NY3d 810). Here, the People requested that the court resentence defendant pursuant to section 70.85, and the court granted that request. The fact that defendant did not ask for resentencing is of no moment (*see generally Williams*, 82 AD3d at 1577). Contrary to defendant's contention, the resentence in appeal No. 2 does not result in an injustice inasmuch as defendant has received sentences for the two counts of attempted kidnapping in the second degree that are entirely consistent with the terms of the plea agreement, i.e., determinate concurrent sentences within the permissible sentencing range *with no PRS*.

Defendant also contends that his sentence is unduly harsh and severe, and asks us to reduce his aggregate sentence of imprisonment from 15 years to 13 years, which essentially amounts to time served. As we noted in defendant's appeal from the judgment of conviction (*Bennefield*, 306 AD2d at 912), however, defendant's challenge to the severity of his sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Suttles*, 107 AD3d 1467, 1468).

We have reviewed the remaining contentions in defendant's main brief and pro se supplemental brief and conclude that none warrants

reversal or modification of the resentence in appeal No. 2.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

925

KA 08-02110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK D. CONEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARY ELLEN WEST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered September 2, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a forged instrument in the second degree (8 counts) and identity theft in the first degree (11 counts).

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of 8 counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and 11 counts of identity theft in the first degree (§ 190.80 [1], [3]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. The conviction stems from defendant's conduct in fraudulently securing three student loans and attempting to cash or deposit the proceeds of one of the loans with a forged signature. Having viewed the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349) and having "weigh[ed the] conflicting testimony, review[ed the] rational inferences that may be drawn from the evidence and evaluate[d] the strength of such conclusions" (*id.* at 348), we conclude that the evidence amply supports County Court's determination that defendant knowingly used the personal identifying information of a woman who he did not know and from whom he did not have permission to use such information in order to secure the loans and procure the proceeds. Despite defendant's testimony that he did not know that the woman who supplied him with the personal identifying information used to cosign on the loan applications was not the woman to whom the information belonged, we note that, " '[i]n a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented

are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422; *see People v White*, 149 AD2d 915, 915-916, *lv denied* 74 NY2d 854). We perceive no reason to disturb the court's credibility determination.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

926

KA 12-00546

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STARLET BATTLE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered September 20, 2011. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree, assault in the second degree, resisting arrest, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of, inter alia, burglary in the second degree (Penal Law § 140.25 [1] [b]), assault in the second degree (§ 120.05 [3]) and resisting arrest (§ 205.30), defendant contends that County Court erred in denying her suppression motion without a hearing. In her motion, defendant sought to suppress, inter alia, evidence obtained by the police after defendant was arrested for stealing items from a Walmart store in the Town of Victor. Defendant had previously been banned from entering all Walmart stores due to a recent conviction of grand larceny in Onondaga County. The court summarily denied the suppression motion, and defendant thereafter pleaded guilty to the entire indictment. In return for the plea, the court promised to impose the minimum sentence and to sentence defendant concurrently to the sentences she was to receive for violating the terms and conditions of probation imposed for felony convictions in Onondaga and Jefferson Counties. We affirm.

We agree with defendant that the court erred in ruling that defendant, in order to be entitled to a suppression hearing, was required to submit an affidavit in support of her motion. As the Court of Appeals has stated, “suppression motions must be in writing, state the legal ground of the motion and ‘contain sworn allegations of fact,’ made by defendant *or ‘another person’* ” (*People v Mendoza*, 82

NY2d 415, 421, quoting CPL 710.60 [1] [emphasis added]). A suppression motion may be based on factual allegations made upon information and belief by defense counsel, provided that, as here, the sources of the attorney's information and the grounds of his or her belief are identified in the motion papers (*see* CPL 710.60 [1]). The court also erred in suggesting that defendant was required to deny participation in the crime. It is well settled that a defendant must either "deny participating in the transaction *or suggest some other grounds for* suppression" in order to warrant a suppression hearing (*see Mendoza*, 82 NY2d at 429 [emphasis added]).

In addition, we reject the People's contention that the court's summary denial of the motion was proper because defendant failed to specify in her motion papers the evidence sought to be suppressed. Although the motion papers were vague in that regard, defense counsel stated during oral argument of the motion that defendant was seeking suppression of the physical evidence obtained by the police from her person and her handbag. Indeed, before the court ruled on the motion, the prosecutor acknowledged that defense counsel had sufficiently clarified defendant's request. In any event, the court did not deny defendant's motion due to an alleged lack of specificity, and thus we could not affirm on that basis (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 194-195).

Nevertheless, we agree with the People that the court properly denied the motion without a hearing on the grounds that the factual assertions contained in defendant's moving papers were insufficient to warrant a hearing (*see People v Kirk*, 27 AD3d 383, 384, *lv denied* 6 NY3d 895). Although a defendant "need not prove his entire case in the motion papers" (*People v Lopez*, 263 AD2d 434, 435), a hearing is "not available merely for the asking" (*Mendoza*, 82 NY2d at 425 [internal quotation marks omitted]). "[T]he sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" (*id.* at 426).

Here, the documents provided to defendant, including the application for the search warrant that was signed by the court, gave her "enough information upon which to make a proper suppression motion" (*People v Roberts*, 23 AD3d 245, 246, *lv denied* 6 NY3d 817). Those documents demonstrated that defendant and her codefendants were observed by an off-duty police officer engaging in conduct that reasonably led the officer to believe that they were stealing DVDs from the store. Indeed, defendant does not dispute that the off-duty officer had probable cause to arrest her. Defendant contends, however, that she is entitled to a hearing to determine whether the arresting officer had probable cause to make the arrest. Although it is true, as defendant asserts, that the off-duty officer did not provide the arresting officer with a specific description of defendant, the warrant application establishes that the off-duty officer provided the arresting officer with a contemporaneous account of defendant's actions. Notably, as defendant was leaving the store, the off-duty officer notified the arresting officer of that fact. While waiting in the parking lot outside, the arresting officer

approached defendant as she exited the store and attempted to arrest her, whereupon defendant fled and then resisted arrest, causing an injury to the officer in the process. In her affirmation submitted in support of the motion, defense counsel merely alleged that the arrest was unlawful because the arresting officer "did not have specific information" about defendant when he approached defendant. That assertion, under the facts of this case, was insufficient to trigger the need for a suppression hearing (*see People v Jones*, 95 NY2d 721, 728-729).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

927

CAF 12-00627

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

IN THE MATTER OF CHRISTAL L. BUTTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD J. ALLEN, RESPONDENT-RESPONDENT.

IN THE MATTER OF RICHARD J. ALLEN,
PETITIONER-RESPONDENT,

V

CHRISTAL L. BUTTON, RESPONDENT-APPELLANT.

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

BETZJITOMIR & BAXTER, LLP, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

SAMANTHA PETERS SMITH, ATTORNEY FOR THE CHILDREN, CANISTEO.

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILD, BATH.

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered March 27, 2012 in a proceeding pursuant to Family Court Act article 6. The order awarded the parties joint custody, awarded primary physical custody of two children to Richard J. Allen and awarded primary physical custody of one child to Christal L. Button.

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

Memorandum: Petitioner-respondent mother appeals from an order that, inter alia, awarded the parties joint legal custody of the children, awarded primary physical custody of the parties' sons to respondent-petitioner father and awarded primary physical custody of the parties' daughter to the mother. On appeal, the mother contends that Family Court abused its discretion in awarding primary physical custody of the parties' sons to the father because splitting physical placement of the children is not in their best interests. We reject that contention. The court's custody determination following a hearing is entitled to great deference (*see Eschbach v Eschbach*, 56

NY2d 167, 173-174). We will not disturb the custody determination here inasmuch as the court made extensive factual findings that are supported by the record and "that warrant the conclusion that the needs of each of the children will best be met by the court's disposition" (*Matter of Roulo v Roulo*, 201 AD2d 937, 937-938).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

929

CAF 12-01287

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

IN THE MATTER OF KADYN J. AND LEXIE J.

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

KELLY M.H., RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 2, 2012 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent had neglected the subject children.

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

Memorandum: Respondent mother appeals from an order of fact-finding adjudging that she neglected the two children who are the subject of this proceeding. The mother correctly contends that Family Court erred in admitting police records in evidence inasmuch as the certification attached to those records failed to comply with Family Court Act § 1046 (a) (iv). That statute provides that where, as here, a certification is completed by a "responsible employee" rather than the head of an agency, the certification "***shall*** be accompanied by a photocopy of a delegation of authority signed by both the head of the . . . agency and by such other employee" (emphasis added). The language of the statute is mandatory, and it is undisputed that "the requisite delegation of authority to [the employee] was lacking" (*Matter of John QQ.*, 19 AD3d 754, 755). We must therefore "find the admission of these records to have been in error if we are to give effect to the clear and unambiguous intention of the [l]egislature" (*id.* at 755-756; *cf. Elkaim v Elkaim*, 176 AD2d 116, 117, *lv dismissed* 78 NY2d 1072; *see generally* McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 92).

Contrary to the mother's further contention, however, we nevertheless conclude that the finding of neglect is supported by a preponderance of the credible evidence. While the petition alleged

numerous acts of neglect, we address only the issues related to domestic violence. "To establish neglect, . . . petitioner must demonstrate by a preponderance of the evidence 'first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship' . . . Although the 'exposure of the child[ren] to domestic violence . . . may form the basis for a finding of neglect' . . . , 'exposing . . . child[ren] to domestic violence is *not* presumptively neglectful. Not [all] child[ren] exposed to domestic violence [are] at risk of impairment' " (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 368).

The evidence presented at trial established that police officers had been called to the mother's residence on numerous occasions for disturbances and repeated acts of domestic violence. The subject children, who were eight and nine years old, were present in the very small apartment for many of those incidents. On the most recent occasion, the police responded to the apartment and observed wet blood in the common hallway of the dwelling that "looked like a trail" leading toward the mother's apartment. Inside that apartment, there was a "huge puddle" of blood, and the responding officers observed a man, previously identified as the mother's boyfriend, with a cloth covering his bloody arm. The mother was not injured, and the officers recovered a hunting knife covered with "fresh blood" near a window. Based on his observations of their behavior and the empty beer cans in the kitchen, the police officer who testified at the hearing opined that the mother and her boyfriend were both intoxicated. The children were in one of the two bedrooms with the door open, and the police officer testified that they had their eyes open and were watching television. The mother was arrested and taken into police custody.

A caseworker who interviewed the children on two separate occasions testified that, although they stated that they slept through the entire incident, the children were traumatized by seeing the copious amount of blood and by being forced to clean it up the next day. The children informed the caseworker that they had observed other acts of violence between the mother and her boyfriend. We note that, inasmuch as the mother declined to testify, "the court [was] permitted to draw the strongest possible negative inference" against her (*Matter of Jasmine A.*, 18 AD3d 546, 548; *see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808).

In our view, the testimony at the hearing was sufficient to establish first, that the children's emotional and mental conditions had already been impaired or, at the very least, were in imminent danger of becoming impaired due to the repeated acts of violence in the household that "occasionally occurred in the presence of the subject children" (*Kennedie M.*, 89 AD3d at 1545); and second, "that the actual or threatened harm to the child[ren] [was] a consequence of the failure of [the mother] to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship"

(*Nicholson*, 3 NY3d at 368). We thus conclude that the evidence established that the children were in fact neglected and that the mother, who was the "instigator of [the] physical altercation with [the boyfriend]" (*Matter of Richard T.*, 12 AD3d 986, 987), was "responsible for [that] neglect" (*Nicholson*, 3 NY3d at 368; *cf. Matter of Ravern H.*, 15 AD3d 991, 992, *lv denied* 4 NY3d 709). Based on our determination, we see no need to address the mother's additional challenges to the finding of neglect.

Finally, the mother contends that the court erred in awarding temporary custody of the children to their half-sister over the mother's objection (*see generally* Family Ct Act § 1017). In their briefs, petitioner and the Attorney for the Children state that, subsequent to the filing of this appeal, the mother consented to an order continuing custody of the children with their half-sister. The mother has not disputed that fact, and the subsequent order "is a matter of public record of which we may take judicial notice" (*Matter of Chloe Q. [Dawn Q.- Jason Q.]*, 68 AD3d 1370, 1371; *see Matter of Sharon D.*, 274 AD2d 702, 703). Consequently, the mother's contention is moot (*see Chloe Q.*, 68 AD3d at 1371; *Matter of Catherine W. v Donald W.*, 166 AD2d 651, 651). In any event, we reject the mother's contention on the merits (*see Matter of Gabriel James Mc.*, 60 AD3d 1066, 1067).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

930

CA 13-00377

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

UTICA CUTLERY COMPANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HISCOCK & BARCLAY, LLP, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CARL J. COCHI, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered December 13, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking damages based on defendant's alleged failure to investigate and notify plaintiff in a timely manner of the available insurance covering plaintiff with respect to the underlying lawsuit against it for, inter alia, trade dress infringement. Supreme Court properly denied defendant's motion for summary judgment seeking dismissal of the complaint. To establish a cause of action for legal malpractice, " 'a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care' " (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045; *see generally McCoy v Feinman*, 99 NY2d 295, 301-302; *Williams v Kublick*, 302 AD2d 961, 961).

Defendant moved for summary judgment on the ground that plaintiff had a contractual duty and actual knowledge of the requirement to notify its insurers of the commencement of the underlying action, which superceded any alleged duty that defendant had to plaintiff. We conclude that defendant "failed to meet its burden of establishing as a matter of law that any alleged negligence on its part was not a proximate cause of plaintiff['s] damages" (*New Kayak Pool Corp. v Kavinoky Cook LLP*, 74 AD3d 1852, 1853). Notably, a plaintiff in a legal malpractice action must establish that the defendant law firm was *a* proximate cause of damages, but need not establish that it was *the* proximate cause (*see Barnett v Schwartz*, 47 AD3d 197, 204-205).

Defendant also failed to establish that plaintiff's conduct was an intervening and superseding cause such that defendant's alleged negligence was not a proximate cause of any damages (*cf. Alden v Brindisi, Murad, Brindisi, Pearlman, Julian & Pertz ["The People's Lawyer"]*, 91 AD3d 1311, 1311; *see generally Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304-305).

Contrary to defendant's contention, the court properly denied its alternative request for partial summary judgment on the second and fourth affirmative defenses and dismissal of a particular claim for damages. Defendant correctly notes that the insurance policies required plaintiff to give timely notice of the underlying action and properly alleges the culpable conduct of plaintiff in failing to give notice in a timely manner to the insurance companies as an affirmative defense (*see generally Arnav Indus., Inc. Retirement Trust*, 96 NY2d at 305 n 2). On this record, however, defendant has not established that plaintiff was comparatively negligent as a matter of law. Plaintiff's president explained at his deposition and in his affidavit the reason why he failed to give timely notice to the insurance companies, i.e., he did not believe that the underlying claim was covered by insurance. Whether that belief was reasonable and negated any culpable conduct on plaintiff's part is for a jury to determine. We further conclude that defendant failed to establish as a matter of law that the insurance policies would not have covered certain damages paid by plaintiff in the underlying action.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

931

CA 12-01864

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

JANICE MAZELLA, AS ADMINISTRATRIX OF
THE ESTATE OF JOSEPH MAZELLA, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BEALS, M.D., DEFENDANT,
AND ELISABETH MASHINIC, M.D.,
DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES D. LANTIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DELDUCHETTO & POTTER, SYRACUSE (ERNEST A. DELDUCHETTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 2, 2012. The order denied the motion of defendant Elisabeth Mashinic, M.D., 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 medical malpractice action seeking damages arising from the death of her husband (decedent), who committed suicide 16 days after he was released from the psychiatric ward of Auburn Memorial Hospital (hospital). Elisabeth Mashinic, M.D. (defendant) is a psychiatrist who treated decedent during his inpatient stay at the hospital. The complaint, as amplified by the amended bill of particulars, alleges myriad theories of negligence against defendant, including claims that she failed to diagnose a medication-induced akathisia, misdiagnosed decedent as having psychomotor agitation, and improperly discharged decedent from the hospital without making arrangements for decedent to be treated by a psychiatrist upon release. Following discovery, defendant moved for summary judgment dismissing the complaint against her. Supreme Court denied the motion, and we now affirm.

Even assuming, arguendo, that defendant met her initial burden of establishing entitlement to judgment as a matter of law (*see Edwards v St. Elizabeth Med. Ctr.*, 72 AD3d 1595, 1596), we conclude that plaintiff raised material issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

For instance, plaintiff submitted the affidavit of her unidentified expert, wherein the expert stated that the proper standard of care required that decedent, who had been prescribed multiple medications that had significant side effects, such as suicidal ideation, "be monitored closely by a psychiatrist from the point of his discharge." It is undisputed that defendant approved the discharge without ensuring that decedent had a psychiatrist who could treat him. Additionally, defendant acknowledged at her deposition that decedent required psychiatric care upon discharge, but testified that it was not her responsibility to arrange for decedent's post-discharge care and that this responsibility was "customarily [within] the purview of the social worker." Similarly, defendant's expert stated in his affidavit that it was within the standard of care to delegate to a licensed social worker the task of arranging for post-discharge care. Plaintiff's expert, however, disagreed, stating that "delegating the task to a social worker without insuring that the task was completed is a . . . deviation from the standard of care." We conclude that the conflicting opinions of the experts raise an issue of fact for trial (*see Haas v F.F. Thompson Hosp., Inc*., 86 AD3d 913, 914; *Dandrea v Hertz*, 23 AD3d 332, 333).

We reject defendant's contention that the post-discharge arrangements made for decedent by the social worker were sufficient as a matter of law. Although the social worker made an appointment for decedent at the Brownell Center for Behavioral Health, an outpatient mental health facility, plaintiff's expert opined that the standard of care required that psychiatric care be made "immediately available" to decedent upon discharge. Decedent did not see a psychiatrist (or even a physician) during his initial appointment at the Brownell Center on September 3, 2009, which was one week after his release from the hospital, and he still had not spoken to a psychiatrist by the time he committed suicide on September 12, 2009.

Defendant relies heavily on the fact that decedent imposed "self-limitations" on his post-discharge care. According to defendant, decedent said that he did not want to engage in talk therapy, he would treat only with a male physician, and he did not want to be treated in Syracuse given his status in the community. Even assuming, arguendo, that those conditions rendered it impossible for defendant to arrange adequate post-discharge care for decedent, we conclude that there is an issue of fact whether defendant should have refrained from approving decedent's discharge from the hospital until he modified his self-imposed limitations. In sum, defendant released decedent from her care without ensuring that he would be treated by a psychiatrist upon discharge, and an issue of fact exists whether she was negligent in doing so. The court thus properly denied defendant's motion for summary judgment.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

933

CA 12-01749

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

CLAUDIA S. JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY C. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (ASHLEA L. PALLADINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 7, 2011. The order, among other things, found defendant to be in contempt of court for his willful failure to pay his child support obligation.

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

Same Memorandum as in *Johnson v Johnson* ([appeal No. 2] ___ AD3d ___ [Sept. 27, 2013]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

934

CA 12-01751

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

CLAUDIA S. JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY C. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (ASHLEA L. PALLADINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 24, 2012. The order, among other things, distributed the parties' personal property.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Supreme Court, Erie County, for further proceedings with respect to the disposition of the real property located in Idaho and as modified the order is affirmed without costs in accordance with the following Memorandum: In appeal No. 1, defendant appeals from an order that, inter alia, found defendant in contempt of court on the ground that he willfully failed to pay child support pursuant to the judgment of divorce and awarded attorney's fees to plaintiff. In appeal No. 2, defendant appeals from an order that, inter alia, distributed the parties' personal property.

In appeal No. 1, we conclude that Supreme Court properly determined that defendant willfully failed to pay child support pursuant to the judgment of divorce. Defendant's admission at the hearing that he had not paid child support as required by the judgment of divorce constituted prima facie evidence of a willful violation of that judgment, and thus the burden shifted to defendant to present some competent and credible evidence justifying his failure to pay child support (*see Matter of Powers v Powers*, 86 NY2d 63, 68-70; *Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537). Contrary to defendant's contention, his failure to make child support payments to plaintiff is not excused by an Idaho statute requiring that child support payments be made directly to the Idaho Department of Health and Welfare (*see* Idaho Code § 32-710A [A]). The Idaho statute is not applicable to this case because the judgment of divorce was issued in New York and, under the Uniform Interstate Family Support Act, "[t]he

law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order" (Family Ct Act § 580-604 [a]; *see* Idaho Code § 7-1046 [1] [a]).

We further conclude that the court properly awarded attorney's fees to plaintiff. "In any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award[,] the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to" the other party's attorney (Domestic Relations Law § 237 [c]). Here, inasmuch as the court properly determined that defendant willfully failed to pay child support pursuant to the judgment of divorce, it therefore "properly awarded [plaintiff] an attorney's fee [for legal expenses she] incurred in enforcing those obligations" (*McDermott v McDermott*, 54 AD3d 911, 912; *see* § 237 [c]; *Simons v Simons*, 139 AD2d 959, 961; *cf. Boardman v Boardman*, 300 AD2d 1110, 1111).

In appeal No. 2, we agree with defendant that the court erred in failing to determine the disposition of real property located in Idaho. In a prior appeal, we modified the judgment of divorce by "remitting the matter to Supreme Court to determine the disposition of the [real and personal] property in Idaho" (*Johnson v Johnson*, 68 AD3d 1685, 1686). On remittal, the court distributed the personal property located in Idaho but failed to distribute the real property. Thus, we modify the order in appeal No. 2 by remitting the matter to Supreme Court to determine the disposition of the real property located in Idaho (*see id.*). Finally, we reject defendant's contention that the court erred in distributing the parties' personal property (*see Marcera v Marcera*, 87 AD3d 1276, 1277).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

935

CA 12-02188

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

SUSAN P. WIND, PLAINTIFF-APPELLANT,

V ORDER

TIMOTHY J. MCNEIL, DEFENDANT-RESPONDENT.

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

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 8, 2012. The order granted the motion of defendant to amend his answer and for summary judgment dismissing the complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

937

CA 12-02254

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

IN THE MATTER OF COUNTY OF HERKIMER,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF HERKIMER,
RESPONDENT-DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Herkimer County (Erin P. Gall, J.) entered August 23, 2012 in a CPLR article 78 proceeding and declaratory judgment action. The judgment declared null and void the February 6, 2012 amendment to the Village of Herkimer's zoning ordinance, denied the motions of respondent-defendant to dismiss and strike and reserved decision with respect to sewer and municipal services.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the declaration and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Herkimer County, for further proceedings in accordance with the following Memorandum: Petitioner-plaintiff, County of Herkimer (County), selected an abandoned shopping center located within respondent-defendant, Village of Herkimer (Village), as the site for its new jail, i.e., the proposed Herkimer County Correctional Facility (Facility). Pursuant to Correction Law § 45 (10), the Commission of Correction (Commission) approved that site for the construction of the Facility, and the County thereafter applied for approval of a connection for the Facility to the Village sanitary sewer system. After the Village Board denied that application, the County commenced this hybrid CPLR article 78 proceeding and declaratory judgment action. The petition-complaint sought, inter alia, a judgment annulling the determination denying the County's application and declaring that the Village is required to provide sewer services to the Facility. In anticipation of amendments to the Village zoning ordinance that would exclude correctional facilities from the zoning districts in which the site of the planned Facility was located, the County amended its petition-complaint to seek, inter alia, a further declaration that such amendments are null and void.

The Village thereafter adopted the anticipated amendments, which exclude from the legal uses in C-3 Central Commercial Districts and I-I Industrial Districts a "correctional facility, correctional institution, or jail" (Amended Zoning Ordinance of the Village of Herkimer §§ 3.6 [j]; 3.7 [b] [4]).

We agree with the Village that the record is inadequate to make a determination, based upon a "balancing of public interests," whether the County is immune from the requirements of those amendments with respect to its siting of the proposed Facility (*Matter of County of Monroe [City of Rochester]*, 72 NY2d 338, 341 [internal quotation marks omitted]). The factors to be weighed in making that determination are "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests[,] . . . the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, . . . alternative methods of providing the needed improvement[,] . . . intergovernmental participation in the project development process and an opportunity to be heard" (*id*. at 343 [internal quotation marks omitted]). Here, inasmuch as the record is inadequate to permit the appropriate balancing of those factors, we remit the matter to Supreme Court for a determination, based upon a more complete record, whether the County is immune from the requirements of the Village zoning ordinance (*see generally Town of Riverhead v County of Suffolk*, 66 AD3d 1004, 1005).

We also agree with the Village that the court erred in granting that part of the amended petition-complaint seeking judgment declaring that the amendments to the zoning ordinance, insofar as they result in the exclusion of the Facility from the location approved by the Commission, are null and void on the ground that they are preempted by state law. In the event that the court determines, upon remittal, that the County is immune from the requirements of the amendments at issue, that request for declaratory relief will be rendered moot (*see generally New York Pub. Interest Research Group v Carey,* 42 NY2d 527, 531; *Times Sq. Stores Corp. v Bernice Realty Co*., 107 AD2d 677, 682). The court, however, granted a declaration that those amendments are null and void as applied to the proposed Facility, which would produce the same result as a determination of immunity in the County's favor. We therefore note our disagreement with the court's determination that the amendments to the zoning ordinance are preempted by state law. We conclude that the New York State Legislature has not "enacted a comprehensive and detailed regulatory scheme" with respect to the siting of County correctional facilities (*Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 105), nor has the State otherwise "demonstrated its intent to preempt [the] entire field and preclude any further local regulation" in that area (*Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 505). To the contrary, state legislation regarding the siting of county correctional facilities is limited to requiring Commission approval of a county's site selection (*see* County Law § 216; Correction Law § 45 [10]). The New York State Legislature has not directly or impliedly expressed any intent "to trump local

efforts to regulate the location of [correctional] facilities through the application of [the] zoning laws" (*Incorporated Vil. of Nyack*, 78 NY2d at 507). We therefore modify the judgment by vacating the declaration.

We reject the contention of the County, raised for the first time on appeal, that the amendments at issue are invalid on the alternative ground that they "violate[] the principle that zoning is concerned with the use of land, not with the identity of the user" (*Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead*, 20 NY3d 481, 483, *rearg denied* 21 NY3d 978). The amendments here are directed at land use, not at the entity that owns or occupies the land (*cf. id*. at 485). Contrary to the County's further contention, the action of the Village Board in amending the Village zoning ordinance does not constitute exclusionary zoning (*see generally Asian Ams. for Equality v Koch*, 72 NY2d 121, 133).

We have considered the parties' remaining contentions and conclude that none requires further modification of the judgment.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

938

CA 12-02306

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

LEE O. SIGNS AND ROBIN A. SIGNS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DAVID D. CRAWFORD, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE MISERENDINO LAW FIRM, P.C., BUFFALO (JOY ELLEN MISERENDINO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 7, 2012. The order, insofar as appealed from, denied that part of the motion of defendant David D. Crawford for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim and granted the cross motion of plaintiffs for partial summary judgment pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Lee O. Signs (plaintiff) sustained at a construction site owned by David D. Crawford (defendant) when a metal plate that was being hoisted by a jib fell and caught plaintiff's glove, causing him to fall from scaffolding. Defendant appeals from an order denying that part of his motion for summary judgment dismissing the complaint insofar as the complaint asserts a Labor Law § 240 (1) claim and granting the cross motion of plaintiffs for partial summary judgment on liability on that claim.

We conclude that the court properly denied that part of defendant's motion with respect to the Labor Law § 240 (1) claim and properly granted plaintiffs' cross motion. The metal plate fell and struck plaintiff "because of the absence or inadequacy of a safety device of the kind enumerated in Labor Law § 240 (1)" (*Karcz v Klewin Bldg. Co., Inc.*, 85 AD3d 1649, 1651). "Thus, 'the harm [to plaintiff] flow[ed] directly from the application of the force of gravity' " (*id.,* quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604). We reject defendant's contention that plaintiff's actions were the sole proximate cause of the accident. Plaintiff's actions in

attempting to prevent the metal plate from falling "raise, at most, an issue of comparative negligence, which is not an available defense under section 240 (1)" (*id*. [internal quotation marks omitted]; *see Dean v City of Utica*, 75 AD3d 1130, 1131).

Finally, we conclude that defendant's contention that the accident here was caused by a hazard unrelated to the safety device lacks merit. The work being performed by plaintiff "involved an elevation-related risk and not a usual and ordinary risk of a construction site to which the extraordinary protections of Labor Law § 240 (1) do not extend" (*Tafelski v Buffalo City Cemetery, Inc.,* 68 AD3d 1802, 1803, *lv dismissed* 14 NY3d 936 [internal quotation marks omitted]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

939

CA 12-02339

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

CHRISTINA SOWICH, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ONEIDA, LUCILLE A. SOLDATO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS COMMISSIONER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, COLLEEN OLNEY, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS SUPERVISOR WITH ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND CHRISTINE CORTESE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS SUPERVISOR WITH ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

SOKOLOFF STERN LLP, CARLE PLACE (STEVEN C. STERN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NORMAN P. DEEP, ROME, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 30, 2011. The order, among other things, denied in part the motion of defendants to dismiss.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

944

KA 10-02194

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BOLDEN, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 8, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [1]), defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that he was the person who committed the crimes with the codefendant, who was tried jointly with defendant and also convicted. We reject defendant's contentions.

The evidence at trial established that the victim rode his bicycle to a gas station in Buffalo at 5:30 a.m. on the day in question. After purchasing cigarettes, the victim observed a black Chevy Trailblazer with front-end damage pull up to the gas pump. There were two African-American men in the Trailblazer, one of whom the victim had known since childhood but whose name he could not recall. The victim approached the Trailblazer and chatted with the two men, who were drinking from a bottle of Grey Goose vodka. After approximately five minutes of conversation, the man whom the victim knew exited the vehicle and struck the victim's head with the bottle. The other man then slammed the victim to the ground and, while the victim was face-down on the ground, one of the two perpetrators searched the victim's pockets and took his cell phone, cash and cigarettes before driving away in the Trailblazer. The victim rode his bicycle to a nearby pay phone and called 911. The police arrived

within minutes and took a statement from the victim, who, according to one of the responding officers, appeared disheveled and upset. The officers then began to search for the perpetrators.

Within 20 minutes of the robbery, the police observed a black Chevy Trailblazer with front-end damage parked on the street within a quarter of a mile from the crime scene. Defendant was in the driver's seat of the vehicle, and the codefendant was in the front passenger's seat. After approaching the vehicle and detaining defendant and the codefendant, both of whom are African-American, the police dialed the victim's cell phone number, whereupon a cell phone in the vehicle started to ring. The police seized the phone, which was later determined to belong to the victim, along with a pack of cigarettes found in the center console. In addition, the police found an empty bottle of Grey Goose vodka on the ground next to the vehicle, and another bottle inside the vehicle. During a police-arranged showup identification procedure conducted within 30 minutes of the crime, the victim identified both defendant and the codefendant as the men who robbed him. At trial, the victim again made a positive identification of defendant and the codefendant, and he testified that during a break in the trial defendant approached him and offered to give everything back to him.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person" to conclude that defendant participated in the robbery with the codefendant (*People v Bleakley*, 69 NY2d 490, 495). Moreover, 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 id.*). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Kalen*, 68 AD3d 1666, 1666-1667, *lv denied* 14 NY3d 842; *see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the police unlawfully seized him and that Supreme Court therefore erred in refusing to suppress the physical evidence thereafter obtained by the police. We reject that contention as well. As noted, within 20 minutes of the crime, defendant was observed in the driver's seat of a vehicle that matched the detailed description of the vehicle used by the robbers. The vehicle was located a quarter of a mile from the crime scene, and defendant and the codefendant matched the general description of the suspects provided by the victim. Based on those observations, the police had reasonable suspicion to detain defendant for investigatory purposes, including a prompt showup identification procedure (*see People v Roque*, 99 NY2d 50, 54; *People v Gonzalez*, 91 NY2d 909, 910; *see generally People v Hicks*, 68 NY2d 234, 238-242).

Although defendant did not request a *Wade* hearing, he nevertheless contends on appeal that the showup identification procedure was unduly suggestive. Even assuming, arguendo, that this

issue is properly before us, inasmuch as the court addressed the legality of the showup identification procedure in its decision, we reject defendant's contention. The showup identification procedure was not rendered unduly suggestive based on the fact that defendant was in handcuffs and in the presence of a uniformed police officer (*see People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800; *People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957), and there is no evidence in the record that the police otherwise suggested to the victim that either suspect was involved in the robbery.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

946

KA 13-00053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASEY BROWNELL, DEFENDANT-APPELLANT.

JAMES QUINN AURICCHIO, BUFFALO, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered June 10, 2011. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for resentencing in accordance with the following Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that County Court erred in failing to determine whether he was eligible for youthful offender status. We agree. There was no mention of defendants eligibility for youthful offender status during the plea, and defense counsel noted at sentencing that, although defendant was eligible for such status, "we are all aware of what is set out in the Pre-Plea Investigation in that regard, and he understands that [it] is not part of the plea agreement."

"After receipt of a written report of the [preplea or presentence] investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). In *People v Rudolph* (___ NY3d ___ [June 27, 2013]), the Court of Appeals held that section 720.20 mandates that, when the sentence is imposed, the sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it. The Court of Appeals stated that "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*id*. at ___). Here, although defense counsel's statements unequivocally established that a determination had been made not to afford defendant youthful offender status, it is unclear whether that determination was made by the court, as required by section 720.20, rather than by the prosecutor. Consequently, we modify the judgment by vacating the sentence, and we remit the matter to County Court to determine and to state for the record "whether defendant is a youthful offender"

(*Rudolph*, ___ NY3d at ___).

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

947

KA 09-01395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONOVAN HUMPHREY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (Francis A. Affronti, J.), rendered August 27, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]) and assault in the second degree (§ 120.05 [2]). Defendant failed to preserve for our review his contention that Supreme Court erred in permitting the People to introduce evidence of a prior uncharged crime inasmuch as he never objected to the evidence on that ground (*see People v Nappi*, 83 AD3d 1592, 1594, *lv denied* 17 NY3d 820). In any event, that contention is without merit. Photographs of defendant holding what appeared to be a rifle "[are] not evidence of an uncharged crime absent further proof that his possession of th[at] item[] was illegal" (*People v Hucks*, 292 AD2d 833, 833, *lv denied* 98 NY2d 697; *see generally People v Hillard*, 79 AD3d 1757, 1758, *lv denied* 17 NY3d 796). "[M]ere speculation that a jury may discern something sinister about a defendant's behavior does not render such behavior an uncharged crime" (*Hucks*, 292 AD2d at 833).

Defendant failed to preserve for our review his contention that the court erred in allowing the People to present rebuttal testimony on an allegedly collateral matter inasmuch as he failed to object to such testimony at trial (*see People v Comerford*, 70 AD3d 1305, 1305-1306; *People v Clabeaux*, 277 AD2d 988, 988, *lv denied* 96 NY2d 781), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant likewise failed to preserve for our review his challenge to

the jury charge with respect to his justification defense (*see People v Johnson*, 103 AD3d 1226, 1226, *lv denied* 21 NY3d 944; *People v Poles*, 70 AD3d 1402, 1403, *lv denied* 15 NY3d 808; *People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961). In any event, we conclude that the court's justification charge does not require reversal. "[D]espite the absence of the word 'deadly' from that part of the court's charge defining the term initial aggressor, the court's justification charge adequately conveyed to the jury that defendant could be justified in the use of deadly physical force to defend himself against deadly physical force initiated by [others]. Thus, the justification charge, viewed in its entirety, was 'a correct statement of the law' " (*McWilliams*, 48 AD3d at 1267, quoting *People v Coleman*, 70 NY2d 817, 819). Finally, "[b]ecause the court did not erroneously instruct the jury regarding justification, defense counsel was not ineffective for failing to object to that charge" (*Johnson*, 103 AD3d at 1226).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

949

CAF 12-01770

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

IN THE MATTER OF DAWN BENZIN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY KUTY, SR., RESPONDENT-RESPONDENT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY KUTY, SR., RESPONDENT-RESPONDENT PRO SE.

ANTHONY J. CERVI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 31, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order dismissing her petition to modify her visitation rights as set forth in a prior order. We reject the mother's contention that Family Court erred in dismissing her petition without conducting a hearing. The record establishes that, while this proceeding was pending, an order was entered in Surrogate's Court granting a petition filed by respondent father and his wife seeking adoption of the subject child by the father's wife. As the Attorney for the Child points out in his brief, Domestic Relations Law § 117 (1) (a) provides that "[a]fter the making of an order of adoption the birth parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for *and shall have no rights over such adoptive child*" except under certain limited circumstances, none of which applies here (emphasis added). Thus, upon entry of the adoption order, the mother's "parental rights ceased, and [s]he lacked standing to prosecute a . . . visitation petition regarding the subject child" (*Matter of Kevin W. v Monique T.*, 38 AD3d 672, 673, *lv denied* 9 NY3d 803).

Although it appears from the record that the father and his wife failed to provide notice of the adoption proceeding to the mother as required by Domestic Relations Law § 111 (3) (a), we conclude that Family Court lacked authority to vacate or ignore the adoption order on that or any other ground, inasmuch as that court could "not

arrogate to [itself] powers of appellate review" with respect to the adoption order (*Dain & Dill v Betterton*, 39 AD2d 939, 939). If the mother seeks relief from the adoption order, she must seek such relief in "[t]he court which rendered [that] . . . order" (CPLR 5015 [a]; *see generally Nina M. v Otsego County Social Servs. Dept.*, 201 AD2d 788, 790, *lv denied* 83 NY2d 755).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

950

CAF 12-02037

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

IN THE MATTER OF ISAAC J.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

JASON J. BOWMAN, ONTARIO, FOR RESPONDENT-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered January 3, 2012 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent to be a juvenile delinquent.

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

Memorandum: Respondent appeals from an order of disposition adjudicating him a juvenile delinquent based on the finding that he had committed acts that, if committed by an adult, would constitute the crime of assault in the third degree (Penal Law § 120.00 [1]). We reject respondent's contention that the evidence is legally insufficient to establish that he intended to cause physical injury to the victim or that the victim sustained such injury (*see Matter of Santoshia L.*, 202 AD2d 1027, 1027; *see also People v Stearns*, 72 AD3d 1214, 1217, *lv denied* 15 NY3d 778). Although we conclude that a different result would not have been unreasonable inasmuch as respondent testified to a version of the incident different from that presented by petitioner, we perceive no basis to disturb Family Court's resolution of witness credibility (*see Matter of Eric A.*, 66 AD3d 603, 603; *Matter of Brooke II*, 45 AD3d 1234, 1234-1235). We further conclude that the court did not fail "to give the evidence the weight it should be accorded" (*People v Bleakley*, 69 NY2d 490, 495; *see Matter of Travis D.*, 1 AD3d 968, 969).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

951

CAF 13-00206

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

IN THE MATTER OF LISA A. GALLAGHER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL T. GALLAGHER, RESPONDENT-RESPONDENT.

WELCH & ZINK, CORNING (JEFF N. EVANS OF COUNSEL), FOR PETITIONER-APPELLANT.

BETZJITOMIR & BAXTER, LLP, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered April 26, 2012 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, denied the amended petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding seeking an upward modification of respondent father's child support obligation as set forth in the parties' separation agreement. We agree with the mother that Family Court erred in concluding, following a hearing, that she failed to establish a sufficient change in circumstances to warrant modification of the father's child support obligation.

The parties' separation agreement, which was incorporated but not merged into the judgment of divorce, provided, inter alia, that the parties were opting out of the requirements of the Child Support Standards Act based on several factors, including that the children would spend a significant portion of time with the father pursuant to the visitation schedule set forth in the separation agreement. In her petition, the mother alleged that there had been a breakdown in the father's relationship with the children such that there was only sporadic visitation with them, leading to a concomitant increase in her child-rearing expenses. The evidence presented at the hearing establishes that such a breakdown occurred.

We agree with the mother that "the complete breakdown in the

visitation arrangement, which effectively extinguished [the father's] support obligation, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations" (*Matter of Gravlin v Ruppert*, 98 NY2d 1, 6; *see Matter of McCormick v McCormick*, 97 AD3d 682, 683; *Matter of Joslin v Sullivan*, 12 AD3d 1070, 1070). We therefore reverse the order insofar as appealed from, reinstate the amended petition, and remit the matter to Family Court for a determination of the appropriate amount of support to be paid by the father, after a further hearing if necessary.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

952

CAF 12-01023

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

IN THE MATTER OF KEITH A. WEEKLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH A. WEEKLEY, RESPONDENT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR RESPONDENT-APPELLANT.

SOUTHERN TIER LEGAL SERVICES, A DIVISION OF LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JEFFREY M. REED OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY A. TUTTLE, ATTORNEY FOR THE CHILD, ALLEGANY.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered May 24, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated petitioner as the primary residential parent of the subject child.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order that, following a hearing, granted petitioner father's petition seeking to modify a prior order awarding primary physical custody of the parties' child to the mother by awarding him primary physical custody. The order also, inter alia, prohibited all contact between the mother's live-in fiancé, a level one sex offender, and the child. We affirm.

The mother failed to preserve for our review her contention that statements made by her fiancé to his counselor were privileged and therefore should not have been the subject of testimony during the hearing (*see generally Kuo Feng Corp. v Ma*, 248 AD2d 168, 169, *appeal dismissed* 92 NY2d 845, *lv denied* 92 NY2d 809; *Rossignol v Silvernail*, 185 AD2d 497, 500, *lv denied* 80 NY2d 760). In any event, that contention is without merit inasmuch as the record reflects that the mother's fiancé authorized his counselor to disclose privileged communications (*see* CPLR 4508 [a] [1]). Contrary to the mother's further contention, Family Court properly permitted her fiancé's counselor to testify concerning the underlying facts of her fiancé's

sexual abuse conviction, which were disclosed by her fiancé during counseling sessions. That testimony did not constitute inadmissible hearsay because it was not offered for the truth of the matters asserted therein, and it was relevant to, inter alia, the mother's state of mind (*see Matter of Noemi D.*, 43 AD3d 1303, 1304, *lv denied* 9 NY3d 814; *see generally Matter of Mateo v Tuttle*, 26 AD3d 731, 732). The mother's contention that the court erred in admitting testimony to the effect that her fiancé had been charged with the crime of sexual abuse involving a different victim is unpreserved for our review and, in any event, is without merit.

Finally, we conclude that, contrary to the further contention of the mother, the court's determination that it is in the best interests of the child to award primary physical custody to the father is supported by a sound and substantial basis in the record (*see Matter of Crudele v Wells* [appeal No. 2], 99 AD3d 1227, 1228). The court considered various factors and determined that the father was better able to provide for the child's emotional and intellectual development, as well as the child's medical, educational, and financial needs, and the record supports the court's determinations with respect to those factors (*see generally Fox v Fox*, 177 AD2d 209, 210). In addition, the court properly weighed against the mother the fact that she resided with a sex offender and permitted him to have unsupervised contact with the child (*see Matter of Albert T. v Wanda H.*, 43 AD3d 1320, 1321; *Matter of Richard C.T. v Helen R.G.*, 37 AD3d 1118, 1118-1119).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

953

CA 12-00885

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

ATASH IMANVERDI AND SHEILA IMANVERDI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BRYAN G. POPOVICI, DPM, INDIVIDUALLY AND AS
AN AGENT, OFFICER AND/OR EMPLOYEE OF BRYAN G.
POPOVICI, DPM, PC, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 23, 2012. The order, among other things, directed plaintiffs to produce contents of a Facebook page for in camera review, and denied the cross motion of plaintiffs for a protective order.

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

Memorandum: Plaintiffs appeal from an order that, inter alia, directed plaintiffs to produce contents of a Facebook page for in camera review, denied their cross motion for a protective order and awarded defendant-respondent (defendant) attorney's fees and costs. We affirm. "It is well settled that '[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion' " (*Giles v Yi*, 105 AD3d 1313, 1315). " '[E]very court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action' " (*Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1034, quoting *Liss v Trans Auto Sys.*, 68 NY2d 15, 20; *see Pino v Harnischfeger*, 42 AD3d 980, 983). Contrary to plaintiffs' contention, Supreme Court properly exercised its discretion in modifying its prior order to compel discovery by directing plaintiff Atash Imanverdi to produce her Facebook page for in camera review (*see Richards v Hertz Corp.*, 100 AD3d 728, 730; *Pino*, 42 AD3d at 983; *Lidge*, 17 AD3d at 1034).

Furthermore, the court properly exercised its discretion in awarding costs and attorney's fees to defendant (*see* CPLR 3126; *Riley v ISS Intl. Serv. Sys.*, 304 AD2d 637, 637-638; *see also Danser v Carrols Corp.*, 11 AD3d 940, 940-941), and in denying plaintiffs' cross motion for a protective order (*see Rawlins v St. Joseph's Hosp. Health Ctr.*, 108 AD3d 1191, 1191-1192).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

954

CA 13-00331

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

ENVIRONMENTAL TESTING & CONSULTING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT,
AND BUFFALO URBAN RENEWAL AGENCY,
DEFENDANT-RESPONDENT.

LOTEMPIO & BROWN, P.C., BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered April 23, 2012. The order granted in part and denied in part the motion of plaintiff and cross motion of defendant Buffalo Urban Renewal Agency for summary judgment.

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

Memorandum: Plaintiff appeals from an order denying that part of its motion seeking partial summary judgment on liability with respect to its second through fourth causes of action, for breach of contract, and granting the cross motion of Buffalo Urban Renewal Agency (defendant) for summary judgment dismissing those causes of action. The parties entered into a contract whereby plaintiff, an environmental testing and remediation company, agreed to perform various services for homeowners who participated in defendant's "Rehab Program," which provides funds to qualified homeowners seeking to improve their properties. The contract documents specified the fee to which plaintiff would be entitled for each of the three services provided by plaintiff to the homeowners. According to plaintiff, defendant was obligated under the contract to retain plaintiff to perform between 220 and 260 lead paint tests, and an equal number of clearance tests and risk assessments. Plaintiff contends that defendant breached the contract because it retained plaintiff to perform only 44 lead paint tests and no clearance tests or risk assessments.

We agree with defendant that the clear and unambiguous language of the contract provided only for a "fee for services" arrangement

(*see generally Bailey v Fish & Neave*, 8 NY3d 523, 528; *Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88, *lv denied* 97 NY2d 603), and thus that Supreme Court properly dismissed the second through fourth causes of action. Article 2 of the contract, entitled "WORK TO BE PERFORMED," refers to the "Lead Hazard Control Fee Schedule," which is set forth in plaintiff's bid application. The fee schedule, in turn, sets forth only the agreed-upon per-unit price for each of the three services to be provided by plaintiff to the homeowners; it does not state that defendant is required to hire plaintiff to perform any minimum number of services.

We reject plaintiff's contention that the Scope of Services document, which is not signed by either party and is not referenced in the contract, requires a different result. Even assuming, arguendo, that the Scope of Services document is part of the contract, we note that it does not guarantee that plaintiff will be hired to perform a minimum number of services. Instead, that document merely recites plaintiff's projection that, under the contract, it likely would provide all three services to between 110 and 130 houses each year. We agree with defendant, moreover, that it was not in a position to guarantee plaintiff a specific amount of work inasmuch as it was ultimately the decision of the homeowners participating in defendant's "Rehab Program" whether to retain plaintiff.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

955

CA 12-01123

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

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

V MEMORANDUM AND ORDER

MICHAEL MATTER, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 19, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order determined that respondent is a dangerous sex offender requiring confinement and 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 revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). On a prior appeal, we affirmed an order determining that respondent is a detained sex offender requiring civil management through a regimen of SIST and placing him with the New York State Department of Corrections and Community Supervision (*Matter of State of New York v Matter*, 103 AD3d 1113). While that prior appeal was pending, petitioner filed a petition alleging that respondent had violated the conditions and terms of his SIST regimen, and a hearing was held on the petition.

We conclude that respondent's constitutional and statutory challenges to the treatment he received while in a regimen of SIST are not properly before us inasmuch as they are not preserved for our review (*see Matter of State of New York v Gooding*, 104 AD3d 1282, 1282-1283). In any event, "there is no evidence that petitioner . . . failed to fulfill its treatment responsibilities or violated respondent's due process rights" (*id.* at 1283).

Contrary to respondent's contention, we conclude that petitioner

established by clear and convincing evidence at the hearing that respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.07 [f]; 10.11 [d] [4]; *Matter of State of New York v Motzer*, 79 AD3d 1687, 1688). Finally, we reject respondent's further contention that "petitioner was required to 'refute the possibility of a less restrictive placement' or that the court was required to specifically address the issue of a less restrictive alternative" (*Gooding*, 104 AD3d at 1282; *see Matter of State of New York v Enrique T.*, 93 AD3d 158, 166-167, *lv dismissed* 18 NY3d 976).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

957

CA 13-00191

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

UTICA NATIONAL INSURANCE GROUP, AS SUBROGEE
OF MARIANNE ELLIS AND MARK ELLIS,
PLAINTIFF-RESPONDENT,

V ORDER

OUR TOUCH, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 11, 2012. The order, among other things, denied the motion of defendant Our Touch, Inc., seeking summary judgment dismissing the amended complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

959

CA 13-00394

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

CAROLYN GLOVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. BOTSFORD, INDIVIDUALLY AND DOING BUSINESS AS ALICE'S MARKET, DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (BRETT MANSKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered June 5, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on snow or ice on the sidewalk in front of a store owned by defendant and operated by defendant's wife. Plaintiff alleges in the complaint, as amplified by the bill of particulars, that defendant was negligent because he either created the dangerous condition outside of his store or failed to remedy the condition despite actual or constructive notice of it. Following discovery, defendant moved for summary judgment dismissing the complaint, contending, inter alia, that he had no duty to remove the snow and ice from the sidewalk because there was a storm in progress at the time of the accident. Supreme Court denied the motion, determining that there was an issue of fact whether defendant "properly maintained the dangerous, slippery condition by removing the snow, but not salting or removing the ice, as alleged." We reverse.

We conclude that the evidence submitted by defendant in support of his motion, including an affidavit from his expert meteorologist and the weather reports upon which that expert relied, established as a matter of law that there was a storm in progress at the time of the accident (*see Sheldon v Henderson & Johnson Co., Inc.*, 75 AD3d 1155, 1156) and, thus, that defendant had no duty to remove the snow and ice "until a reasonable time ha[d] elapsed after cessation of the storm"

(*Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160 [internal quotation marks omitted]). The accident occurred at approximately 8:45 a.m. on December 31, 2008, when plaintiff exited defendant's store in the City of Rochester. According to defendant's expert meteorologist, a snowstorm began in the Rochester area late in the evening on December 30, 2008, and continued into the next day. At 4:15 a.m. on December 31, the National Weather Service issued a "winter weather advisory" for the Rochester area and, two hours later, the advisory was upgraded to a "winter storm warning." More than 11 inches of snow accumulated in Rochester on December 31, which was a record for that date, and most of that snow fell during the early morning hours. Indeed, plaintiff acknowledged during her deposition that it was snowing on the morning in question as she drove to the store, and that testimony was consistent with the testimony of defendant's wife, among other witnesses.

We further conclude that, in opposition to the motion, plaintiff failed to raise an issue of fact whether there was a storm in progress when the accident occurred (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, plaintiff relied exclusively on an affirmation from her attorney who asserted, based on an inaccurate reading of the weather reports submitted by defendant, that it was not clear whether it had been snowing at the time of the accident. Even assuming, arguendo, that it was not snowing heavily at the time of the accident, we note that the "storm in progress doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement, winter weather" (*Camacho v Garcia*, 273 AD2d 835, 835 [internal quotation marks omitted]). Moreover, plaintiff failed to establish that there was a "lull" or a "break" in the storm such that defendant had a reasonable time in which to abate the slippery conditions (*see Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154; *Camacho*, 273 AD2d at 835).

Plaintiff likewise failed to raise an issue of fact whether defendant created the dangerous condition that caused her to slip and fall or whether the snow removal efforts of defendant's wife exacerbated the dangerous condition created by the storm (*see Smilowitz v GCA Serv. Group, Inc.*, 101 AD3d 1101, 1102). Contrary to plaintiff's contentions, it is well settled that the "mere failure to remove *all* snow and ice from a sidewalk . . . does not constitute negligence and does not constitute creation of a hazard" (*Wheeler v Grand'Vie Senior Living Community*, 31 AD3d 992, 992-993 [internal quotation marks omitted]; *see Wohlars v Town of Islip*, 71 AD3d 1007, 1009; *Cardinale v Watervliet Hous. Auth.*, 302 AD2d 666, 666-667), and that the failure to salt or sand a sidewalk does not constitute an affirmative act that would constitute an exacerbation of a dangerous condition (*see Ali v Village of Pleasantville*, 95 AD3d 796, 797; *Zima v North Colonie Cent. Sch. Dist.*, 225 AD2d 993, 994). We therefore conclude that the court erred in denying defendant's motion for

summary judgment dismissing the complaint.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

960

CA 13-00296

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

NEWBURY PLACE REO II, LLC, PLAINTIFF,

V ORDER

ALI A. ZAHRAN, ALSO KNOWN AS
ALI ZAHRAN, DEFENDANT.

ALI A. ZAHRAN, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

MICHAEL VISCOME AND LISA M. VISCOME, THIRD-PARTY
DEFENDANTS-APPELLANTS,
ET AL., THIRD-PARTY DEFENDANTS.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 5, 2012. The order denied the motion of third-party defendants Michael Viscome and Lisa M. Viscome for summary judgment dismissing the third-party complaint against them.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

961

KA 12-00992

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR ALVARADO, DEFENDANT-APPELLANT.

REBECCA CURRIER, AUBURN, FOR DEFENDANT-APPELLANT.

HECTOR ALVARADO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 3, 2011. Defendant was resentenced upon his conviction of assault in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a resentence with respect to his conviction in 2001 of, inter alia, assault in the second degree (Penal Law § 120.05 [3]). Defendant was incarcerated at the time of the conviction, and County Court (Contiguglia, A.J.) originally directed that the sentences imposed on the assault count and another count were to run concurrently to each other and consecutively to the sentence defendant was serving. At the resentencing, County Court (Fandrich, A.J.), with the consent of the People, imposed the same sentence that was imposed in 2001 (*see* Corrections Law § 601-d [3]), without postrelease supervision. As a preliminary matter, we note that defendant raises contentions in his pro se supplemental brief related to the underlying conviction. Inasmuch as defendant failed to appeal from the judgment of conviction and the resentence occurred more than 30 days after the original sentence, the appeal is from the resentence only (*see* CPL 450.30 [3]). Thus, defendant's contentions in his pro se supplemental brief are not properly before us (*see People v Pelczynski*, 43 AD3d 1279, 1279; *People v Coble*, 17 AD3d 1165, 1165, *lv denied* 5 NY3d 787).

The People correctly concede that defendant had completed his sentence prior to the date of resentencing. We therefore agree with defendant that the court lacked authority to resentence him (*see People v Williams*, 14 NY3d 198, 217, *cert denied* ___ US ___, 131 S Ct 125), and that the resentencing was in violation of the constitutional prohibition against double jeopardy (*see generally People v Velez*, 19

NY3d 642, 649). Although no period of postrelease supervision (PRS) was added (*cf. id.*; *Williams*, 14 NY3d at 209), we nevertheless conclude that, because the court could have imposed a period of PRS following the completion of defendant's sentence, he was improperly subjected to " 'multiple punishments for the same offense in successive proceedings' " (*People v Gause*, 19 NY3d 390, 394). However, because "we cannot afford defendant any meaningful relief," we dismiss the appeal as moot (*People v Facen*, 67 AD3d 1478, 1479, *lv denied* 14 NY3d 800, *reconsideration denied* 15 NY3d 749; *see People v Jackson*, 89 AD3d 1122, 1123, *lv denied* 19 NY3d 1103).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

962

KA 11-01660

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY A. KAMINSKI, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETTIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 13, 2011. The judgment convicted defendant, upon a jury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while ability impaired.

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 aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a]) and driving while ability impaired (§ 1192 [1]). As defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, 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 Bleakley*, 69 NY2d at 495).

Defendant's contention that he was deprived of effective assistance of counsel based on defense counsel's failure to call a certain witness to testify at trial or to seek an adjournment in order to call that witness at trial is based on matters outside the record on appeal, and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL 440.10 (*see People v Wittman*, 103 AD3d 1206, 1206-1207, *lv denied* 21 NY3d 915; *People v King*, 90 AD3d 1533, 1534, *lv denied* 18 NY3d 959). Moreover, inasmuch as "the evidence is legally sufficient to support defendant's

conviction . . . , it cannot be said that defense counsel's failure to renew the motion for a trial order of dismissal constitutes ineffective assistance of counsel" (*People v Pytlak*, 99 AD3d 1242, 1243, *lv denied* 20 NY3d 988; *see generally People v Caban*, 5 NY3d 143, 152).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

964

KA 09-02542

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY JOHNSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 19, 2009. The judgment convicted defendant, after a nonjury trial, of criminal sexual act in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of two counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and one count of endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that Supreme Court erred in refusing to suppress his statement to the police. Even assuming, arguendo, that defendant was in custody when he made the statement, we conclude that the evidence presented at the suppression hearing supports the court's determination that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights before making the statement (*see People v Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885). Contrary to defendant's contention, "the record of the suppression hearing fails to establish that he was intoxicated at the time he waived those rights 'to the degree of mania, or of being unable to understand the meaning of his statements' " (*id.* at 1455, quoting *People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874).

Defendant also contends that he was denied his constitutional right to present a defense based on the refusal of County Court, which conducted the nonjury trial, to admit in evidence a neglect petition filed in Family Court against the victim's mother. That contention is not preserved for our review (*see People v Lane*, 7 NY3d 888, 889; *People v Baxter*, 108 AD3d 1158, 1160). In any event, it is well settled that the "right to . . . present a defense is not absolute"

(*People v Williams*, 81 NY2d 303, 313), and we conclude that the petition was "too remote or speculative" to establish that the victim's mother was attempting to manipulate the victim into fabricating allegations of sexual abuse against defendant, who planned to file for custody of the victim (*People v Poole*, 55 AD3d 1349, 1350, *lv denied* 11 NY3d 929).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*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). "[N]othing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of those crimes . . . , and thus it cannot be said that the [court] failed to give the evidence the weight it should be accorded" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765; *see People v Ludwig*, 104 AD3d 1162, 1164).

Finally, we reject defendant's challenge to the severity of the sentence. Defendant, a second felony offender, was convicted of engaging in oral and anal sexual contact with his 13-year-old son. "[T]he statement of defendant that he is HIV positive, without any additional information as to the state of his health, is insufficient to warrant a reduction of the sentence" (*People v Scott*, 101 AD3d 1773, 1774). Furthermore, defendant's crack cocaine addiction and HIV positive status "were before the court at the time of sentencing . . . [and] [t]hus, defendant has not established 'extraordinary circumstances . . . that would warrant a reduction of the sentence as a matter of discretion in the interest of justice' " (*id.*). Although the seven-year sentence is longer than the plea offer of two years, "a sentence imposed after trial may be more severe than a promised sentence in connection with a plea agreement" (*People v Chapero*, 23 AD3d 492, 493, *lv denied* 6 NY3d 846).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

965

KA 09-00854

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARRELL J. CARTER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 15, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress the gun seized by the police from defendant's person during a pat frisk conducted during a traffic stop. As defendant correctly concedes, the police officer lawfully stopped defendant's vehicle because it had a broken taillight (*see generally People v Fagan*, 98 AD3d 1270, 1271, *lv denied* 20 NY3d 1061; *People v Dempsey*, 79 AD3d 1776, 1777, *lv denied* 16 NY3d 830), and defendant voluntarily exited the vehicle. Given defendant's furtive behavior before and after exiting his vehicle, including being "fidgety" and "evasive" when answering the police officer's questions, turning the right side of his body away from the police officer, and placing his right hand in his jacket pocket, the police officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" (*Fagan*, 98 AD3d at 1271; *see People v Daniels*, 103 AD3d 1204, 1205). "Based upon [his] reasonable belief that defendant was armed, the officer[] lawfully conducted [the] pat frisk" that resulted in the seizure of the gun (*Fagan*, 98 AD3d at 1271; *see People v Batista*, 88 NY2d 650, 654*; People v Grant*, 83 AD3d 862, 863-864, *lv denied* 17 NY3d 795).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

966

KA 11-01766

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PRICE, 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 (M. William Boller, A.J.), rendered August 5, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and escape 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, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that he was forcibly stopped in the absence of the requisite reasonable suspicion and thus that Supreme Court erred in refusing to suppress the gun that defendant dropped during a struggle with police. We reject that contention. The record establishes that police officers responded to a report of a black male in his twenties standing near a silver Grand Prix holding a gun, with two younger males approaching him. Defendant was observed standing near a silver Grand Prix with two other males at a gas station that was one block from the reported incident. Based upon the observation of one officer that defendant was acting suspiciously, another officer asked defendant whether he would answer a couple of questions and permit her to ensure that he did not have a weapon. Although defendant initially complied with the request by placing his hands on the wall, he fled the scene before the pat-down search commenced. He was tackled on the street shortly thereafter by another police officer who was exiting a building on the street and observed defendant running toward him and removing a gun from his waistband.

We reject defendant's contention that the initial encounter constituted a level-three forcible stop without the requisite reasonable suspicion that he was involved in a crime (*see generally*

People v Moore, 6 NY3d 496, 498-499; *People v De Bour*, 40 NY2d 210, 223). Inasmuch as defendant matched the physical description of the person reported to have a gun and was observed in proximity of a silver Grand Prix, and "based upon defendant's physical and temporal proximity to the scene of the reported incident" (*People v McKinley*, 101 AD3d 1747, 1748), we conclude that the police initially had a common-law right of inquiry based upon a founded suspicion that criminal activity was afoot (*see id.*; *see generally People v Garcia*, 20 NY3d 317, 322; *People v Hollman*, 79 NY2d 181, 185). The court properly determined that the police thereafter had the requisite reasonable suspicion that defendant "may be engaged in criminal activity" based upon those factors, together with defendant's flight from police (*People v Sierra*, 83 NY2d 923, 929; *cf. People v Cady*, 103 AD3d 1155, 1156; *People v Riddick*, 70 AD3d 1421, 1422-1423, *lv denied* 14 NY3d 844). Probable cause for defendant's arrest was established when a police witness observed defendant pull a gun from his waistband while fleeing from the police (*see generally Moore*, 6 NY3d at 498-499). We therefore reject defendant's further contention that his statement to the police was the product of an illegal seizure and also should have been suppressed.

Contrary to defendant's contention, the court properly determined that the identifications of defendant by four police witnesses from a photograph at the grand jury were confirmatory, and thus properly denied his request for a *Wade* hearing to determine whether there was an independent basis for each of the identifications (*see People v Wharton*, 74 NY2d 921, 923). The grand jury minutes and the record of the suppression hearing establish that each of the four witnesses was involved in the apprehension and arrest of defendant and that two of the witnesses accompanied defendant for medical treatment. We therefore conclude that the record establishes that each of the officers had the opportunity to observe defendant at close range and in broad daylight (*cf. People v Boyer*, 6 NY3d 427, 432-433). A *Wade* hearing is not warranted where, as here, the "risk of undue suggestiveness is obviated [because] the identifying officer[s'] observation[s] of the defendant . . . could not be mistaken" (*id.* at 432).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

967

KA 12-01162

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHON JOHNSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 February 3, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). We agree with defendant that his waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Hamilton*, 49 AD3d 1163, 1164; *People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767). Indeed, we are unable to determine based on the record before us whether the court ensured "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). Nevertheless, we reject defendant's contention that the court abused its discretion in denying his request for youthful offender status (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889). The court relied on, inter alia, the fact that defendant engaged in dangerous gratuitous violence in committing the subject crime. We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*cf. People v Shrubsall*, 167 AD2d 929, 930-931), and we reject defendant's

challenge to the severity of the sentence.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

969

CA 13-00238

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

GLENN B. SUMMERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER A. SPADA AND BARBARA ANN SPADA,
DEFENDANTS-APPELLANTS.

ADAMS, HANSON, REGO, CARLIN, HUGHES, KAPLAN & FISHBEIN, WILLIAMSVILLE (BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (THOMAS J. LANG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 8, 2012. The order, among other things, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving collided with a vehicle owned by defendant Barbara Ann Spada and operated by defendant Peter A. Spada. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We note at the outset that, although plaintiff failed to allege in his bill of particulars that he sustained a serious injury under any of the categories set forth in the statute, the parties addressed the permanent consequential limitation of use, significant limitation of use and 90/180-day categories in their motion papers and briefs on appeal, and we likewise address those categories.

Supreme Court properly denied the motion. Defendants' own submissions in support of the motion raise triable issues of fact whether plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories. The physician who conducted independent medical examinations of plaintiff concurred with the reports of imaging studies of plaintiff's spine, which provided the requisite objective evidence of injury (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350), and he further provided a "designation of a numeric percentage of . . . plaintiff's loss of range of motion [that] can be used to substantiate a claim of serious injury" (*id.*; *see Matte v*

Hall, 20 AD3d 898, 899). The physician's conclusion that the abnormalities in plaintiff's imaging studies are age-related and unrelated to the accident is inconsistent with his contemporaneous conclusion that plaintiff "has no medical condition not related to the accident" and is thus insufficient to establish defendants' entitlement to judgment on the issue of causation (*see generally Jackson v Leung*, 99 AD3d 489, 489; *McCree v Sam Trans Corp.*, 82 AD3d 601, 601).

Defendants also failed to meet their burden with respect to the 90/180-day category of serious injury inasmuch as defendants' own submissions also raise triable issues of fact with respect to that category (*see Zeigler v Ramadhan*, 5 AD3d 1080, 1081). The employment and medical records submitted by defendants indicate that, during the two years following the accident, plaintiff was absent from work or his duties were significantly restricted at the direction of his treating chiropractor (*see Matte*, 20 AD3d at 899; *see also Limardi v McLeod*, 100 AD3d 1375, 1377; *Sewell v Kaplan*, 298 AD2d 840, 841-842). In light of defendants' failure to meet their initial burden on the motion, there is no need to consider the sufficiency of plaintiff's opposition thereto (*see Matte*, 20 AD3d at 899).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

971

CA 12-00173

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF THE ESTATE OF LULA BAITY, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, BISILOLA F. JACKSON, AS ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED, GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, TIFFANY MATTHEWS AND PHILLIP J. RADOS, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF FRANK S. FALZONE, BUFFALO (RONALD P. HART OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, AND BISILOLA F. JACKSON, AS ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILLIP J. RADOS, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL AND TIFFANY MATTHEWS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 8, 2011. The order, among other things, granted the cross motions of defendants to amend their answers to assert affirmative defenses of res judicata and collateral estoppel.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

972

CA 12-01849

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL FUEL CORPORATION, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

HARTER SECREST & EMERY, LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered December 14, 2011. The order, among other things, granted the motion of defendant to dismiss the complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

973

CA 12-01850

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL FUEL CORPORATION, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

HARTER SECREST & EMERY, LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered January 17, 2012. The order denied the motion of plaintiff for reargument.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

975

CA 13-00397

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

JAMES B. CLARKE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROL DANGELO, RAYMOND DANGELO AND LORI GAYHART ZECCHINO, DEFENDANTS-RESPONDENTS.

THOMAS J. RZEPKA, ROCHESTER, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CAROL DANGELO AND RAYMOND DANGELO.

LAW OFFICES OF FOSTER, FOSTER & ZAMBITO, LLP, SPENCERPORT (CHARLES N. ZAMBITO OF COUNSEL), FOR DEFENDANT-RESPONDENT LORI GAYHART ZECCHINO.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered May 18, 2012. The order, among other things, granted the motion and cross motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a three-vehicle collision. In his bill of particulars, plaintiff alleged that he sustained a serious injury under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). Supreme Court properly granted defendants' respective motion and cross motion seeking summary judgment dismissing the complaint and cross claims against them on the ground that plaintiff did not sustain a serious injury within the meaning of the statute. Plaintiff does not raise any issue on appeal regarding the permanent loss of use category, and he has therefore abandoned any contention with respect thereto (*see Smith v Reeves*, 96 AD3d 1550, 1551; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543).

Defendants met their burden with respect to the permanent consequential limitation of use and significant limitation of use categories by submitting the affirmed report of the physician who examined plaintiff on behalf of defendants. That physician concluded that plaintiff sustained only sprain/strain injuries in the accident,

which had resolved (*see Scheer v Koubek*, 70 NY2d 678, 679; *Rabolt v Park*, 50 AD3d 995, 995), and that the conditions revealed in the diagnostic imaging tests were preexisting degenerative changes that were not causally related to the accident (*see Pommells v Perez*, 4 NY3d 566, 579). Contrary to plaintiff's contention, the affidavit of his treating neurologist failed to address that evidence, "except in conclusory terms, and thus was insufficient to raise a triable issue of fact" (*Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1155).

Finally, although the court in its decision improperly shifted the initial burden of proof on the motion and cross motion to plaintiff with regard to the 90/180-day category (*see generally Williams v Howe*, 297 AD2d 671, 672), we nevertheless conclude that defendants met their burden concerning that category by submitting plaintiff's deposition testimony establishing that he was not prevented "from performing substantially all of the material acts which constitute [his] usual and customary daily activities" for at least 90 out of the 180 days immediately following the accident, and plaintiff failed to raise a triable issue of fact (Insurance Law § 5102 [d]; *see Delk v Johnson*, 92 AD3d 1234, 1235; *Robinson v Polasky*, 32 AD3d 1215, 1216).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

976

CA 12-02091

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

JOE ANN MCCALL, PLAINTIFF-RESPONDENT,

V ORDER

JOYCE A. SANDERS AND LADEL SANDERS, ALSO KNOWN AS LYDEL SANDERS, DEFENDANTS-APPELLANTS.

LAW OFFICES OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered August 21, 2012. The order rescinded a general release signed by plaintiff and denied the motion of defendants to dismiss the amended complaint.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

977

CA 13-00146

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF THE ESTATE OF LULA BAITY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, BISILOLA F. JACKSON, AS ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED, GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, TIFFANY MATTHEWS, AND PHILLIP J. RADOS, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF FRANK S. FALZONE, BUFFALO (RONALD P. HART OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, AND BISILOLA F. JACKSON, AS ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILLIP J. RADOS, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL AND TIFFANY MATTHEWS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 18, 2012. The order granted the respective motion and cross motions of defendants for summary judgment dismissing the second amended complaint.

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

Memorandum: Plaintiff appeals from an order granting the respective motion and cross motions of defendants seeking summary judgment dismissing the second amended complaint against them. It is undisputed that plaintiff failed to oppose the motion and cross motions or to appear on the return date thereof, and thus we deem the order to be entered upon plaintiff's default (*see generally Armele v*

Moose Intl., 302 AD2d 986, 987). We therefore dismiss the appeal from the order inasmuch as no appeal lies from an order entered on default (*see* CPLR 5511; *Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128; *Putrino-Weiser v Sharf*, 272 AD2d 894, 894). The fact that Supreme Court, upon plaintiff's default, granted the motion and cross motions on the merits and on the grounds of res judicata and collateral estoppel is of no moment inasmuch as no appeal lies from an order entered on default. "[I]t is not inconsistent to determine both that plaintiff[is] in default and that defendants are entitled to summary judgment on the merits. Plaintiff['s] remedy is to move to vacate the default [order]" (*Putrino-Weiser*, 272 AD2d at 895).

We note, however, that the appeal from the final order brings up for our review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3; *see Lewis v Lewis*, 183 AD2d 875, 875; *cf. Tun v Aw*, 10 AD3d 651, 651-652), i.e., the propriety of the nonfinal order granting the respective cross motions of defendants seeking leave to amend their answers to allege the affirmative defenses of res judicata and collateral estoppel. Inasmuch as the amended answers alleged new affirmative defenses that served as one of the two bases for the final order granting the motion and cross motions for summary judgment, the nonfinal order "necessarily affect[s] the final [order]" (*Oakes v Patel*, 20 NY3d 633, 645). We agree with plaintiff that the court abused its discretion in granting those parts of the cross motions with respect to the affirmative defense of res judicata. The cross motions seeking leave to amend the respective answers were based upon the dismissal of a federal court action arising from the underlying facts at issue here, namely, the alleged wrongful removal of plaintiff's decedent from her home for medical treatment and the alleged continued wrongful confinement of plaintiff's decedent. Because the federal court did not exercise its pendent jurisdiction over the related state law claims, but instead dismissed those claims without prejudice, the ultimate dismissal of the federal action did not have res judicata effect with respect to the instant action (*see McLearn v Cowen & Co.*, 60 NY2d 686, 688; *cf. Troy v Goord*, 300 AD2d 1086, 1087). We nevertheless conclude that, because the court granted defendants summary judgment on a ground other than res judicata, i.e., on the merits, and that order entered on default is not properly before us on appeal (*see* CPLR 5511), there is no action pending and thus "a favorable ruling would not entitle [plaintiff] to any particular relief" (*Matter of Ameillia R.R. [Megan SS.]*, 95 AD3d 1525, 1526). We therefore dismiss the appeal as moot insofar as it brings up for review the prior nonfinal order granting defendants' respective cross motions for leave to amend their answers.

Finally, plaintiff relies on matters outside of the record on appeal in support of the contention in her brief that the court abused its discretion in denying her request for an adjournment of the return date of defendants' motion and cross motions seeking summary judgment,

and thus it is not properly before us (*cf. Tun*, 10 AD3d at 651-652).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

978

CA 11-02248

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF DEAN FAIELLO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, AND DORA B. SCHRIRO, COMMISSIONER,
NEW YORK CITY DEPARTMENT OF CORRECTIONS,
RESPONDENTS-RESPONDENTS.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

MICHAEL A. CARDOZO, CORPORATION COUNSEL, NEW YORK CITY (KRISTIN M. HELMERS OF COUNSEL), FOR RESPONDENT-RESPONDENT DORA B. SCHRIRO, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTIONS.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 9, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the amended petition.

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

Memorandum: Petitioner appeals from a judgment denying his CPLR article 78 amended petition seeking review of the determination calculating his jail time credit. We affirm. Inasmuch as "Penal Law § 70.30 (3) draws no distinction between an inmate who is detained in New York and one who is detained elsewhere, an inmate who has spent time in federal custody, another state's custody or even another country's custody is entitled to jail time credit so long as, among other things, the inmate 'provide[s] a certified record of that detention' " (*Matter of Ramos v Goord*, 58 AD3d 921, 922, quoting *Matter of Guido v Goord*, 1 NY3d 347, 349 n 3). Petitioner has not produced a certified record of his detention in Costa Rica, and thus there is no basis to disturb the calculation of petitioner's jail time credit (*see id.*; *cf.* CPLR 4542). Petitioner's contention concerning the impact of CPLR 2101 on the determination herein is without merit because that statute is inapplicable here, and his remaining contentions are raised for the first time on appeal and therefore are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Finally, we note that our determination of this appeal does not preclude petitioner from again seeking relief with respect to his jail

time credit, upon production of the requisite documentation.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

980

CA 13-00372

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, AND VALENTINO, JJ.

CONLEY & TIBBITTS PROPERTIES, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LEATHERSTOCKING COOPERATIVE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

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

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (E. W. GARO GOZIGIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered July 11, 2012. The order denied the motion of plaintiff for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the amended complaint.

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

Memorandum: In this breach of contract action arising from a dispute over insurance coverage, plaintiff appeals from an order that denied its motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the amended complaint. We affirm. Plaintiff obtained insurance from defendant to cover a rental property (hereafter, building) that it owns in Oneida County. Although the policy covered losses caused by, inter alia, fire, it contained an exclusion for losses or increased costs resulting directly or indirectly from "enforcement of any code, ordinance or law regulating the . . . repair . . . of a building," irrespective of "any other cause or event that contributes concurrently or in any sequence to the loss."

While the policy was in effect, a fire damaged the building. Plaster had been disturbed while the fire was being extinguished, and a state code required under such circumstances that an asbestos survey be completed before any further action could be taken with respect to the building. The survey indicated that asbestos was present, and plaintiff obtained an estimate for the cost of removing the asbestos. Although defendant reimbursed plaintiff for all other parts of its claim, it denied coverage for the cost of asbestos removal. Plaintiff thereafter commenced this action seeking "the full amount of the building damages and remediation of asbestos."

" 'Where[, as here,] the provisions of an insurance contract are clear and unambiguous, they must be enforced as written' " (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66). Affording the unambiguous terms in the instant insurance contract their plain and ordinary meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267), we conclude that defendant established its entitlement to judgment as a matter of law by establishing that the policy does not provide coverage for the increased costs sought by plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Pursuant to the terms of the contract exclusion, no coverage exists for increased costs caused by the enforcement of the state code at issue here, "irrespective of any other concurrent or subsequent contributing cause or event" (*Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1380).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

981

CA 13-00276

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

ALBERT R. SUNICK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. WADSWORTH, DEFENDANT-APPELLANT.

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

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 17, 2012. The order denied the motion of defendant to change the place of the trial from Erie County to Chautauqua County.

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

Memorandum: The parties were involved in an automobile/motorcycle accident in Chautauqua County, and plaintiff thereafter commenced this negligence action in Erie County. Defendant sought a change of venue from Erie County to Chautauqua County "upon the grounds that the convenience of material witnesses and the ends of justice will be promoted by the change." Supreme Court denied the motion, and we affirm. The standard of review for a change of venue is not whether the court abused its discretion but, rather, it is "whether such discretion was exercised in a provident manner" (*O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172). Under the circumstances presented here, we cannot conclude that the court improvidently exercised its discretion in denying the motion to change venue. In our view, defendant failed to meet his burden of establishing that nonparty witnesses would in fact be inconvenienced in absence of a change of venue (*see Huttenlocker v White*, 298 AD2d 960, 960; *O'Brien*, 207 AD2d at 173).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

982

KA 12-00715

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SABRINA GUNTER, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 19, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and burglary in the second degree (§ 140.25 [2]). 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). The testimony of the victim and an eyewitness, combined with the compelling physical evidence recovered from defendant's apartment and the testimony of the witnesses with respect to defendant's conduct before and after the incident, amply supports the jury's verdict. The jury was entitled to credit the testimony of the victim and the eyewitness and reject that of defendant (*see generally People v Baker*, 30 AD3d 1102, 1103, *lv denied* 7 NY3d 846; *People v Smith*, 278 AD2d 837, 837, *lv denied* 96 NY2d 835). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

983

KA 09-00497

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR CUFFIE, DEFENDANT-APPELLANT.

PETER J. GLENNON, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 7, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arose out of a traffic stop of a vehicle in which defendant was a passenger. Defendant contends that County Court erred in refusing to suppress the firearm that he was charged with possessing. Specifically, defendant contends that the testimony of the People's witnesses at the suppression hearing was contradictory and that the People failed to satisfy their initial burden of establishing the legality of the police conduct. We reject defendant's contentions. As defendant correctly concedes, the police were justified in stopping the vehicle based upon the driver's failure to signal his intention to turn for the requisite distance before the intersection (*see* Vehicle and Traffic Law § 1163 [b]; *see generally People v Horge*, 80 AD3d 1074, 1074; *People v Smith*, 66 AD3d 514, 514, *lv denied* 13 NY3d 942). Although defendant contends that the stop was pretextual, we reject that contention inasmuch as "a traffic stop is lawful where, as here, 'a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, . . . [regardless of] the primary motivation of the officer' " (*People v Binion*, 100 AD3d 1514, 1515, *lv denied* 21 NY3d 911, quoting *People v Robinson*, 97 NY2d 341, 349).

Additionally, we conclude that the police had probable cause to search the vehicle. Two police officers testified at the suppression

hearing that, after the vehicle was stopped, they approached it from opposite sides and detected the odor of marihuana emanating from inside the vehicle through the open front windows. Both officers further testified that they had been trained in the detection of marihuana and had detected the odor of marihuana on numerous occasions prior to the traffic stop at issue. Contrary to the contention of defendant, it is well established that "[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause" to search a vehicle and its occupants (*People v Gaines*, 57 AD3d 1120, 1121 [internal quotation marks omitted]; *see People v Chestnut*, 43 AD2d 260, 261, *affd* 36 NY2d 971; *People v Robinson*, 103 AD3d 421, 421-422, *lv denied* 20 NY3d 1103; *People v Cosme*, 70 AD3d 1364, 1364, *lv denied* 14 NY3d 886; *People v Lightner*, 56 AD3d 1274, 1274, *lv dismissed* 12 NY3d 760, 763; *People v Badger*, 52 AD3d 231, 232, *lv denied* 10 NY3d 955). Further, the driver admitted that someone may have smoked marihuana in the vehicle prior to the stop (*see People v George*, 78 AD3d 728, 728-729, *lv denied* 16 NY3d 859), and the police witnesses testified that the vehicle continued to smell of marihuana even after the occupants were removed from the vehicle (*cf. People v Smith*, 98 AD3d 590, 592). Notably, the subsequent search of the vehicle yielded 16 bags of marihuana under the rear passenger's seat.

With respect to the alleged contradictions in the officers' testimony, we conclude that such contradictions are minor or immaterial to the lawfulness of the police conduct, and thus provide no basis to disturb the court's credibility determinations (*see People v Shaw*, 66 AD3d 1417, 1418, *lv denied* 14 NY3d 773). In particular, whether the police removed the driver from the vehicle before or after they ran his license and registration is irrelevant inasmuch as the police had probable cause to remove the occupants from the vehicle and search the vehicle immediately upon detecting the odor of marihuana (*see Robinson*, 103 AD3d at 421-422; *Cosme*, 70 AD3d at 1364; *Badger*, 52 AD3d at 232; *see also Gaines*, 57 AD3d at 1121). Thus, "[a]ccording appropriate deference to [the court's] assessment of witness credibility" (*Horge*, 80 AD3d at 1074), we conclude that the police lawfully searched the vehicle and that the court therefore properly refused to suppress the evidence recovered therefrom (*see George*, 78 AD3d at 728-729; *Cosme*, 70 AD3d at 1364; *Smith*, 66 AD3d at 514).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

985

KA 11-02160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL CHANDLER, DEFENDANT-APPELLANT.

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

SAMUEL CHANDLER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 12, 2011. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [1]), defendant contends in his main brief that Supreme Court erred in granting his request at trial to proceed pro se. We reject that contention. "A defendant in a criminal case may invoke the right to defend [pro se] provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17). "If a timely and unequivocal request has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385; *see People v Crampe*, 17 NY3d 469, 481-482, *cert denied* ___ US___, 132 S Ct 1746).

Here, defendant does not dispute that his request to represent himself was unequivocal, nor does he contend that he engaged in conduct that would prevent the fair and orderly disposition of the trial. Even assuming, arguendo, that defendant's request was not timely asserted, we conclude that he was not prejudiced by the court's implicit determination to the contrary. We further conclude, upon our

review of "the whole record, not simply . . . [the] waiver colloquy" (*People v Providence*, 2 NY3d 579, 582), that defendant made a knowing, voluntary and intelligent waiver of his right to counsel. Before granting defendant's request to proceed pro se, the court conducted the requisite searching inquiry, during which defendant stated, inter alia, that he had successfully represented himself at trial in a prior case. From his initial appearance to his mid-trial request to proceed pro se, defendant expressed dissatisfaction with his assigned attorneys, against whom he had filed multiple complaints with the Attorney Grievance Committee, and he engaged in concerted efforts to assist in his defense. The court "had numerous opportunities to see and hear . . . defendant firsthand, and, thus, had general knowledge of defendant's age, literacy and familiarity with the criminal justice system" (*People v Anderson*, 94 AD3d 1010, 1012, *lv denied* 19 NY3d 956, *reconsideration denied* 19 NY3d 1101 [internal quotation marks omitted]). In addition, the court fulfilled its obligation to ensure that defendant was "aware of the dangers and disadvantages of self-representation" (*Providence*, 2 NY3d at 582 [internal quotation marks omitted]).

Defendant contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel during the period of counsel's representation. To the extent that defendant's contention concerns matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318). On the record before us, we conclude that defendant was afforded effective assistance (*see People v Brown*, 6 AD3d 1125, 1126, *lv denied* 3 NY3d 657).

We have reviewed the remaining contentions in defendant's main brief and pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

986

KA 10-00503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WARREN J. GLOVER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 14, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [4]). Contrary to the contention of defendant, County Court properly refused to suppress his written and oral statements to the police. The record establishes that defendant's statements were voluntarily made; there is no indication in the record of the suppression hearing that he " 'was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements' " (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885; *People v Prober*, 298 AD2d 966, 967, *lv denied* 99 NY2d 538).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

987

KA 09-02539

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAYTON H. STEVENS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered November 10, 2009. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, unlawful possession of marihuana, failure to wear a seat belt and consumption of alcoholic beverages or possession of an open container containing alcoholic beverages in a motor vehicle.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, felony driving while intoxicated (DWI) (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), failure to wear a seat belt (§ 1229-c [3]), and consumption of alcoholic beverages or possession of an open container containing alcoholic beverages in a motor vehicle (§ 1227 [1]). Contrary to the contention of defendant, we conclude that, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different result would not have been unreasonable, " '[t]he jury was entitled to resolve issues of credibility in favor of the People . . . , and it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Caver*, 56 AD3d 1204, 1204, *lv denied* 12 NY3d 781).

We reject defendant's further contention that County Court failed to fashion an appropriate *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371, 374). We conclude that the court's *Sandoval* compromise, in which it limited questioning on defendant's prior convictions for DWI-related offenses to whether defendant had been convicted of a felony or misdemeanor on the appropriate date, "reflects a proper exercise of

the court's discretion" (*People v Thomas*, 305 AD2d 1099, 1099, *lv denied* 100 NY2d 600). The court did not abuse its discretion in further permitting specific questioning as to defendant's other convictions, even though they were remote in time (*see generally People v Walker*, 83 NY2d 455, 458-459).

Defendant failed to preserve for our review his challenge that he was punished for exercising his right to a trial (*see People v Carey*, 92 AD3d 1224, 1225, *lv denied* 18 NY3d 992; *People v Shay*, 85 AD3d 1708, 1709, *lv denied* 17 NY3d 822). In any event, we conclude that the contention is without merit (*see People v Coapman*, 90 AD3d 1681, 1684, *lv denied* 18 NY3d 956; *People v Dorn*, 71 AD3d 1523, 1524). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

988

KA 11-01850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT KNIGHTON, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 12, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and affording great deference to County Court's credibility determinations (*see People v White*, 43 AD3d 1407, 1408, *lv denied* 9 NY3d 1010), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note, however, that the certificate of conviction incorrectly recites that defendant was convicted of criminal contempt in the first degree under Penal Law § 215.51 (b) (v), and it must therefore be amended to reflect that he was convicted of that crime under Penal Law § 215.51 (c) (*see People v Saxton*, 32 AD3d 1286, 1286).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

989

KA 08-02485

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN L. COTTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 8, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and failing to signal.

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 criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and failing to signal (Vehicle and Traffic Law § 1163 [b]). Defendant's challenge to the legal sufficiency of the evidence is unpreserved for our review because "his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal" (*People v Wright*, 107 AD3d 1398, 1401; *see People v Gray*, 86 NY2d 10, 19). Further, defendant's posttrial motion pursuant to CPL 330.30 was insufficient to preserve for our review that contention (*see People v Jones*, 85 AD3d 1667, 1668, *lv denied* 19 NY3d 974), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

990

CA 13-00453

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

COLLEEN O'BRIEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY J. BAINBRIDGE AND FEDEX GROUND PACKAGE SYSTEM, INC., DEFENDANTS-APPELLANTS.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILLIP GULISANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 11, 2012 in a personal injury action. The order denied the motion of defendants for partial summary judgment dismissing the complaint insofar as it alleges that plaintiff sustained a serious injury under the permanent loss of use category of Insurance Law § 5102 (d).

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, defendants appeal from an order denying their motion for partial summary judgment dismissing the complaint insofar as it alleges that plaintiff sustained a serious injury under the permanent loss of use category of Insurance Law § 5102 (d). We conclude that Supreme Court properly denied the motion as untimely. The complaint, as amplified by the amended bill of particulars, alleged that plaintiff sustained a serious injury under five different categories: (1) significant disfigurement; (2) permanent loss of use of a body organ, member, function or system; (3) permanent consequential limitation of use of a body organ or member; (4) significant limitation of use of a body function or system; and (5) a nonpermanent injury or impairment that prevented plaintiff from performing substantially all of the material acts constituting her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. After discovery, defendants timely moved for summary judgment dismissing the complaint, including the claim that plaintiff sustained a permanent loss of use of a body organ, member, function or system (original motion). Although plaintiff, in opposing the original motion, did not mention the permanent loss of use claim, the court denied that motion in its

entirety, thereby leaving intact all of plaintiff's claims.

Defendants moved for leave to reargue the original motion. In so moving, however, defendants did not refer to the permanent loss of use category; instead, their reargument motion was limited to the other four categories of serious injury alleged in the amended bill of particulars. The court granted reargument and, upon reargument, granted defendants' original motion in part by dismissing the claims that plaintiff sustained a serious injury under the permanent consequential and significant limitation of use categories. Although defendants appealed from that part of the order denying, upon reargument, the original motion with respect to the significant disfigurement and 90/180-day claims, defendants did not raise in their brief any contention concerning the permanent loss of use claim. On that appeal, we agreed with defendants regarding the 90/180-day claim but not regarding the significant disfigurement claim (*O'Brien v Bainbridge*, 89 AD3d 1511, 1512-1513). Thus, in our decision, we stated that "the issue of whether plaintiff's scars constitute a significant disfigurement should be decided by the trier of fact, *along with the remaining category of permanent loss of use*" (*id.* at 1513 [emphasis added]).

After the prior appeal, defendants moved for partial summary judgment dismissing the permanent loss of use claim (second motion). According to defendants, plaintiff had abandoned that claim when she failed to oppose that part of defendants' original motion concerning that claim, and the court, through an oversight, neglected to dismiss the claim in its initial order. The court denied the second motion as untimely, and we now affirm.

"Where . . . a court does not set a date by which summary judgment motions must be made pursuant to CPLR 3212 (a), such a motion must be made no later than 120 days after the filing of the note of issue 'except with leave of court on good cause shown' " (*Matys v Zuccala*, 52 AD3d 1241, 1241, quoting CPLR 3212 [a]). Good cause in the context of CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652).

Here, the court did not set a deadline for the filing of summary judgment motions, and the note of issue was filed on May 3, 2010. Thus, pursuant to CPLR 3212 (a), the deadline for filing motions for summary judgment was August 31, 2010. The motion at issue in this appeal, i.e., the second motion, was filed on March 21, 2012, more than 18 months after the deadline, and we agree with the court that defendants failed to show good cause for the substantial delay. Contrary to defendants' assertions, plaintiff never "jettisoned" her claim that she sustained a serious injury under the permanent loss of use category, and the court did not inadvertently fail to address that claim in its initial decision. In fact, the court directly addressed the claim in its initial decision and, as noted, it denied defendants' original motion in its entirety. Although defendants moved to reargue the original motion, they failed in their reargument motion to mention

the permanent loss of use claim. Thus, the court properly ignored that claim in its decision and order. In any event, even if defendants had contended in the prior appeal that the court should have dismissed the permanent loss of use claim on reargument, which they did not, such a contention would not have been properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Under the circumstances, we conclude that the court properly determined that defendants failed to establish good cause for the untimely filing of the second motion. The second motion was not necessitated by an oversight of the court, as defendants assert; instead, it arose from defendants' apparent misapprehension, when they filed the reargument motion, that the permanent loss of use claim had been dismissed by the court or abandoned by plaintiff.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

991

CA 13-00413

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

PATRICIA FLYNN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MIKHAEL N. HADDAD, DEFENDANT-RESPONDENT.

ELLIOTT, STERN & CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 11, 2012 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell immediately after descending the single step that led into defendant's garage. In her complaint and bill of particulars, plaintiff alleged that the premises were defective in that the garage floor was painted with a paint that created an unreasonably slippery surface.

Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint. " '[I]n the absence of evidence of a negligent application of floor wax or polish [or other substance], the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence' " (*Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1276; *see Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326-327; *see generally Murphy v Conner*, 84 NY2d 969, 971). In support of the motion, defendant submitted his deposition testimony, wherein he testified that he painted the garage floor 8 to 10 years prior to the accident with a paint that he believed gave the floor a nonslip finish. He further testified that, prior to the accident, no one ever slipped and fell on the garage floor; no one ever told him that the floor was slippery; and he did not detect that the floor was slippery. Defendant thus established as a matter of law that he did not apply the paint in a negligent manner, and plaintiff failed to raise a triable issue of fact (*see Walsh v Super Value, Inc.*, 76 AD3d 371, 374-377).

In opposition to the motion, plaintiff raised for the first time the theory that she fell due to a defect in the step, i.e., it was too high and threw off her balance. It is well settled that " '[a] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion' " (*Marchetti v East Rochester Cent. Sch. Dist.*, 26 AD3d 881, 881; *see Mullaney v Royalty Props., LLC*, 81 AD3d 1312, 1313; *Rumyacheva v City of New York*, 36 AD3d 790, 790-791; *Forester v Golub Corp.*, 267 AD2d 526, 527). Plaintiff may therefore not rely on that theory to defeat defendant's entitlement to summary judgment (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651, 651; *Taylor v Jaslove*, 61 AD3d 743, 744-745; *Wilson v Prazza*, 306 AD2d 466, 467).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

992

CA 13-00339

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

PATRICK GAFFNEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORAMPAC INDUSTRIES, INC., DEFENDANT-RESPONDENT.

THOMAS C. PARES, BUFFALO, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 8, 2012 in a personal injury action. The order, inter alia, granted that part of the motion of defendant for summary judgment dismissing the complaint with respect to the Labor Law § 240 (1) cause of action and denied the cross motion of plaintiff for partial summary judgment on the common-law negligence and Labor Law §§ 200 and 240 (1) causes of action.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when a seal that was located on top of a loading dock door fell and struck him on the head. Contrary to plaintiff's contention, Supreme Court properly granted that part of defendant's motion for summary judgment dismissing the complaint with respect to the Labor Law § 240 (1) cause of action. At the time of the accident, plaintiff and his coworker were testing a dock lock that they had just repaired. Notably, the door seal that was located above them did not "require[] securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732). Labor Law § 240 (1) therefore does not apply here because " '[t]his was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected' " (*Roberts v General Elec. Co.*, 97 NY2d 737, 738; *see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269; *Smith v Le Frois Dev., LLC*, 28 AD3d 1133, 1133). Contrary to plaintiff's further contention, the court did not err in relying upon the theory that plaintiff did not face an elevation-related risk even though defendant did not raise it in its initial motion papers. Plaintiff cross-moved for partial summary judgment on, inter alia, the Labor Law § 240 (1) cause of action and, pursuant to CPLR 3212 (b), the court had the authority to grant relief to a nonmoving party (*see*

Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo, 105 AD3d 1460, 1462-1463; *Simet v Coleman Co., Inc.*, 42 AD3d 925, 927-928). Thus, the issue whether plaintiff faced an elevation-related risk was before the court on plaintiff's cross motion (*see generally Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430; *Costello v Hapco Realty*, 305 AD2d 445, 446).

The court properly denied that part of plaintiff's cross motion seeking partial summary judgment on the Labor Law § 200 and common-law negligence causes of action. Plaintiff failed to establish as a matter of law that defendant either created the defective condition or had actual or constructive notice of it (*see generally Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1248). We reject plaintiff's contention that he met his burden by establishing that defendant did not inspect the seal prior to the accident. " 'The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances' " (*Anderson v Justice*, 96 AD3d 1446, 1447), and we conclude that it is for a trier of fact to determine whether defendant's conduct was reasonable.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

995

CA 13-00014

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

SCOTT R. NORTZ, AS EXECUTOR OF THE ESTATE
OF RICHARD J. BROWN, DECEASED, INDIVIDUALLY
AND DOING BUSINESS AS GOLD CUP FARMS, INC.,
AND THOUSAND ISLANDS CHEESE, LLC,
PLAINTIFF-APPELLANT,

V ORDER

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (RICHARD PERTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (SHANNON R. BECKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 1, 2012. The order, insofar as appealed from, granted the motion of defendant to compel appraisal.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 29 and June 6, 2013 and filed in the Jefferson County Clerk’s Office on June 11, 2013,

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

996

CA 12-01911

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, SHANNON FROIO, AS PARENT AND NATURAL GUARDIAN OF INFANT SHAWN DARLING, BRENDA FORTINO, AS PARENT AND NATURAL GUARDIAN OF INFANT JULIE FORTINO, MARIE MARTIN, AS PARENT AND NATURAL GUARDIAN OF INFANT KENNETH KENYON, JENNY LYNN COWHER, AS PARENT AND NATURAL GUARDIAN OF INFANT WILLIAM MARTIN, HOLLAN CRIPPEN, AS PARENT AND NATURAL GUARDIAN OF INFANT DEVAN MATHEWS, JESSICA RECORE, AS PARENT AND NATURAL GUARDIAN OF INFANT SAMANTHA MCLOUGHLIN, LAURIE RIZZO AND DOMINICK RIZZO, AS LEGAL CUSTODIANS OF INFANT JACOB MCMAHON, JASON MONTANYE, AS PARENT AND NATURAL GUARDIAN OF INFANT KADEM MONTANYE AND FRANCES SHELLINGS, AS PARENT AND NATURAL GUARDIAN OF INFANT RAYNE SHELLINGS, PLAINTIFFS-RESPONDENTS,

MEMORANDUM AND ORDER

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAC LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF SYRACUSE, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., TAREK ELSAFTY, D.D.S., YAQOOB KHAN, D.D.S., JANINE RANDAZZO, D.D.S., LOC VINH VUU, D.D.S., DEFENDANTS-APPELLANTS;
ET AL., DEFENDANTS.
(ACTION NO. 1.)

SHANTEL JOHNSON, AS PARENT AND NATURAL GUARDIAN OF INFANT KEVIN BUTLER, VERONICA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF INFANT ARIANA FLORES, DEMITA GARRETT, AS PARENT AND NATURAL GUARDIAN OF INFANT I'YANA GARCIA SANTOS, KATHRYN JUSTICE, AS PARENT AND NATURAL GUARDIAN OF INFANT BREYONNA HOWARD, ELIZABETH LORRAINE, AS PARENT AND NATURAL GUARDIAN OF INFANT SHILOH LORRAINE, JR., LAPORSHA SHAW, AS PARENT AND

NATURAL GUARDIAN OF INFANT ALEXIS PARKER, ROBERT RALSTON, AS PARENT AND NATURAL GUARDIAN OF INFANT BRANDIE RALSTON, KATRICE MARSHALL, AS PARENT AND NATURAL GUARDIAN OF INFANT LESANA ROSS, TIFFANY HENTON, AS PARENT AND NATURAL GUARDIAN OF INFANT COREY SMITH AND JANET TABER, AS PARENT AND NATURAL GUARDIAN OF INFANT JON TABER,
PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF ROCHESTER, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, SHILPA AGADI, D.D.S., KOURY BONDS, D.D.S., ISMATU KAMARA, D.D.S., KEIVAN ZOUFAN, D.D.S., SONNY KHANNA, D.D.S., KIM PHAM, D.D.S., LAWANA FUQUAY, D.D.S., DEFENDANTS-APPELLANTS;
ET AL., DEFENDANTS.
(ACTION NO. 2.)

TIMOTHY ANGUS, AS PARENT AND NATURAL GUARDIAN OF INFANT JACOB ANGUS, JESSALYN PURCELL, AS PARENT AND NATURAL GUARDIAN OF INFANT ISAIAH BERG, BRIAN CARTER, AS PARENT AND NATURAL GUARDIAN OF INFANT BRIANA CARTER, APRIL FERGUSON, AS PARENT AND NATURAL GUARDIAN OF INFANT JOSEPH FERGUSON, SHERAIN RIVERA, AS PARENT AND NATURAL GUARDIAN OF INFANT SHADAYA GILMORE, TONYA POTTER, AS PARENT AND NATURAL GUARDIAN OF INFANT DESIRAEE HAGER, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT AALYIAROSE LABOMBARD-BLACK, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT MANUEL LABORDE, JR., JENNIFER BACON, AS PARENT AND NATURAL GUARDIAN OF INFANT ASHLEY PARKER AND COURTNEY CONRAD, AS PARENT AND NATURAL GUARDIAN OF INFANT ZAKARY WILSON,
PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF ALBANY, LLC, ALBANY ACCESS DENTISTRY, PLLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, MAZIAR IZADI, D.D.S., JUDITH MORI, D.D.S., LISSETTE BERNAL, D.D.S., EDMISE FORESTAL,

D.D.S., EVAN GOLDSTEIN, D.D.S., KEERTHI GOLLA, D.D.S., NASSEF LANCEN, D.D.S., DEFENDANTS-APPELLANTS; ET AL., DEFENDANTS.
(ACTION NO. 3.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, SMALL SMILES DENTISTRY OF ALBANY, LLC, ALBANY ACCESS DENTISTRY, PLLC, SMALL SMILES DENTISTRY OF ROCHESTER, LLC AND SMALL SMILES DENTISTRY OF SYRACUSE, LLC.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (DANIELLE N. MEYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S. AND MICHAEL W. ROUMPH.

WILSON ELSER MOZKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS MAZIAR IZADI, D.D.S., JUDITH MORI, D.D.S., EDMISE FORESTAL, D.D.S., EVAN GOLDSTEIN, D.D.S., KEERTHI GOLLA, D.D.S., NASSEF LANCEN, D.D.S., NAVEED AMAN, D.D.S., TAREK ELSAFTY, D.D.S., YAQOOB KHAN, D.D.S., SHILPA AGADI, D.D.S., KOURY BONDS, D.D.S., KIM PHAM, D.D.S., ISMATU KAMARA, D.D.S. AND SONNY KHANNA, D.D.S.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS KEIVAN ZOUFAN, D.D.S., LAWANA FUQUAY, D.D.S., LOC VINH VUU, D.D.S., JANINE RANDAZZO, D.D.S. AND LISSETTE BERNAL, D.D.S.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 4, 2012. The order, inter alia, denied the motions of defendants-appellants to dismiss certain causes of action in the amended complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions in part and dismissing the first and third causes of action of the amended complaints against defendants-appellants and dismissing the fourth cause of action of the amended complaints insofar as it alleges a violation of General Business Law § 350 against the individual defendants-appellants with the exception of Daniel E. DeRose, Michael A. DeRose, D.D.S., Edward J. DeRose, D.D.S., Adolph R. Padula, D.D.S., William A. Mueller, D.D.S., and Michael W. Roumph, and as modified the order is affirmed without costs.

Memorandum: These three actions were commenced by various

plaintiffs asserting causes of action for fraud, battery, breach of fiduciary duty, breach of General Business Law §§ 349 and 350, malpractice, negligence, and failure to obtain informed consent based on dental treatment provided to the subject children. These actions have been coordinated for purposes of discovery pursuant to 22 NYCRR 202.69 in Onondaga County Supreme Court. Defendants-appellants moved to dismiss certain causes of action in the amended complaints, which the court denied in their entirety. On this consolidated appeal, there are four groups of defendants-appellants: Forba, LLC, now known as LICSAC, LLC, et al. (Old FORBA); Forba Holdings, LLC, now known as Church Street Health Management, LLC, et al. (New FORBA); Keivan Zoufan, D.D.S., et al. (Five Dentists); and Maziar Izadi, D.D.S., et al. (Fourteen Dentists) (collectively, defendants).

We agree with defendants that the court erred in denying those parts of their respective motions seeking dismissal of the fraud and breach of fiduciary duty causes of action, and we therefore modify the order by dismissing the first and third causes of action of the amended complaints against defendants. "Dismissal of a fraud cause of action is required '[w]here [it] gives rise to damages which are not separate and distinct from those flowing from an alleged [dental] malpractice cause of action' " (*Abraham v Kosinski*, 251 AD2d 967, 967-968; *see Giannetto v Knee*, 82 AD3d 1043, 1045; *Haga v Pyke*, 19 AD3d 1053, 1055). Inasmuch as the damages sought by plaintiffs, including punitive damages, are the same for the fraud and dental malpractice causes of action, we conclude that the fraud cause of action must be dismissed. We further conclude that the breach of fiduciary duty cause of action must be dismissed because it is duplicative of the malpractice cause of action (*see Padilla v Verczky-Porter*, 66 AD3d 1481, 1484; *see generally Adamski v Lama*, 56 AD3d 1071, 1072-1073; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271). Both the breach of fiduciary duty cause of action and dental malpractice cause of action are based on the same facts and seek identical relief (*cf. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9).

We reject the contention of the Fourteen Dentists that the General Business Law § 349 claim is duplicative of other causes of action in the amended complaints (*see generally Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343-344; *Karlin v IVF Am.*, 93 NY2d 282, 290-294, *rearg denied* 93 NY2d 989), and we also reject the contention of the Five Dentists and the Fourteen Dentists that plaintiffs failed to state a cause of action with respect to the General Business Law § 349 claim (*see generally Stutman v Chemical Bank*, 95 NY2d 24, 29; *Gaidon*, 94 NY2d at 344). Plaintiffs alleged a scheme whereby the individual dentists made fraudulent misrepresentations to parents and custodians to induce consent for dental procedures, resulting in harm to the subject children. With respect to the General Business Law § 350 claim, however, we agree with the Five Dentists and the Fourteen Dentists that the claim should be dismissed against them, and we therefore further modify the order accordingly. Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service . . ." Inasmuch as the amended complaints do not allege that those individual dentists were involved

in any false advertising, that claim must be dismissed against them.

We reject the contention of Old FORBA, New FORBA, and the Five Dentists that the battery cause of action should be dismissed. A battery cause of action may be maintained where the allegation is that the dental professional did not obtain consent for the procedure or treatment (*see VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394). Here, plaintiffs alleged that consent was obtained by fraud, which is the equivalent of no consent at all (*see generally Darrah v Kite*, 32 AD2d 208, 210-211).

We have considered the remaining contentions raised by the parties and conclude that they are without merit.

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

997

CA 13-00108

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

TOWN OF THROOP, PLAINTIFF-APPELLANT,

V ORDER

CHRISTINE CORDWAY, DEFENDANT-RESPONDENT.

NORMAN J. CHIRCO, AUBURN, FOR PLAINTIFF-APPELLANT.

NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, NEW YORK CITY (JENNY R. A. PELAEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 22, 2012. The order reversed and vacated a decision and order of the Town of Throop Town Court, dated August 16, 2011.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

998

CA 13-00294

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

DEBBIE CARTER, PLAINTIFF-RESPONDENT,

V ORDER

SYRACUSE UNIVERSITY AND SYRACUSE UNIVERSITY CARRIER DOME STADIUM, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS R. SMITH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 18, 2012. The order, among other things, denied the motion of defendants Syracuse University and Syracuse University Carrier Dome Stadium for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on May 22, 2013,

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1001

CA 12-02121

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

SYSCO SYRACUSE, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STUART EGAN, III, AND MAINES PAPER & FOOD SERVICE, INC., DEFENDANTS-APPELLANTS.

LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 8, 2012. The order granted plaintiff a preliminary injunction, which was effective until March 29, 2013, prohibiting defendant Stuart Egan, III from soliciting or assisting anyone else to solicit certain customers of plaintiff that Egan serviced during his last year of employment with plaintiff.

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

Memorandum: Plaintiff commenced this action seeking to enforce certain provisions of an employment agreement and thereafter moved for injunctive relief. Supreme Court granted a preliminary injunction, which was effective until March 29, 2013, prohibiting defendant Stuart Egan, III from soliciting or assisting anyone else to solicit certain customers of plaintiff that Egan had serviced during the last year of his employment with plaintiff. Inasmuch as the challenged injunction has expired, we dismiss defendants' appeal as moot (*see H. Meer Dental Supply Co. v Commisso*, 269 AD2d 662, 663; *see also Confidential Brokerage Servs., Inc. v Confidential Planning Corp.*, 85 AD3d 1268, 1270 n 2; *Interface Solutions, Inc. v Donoghue*, 37 AD3d 1127, 1128). Contrary to defendants' contention, this case does not fall within an exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Defendants contend that the appeal is not moot because the issuance of the injunction "directly bears upon the matters at issue in the plenary action." We reject that contention inasmuch as " '[t]he granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits' " (*Digitronics Inventioneering Corp. v*

Jameson, 11 AD3d 783, 784).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1015

CAF 12-01557

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

IN THE MATTER OF KENNETH E. WILLIAMS,
PETITIONER-APPELLANT,

V ORDER

MIKI M. WILLIAMS, RESPONDENT-RESPONDENT.

MCKEE LAW OFFICE, SYRACUSE (JESSICA M. MCKEE OF COUNSEL), FOR PETITIONER-APPELLANT.

GRANITO & SONDEJ, PLLC, LIVERPOOL (V. JAMES GRANITO, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 21, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner to an order of the Support Magistrate.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 30, 2013,

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1016

CA 13-00418

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

GUS MICHAEL FARINELLA, AS ADMINISTRATOR OF THE ESTATE OF MAGDALENA MARTA LUBOWSKA, DECEASED, MARIUSZ LUBOWSKI AND KATARZYNA LUBOWSKA, CLAIMANTS-APPELLANTS,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116051.)

SANDERS, SANDERS, BLOCK, WOYCIK, VIENER & GROSSMAN, P.C., MINEOLA (EDWARD J. NITKEWICZ OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 1, 2012. The order granted the motion of defendant for summary judgment dismissing the claim.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1018

CA 13-00128

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

KATHERINE FRASCELLA AND TIMOTHY FRASCELLA, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF GABRIEL FRASCELLA, AN INFANT, PLAINTIFFS-RESPONDENTS,

V ORDER

HAMBURG CENTRAL SCHOOL DISTRICT, STEVEN ACHRAMOVITZ, PAUL PIETRANTONE, ANNE GILHOOLY AND REBECCA SIPPRELL BUCZAK, DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID ADAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF LAURIE A. BAKER, HAMBURG (LAURIE A. BAKER OF COUNSEL), AND MURPHY MEYERS, LLP, ORCHARD PARK, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 19, 2012. The order denied the motion of defendants to dismiss plaintiffs' second cause of action.

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

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (477/81) KA 13-00983. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD GLOSS, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NOS. (1546-1547/98) KA 12-01290. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. KA 12-01291. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. –- Motion for leave to appeal to the Court of Appeals dismissed (*see* CPL 450.90 [1]). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (626/02) KA 00-03001. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY YOUNGBLOOD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (905/02) KA 01-01982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHONDELL J. PAUL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (1383/02) KA 01-01975. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V DERRICK D. MARTIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (802/03) KA 01-00914. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHARROWL DAVIS, ALSO KNOWN AS SHARROD DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (1244/06) KA 05-01412. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAVIONE GAINEY, ALSO KNOWN AS "SPRAY," DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (1316/06) KA 04-02937. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE L. JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument and for other relief denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (134/07) KA 06-00051. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOBIAS NICKELS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (1011/07) KA 06-00940. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDUNDABIRA O. OJO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (91/08) KA 01-00517. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL RAMSEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (608/08) KA 05-01153. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PRESTON BOYD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (124/09) KA 06-03044. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument and for other relief denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (725/11) KA 09-02332. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARREN MCEATHRON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (994/11) KA 08-01129. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRIS HANKS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NOS. (48/12 and 53/12) KA 08-00031. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON J. BROOKS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 08-00032. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON J. BROOKS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) –- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, defendant was denied effective assistance of counsel because trial counsel failed to provide conflict-free representation. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the orders of January 31, 2012 are vacated and this Court will consider the appeals de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before January 9, 2014. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (123/12) TP 11-01675. -- IN THE MATTER OF WILLIAM EDWARDS, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Motion for reargument denied.

PRESENT: SMITH, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (748.1/12) KA 05-00172. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CYRIL WINEBRENNER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (1326/12) KA 10-02447. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHIAL E. FOSTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (210/13) CA 12-01733. -- NIKKI PAGAN, PLAINTIFF-RESPONDENT-APPELLANT, V FRANK RAFTER, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (302/13) CAF 12-00796. -- IN THE MATTER OF HEATHER A. COLE, PETITIONER-APPELLANT, V MICHAEL JAMES NOFRI, RESPONDENT-RESPONDENT. KELLY M. CORBETT, ESQ., ATTORNEY FOR THE CHILD, APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (309/13) CA 12-01766. -- IN THE MATTER OF ARBITRATION BETWEEN ONTARIO COUNTY AND ONTARIO COUNTY SHERIFF, PETITIONERS-APPELLANTS, AND ONTARIO COUNTY SHERIFF'S UNIT 7850-01, CSEA LOCAL 1000, AFSCME, AFL-CIO, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (333/13) CA 12-01631. -- RICHARD WESTGATE, PLAINTIFF-APPELLANT, V DAVID S. BRODERICK, AS ADMINISTRATOR OF THE ESTATE OF THOMAS D. HOGAN, III, KAREN HOGAN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (355/13) CA 12-01574. -- CHRISTOPHER HAMILTON, PLAINTIFF-APPELLANT, V JOHN MILLER, DAVID MILLER, JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES, DEFENDANTS-RESPONDENTS. -- Motion to resettle and clarify denied. Cross motion to resettle and modify denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (372/13) CA 12-01132. -- IN THE MATTER OF GREEN THUMB LAWN CARE, INC. AND JOHN KNUTSON, PH.D., PETITIONERS-PLAINTIFFS-APPELLANTS, V PETER M. IWANOWICZ, ACTING COMMISSIONER, AND NEW YORK STATE DEPARTMENT OF

ENVIRONMENTAL CONSERVATION, RESPONDENTS-DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (373/13) CA 12-01133. -- IN THE MATTER OF GREEN THUMB LAWN CARE, INC. AND JOHN KNUTSON, PH.D., PETITIONERS-APPELLANTS, V NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENT-RESPONDENT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (378/13) CA 11-02445. -- PATRICIA CURTO, PLAINTIFF-APPELLANT, V ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (379/13) CA 11-02446. -- PATRICIA CURTO, PLAINTIFF-APPELLANT, V ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (380/13) CA 11-02447. -- PATRICIA CURTO, PLAINTIFF-APPELLANT, V ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (381/13) CA 12-00244. -- PATRICIA CURTO, PLAINTIFF-APPELLANT, V ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 4.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (433/13) TP 12-02130. -- IN THE MATTER OF JAYSON BULMAHN, PETITIONER, V NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (453/13) CA 12-01487. -- GERALD SCHMITT, PLAINTIFF-APPELLANT, V SANDRA SCHMITT, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or amendment denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (478/13) CA 12-01827. -- SUE/PERIOR CONCRETE & PAVING, INC., PLAINTIFF-RESPONDENT, V LEWISTON GOLF COURSE CORPORATION, SENECA NIAGARA FALLS GAMING CORPORATION, SENECA GAMING CORPORATION, JEFFREY L. GILL, MARK I. HALFTOWN, GLORIA HERON, MAURICE A. JOHN, SR., MICHAEL L. JOHN, KAREN KARSTEN, INA K. LOCKE, ROBERT E. MELE, RICHARD K. NEPHEW, MARIBEL PRINTUP, COCHISE N. REDEYE, GARY SANDEN, KEVIN W. SENECA, BARRY E. SNYDER, SR., AND STEVE TOME, DEFENDANTS-APPELLANTS, NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: PERADOTTO, J.P., LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (519/13) CA 12-01962. -- MARC A. NICOMETI, PLAINTIFF-RESPONDENT, V THE VINEYARDS OF FREDONIA, LLC, WINTER-PFOHL, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. SCOTT PFOHL, ET AL., THIRD-PARTY PLAINTIFFS, V WESTERN NEW YORK PLUMBING-ELLICOTT PLUMBING AND REMODELING CO., INC., THIRD-PARTY DEFENDANT-APPELLANT. -- Motions and cross motions for reargument denied. Motions and cross motions for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (573/13) KAH 12-00566. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. WILLIAM CRENSHAW, PETITIONER-APPELLANT, V HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. --

Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (576/13) CAF 12-01093. -- IN THE MATTER OF CLARENCE R. BROWN, PETITIONER-APPELLANT, V SHANNON TERWILLIGER AND MARY ANN TERWILLIGER, RESPONDENTS-RESPONDENTS. IN THE MATTER OF CLARENCE R. BROWN, PETITIONER-APPELLANT, V KELLY FINNERTY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (580/13) CA 12-02297. -- IN THE MATTER OF JON M. LADELFA, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF CHARLES MICHAEL LADELFA, DECEASED, PETITIONER-RESPONDENT. GERALD A. CONIGLIO, OBJECTANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (585/13) CA 13-00013. -- ROBERT M. PAYTON, PLAINTIFF-RESPONDENT, V 5391 TRANSIT ROAD, LLC, AND CARROLS CORPORATION, DEFENDANTS-APPELLANTS. CARROLS, LLC, A WHOLLY OWNED SUBSIDIARY OF CARROLS CORPORATION, THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT, V JOSEPH H. TUDOR, DOING BUSINESS AS JM ENTERPRISES, THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY,

JJ. (Filed Sept. 27, 2013.)

MOTION NO. (587/13) CA 12-02172. -- DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLANT, V NIAGARA FRONTIER TRANSPORTATION AUTHORITY, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motions for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (590/13) TP 12-02305. -- IN THE MATTER OF JAMES M. WEST, ALSO KNOWN AS WESS, PETITIONER, V MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT. -- Motion for permission to appeal denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (601/13) CA 12-02380. -- IN THE MATTER OF NORSE PIPELINE, LLC, PETITIONER-APPELLANT, V TOWN OF BUSTI, TOWN OF FRENCH CREEK, TOWN OF NORTH HARMONY AND TOWN OF SHERMAN, ET AL., RESPONDENTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (602/13) CA 12-02058. -- KELLEY BUTTERFIELD AND DOUGLAS BUTTERFIELD, PLAINTIFFS-RESPONDENTS, V JAMES R. CAPUTO, M.D., JAMES R.

CAPUTO, M.D., P.C., DEFENDANTS-APPELLANTS-RESPONDENTS, AND CROUSE HOSPITAL, DEFENDANT-RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. All concur except FAHEY, J., who dissents and votes to grant leave to appeal to the Court of Appeals. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (606/13) CA 12-02381. -- IN THE MATTER OF NORSE PIPELINE, LLC, PETITIONER-APPELLANT, V TOWN OF BUSTI, TOWN OF FRENCH CREEK, TOWN OF NORTH HARMONY AND TOWN OF SHERMAN, ET AL., RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (625/13) CA 13-00036. -- JOHN W. GRACE, PLAINTIFF-RESPONDENT, V MICHAEL R. LAW, PHILLIPS LYTLE, LLP, ROBERT L. BRENNA, JR., AND BRENNA, BRENNA & BOYCE, PLLC, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (651/13) CA 12-01858. -- DASZ, INC., PLAINTIFF-APPELLANT, V MERITOCRACY VENTURES, LTD., ARTHUR N. BAILEY, U.S. COMMERCIAL HABITAT CO., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P.,

FAHEY, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (653/13) CA 12-02356. -- EVELYN M. GRAY, PLAINTIFF-APPELLANT, V ASTON B. WILLIAMS, M.D., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (662/13) TP 12-02388. -- IN THE MATTER OF DAVID REDMOND, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for reargument or reconsideration denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (680/13) CA 12-02001. -- FREDERICK D. TAYLOR, PLAINTIFF-RESPONDENT, V DANRICH HOMES, INC., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (724/13) CA 12-02207. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V NEW YORK STATE COLLEGE OF VETERINARY MEDICINE AT CORNELL, CORNELL UNIVERSITY, NELSON ROTH, VALERIE CROSS, HUNTER RAWLINGS, III, DONALD SMITH, KATHERINE EDMONDSON, LISA CLARK, SUSAN STEVENS SUAREZ, LINDA ALLEN MIZER,

WENDY TARLOW, WALTER LYNN AND DANILEE POPPENSIEK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (725/13) CA 12-02209. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V NEW YORK STATE COLLEGE OF VETERINARY MEDICINE AT CORNELL, CORNELL UNIVERSITY, NELSON ROTH, VALERIE CROSS, HUNTER RAWLINGS, III, DONALD SMITH, KATHERINE EDMONDSON, LISA CLARK, SUSAN STEVENS SUAREZ, LINDA ALLEN MIZER, WENDY TARLOW, WALTER LYNN AND DANILEE POPPENSIEK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (750/13) CA 12-01684. -- APRYL CALACI, PLAINTIFF-RESPONDENT, V ALLIED INTERSTATE, INC., ALLIED INTERSTATE, LLC AND IQOR US INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (753/13) KA 03-01616. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES PENNINGTON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, AND

WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (757/13) KA 10-00178. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARQUIS STANLEY, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (789/13) KA 10-00056. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BLAIR CHATTLEY, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

MOTION NO. (813/13) KA 12-01270. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RUSSELL YOUNG, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Sept. 27, 2013.)

KA 11-00446. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V YUSEF BROWN, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Onondaga County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 27, 2013.)

KAH 11-01160. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. WALTER ROACH, PETITIONER-APPELLANT, V DONALD SAWYER, EXECUTIVE DIRECTOR CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment [denominated order] of Supreme Court, Oneida County, Bernadette T. Clark, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)

KA 12-00927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILBERT WRIGHT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Michael L. D'Amico, J. - Attempted Criminal Possession of a Controlled Substance, 4th Degree). PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Sept. 27, 2013.)