SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 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

859

CA 12-02307

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

IN THE MATTER OF ECOGEN WIND LLC AND ECOGEN TRANSMISSION CORP.,
PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF PRATTSBURGH TOWN BOARD,
RESPONDENT-RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

TOWN OF PRATTSBURGH,
PLAINTIFF-RESPONDENT-APPELLANT,

V

ECOGEN WIND LLC AND ECOGEN TRANSMISSION CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS AND DEFENDANTS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT AND PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Monroe County (John J. Ark, J.), entered February 24, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted in part the motion of petitioners-defendants, Ecogen Wind LLC and Ecogen Transmission Corp., to enforce a settlement agreement and denied the motion of petitioners-defendants to dismiss the declaratory judgment action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the motions of petitioners-defendants to enforce the settlement agreement in its entirety and to dismiss the declaratory judgment action and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-defendants, Ecogen Wind LLC and Ecogen Transmission Corp. (petitioners), appeal and respondents, including the Town of Prattsburgh Town Board (Town Board) and respondent-plaintiff, the Town of Prattsburgh (Town), cross-appeal from a

judgment that, inter alia, granted in part petitioners' motion to enforce a settlement agreement and denied petitioners' motion to dismiss the Town's declaratory judgment action.

Petitioners are engaged in the business of constructing and operating wind turbine energy facilities. This litigation involves petitioners' attempt to construct such a facility in the Town. In March 2009, petitioners were advised in writing by the Town Code Enforcement Officer that "no building permit [could] be required by the Town for [petitioners' proposed wind energy project]" as "[t]here are no Town laws or ordinances which prevent [petitioners] from proceeding with construction." On July 20, 2009, petitioners received the permits required by the New York State Department of Environmental Conservation to construct a wind energy facility in the Town. It is undisputed that, at all times prior to the commencement of this litigation, the Town had no local law, zoning law or building code provision that required any permit or variance for the construction of wind turbines in the Town.

Nonetheless, in an attempt to accommodate the concerns of the Town Board with respect to the proposed project, petitioners undertook a process to gain respondents' approval for the project. Petitioners were unable to reach an agreement with respondents with respect to the project, and in particular with respect to the use of Town roads to access and ship materials to the site, and on November 16, 2009 they commenced this CPLR article 78 proceeding. Thereafter, on December 18, 2009, the parties executed a written settlement agreement providing, inter alia, that "no approvals, permits or other authorizations from the Town are required in order for [petitioners] to develop, construct and operate the Project," and the Town passed a resolution approving the settlement. However, on January 7, 2010 the newly elected Town Board passed a resolution concluding that the settlement agreement was "invalid, illegal, void, and of no force [or] effect" and voted to rescind the prior resolution of December 18, 2009 that had approved the settlement. On March 9, 2010, the Town Board enacted a moratorium on wind turbine development in the Town.

By notice of motion dated February 17, 2010, petitioners moved within the existing CPLR article 78 proceeding to enforce the stipulation of settlement pursuant to CPLR 2104. The Town cross-moved to vacate the settlement on the grounds that, inter alia, it is illegal and constituted "a gratuitous and invalid act to grant [petitioners] 'vested rights' where the [Town] Board ha[d] no authority to do so." Subsequently, the Town commenced a plenary proceeding seeking a declaration that the settlement is, inter alia, invalid and/or void. Petitioners moved to dismiss the Town's declaratory judgment action pursuant to, inter alia, CPLR 3211 (a) (4), as seeking relief already sought in the pending CPLR article 78 proceeding.

Supreme Court granted in part petitioners' motion to enforce the settlement agreement but concluded that petitioners had not obtained vested rights in a traditional sense because no substantial changes or improvements had been made to the real property. The court also

concluded that petitioners were prevented for 168 days from making such improvements because the Town Board could have approved and reached a Road Agreement with petitioners within that time and before the moratorium was enacted. Thus, the court gave petitioners 168 days in which to make such improvements and obtain vested rights. The court also denied the Town's cross motion to vacate the settlement agreement and denied petitioners' motion to dismiss the declaratory judgment action.

We conclude that the court should have granted in its entirety petitioners' motion to enforce the settlement agreement, and we therefore modify the judgment accordingly. "Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230; *see Matter of Galasso*, 35 NY2d 319, 321). "It is well settled that a stipulation of settlement is an independent contract subject to the principles of contract interpretation" (*Corrigan v Breen*, 241 AD2d 861, 863; *see H.K.S. Hunt Club v Town of Claverack*, 222 AD2d 769, 769, *lv denied* 89 NY2d 804), and a party will be relieved from the consequences of a stipulation made during litigation only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident (*see Hallock*, 64 NY2d at 230; *Matter of Frutiger*, 29 NY2d 143, 149-150). Municipalities are treated no differently from private parties with respect to contractual obligations (*see People ex rel. Graves v Sohmer*, 207 NY 450, 457-458, *rearg denied* 208 NY 581).

Here, although the court properly determined that the Town did not meet its burden of demonstrating that the settlement agreement was the product of fraud, collusion, mistake or accident, the court erred in further determining the merits of the issue whether petitioners had acquired traditional "vested rights" in the project. That issue was a predominate focus of the litigation, and it was fully and finally resolved by the settlement agreement. Thus, the parties were bound by the terms of the settlement agreement, and the court was bound to enforce it (*see Matter of New York, Lackawanna & W. R.R. Co.*, 98 NY 447, 452-453).

In light of our determination with respect to the validity of the settlement agreement, we further modify the judgment by granting petitioners' motion to dismiss the Town's declaratory judgment action. We have considered the contentions raised by respondents on their cross appeal and conclude that they are without merit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

864

CA 13-00398

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

SUSAN M. BATT, AS ADMINISTRATRIX OF THE ESTATE
OF EUGENE L. BATT, JR., DECEASED,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, ET AL., DEFENDANTS.

STATE OF NEW YORK, NEW YORK STATE
DEPARTMENT OF TRANSPORTATION AND NEW
YORK STATE THRUWAY AUTHORITY,
THIRD-PARTY CLAIMANTS-RESPONDENTS,

V

AIG DOMESTIC CLAIMS, INC., NEW HAMPSHIRE
INSURANCE CO. AND AMERICAN HOME ASSURANCE CO.,
THIRD-PARTY DEFENDANTS-APPELLANTS.
(CLAIM NO. 115417.)

HISCOCK & BARCLAY, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANTS-THIRD-PARTY CLAIMANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered May 7, 2012. The judgment, among other things, denied the motion of third-party defendants for summary judgment insofar as it sought a declaration that third-party defendant American Home Assurance Co. is not required to defend or indemnify defendants-third-party claimants State of New York or the New York State Thruway Authority under the New York Special Protective Highway policy and granted the cross motion of defendants-third-party claimants for partial summary judgment in part and declared that third-party defendant American Home Assurance Co. is obligated to defend, inter alia, defendant-third-party claimant New York State Thruway Authority under that policy.

It is hereby ORDERED that said appeal insofar as taken by third-party defendants AIG Domestic Claims, Inc. and New Hampshire Insurance

Co. is unanimously dismissed and the judgment is affirmed without costs.

Memorandum: On July 26, 2006, claimant's decedent sustained fatal injuries when the motorcycle that he was operating collided with a vehicle on the exit 56 ramp of the New York State Thruway. In June 2006, defendant-third-party claimant New York State Thruway Authority (NYSTA) contracted with a contractor to perform construction work on the exit 56 interchange. Pursuant to the contract, the contractor obtained insurance from third-party defendants New Hampshire Insurance Co. (New Hampshire) and American Home Assurance Co. (American), naming NYSTA as an additional insured. After plaintiff commenced a personal injury and wrongful death action against defendants-third-party claimants (hereafter, third-party claimants), third-party defendants disclaimed coverage. Thereafter, third-party claimants commenced a third-party action seeking a declaration that New Hampshire and American were required to provide NYSTA with a defense in the underlying action and to indemnify defendant-third-party claimant State of New York (State). Third-party defendants moved for, inter alia, summary judgment declaring that they are not obligated to defend or indemnify third-party claimants. Third-party claimants cross-moved for, inter alia, partial summary judgment declaring that American is required to defend NYSTA in the underlying action. As relevant to this appeal, the Court of Claims denied third-party defendants' motion for summary judgment insofar as it sought a declaration that American is not obligated to defend or indemnify the State or NYSTA under the New York Special Protective Highway policy and granted third-party claimants' cross motion in part and declared that American is obligated to defend, inter alia, NYSTA under that policy. Third-party defendants appealed. We conclude that New Hampshire and third-party defendant AIG Domestic Claims, Inc. are not aggrieved by the judgment and thus the appeal, insofar as taken by those parties, must be dismissed (*see* CPLR 5511), and we otherwise affirm.

An insurer's duty to defend is " 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage' " (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137, quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648; *see Henderson v New York Cent. Mut. Fire Ins. Co.*, 56 AD3d 1141, 1142). Thus, the duty to defend exists " 'even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered' " (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137, quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63; *see also BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714). We conclude that where, as here, the claim, "[i]f[] liberally construed, . . . is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670, *rearg denied* 54 NY2d 753) and without regard to whether the insurer "may not be required to pay once the litigation has run its course" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137).

With respect to indemnification, that determination will abide

the trial (*see id.* at 138; *Incorporated Vil. of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293, 300).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1000

CA 13-00012

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

JAMIE LOBELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

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

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JAMES J. GASCON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 12, 2012. The order, inter alia, denied that part of the motion of defendant to dismiss the complaint with respect to the first cause of action.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that the insurance policy issued by defendant, New York Central Mutual Fire Insurance Company (NYCM), provided coverage for the subject loss. Thereafter, NYCM moved to dismiss the complaint on the ground that the action was not timely commenced. NYCM appeals from that part of the order denying without prejudice its motion with respect to the first cause of action. Initially, we note that, contrary to plaintiff's contention, the order is appealable despite the fact that Supreme Court denied in part NYCM's motion without prejudice to renew (*see Gruet v Care Free Hous. Div. of Kenn-Schl Enters.*, 305 AD2d 1060, 1060). Regarding the merits, we conclude that the motion "was properly denied as premature in light of the incomplete state of discovery, including the lack of any depositions" (*Ali v Effron*, 106 AD3d 560, 560). Plaintiff is entitled to discovery on, inter alia, whether NYCM should be estopped from invoking the statute of limitations defense. Plaintiff failed to preserve for our review his alternative contention that the date of loss under the policy is not the date that the theft occurred, but instead the date that the cause of action against NYCM accrued (*see Fabozzi v Lexington Ins. Co.*, 601 F3d 88; *cf. Klawiter v CGU/OneBeacon Ins. Group*, 27 AD3d 1155; *Costello v Allstate Ins. Co.*, 230 AD2d 763). Thus, we need not

address that issue at this stage of the proceedings.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1029

KA 09-02512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN L. RIVERA, DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 16, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault 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 as a juvenile offender, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) in the shooting of a Rochester police officer. We reject defendant's contention that he was deprived of effective assistance of counsel based solely on an allegedly prejudicial statement that defense counsel made during his opening statement concerning a rumor that the shooting was part of a gang initiation, which defense counsel promptly stated was baseless. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see People v Atkins*, 107 AD3d 1465, 1465). Such an error did not occur here. This was a high publicity case, and defendant has not demonstrated " 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcoming[]" (*People v Benevento*, 91 NY2d 708, 712). In addition to contending that the above error by itself warrants reversal, defendant also contends that there were other instances of ineffectiveness. We conclude, however, that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, we conclude that the

evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The fact that no one saw defendant fire the shot that [injured] the victim does not render the evidence legally insufficient, inasmuch as there was ample circumstantial evidence establishing defendant's identity as the shooter" (*People v Moore* [appeal No. 2], 78 AD3d 1658, 1659, *lv denied* 17 NY3d 798). Moreover, "[w]here, as here, defendant's statements could be interpreted as relevant admissions of guilt . . . , there [i]s both direct and circumstantial evidence" of defendant's guilt (*People v Casper*, 42 AD3d 887, 888, *lv denied* 9 NY3d 990 [internal quotation marks omitted]). Finally, we have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1063

CA 12-02240

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF LEGACY AT FAIRWAYS, LLC
AND BOUGHTON PROPERTIES, LLC,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF VICTOR,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated decision, judgment and order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered October 24, 2012 in a CPLR article 78 proceeding. The judgment, inter alia, 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: Petitioners commenced these CPLR article 78 proceedings seeking, inter alia, to annul the respective determinations of respondent to impose a per unit recreation fee on property owned and developed by them in the Town of Victor (Town). The petitioners in appeal No. 1 challenge the determination imposing a recreation fee of $600 per family unit upon property consisting of 144 apartments owned and developed by them, and the petitioners in appeal No. 2 challenge the determination imposing a recreation fee of $1,000 per unit upon property consisting of 45 townhouse units owned and developed by them.

We note at the outset that petitioners Legacy at Fairways, LLC, US Homes Co., Inc., and Mark IV Construction, Inc., along with Christopher A. DiMarzo, previously commenced a CPLR article 78 proceeding challenging the determination imposing a per unit recreation fee upon property consisting of the apartment units at issue in appeal No. 1. On an initial appeal in that matter, we concluded, inter alia, that Supreme Court properly denied the pre-answer motion to dismiss made by the respondents-defendants in that

matter. In doing so, we noted that there were "triable issues of fact with respect to, inter alia, whether the Town Planning Board[, i.e., the respondent herein,] imposed [a] recreation fee" (*Matter of Legacy at Fairways, LLC v McAdoo*, 67 AD3d 1460, 1462). On a subsequent appeal in that matter, we concluded, inter alia, that the respondent herein imposed a recreation fee in 2000, i.e., the year in which the petitioners in that appeal applied for approval of a minor subdivision plan in relation to that property (*Matter of Legacy at Fairways, LLC v McAdoo*, 76 AD3d 786, 788, *lv denied* 16 NY3d 706 [*Legacy II*]). We also concluded that "the manner in which the [respondent herein] imposed the fee was improper inasmuch as it failed to make findings 'that a proper case exist[ed] for requiring that' parkland be set aside or that a fee be imposed in lieu thereof (Town Law § 277 [4] [b]; *see* § 277-a [6] [b])" (*id.* at 788). We therefore remitted the matter to the respondent herein for further consideration and, if appropriate, for required findings (*id.*).

Upon remittal, respondent reduced the recreation fee of $1,000 per family unit that had been previously paid for the apartments at issue in appeal No. 1 to $600 per family unit. Approximately one month later, respondent reduced the recreation fee of $1,500 that had been assessed by respondent in 2007 and that had been paid relative to the townhouse units at issue in appeal No. 2 to $1,000 per family unit. As noted, petitioners in each of these appeals subsequently commenced these CPLR article 78 proceedings seeking to annul the respective determinations of respondent to impose a recreation fee on each of the apartments and townhouse units. The parties to appeal No. 2 have stipulated that our decision in *Legacy II* is equally applicable to the proceeding in appeal No. 2. We conclude that Supreme Court erred in granting the petitions.

As respondent correctly contends in both appeals, the court erred in agreeing with petitioner that the timing of respondent's findings was a violation of lawful procedure inasmuch as respondent made the findings at issue after the completion of development on the apartments and townhouse units. We thus conclude that the court erred to the extent that it granted the petitions on that ground. Petitioners' contention concerning the timing of respondent's findings following our remittal in *Legacy II* was not properly before the court because it was not raised at the administrative level (*see Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals*, 83 AD3d 711, 713; *Matter of Kahn v Planning Bd. of City of Buffalo*, 60 AD3d 1451, 1451-1452, *lv denied* 13 NY3d 711). Petitioners' contention is therefore " 'precluded from judicial review' " (*Kearney*, 83 AD3d at 713).

We likewise conclude that the court erred in finding that respondent violated lawful procedure by failing to provide petitioners with an opportunity to propose a park, inasmuch as petitioners did not raise that contention either before respondent or before the court, and there was therefore no basis for the court to have reached that issue (*see id.*; *Kahn*, 60 AD3d at 1451-1452; *Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 903, *lv denied* 5 NY3d 713). We note in any event that petitioners do not directly

address that issue on appeal and have apparently conceded it (*see Weldon v Rivera*, 301 AD2d 934, 935).

We also conclude that respondent's use of Town Law § 277 (4) was not an impermissible exercise of taxing power. Inasmuch as the Court of Appeals has rejected the notion that section 277 (4) is a "taxing" statute (*see Twin Lakes Dev. Corp. v Town of Monroe*, 1 NY3d 98, 106-107, *cert denied* 541 US 974), we must decide whether respondent's determination that the Town needs "additional funds to develop parks and recreational facilities," not additional land, is consistent with the legislative purpose of that statute. The Court of Appeals has recognized that section 277 (4) " 'represents a legislative reaction to the threatened loss of open land available for park and recreational purposes resulting from the process of development in suburban areas *and the continuing demands of the growing populations in such areas for additional park and recreational facilities*' " (*Twin Lakes Dev. Corp.*, 1 NY3d at 102, quoting *Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460, 468 [emphasis added]). In that vein, section 277 (4) (b) provides that a set-aside of land for a park or other recreational purposes may be required if the planning board has made a finding that a proper case for such land exists. That section further provides that "[s]uch findings shall include an evaluation of the present and anticipated future needs for park and recreational facilities in the town *based on projected population growth* to which the particular subdivision plat will contribute" (*id*. [emphasis added]). Section 277 (4) (c) provides that, in the event the planning board determines that a park may not be suitably located on the subdivision plat, "[a]ny monies required by the planning board in lieu of land for park, playground or other recreational purposes, pursuant to the provisions of this section, shall be deposited into a trust fund to be used by the town *exclusively for park, playground or other recreational purposes, including the acquisition of property*" (emphasis added).

Here, the court concluded that the assessment of recreation fees was unjustified because respondent found that the Town did not need more recreational land. As noted, however, Town Law § 277 (4) provides that concern over population demand for additional recreational facilities and the unsuitability of the plat at issue may justify the assessment of recreation fees. Furthermore, contrary to petitioners' contention, the application of section 277 involves a town-based review, not a plat-based review. We thus conclude that the court erred in determining that respondent acted irrationally in imposing the recreation fees at issue (*see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). We further conclude upon our review of the record that the determination to impose recreation fees in lieu of parkland dedication is not arbitrary or capricious, nor is it affected by an error of law (*see generally Matter of Davies Farm, LLC v Planning Bd. of Town of Clarkstown*, 54

AD3d 757, 758, *lv denied* 11 NY3d 713).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1064

CA 12-02241

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF LEGACY AT FAIRWAYS TOWNHOMES, LLC, US HOMES CO., INC. AND MARK IV CONSTRUCTION, INC., PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF VICTOR, RESPONDENT-APPELLANT. (APPEAL NO. 2.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated decision, judgment and order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered October 24, 2012 in a CPLR article 78 proceeding. The judgment, inter alia, 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.

Same Memorandum as in *Matter of Legacy at Fairways, LLC v Planning Bd. of Town of Victor* ([appeal No. 1] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1067

KA 10-02428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JETONE JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 (M. William Boller, A.J.), rendered October 8, 2010. The appeal was held by this Court by order entered February 8, 2013, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (103 AD3d 1215). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to Supreme Court to rule on defendant's motion to inspect the grand jury minutes and to dismiss the indictment due to allegedly defective grand jury proceedings, and we rejected defendant's remaining contentions (*People v Jones*, 103 AD3d 1215, *lv dismissed* 21 NY3d 944). Upon remittal, the court inspected the grand jury minutes and denied defendant's motion for disclosure of the minutes and to dismiss the indictment. We affirm the judgment. The court did not abuse its discretion in denying defendant's request to review the grand jury minutes (*see generally Matter of Lungen v Kane*, 88 NY2d 861, 862-863; *People v Douglas*, 288 AD2d 859, 859, *lv denied* 97 NY2d 681) and, having reviewed the grand jury minutes, we conclude that the court properly refused to dismiss the indictment. The minutes demonstrate that the prosecutor properly instructed the grand jurors and that the proceedings were not otherwise defective (*see generally People v Hebert*, 68 AD3d 1530, 1533-1534, *lv denied* 14 NY3d 841).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1085

CA 13-00751

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

LHR, INC., PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

T-MOBILE USA, INC. AND SUNCOM WIRELESS OPERATING COMPANY, LLC, DEFENDANTS-RESPONDENTS-APPELLANTS.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), AND KLEINBARD BELL & BRECKER LLP, PHILADELPHIA, PENNSYLVANIA, FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 25, 2013. The order, among other things, granted those parts of the motion of defendants for partial summary judgment seeking to limit plaintiff's damages and to dismiss the cause of action for intentional interference with contract, but denied that part of the motion seeking to dismiss the cause of action for conversion.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second, fourth, and fifth ordering paragraphs, denying that part of the motion seeking to limit plaintiff's damages to $1.2 million, and granting that part of the motion seeking to dismiss the 29th cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a debt collection agency, commenced this action seeking damages resulting from defendants' alleged breach of contract and negligence with respect to the sale by defendant SunCom Wireless Operating Company, LLC (SunCom) of delinquent customer accounts to plaintiff. From November 2005 until March 2008, plaintiff and SunCom executed six "Purchase and Sale Agreements" (purchase agreements). Four of the purchase agreements involved the transfer of a single debt portfolio; the other two agreements, which the parties refer to as "forward flow agreements," provided for the transfer of debt portfolios on a monthly basis. The purchase agreements are largely identical, although the forward flow agreements contain modifications to reflect the ongoing nature of the arrangement. As particularly relevant here, article 5 of each of the purchase agreements includes certain indemnification obligations on the part of

plaintiff and SunCom, and provides that the "Seller," i.e., SunCom, "will not be required to indemnify, and will not otherwise be liable to, [plaintiff] for Seller's indemnification obligations under this Article 5 for any amounts in excess of a maximum aggregate amount of Two Hundred Thousand Dollars ($200,000)."

In or about February 2008, SunCom became a wholly-owned subsidiary of defendant T-Mobile USA, Inc. (T-Mobile). According to plaintiff, SunCom and/or T-Mobile, as successor in interest to the purchase agreements, breached those agreements by failing to provide plaintiff with documents necessary to verify the amount of the debt transferred under the agreements. Plaintiff also initially alleged that defendants acted negligently in failing to preserve the necessary documents. Supreme Court granted in part defendants' motion to dismiss the complaint by dismissing the negligence cause of action against SunCom, granted in part plaintiff's cross motion for leave to amend the complaint by permitting plaintiff to add a cause of action against T-Mobile for intentional interference with contract, and denied that part of plaintiff's cross motion seeking to add a cause of action against T-Mobile for conversion. On a prior appeal, this Court modified that order by dismissing the negligence cause of action against T-Mobile, and granting plaintiff leave to amend the complaint to include a cause of action for conversion against T-Mobile (*LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301). Defendants thereafter moved for partial summary judgment seeking to limit plaintiff's damages to $1.2 million, i.e., $200,000 on each of the six purchase agreements, and to dismiss plaintiff's causes of action against T-Mobile for conversion and intentional interference with contract. The court granted those parts of defendants' motion seeking to limit plaintiff's damages and to dismiss the cause of action for intentional interference with contract, but denied that part of the motion seeking to dismiss the cause of action for conversion. Plaintiff appeals and defendants cross-appeal.

Contrary to plaintiff's contention on its appeal, we conclude that the court properly determined that the clear and unambiguous language of the indemnification provisions of the purchase agreements apply to this action. The purchase agreements provide that they are to be "governed by, and construed and enforced in accordance with[,] the laws of the Commonwealth of Pennsylvania," and all parties agree that Pennsylvania law applies here. "In undertaking the interpretation of a contract under Pennsylvania law, the court must begin with the language of the contract itself" (*United States Steel Corp. v Lumbermens Mut. Cas. Co.*, 2005 WL 2106580, *7 [US Dist Ct, WD Pa, Aug. 31, 2005, No. Civ. A. 02-2108]). "The ultimate goal of interpreting a contract is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement" (*County of Delaware v J.P. Mascaro & Sons, Inc.*, 830 A2d 587, 591, *affd* 582 Pa 590, 873 A2d 1285). Where contractual language is "clear and unambiguous, the focus of interpretation is upon the terms of the agreement *as manifestly expressed*, rather than as, perhaps, silently intended" (*Steuart v McChesney*, 498 Pa 45, 49, 444 A2d 659, 661; *see Halpin v LaSalle Univ.*, 432 Pa Super 476, 481,

639 A2d 37, 39, *appeal denied* 542 Pa 670, 668 A2d 1133). "A contract is not rendered ambiguous by the mere fact that the parties do not agree upon its proper construction" (*J.P. Mascaro & Sons, Inc.*, 830 A2d at 591; *see Halpin*, 432 Pa Super at 482, 639 A2d at 39; *see also 12th St. Gym, Inc. v General Star Indem. Co.*, 93 F3d 1158, 1165). Rather, "[a] contract is ambiguous if it is *reasonably susceptible* of different constructions and capable of being understood in more than one sense" (*Trizechahn Gateway LLC v Titus*, 601 Pa 637, 653, 976 A2d 474, 483 [internal quotation marks omitted and emphasis added]; *see Madison Constr. Co. v Harleysville Mut. Ins. Co.*, 557 Pa 595, 606, 735 A2d 100, 106).

Here, we agree with defendants that the indemnification provisions at issue herein are broadly worded and encompass first-party claims, i.e., claims between the contracting parties (*see SBA Network Servs., Inc. v Telecom Procurement Servs., Inc.*, 250 Fed Appx 487, 492 [3rd Cir 2007]; *Waynesborough Country Club of Chester County v Diedrich Niles Bolton Architects, Inc.*, 2008 WL 4916029, *4-5 [ED Pa, Nov. 12, 2008, No. Civ. A. 07-155]; *STS Holdings, Inc. v CDI Corp.*, 2004 WL 739869, *2-3 [US Dist Ct, ED Pa, Mar. 19, 2004, No. Civ. A. 99-3480]; *Circuit City Stores, Inc. v Citgo Petroleum Corp.*, 1995 WL 393721, *5 [US Dist Ct, ED Pa, June 29, 1995, No. Civ. A. 92-7394]; *see also Benchmark Group, Inc. v Penn Tank Lines, Inc.*, 612 F Supp 2d 562, 594 n16 [ED Pa 2009]). We note that nothing in article 5 of the purchase agreements limits that article's provisions to claims commenced by third parties (*see STS Holdings, Inc.*, 2004 WL 739869, at *3; *Circuit City Stores, Inc.*, 1995 WL 393721, at *5). To the contrary, section 5.5 of the purchase agreements, entitled "Procedure for Indemnification," specifically contemplates first-party indemnification claims. Because the relevant provisions of the purchase agreements are unambiguous, we must enforce the language as written (*see Waynesborough Country Club of Chester County*, 2008 WL 4916029, at *3; *see generally Madison Constr. Co.*, 557 Pa at 606, 735 A2d at 106). Although plaintiff contends that such result is unfair and economically unreasonable, it is well established that "[a] court may not rewrite [a] contract for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice . . . make for [the parties] a better contract than they chose, or saw fit, to make for themselves, or remake a contract, under the guise of construction, because it later appears that a different agreement should have been consummated in the first instance" (*Steuart*, 498 Pa at 51, 444 A2d at 662). Thus, the court properly concluded that plaintiff is bound by the indemnification provisions and, thus, the limitations on liability set forth in article 5 of the purchase agreements (*see STS Holdings, Inc.*, 2004 WL 739869, at *3).

We agree with plaintiff, however, that there is an issue of fact whether the $200,000 limitation on liability applies to each of the six purchase agreements executed by the parties or to each of the 28 debt portfolio transfers collectively consummated thereunder. In order to affirm an order granting " 'summary judgment on an issue of contract interpretation, we must conclude that the contractual

language is subject to only one reasonable interpretation' " (*Sanford Inv. Co., Inc. v Ahlstrom Mach. Holdings, Inc.*, 198 F3d 415, 420-421). Here, we conclude that the language of the purchase agreements is ambiguous, i.e., it is "subject to more than one reasonable interpretation when applied to a particular set of facts" (*Shepard v Temple Univ.*, 948 A2d 852, 857), and thus that the court erred in granting partial summary judgment to defendants limiting plaintiff's damages to $200,000 per purchase agreement. We therefore modify the order accordingly.

As noted above, the parties executed a total of six purchase agreements containing the indemnification clauses at issue—the four agreements transferring individual debt portfolios and the two forward flow agreements. The forward flow agreements provide that each of the monthly debt portfolio transfers are "[s]ubject to the terms of this Agreement," and that the accounts are to be "transferred and assigned pursuant to a Bill of Sale in the form attached [t]hereto." The language of the forward flow agreements and the form bill of sale support defendants' interpretation, accepted by the court, that article 5's limitation of liability applies to the six agreements, not to each separate debt portfolio transfer. According to the court, "[c]onstruing the writings themselves, the Bills of Sale and Assignments of Accounts were not intended to be separate agreements from the [purchase agreements] under which they were issued." We note, however, that the parties did not use the form bill of sale attached to the forward flow agreements for their subsequent transactions, and that the bills of sale that they actually executed appear to function as stand-alone agreements. Specifically, the bills of sale accompanying each forward flow agreement do not refer back to the forward flow agreement, but rather refer to a separate "Purchase Agreement" dated as of the date of the transfer. The bills of sale were accompanied by an "Inventory of Receivables included under this Agreement"; a document listing the number and face value of the accounts transferred, the total purchase price, the total due at closing, and the closing date; and a cover page entitled "General Terms and Conditions," which is followed by a copy of the forward flow agreement. The parties followed the same pattern with respect to the first five bills of sale executed under the second forward flow agreement. After plaintiff terminated the second forward flow agreement and amended the agreement to provide for a lower purchase price, the parties amended the bill of sale to refer back to the second forward flow agreement.

We conclude that the imprecise language contained in the earlier bills of sale is ambiguous, i.e., "it is reasonably susceptible of different constructions and capable of being understood in more than one sense" (*Madison Constr. Co.*, 557 Pa at 606, 735 A2d at 206 [internal quotation marks omitted]). Specifically, it is unclear whether the terms and conditions of the forward flow agreements—most notably, the indemnification provisions—apply to *all* of the debt portfolio transfers under a given purchase agreement or to *each* debt portfolio transfer, individually. In our view, that ambiguity presents an issue "of fact for the trier of fact to resolve in light

of the extrinsic evidence offered by the parties in support of their respective interpretations" (*Sanford Inv. Co., Inc.*, 198 F3d at 421; *see School Dist. of City of Monessen v Farnham & Pfile Co., Inc.*, 878 A2d 142, 149; *Juniata Val. Bank v Martin Oil Co.*, 736 A2d 650, 663; *see generally Community Coll. of Beaver County v Community Coll. of Beaver County, Socy. of the Faculty [PSEA/NEA]*, 473 Pa 576, 592, 375 A2d 1267, 1275). Here, plaintiff's president and vice president averred that each debt portfolio purchased under the forward flow agreements constituted a separate and distinct contract. Plaintiff's expert likewise opined that "[i]t is generally understood and accepted in the [debt collection] industry that a forward flow agreement sets forth the general terms and conditions for each successive monthly purchase, and that each sale of a portfolio is a separate and distinct contract or agreement." Thus, in his opinion, there were "28 separate contracts entered into between the parties" and "any limitation on the indemnification obligation would apply to each separate portfolio purchase." In light of plaintiff's extrinsic evidence and the well-settled principle that "indemnity clauses are construed most strictly against the party who drafts them especially when that party is the indemnitee" (*Ratti v Wheeling Pittsburgh Steel Corp.*, 758 A2d 695, 702, *appeal denied* 567 Pa 715, 785 A2d 90), we conclude that the court erred in accepting defendants' interpretation of the contract and in limiting plaintiff's damages to $1.2 million upon defendants' motion for partial summary judgment (*see School Dist. of City of Monessen*, 878 A2d at 149; *Juniata Val. Bank*, 736 A2d at 663-664).

Contrary to plaintiff's final contention, we conclude that the court properly dismissed the cause of action for tortious interference with contract against T-Mobile. As SunCom's successor in interest to the purchase agreements, T-Mobile cannot be liable for interfering with its own contract (*see Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425; *Tri-Delta Aggregates v Goodell*, 188 AD2d 1051, 1051, *lv denied* 82 NY2d 653).

With respect to the cross appeal, we agree with defendants that the court erred in denying that part of their motion for partial summary judgment dismissing the 29th cause of action, for conversion. "[I]t is well established that a cause of action to recover damages for conversion cannot be predicated on a mere breach of contract" (*Schmidt v Lorenzo*, 70 AD3d 1362, 1362 [internal quotation marks omitted]). Because plaintiff "failed to show . . . that [T-Mobile] engaged in tortious conduct separate and apart from [its alleged] failure to fulfill its contractual obligations," the cause of action for conversion must be dismissed (*LHR, Inc.*, 88 AD3d at 1304 [internal quotation marks omitted]; *see Matzan v Eastman Kodak Co.*, 134 AD2d 863, 863-864). We therefore further modify the order accordingly.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1087

CA 13-00662

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

JOSEPH CATALANO AND BARBARA CATALANO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LAURIE TANNER, INDIVIDUALLY AND DOING BUSINESS
AS DAN'S RESTAURANT, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 21, 2013. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Joseph Catalano (plaintiff) when a chair at a restaurant owned by defendant collapsed as he sat on it, causing him to fall to the ground. We agree with defendant that Supreme Court erred in denying her motion for summary judgment dismissing the complaint.

Defendant met her initial burden of establishing that she neither created nor had actual or constructive notice of the allegedly defective condition of the chair (*see Loiacono v Stuyvesant Bagels, Inc.*, 29 AD3d 537, 538; *see generally King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415). In support of the motion, defendant submitted, inter alia, the deposition testimony of plaintiff and his wife, plaintiff Barbara Catalano, and defendant. Plaintiff and his wife testified that, prior to the accident, they had patronized defendant's restaurant for a number of years and had never noticed or encountered any problems with the metal-framed chairs at issue. Indeed, plaintiff testified that he went to the restaurant five mornings per week, that he and his dining companions sat at the same table and in the same chairs every morning, and that neither he nor his companions had ever experienced any problems with the chairs. On the day he fell, plaintiff did not notice anything wrong with the chair when he sat

down, and he had no idea what caused the chair to collapse. Defendant testified that, prior to the accident, she had received no complaints about the chairs and no such chair had broken previously. With the exception of the chair at issue, defendant continued to use the same chairs at the restaurant, and has not experienced any problems with the chairs since the accident (*see generally Anderson v Justice*, 96 AD3d 1446, 1447).

Plaintiffs failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiffs asserted only that there were issues of fact concerning defendant's constructive notice, i.e., whether reasonable inspections of the chair would have disclosed the alleged defect that caused the chair to collapse. The duty of a property owner to inspect his or her property "is measured by a standard of reasonableness under the circumstances" (*Pommerenck v Nason*, 79 AD3d 1716, 1717). Here, defendant testified that she wipes down the chairs at the end of each day and that, "every month or so," she performs a "major cleaning" of the restaurant, which includes an inspection of the chairs. In the absence of any prior complaints, incidents, accidents, or any other circumstances that should have aroused defendant's suspicion that the chairs were defective (*see Anderson*, 96 AD3d at 1448; *Pommerenck*, 79 AD3d at 1718; *Scoppettone v ADJ Holding Corp.*, 41 AD3d 693, 695), we conclude that plaintiffs failed to raise a triable issue of fact concerning the reasonableness of defendant's inspection practices, and thus whether defendant had constructive notice of the alleged defective condition of the chair.

We reject plaintiffs' alternative contention that notice to defendant was not required because the doctrine of res ipsa loquitur applies. That doctrine "does not apply here because, inter alia, defendant was not in exclusive control of the instrumentality that allegedly caused plaintiff's injuries," i.e., the chair (*Moore v Ortolano*, 78 AD3d 1652, 1653; *see Chini v Wendcentral Corp.*, 262 AD2d 940, 940, *lv denied* 94 NY2d 752). Specifically, "[t]he record is devoid of evidence that defendant's control of the chair, located in a restaurant open to the public where innumerable patrons had access to the chair, was sufficiently exclusive 'to fairly rule out the chance that the defect . . . was caused by some agency other than defendant's negligence' " (*Hardesty v Slice of Harlem, II, LLC*, 79 AD3d 472, 472, quoting *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 228; *see Loiacono*, 29 AD3d at 538; *Chini*, 262 AD2d at 940). The restaurant at issue is open to the public five days per week for breakfast and lunch, and plaintiff's wife testified that "everybody sits at th[e] table" where the allegedly defective chair was located, and that "[i]t's like a social gathering table."

All concur except VALENTINO and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. We disagree with the majority's conclusion that defendant met her initial burden of establishing lack of constructive notice. To the contrary, we conclude that there are issues of fact concerning the nature of the alleged defect that caused the chair to collapse and the reasonableness of defendant's preaccident inspection practices, i.e.,

whether reasonable inspection practices should have alerted defendant to the defective condition of the chair, thereby precluding summary judgment to defendant (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Notably, the record is devoid of any evidence of the nature of the defect that caused the chair leg to separate from the seat, and any evidence indicating whether the defect was hidden or observable. Photographs taken of the chair showing its postaccident condition show that the chair leg cleanly separated from the seat and that the leg had been affixed to the seat with some type of fasteners. With respect to the condition of the chair, defendant testified that she had purchased the chair as part of a larger purchase of used chairs, that she did not know the weight capacity of the chairs, and that some of her restaurant patrons probably weighed 300 pounds or more. With respect to defendant's preaccident inspection practices, defendant testified that she inspected the chairs approximately once per month, "to make sure that everything is solid[,] feels good and everything is in shape." Defendant failed to submit any evidence, however, as to when she last conducted an inspection of the chair and its fasteners prior to the injury of plaintiff Joseph Catalano (*see Bailey v Curry*, 1 AD3d 1059, 1059; *cf. Anderson v Justice*, 96 AD3d 1446, 1447-1448) and, in the absence of such evidence, we conclude that she has failed to establish as a matter of law that she lacked constructive notice of the alleged defect that caused the chair to collapse (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501). Defendant also failed to submit any evidence that a reasonable inspection would not have revealed the alleged defect (*see Personius v Mann*, 20 AD3d 616, 617, *mod on other grounds* 5 NY3d 857). For the foregoing reasons, we conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint and would thus affirm.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1187

CA 12-02362

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

IN THE MATTER OF JASON SYKES, MARC MARTINEZ, TODD FADDOUL AND SHAWN ARNDT, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, RESPONDENT-APPELLANT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 11, 2012 in a CPLR article 78 proceeding. The judgment granted the petition to compel respondent to permanently designate petitioners as police detectives.

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

Memorandum: Petitioners are members of the Niagara Falls Police Department (NFPD) Crime Scene Unit and commenced this CPLR article 78 proceeding seeking designation as police detectives pursuant to Civil Service Law § 58 (4) (c) (ii). After a hearing, Supreme Court granted the petition, concluding that petitioners were temporarily assigned to the same duties as detectives in the NFPD and thus were entitled to such designation in accordance with the statute (*see id.*). Viewing the evidence in the light most favorable to petitioners, the prevailing parties, we conclude that the court's decision is supported by a fair interpretation of the evidence (*see generally Matter of Harnischfeger v Moore*, 79 AD3d 1706, 1707, *lv dismissed* 16 NY3d 848; *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1193

CA 12-02342

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

ELLISON HEIGHTS HOMEOWNERS ASSOCIATION, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELLISON HEIGHTS LLC AND TOWN OF PENFIELD,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR DEFENDANT-RESPONDENT ELLISON HEIGHTS LLC.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF PENFIELD.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William P. Polito, J.), entered September 4, 2012. The order and judgment, among other things, dismissed the first cause of action against all defendants and dismissed the remainder of the amended complaint against defendant Town of Penfield.

It is hereby ORDERED that the appeal from the order and judgment insofar as it concerns the easement over the emergency access driveway is dismissed and the order and judgment is unanimously modified on the law by deleting the fourth ordering paragraph insofar as it grants a declaration and as modified the order and judgment is affirmed without costs.

Memorandum: These consolidated appeals involve a dispute between landowners of two adjoining properties. The properties previously were owned as a single parcel, and in the late 1990s the owner of the property sought to develop the parcel into apartment buildings and townhome units as a cluster development pursuant to Town Law § 278. After the resolution of certain obstacles to approval, including ensuring compliance with this Court's 1999 decision regarding the zoning requirements (*Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342), the Town of Penfield Planning Board (Planning Board) approved the application. The owner of the parcel subsequently conveyed it to a developer that, in turn, conveyed the property to Ellison Heights LLC (defendant).

In 2005, defendant applied to the Planning Board to amend the site plan for the cluster development. Defendant sought, inter alia, to reduce the number of townhomes on the property, increase the number of apartment units, and subdivide the property into two smaller parcels, with the townhomes developed on one parcel as Phase I of the project and the apartment buildings developed on the other parcel as Phases II and III of the project. The Planning Board eventually approved defendant's site plan and the subdivision of the parcel. Defendant thereafter began construction on the townhomes and sold the property on which the townhomes are located to plaintiff. Defendant retained the property on which the apartment buildings were to be constructed at some later date.

In 2011, defendant applied to the Planning Board to amend its site plan for the property that it had retained. Defendant sought to develop the property using the same density and open space restrictions established by the Planning Board in 1999, thereby incorporating the open space of plaintiff's property in its density calculation. Plaintiff thereafter commenced this action seeking, inter alia, declarations regarding its property rights pursuant to RPAPL article 15 (*see* RPAPL 1521 [1]). Plaintiff alleged, inter alia, that defendant had not reserved an easement over the private road on plaintiff's property known as Sable Oaks Lane, that defendant had no right to use the emergency access driveway or utilities located on plaintiff's property, and that defendant had no right to restrict development on plaintiff's property by using the open space located on plaintiff's property in defendant's calculation of the density of the development on its own property. Defendant, along with the individual defendants, moved to dismiss the amended complaint against them pursuant to CPLR 3211 (a) (1) and (7), and defendant Town of Penfield (Town) also moved to dismiss the amended complaint against it, contending, inter alia, that the Town is not a proper defendant to any of plaintiff's causes of action. By the order and judgment in appeal No. 1, Supreme Court dismissed the first cause of action against all defendants and dismissed the remainder of the amended complaint against the Town as well.

Plaintiff then moved pursuant to CPLR 3025 (c) for leave to amend the amended complaint, to conform the pleading to the order and judgment in appeal No. 1. Plaintiff sought leave to assert a new cause of action pursuant to RPAPL article 15 alleging that, because the court had declared that plaintiff's property was bound by the plat map filed in 2007, then defendant's property likewise was bound by that plat map, and defendant thus was prohibited from developing its property in a manner inconsistent with the plat map and the document referenced therein. By the order and judgment in appeal No. 2, the court denied plaintiff's motion on the ground that the proposed amendment was without merit.

Initially, we agree with defendant that plaintiff's appeal from the order and judgment in appeal No. 1 insofar as it concerns defendant's use of the emergency access driveway located on plaintiff's property must be dismissed as moot inasmuch as "changed circumstances prevent us 'from rendering a decision which would

effectually determine an actual controversy between the parties involved' " (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811, *cert denied* 540 US 1017). Plaintiff does not refute defendant's assertion that, during the pendency of this action, defendant submitted a revised site plan to the Planning Board that made no use of the emergency access driveway on plaintiff's property. Contrary to plaintiff's contention, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *Matter of Gannett Co., Inc. v Doran*, 74 AD3d 1788, 1789).

We reject plaintiff's contention in appeal No. 1 that the court erred in granting the Town's motion with respect to the RPAPL cause of action against it. The Town will not "be inequitably affected by a judgment in the action" (CPLR 1001 [a]), nor does the Town "have an estate or interest in the real property which may in any manner be affected by the judgment" (RPAPL 1511 [2]). Thus, contrary to plaintiff's contention, the Town is not a necessary party to the RPAPL article 15 cause of action (*see Boccardi v Horn Constr. Corp.*, 204 AD2d 502, 502).

Addressing next the propriety of the order and judgment in appeal No. 1 with respect to defendant, we note that, although plaintiff's cause of action against defendant pursuant to RPAPL article 15 also sought declarations regarding defendant's use of Sable Oaks Lane and utilities located on plaintiff's property, plaintiff has abandoned any contention regarding the utilities or defendant's easement over Sable Oaks Lane by failing to address those issues in its brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Thus, the only remaining issue in appeal No. 1 with respect to that cause of action against defendant concerns the density and open space conditions that restrict further development on plaintiff's property.

Plaintiff contends in appeal No. 1 that, in dismissing the first cause of action against defendant, the court erred in determining that documents on file with the Town permanently encumber and restrict further development of plaintiff's property. According to plaintiff, those documents, which reference the density and open space restrictions for the cluster development, are not within its chain of title and thus cannot form the basis for an encumbrance on its property. We reject that contention, inasmuch as defendant is correct that the density and open space restrictions on further development of plaintiff's property are the result of zoning regulations and do not amount to encumbrances that must be recorded in plaintiff's chain of title (*see O'Mara v Town of Wappinger*, 9 NY3d 303, 309-311). Here, the Planning Board imposed the density and open space restrictions at issue when it originally approved the cluster development in 1999 (*see* Town Law § 278 [3] [b]). Defendant's subsequent 2005 application made use of those same density and open space restrictions, despite the subdivision of the property into two parcels, and the application was approved by the Planning Board. "The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and

distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement" (*Matter of Friends of Shawangunks v Knowlton*, 64 NY2d 387, 392). We conclude that here, as in *O'Mara*, the density and open space conditions that restrict further development of plaintiff's property are the result of the Town's "ability to impose such conditions on the use of land through the zoning process," which conditions are "meaningless without the ability to enforce those conditions, even against a subsequent purchaser" (*O'Mara*, 9 NY3d at 311). Indeed, it is well settled that, " 'where a person agrees to purchase real estate, which, at the time, is restricted by laws or ordinances, he will be deemed to have entered into the contract subject to the same [and] [h]e cannot thereafter be heard to object to taking the title because of such restrictions' " (*Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 570-571, quoting *Lincoln Trust Co. v Williams Bldg. Corp.*, 229 NY 313, 318).

Inasmuch as the density and open space restrictions are the result of the zoning process, not property encumbrances that must be recorded in plaintiff's chain of title, we further conclude that dismissal of plaintiff's RPAPL article 15 cause of action, rather than the issuance of declarations pursuant to RPAPL 1521 (1), was the proper remedy (*see generally O'Mara*, 9 NY3d at 309-311). By using the density and open space restrictions on plaintiff's property in its calculation of the density and open space for the proposed development on its own property, defendant did not "claim an estate or interest in [plaintiff's] real property, adverse to that of the plaintiff" (RPAPL 1515 [1] [b]), and plaintiff thus may not challenge those zoning restrictions pursuant to an RPAPL article 15 cause of action. We therefore modify the order and judgment by deleting from the fourth ordering paragraph the declaration that "the Phase I property is subject to the plat map as filed in 2007."

Finally, we conclude with respect to the order and judgment in appeal No. 2 that the court properly denied plaintiff's motion for leave to amend the amended complaint inasmuch as the proposed amendments are patently lacking in merit (*see generally Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396). As the court properly noted, either party could apply to the Planning Board for modification of the density and open space restrictions on its property and, if plaintiff disagreed with the Planning Board's determination, plaintiff's remedy would be to commence a proceeding pursuant to CPLR article 78 after exhausting its administrative remedies.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1194

CA 12-02343

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

ELLISON HEIGHTS HOMEOWNERS ASSOCIATION, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELLISON HEIGHTS LLC AND TOWN OF PENFIELD,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR DEFENDANT-RESPONDENT ELLISON HEIGHTS LLC.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF PENFIELD.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William P. Polito, J.), entered December 3, 2012. The order and judgment denied the motion of plaintiff for leave to amend its amended complaint.

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

Same Memorandum as in *Ellison Hgts. Homeowners Assoc., Inc. v Ellison Hgts. LLC* ([appeal No. 1] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1201

KA 11-02399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VAN T. CUNG, 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 PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 21, 2011. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree 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 upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [i]) and endangering the welfare of a child (§ 260.10 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon the same jury verdict of criminal contempt in the second degree (§ 215.50 [3]) as a lesser included offense of criminal contempt in the first degree (§ 215.51 [b] [ii]). In both appeals, defendant contends that the evidence is legally insufficient to support his conviction of the crimes of criminal contempt in the first and second degrees, and that the verdict with respect to those crimes is against the weight of the evidence. We affirm.

As defendant correctly concedes, his challenge to the legal sufficiency of the evidence is unpreserved for our review inasmuch as "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). In any event, we reject defendant's challenge.

With respect to appeal No. 1, defendant contends that the evidence is legally insufficient to establish that he knowingly and intentionally violated the June 2010 no-contact order of protection issued in favor of the victim (hereafter, first order of protection),

and that the verdict is against the weight of the evidence in that regard. We reject those contentions. It is undisputed that defendant was present in court and represented by an attorney when the first order of protection was issued, that he signed the order, and that he received a copy thereof. Although defendant claimed that he did not fully understand the order of protection because he speaks only Chin, a Burmese dialect, the People introduced evidence that the order of protection was explained to defendant in Burmese, and that defendant understood that he had to stay away from, and could not contact, the victim. A Burmese interpreter testified that, on the date the first order of protection was issued, he translated the order of protection from English to Burmese and explained it to defendant (*see People v Wilmore*, 305 AD2d 117, 118, *lv denied* 100 NY2d 589). Further, a caseworker testified that, after the incident underlying defendant's conviction of criminal contempt in the first degree, defendant admitted to her that he knew there was an order of protection in place at the time of the incident and that he understood its meaning. We thus conclude that "[t]he evidence is legally sufficient . . . to establish defendant's knowledge of the existence and contents of [the first] order of protection [and] the conduct prohibited thereby" (*People v Roman*, 13 AD3d 1115, 1115, *lv denied* 4 NY3d 802; *see Wilmore*, 305 AD2d at 118).

Contrary to the further contention of defendant in appeal No. 1, the evidence is legally sufficient to establish that he intentionally placed or attempted to place the victim in reasonable fear of physical injury (*see* Penal Law § 215.51 [b] [i]; *see also People v Harrison*, 270 AD2d 876, 876, *lv denied* 95 NY2d 797). "It is well established that a defendant may be presumed to intend the natural and probable consequences of his [or her] actions" (*Roman*, 13 AD3d at 1116 [internal quotation marks omitted]), and that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682; *see People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832). Here, the People established that, after calling the victim 23 times, defendant knocked on the door to the victim's apartment and, when she did not answer, he entered the apartment through an upstairs door or window. The victim called 911 and then fled through a window onto the roof of the porch with the parties' infant daughter strapped to her back because, according to the victim, she was afraid defendant would kill her. Defendant then picked up a knife and, according to several police officers who responded to the scene, waved the knife at the victim and shouted at her through the window. A neighbor testified that the victim was "crying" and "screaming" on the roof of the porch, and that she "sounded terrified." We thus conclude that the evidence is legally sufficient to establish that defendant intentionally placed the victim in reasonable fear of physical injury (*see Harrison*, 270 AD2d at 876; *see also People v Crump*, 77 AD3d 1335, 1335-1336, *lv denied* 16 NY3d 857). Indeed, defendant himself testified that the victim was afraid of him and that she was going to jump off the roof to get away from him.

With respect to appeal No. 2, we likewise conclude that the evidence is legally sufficient to establish that defendant

intentionally violated the order of protection (*see* Penal Law § 215.50 [3]; *Roman*, 13 AD3d at 1115). Although defendant again contends that he did not fully understand the October 2010 order of protection issued in favor of the victim (hereafter, second order of protection), he concedes that the order "was served at a court proceeding at which [he] was assisted by counsel and an interpreter" (*People v Pichardo*, 298 AD2d 150, 151, *lv denied* 99 NY2d 562). With respect to defendant's claim that he did not think that it was a violation of the second order of protection if the victim "accept[ed] [him]," the victim testified that she permitted defendant into her home in December 2010 only because he threatened her (*see generally People v Barrios-Rodriguez*, 107 AD3d 1533, 1534).

Because the evidence is legally sufficient to support the conviction of criminal contempt in the first and second degrees, there is no merit to defendant's further contention that defense counsel's failure to make a specific motion for a trial order of dismissal relative to those crimes constitutes ineffective assistance of counsel (*see People v Pytlak*, 99 AD3d 1242, 1243, *lv denied* 20 NY3d 988). Further, viewing the evidence in light of the elements of criminal contempt in the first and second degrees 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 with respect to those crimes (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to the further contention of defendant in both appeals, we conclude that Supreme Court did not err in its *Molineux* ruling in allowing the People to introduce testimony regarding defendant's prior acts of domestic violence against the victim inasmuch as that testimony was "relevant to provide background information concerning the context and history of defendant's relationship with the victim" (*People v Wolff*, 103 AD3d 1264, 1265, *lv denied* 21 NY3d 948; *see People v Dennis*, 91 AD3d 1277, 1279, *lv denied* 19 NY3d 995), and was also relevant to the issue whether defendant intended to place or to attempt to place the victim in reasonable fear of physical injury (*see People v Garvin*, 37 AD3d 372, 372-373, *lv denied* 8 NY3d 984; *see also People v Thomas*, 85 AD3d 1572, 1572, *affd* 21 NY3d 226; *People v McCowan*, 45 AD3d 888, 890, *lv denied* 9 NY3d 1007). Further, the probative value of such testimony exceeded its potential for prejudice (*see Wolff*, 103 AD3d at 1266; *Crump*, 77 AD3d at 1336; *Garvin*, 37 AD3d at 372-373), and the court's limiting instructions minimized any prejudicial impact (*see People v Rogers*, 103 AD3d 1150, 1152-1153, *lv denied* 21 NY3d 946).

The court likewise did not err in its *Molineux* ruling in allowing the victim to testify that defendant forced her to engage in sexual intercourse during the time period charged in the indictment in appeal No. 2. That testimony was relevant to an element of the charged crime, i.e., whether defendant "intentionally place[d] or attempt[ed] to place [the victim] . . . in reasonable fear of physical injury . . . by . . . engaging in a course of conduct or repeatedly committing acts over [that] period of time" (Penal Law § 215.51 [b] [ii]; *see People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838).

Finally, the sentence is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1202

KA 11-02400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VAN T. CUNG, 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 PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 21, 2011. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the second degree.

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

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1213

CA 13-00190

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

MICHAEL F. FERCHAW AND REBECCA L. FERCHAW,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RUTH A. TROXEL, DEFENDANT-APPELLANT.

THOMAS J. RZEPKA, ROCHESTER, AND BURKE, ALBRIGHT, HARTER & REDDY, LLP, FOR DEFENDANT-APPELLANT.

ROSSETTIE ROSSETTIE & MARTINO LLP, CORNING (GABRIEL V. ROSSETTIE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered September 14, 2012. The judgment granted the motion of plaintiffs seeking, inter alia, summary judgment declaring valid and enforceable the purchase and sale contract executed by the parties on July 13, 2011 and seeking certain injunctive relief.

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

Memorandum: Plaintiffs commenced this action pursuant to RPAPL article 15, seeking a judgment declaring that the real estate contract executed by the parties is valid and enforceable. The complaint also sought a judgment directing defendant to cooperate with plaintiffs in their efforts to perform the contract and to grant plaintiffs access to the property for the purpose of obtaining an appraisal. Supreme Court granted plaintiffs' motion for summary judgment on both causes of action, issuing the declaration and granting the injunctive relief sought by plaintiffs. We affirm.

In July 2011, shortly after her husband died, defendant approached plaintiff Michael F. Ferchaw and asked whether he would like to purchase her farm, stating that she wanted to sell the property as soon as possible. Defendant had significant debt and a fixed income, and she was concerned that she could not afford to keep the farm. After inspecting the property, plaintiffs agreed to defendant's purchase price of $300,000. Plaintiffs' attorney drafted the purchase and sale contract, which provided, inter alia, that the sale was "contingent upon [plaintiffs] obtaining mortgage financing satisfactory to [them] within six (6) weeks of the acceptance of [their] offer." The purchase price set forth in the contract is

$375,000, with a $75,000 "gift of equity" to plaintiffs at closing, "leaving a balance of $300,000 being payable" to defendant at closing. The contract was not contingent upon approval of the parties' attorneys.

The parties executed the contract on July 13, 2011. The following day, defendant received an offer from another party to purchase the oil, gas and mineral rights on the property for more than $440,000. Although, as noted, the contract did not include a contingency for attorney approval, defendant's attorney advised plaintiffs on July 15, 2011 that he did not approve of the contract and that it was "deemed canceled." Plaintiffs thereafter commenced this action.

Defendant contends that the court erred in granting plaintiffs' motion for summary judgment because plaintiffs offered no evidence that they had the financial wherewithal to purchase the property and thus failed to establish that they were ready, willing, and able to perform under the contract. That contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, defendant's contention lacks merit. Although a plaintiff seeking specific performance or monetary damages for nonperformance of a contract must demonstrate that he or she was ready, willing and able to perform on the contract (*see Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 531-532; *Madison Invs. v Cohoes Assoc.*, 176 AD2d 1021, 1021-1022, *lv dismissed* 79 NY2d 1040), plaintiffs in this case have not requested specific performance or monetary damages; instead, their complaint seeks declaratory relief and a court directive that defendant must allow plaintiffs on the property for the purpose of obtaining an appraisal. We note that, because defendant refused to allow plaintiffs to enter the property, plaintiffs were unable to obtain an appraisal, which was necessary for them to secure financing. Thus, defendant's anticipatory breach impeded plaintiffs' ability to demonstrate that they were financially capable of purchasing the property.

Defendant further contends that, because the mortgage contingency provision of the contract fails to include essential and material terms of the mortgage to be obtained by plaintiffs, such as the interest rate and term of the mortgage, there is an issue of fact whether the contract is unenforceable under the statute of frauds (*see* General Obligations Law § 5-703 [2]). By failing to plead the statute of frauds as an affirmative defense in her answer, however, defendant waived that defense (*see* CPLR 3018 [b]; *Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1566). In any event, we conclude that the contract satisfies the statute of frauds inasmuch as it identifies the parties, describes the property to be conveyed, sets forth the purchase price and the closing date, and provides the medium of payment (*see Sabetfard v Djavaheri Realty Corp.*, 18 AD3d 640, 641; *Birnhak v Vaccaro*, 47 AD2d 915, 916). Although there is authority for the proposition that "the terms and conditions of a mortgage subject to which a purchaser is to take title to real property are essential and material elements of [a] contract" for the sale of real property (*Read v Henzel*, 67 AD2d 186, 189; *see Matter of Licata*, 76 AD3d 1076, 1077;

Wacks v King, 260 AD2d 985, 987), those cases involve contracts pursuant to which the seller loaned money to the buyer and then held a mortgage on the transferred property. Here, in contrast, the contract provided for defendant to be paid in full at closing and for plaintiffs to obtain financing from a third-party lender. Thus, there was no need for the parties' contract to specify the interest rate and the term of the mortgage.

Defendant's further contention that the "gift of equity" provision renders the contract illegal is improperly raised for the first time on appeal, and we therefore do not address it (*see Mee v Strader*, 89 AD3d 1487, 1488; *Matter of City of Yonkers v International Assn. of Firefighters, Local 628, AFL-CIO*, 58 AD2d 891, 891, *lv denied* 43 NY2d 643). We reject defendant's related contention that the "gift of equity" provision was drafted and presented to defendant in a manner calculated to deceive her, and we conclude that defendant's alleged lack of understanding of that provision does not render the contract unenforceable (*see generally Da Silva v Musso*, 53 NY2d 543, 550). Finally, we conclude that the issue whether a contingency provision for attorney approval should be required in residential real estate contracts, as defendant suggests, involves "a policy decision for the Legislature, not the courts, to make," and we decline to impose such a requirement (*Doe v City of Schenectady*, 84 AD3d 1455, 1459).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1214

CA 13-00594

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

REMET CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE ESTATE OF JAMES R. PYNE, DECEASED, KATHERINE B. PYNE, INDIVIDUALLY AND AS THE EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, EDWARD R. WIEHL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

NEIL M. GINGOLD, FAYETTEVILLE, AND STEATES, REMMELL, STEATES & DZIEKAN, UTICA, FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), AND MAYER BROWN LLP, CHICAGO, ILLINOIS, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered June 11, 2012. The judgment granted that part of the motion of plaintiff for partial summary judgment on the issue of liability and declared that plaintiff is entitled to indemnification for environmental losses.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied in its entirety, and judgment is granted in favor of defendants as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to indemnification from defendants.

Memorandum: In October 2002, the New York State Department of Environmental Conservation (DEC) sent plaintiff a notice letter identifying plaintiff as a potentially responsible party (PRP), along with four other entities, for the presence of hazardous waste in a section of the Erie Canal in the Town of Frankfort. The letter

requested plaintiff to develop, implement, and finance a remedial program for the site and stated that, if plaintiff did not act, the DEC would perform the remediation itself and seek recovery from plaintiff as a PRP. Plaintiff demanded indemnification from defendants pursuant to an indemnification provision in an agreement between, inter alia, plaintiff and defendants' decedent. When defendants refused to indemnify plaintiff, plaintiff commenced this action seeking, inter alia, a declaration that its losses were subject to indemnification by defendants.

Defendants, with the exception of defendant JP Morgan Escrow Services, (hereafter, defendants) appeal from a judgment granting that part of plaintiff's motion seeking partial summary judgment on the issue of liability and declaring that plaintiff is "entitled to indemnification for all past environmental losses that have occurred to date and for all future environmental losses that will occur due to and arising out of the DEC investigation and/or remediation of the Erie Canal Site in Utica" pursuant to the indemnification provision in the agreement. On appeal, defendants contend that plaintiff is not entitled to indemnification pursuant to that provision. We agree.

As a preliminary matter, we note that defendants appeal from the judgment insofar as Supreme Court granted plaintiff's motion for partial summary judgment on liability, but they purport to appeal from the court's decision with respect to the declaration issued by the court. We exercise our discretion to treat the latter part of the notice of appeal as valid and deem the entire appeal as taken from the judgment (*see* CPLR 5520 [c]; *see generally McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1310).

The indemnification provision in the agreement limits indemnification to only those losses that "arise out of or result from actions . . . that [plaintiff] *is required to take* under or in connection with any Environmental Law or Environmental Permit" (emphasis added). Because the DEC's letter "merely informed . . . plaintiff[] of [its] potential liability and sought voluntary action on [its] part" (*Carpentier v Hanover Ins. Co.*, 248 AD2d 579, 580; *see Technicon Elecs. Corp. v American Home Assur. Co.*, 141 AD2d 124, 145-146, *affd on other grounds* 74 NY2d 66), we conclude that it did not require plaintiff to take action. Consequently, plaintiff is not entitled to indemnification pursuant to the indemnification provision in the agreement. We therefore reverse the judgment and, because we "may search the record and grant summary judgment in favor of a nonmoving party . . . with respect to a cause of action or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430; *see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111), we grant summary judgment to defendants declaring that plaintiff is not entitled to indemnification from defendants.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1215

CA 13-00613

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

IN THE MATTER OF HOLIMONT, INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF ELLICOTTVILLE ZONING BOARD OF
APPEALS AND VILLAGE OF ELLICOTTVILLE,
RESPONDENTS-RESPONDENTS.

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

BACKHAUS & SIMON, P.C., OLEAN (ROBERT J. SIMON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered June 21, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking to challenge the determination of respondent Village of Ellicottville Zoning Board of Appeals (ZBA) denying its request for a use variance to permit it, inter alia, to extend a ski lift over a parcel of land that it had acquired at 36 Adams Street in the Village of Ellicottville. Supreme Court properly denied the petition. "The determination of the ZBA is entitled to great deference and must be sustained where, as here, it has a rational basis and is supported by substantial evidence" (*Matter of Farrell v Johnson*, 266 AD2d 873, 873). The ZBA properly determined that petitioner failed to show that it was entitled to the use variance inasmuch as it failed to establish that it could not realize a reasonable rate of return without the use variance (*see generally Matter of Cohen v Hahn*, 155 AD2d 969, 970). Although petitioner presented the testimony of an expert on that point, we note that it is the "sole province of the ZBA . . . as administrative factfinder" to resolve issues of credibility (*Matter of Supkis v Town of Sand Lake Zoning Bd. of Appeals*, 227 AD2d 779, 781). Additionally, petitioner failed to establish that its proposed development would not alter the essential character of the surrounding neighborhood (*see Matter of Genser v Board of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144, 1147). Indeed, the record establishes

that permitting petitioner to maintain an active ski lift and snowmaking equipment on its parcel will alter the quiet residential area surrounded by nature in which that parcel is located because of the increased use of the parcel. Finally, the record establishes that petitioner's hardship was self-created inasmuch as petitioner previously had stipulated to restrictions calling for an "undisturbed green area" in the location petitioner now seeks to develop (*id.*; *see Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1038, *lv denied* 8 NY3d 807).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1216

TP 13-00782

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

IN THE MATTER OF MARCUS AYUSO, PETITIONER,

V ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

MARCUS AYUSO, 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, Seneca County [Dennis F. Bender, A.J.], entered May 1, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1217

TP 12-00872

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

IN THE MATTER OF CEDRIC REID, PETITIONER,

V ORDER

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

CEDRIC REID, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD 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 May 8, 2012) 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: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1218

KAH 12-02067

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

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

V MEMORANDUM AND ORDER

MALCOLM R. CULLY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY AND ANDREA W. EVANS,
CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), dated August 6, 2012 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot by his release from custody upon reaching his maximum expiration date (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *People ex rel. Kendricks v Smith*, 52 AD2d 1090, 1090). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply, inasmuch as the alleged error he identifies on appeal is not likely to recur, the alleged error is not one typically evading review, and the appeal does not involve any substantial or novel issues (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1220

KA 11-00574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILSON, 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 September 21, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree 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 jury verdict, of predatory sexual assault against a child (Penal Law § 130.96), rape in the first degree (§ 130.35 [1]), and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that County Court abused its discretion or denied him his constitutional right to present a defense in precluding the alibi testimony of a defense witness inasmuch as defendant failed to file a notice of alibi pursuant to CPL 250.20 (*see People v Watson*, 269 AD2d 755, 756, *lv denied* 95 NY2d 806). Defendant failed to preserve for our review his further contention that he was denied his constitutional right to present a defense by the court's preclusion of the non-alibi testimony of that defense witness (*see People v Lane*, 7 NY3d 888, 889; *People v Baxter*, 108 AD3d 1158, 1160), 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 failed to preserve for our review his contention that the court erred in instructing the jury that his wife and daughter were interested witnesses as a matter of law (*see* CPL 470.05 [2]). In any event, although we agree with him that the court erred in giving that instruction (*see People v Fuentes*, 52 AD3d 1297, 1299, *lv denied* 11 NY3d 736), we conclude that the error is harmless (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Contrary to

defendant's further contention, "there is no evidence in the record indicating an abuse of discretion by the court in denying the motion[s] for substitution of counsel where[, as here, the] defendant failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100; *see People v Beriguette*, 84 NY2d 978, 980, *rearg denied* 85 NY2d 924; *People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010).

We reject defendant's contention that he was denied effective assistance of counsel. Defense counsel's failure to file a notice of alibi and failure to object to the improper jury instruction concerning defendant's wife and daughter did not render her representation less than meaningful (*see generally People v Benevento*, 91 NY2d 708, 712-713). To the extent that defendant contends that he was denied effective assistance of counsel by defense counsel's failure to object to the court's rulings with respect to two proposed defense witnesses, as well as her failure to make a closing argument at the end of the suppression hearing, that contention is without merit. Defendant failed to demonstrate that those objections and that closing argument, if made, would have been successful (*see People v Stultz*, 2 NY3d 277, 287; *People v Noguel*, 93 AD3d 1319, 1320, *lv denied* 19 NY3d 965). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1221

KA 12-00122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HILLERY M. DUPLEASIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 13, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [3]). On a prior appeal, we reversed the judgment convicting defendant of, inter alia, the instant crime and granted a new trial based on our conclusion that "Supreme Court failed to comply with CPL 310.30 during jury deliberations" (*People v Dupleasis*, 79 AD3d 1777, 1778). Defendant was retried on only one count of murder in the second degree, and now contends that the evidence is legally insufficient to establish that he was the individual who shot the victim or that the homicide took place during a robbery or a burglary. As defendant correctly concedes, he failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19), and we conclude in any event that it lacks merit. The testimony of defendant's accomplice is legally sufficient to establish both facts (*see generally People v Bleakley*, 69 NY2d 490, 495), and that testimony was not incredible as a matter of law (*see People v Shedrick*, 104 AD2d 263, 274, *affd* 66 NY2d 1015, *rearg denied* 67 NY2d 758; *see also People v Santiago*, 96 AD3d 1495, 1496, *mod on other grounds* 22 NY3d 900). Moreover, the accomplice's testimony was sufficiently corroborated (*see generally People v Reome*, 15 NY3d 188, 191-192). "Although there is no direct evidence of defendant's intent to commit the robbery [or burglary], it is well settled that '[i]ntent may be inferred from

conduct as well as the surrounding circumstances' " (*People v DeNormand*, 1 AD3d 1047, 1048, *lv denied* 1 NY3d 626, quoting *People v Steinberg*, 79 NY2d 673, 682; *see People v Kyler*, 280 AD2d 346, 347-348, *lv denied* 96 NY2d 802). Inasmuch as the evidence is legally sufficient to support the conviction, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to move for a trial order of dismissal on more specific grounds. "It is well settled that [a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make a motion or argument that has little or no chance of success" (*People v Wilson*, 104 AD3d 1231, 1232, *lv denied* 21 NY3d 1011, *reconsideration denied* 21 NY3d 1078 [internal quotation marks omitted]; *see People v Webb*, 60 AD3d 1291, 1292, *lv denied* 12 NY3d 930).

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 reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*).

"By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his further contention . . . that the ruling constitutes an abuse of discretion . . . In any event, the court's *Sandoval* ruling did not constitute a clear abuse of discretion warranting reversal . . . The prior convictions in question were relevant to the credibility of defendant" (*People v Tolliver*, 93 AD3d 1150, 1151-1152, *lv denied* 19 NY3d 968 [internal quotation marks omitted]; *see People v Williams*, 101 AD3d 1730, 1732, *lv denied* 21 NY3d 1021). In our view, "the court's ruling was a considered decision [that] took into account all relevant factors and further struck a proper balance between the probative value of the[ ] convictions on defendant's credibility and the possible prejudice to him" (*People v Poole*, 79 AD3d 1685, 1686, *lv denied* 16 NY3d 862 [internal quotation marks omitted]).

Finally, we conclude that the sentence is not unduly harsh or severe but, as we noted in the prior appeal, "in view of the date on which the crimes were committed, the court erred in imposing the DNA databank fee" (*Dupleasis*, 79 AD3d at 1778; *see People v Cooper*, 77 AD3d 1417, 1419, *lv denied* 16 NY3d 742). We therefore modify the judgment accordingly.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1222

KA 12-00374

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE W. BRAND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN 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 Erie County Court (Thomas P. Franczyk, J.), rendered December 21, 2011. The judgment convicted defendant, upon his plea of guilty, of assault 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: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. The plea colloquy conducted by County Court adequately apprised defendant 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; *see People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920). Contrary to defendant's contention, his " 'waiver [of the right to appeal] is not invalid on the ground that the court did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression rulings' " (*Graham*, 77 AD3d at 1439). Moreover, defendant's history of mental illness did not invalidate the waiver of the right to appeal inasmuch as there was no showing that " 'defendant was uninformed, confused or incompetent when he' waived his right to appeal" (*People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21 NY3d 1015). The valid waiver by defendant of the right to appeal encompasses his challenge to the suppression rulings (*see People v Kemp*, 94 NY2d 831, 833), and his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *see generally People v*

Hidalgo, 91 NY2d 733, 737).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1224

KA 10-02344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN BASSETT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT 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 (Anthony F. Aloi, J.), rendered September 9, 2010. 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: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [b]). 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 reject defendant's contention that the verdict is 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).

We reject defendant's further contention that the showup identification procedure resulting in identifications made by two witnesses was unduly suggestive and that County Court erred in refusing to suppress the identifications. Prompt showup identification procedures that are conducted in geographic and temporal proximity to the crime "are not 'presumptively infirm,' and in fact have generally been allowed" (*People v Ortiz*, 90 NY2d 533, 537, quoting *People v Duuvon*, 77 NY2d 541, 543). Here, the showup identification procedure was reasonable because it was conducted within 200 yards of the scene of the crime, within 20 minutes of the commission of the crime, and in the course of a continuous, ongoing investigation (*see People v Brisco*, 99 NY2d 596, 597; *People v Lewis*, 97 AD3d 1097, 1098, *lv denied* 19 NY3d 1103). Moreover, the two

witnesses were placed in different police vehicles and remained apart throughout the showup identification procedure. Thus, " 'it cannot be said that the [witnesses] were in such proximity while viewing [defendant] that there was an increased likelihood that if one of them made an identification the other[] would concur' " (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803).

Defendant's contention that he was denied a fair trial based on the prosecutor's improper questions on cross-examination of defendant and improper comments during summation is not preserved for our review inasmuch as defendant failed to object to those instances of alleged misconduct (*see* CPL 470.05 [2]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see also People v Washington*, 89 AD3d 1516, 1516-1517, *lv denied* 18 NY3d 963). Finally, the sentence is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1225

CAF 12-01671

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

IN THE MATTER OF DWAYNE MCNALLY,
PETITIONER-RESPONDENT,

V ORDER

ELIZABETH MCNALLY, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES P. ROMAN, CHITTENANGO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered August 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a prior custody order by awarding petitioner sole legal and residential custody of the subject child.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1226

CAF 13-00870

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

IN THE MATTER OF MARY L. KESSLER, PETITIONER,

V MEMORANDUM AND ORDER

SCOTT M. FANCHER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 1.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

MARY L. KESSLER, PETITIONER PRO SE.

SCOTT M. FANCHER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition for an order of protection.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1227

CAF 13-00873

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

IN THE MATTER OF MARY L. KESSLER, PETITIONER,

V MEMORANDUM AND ORDER

SCOTT M. FANCHER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 2.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

MARY L. KESSLER, PETITIONER PRO SE.

SCOTT M. FANCHER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a custody order.

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

Memorandum: The Attorney for the Children (AFC) appeals from a decision of Family Court dismissing various petitions filed by the parents of two minor children. We note at the outset that no appeal lies from a decision (*see Pecora v Lawrence*, 28 AD3d 1136, 1137). We exercise our discretion, however, to treat the notice of appeal as valid and deem the appeals as taken from the seven orders in the respective appeals that were entered upon the single decision (*see* CPLR 5520 [c]).

We conclude that the children are not aggrieved by the orders in appeal Nos. 1 and 3 through 6 inasmuch as those orders dismissed petitions filed by one parent alleging that the other parent had violated an order of custody or seeking a personal order of protection against the other parent (*see Matter of Lagano v Soule*, 86 AD3d 665, 666 n 4; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545; *Mixon v TBV, Inc.*, 76 AD3d 144, 148-149). Moreover, inasmuch as the AFC opposed the relief requested in the petition in appeal No. 7, we conclude that the children are not aggrieved by the order dismissing that petition. We therefore dismiss the AFC's appeals from the orders in appeal Nos. 1 and 3 through 7.

With respect to the order in appeal No. 2, which dismissed the petition of Mary L. Kessler (mother) seeking modification of a custody order, the mother has not taken an appeal from that order. The children, while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned (*see Matter of McDermott v Bale*, 94 AD3d 1542, 1543-1544). As we wrote in *McDermott*, "children in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement . . . There is a significant difference between allowing children to express their wishes to the court and allowing their wishes" to chart the course of litigation (*id.* at 1543). We thus affirm the order in appeal No. 2 and see no need to address the AFC's remaining contentions.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1228

CAF 13-00874

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

IN THE MATTER OF SCOTT M. FANCHER, PETITIONER,

V MEMORANDUM AND ORDER

MARY L. KESSLER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 3.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

SCOTT M. FANCHER, PETITIONER PRO SE.

MARY L. KESSLER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for violation of an order of custody.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1229

CAF 13-00875

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

IN THE MATTER OF MARY L. KESSLER, PETITIONER,

V MEMORANDUM AND ORDER

SCOTT M. FANCHER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 4.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

MARY L. KESSLER, PETITIONER PRO SE.

SCOTT M. FANCHER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for violation of an order of custody.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1230

CAF 13-00876

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

IN THE MATTER OF MARY L. KESSLER, PETITIONER,

V MEMORANDUM AND ORDER

SCOTT M. FANCHER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 5.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

MARY L. KESSLER, PETITIONER PRO SE.

SCOTT M. FANCHER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 11, 2012 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition for an order of protection.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1231

CAF 13-00877

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

IN THE MATTER OF SCOTT M. FANCHER, PETITIONER,

V MEMORANDUM AND ORDER

MARY L. KESSLER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 6.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

SCOTT M. FANCHER, PETITIONER PRO SE.

MARY L. KESSLER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 11, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for violation of an order of custody.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1232

CAF 13-00878

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

IN THE MATTER OF SCOTT M. FANCHER, PETITIONER,

V MEMORANDUM AND ORDER

MARY L. KESSLER, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 7.)

SCOTT A. OTIS, WATERTOWN, APPELLANT PRO SE.

SCOTT M. FANCHER, PETITIONER PRO SE.

MARY L. KESSLER, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 11, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for custody and transfer accepted.

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

Same Memorandum as in *Matter of Kessler v Fancher* ([appeal No. 2] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1233

CAF 12-01312

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

IN THE MATTER OF JANIE STEARNS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT CRAWFORD, RESPONDENT-APPELLANT.

IN THE MATTER OF ROBERT CRAWFORD,
PETITIONER-APPELLANT,

V

JANIE STEARNS, RESPONDENT-RESPONDENT.

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

DAVID J. PAJAK, ALDEN, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (E. Jeannette Ogden, A.J.), dated May 7, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the petition of petitioner-respondent for sole custody and primary physical residence of the subject children.

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

Memorandum: On appeal from an order that, inter alia, granted petitioner-respondent mother sole custody and primary physical residence of the parties' children with access to respondent-petitioner father, the father contends that Family Court erred in transferring temporary custody of the younger child to the mother in the absence of an attorney representing the father. We reject that contention inasmuch as the father was unrepresented due to his own inaction in seeking assigned counsel (*see Gandia v Rivera-Gandia*, 260 AD2d 321, 321). The record establishes that, during two prior court appearances, the court advised the father of his right to counsel and gave him a referral for assigned counsel. At the third appearance, when the father again appeared without counsel, the court granted the

temporary order upon the motion by the Attorney for the Children. In any event, assuming, arguendo, that the court erred in deciding the motion when the father was unrepresented by counsel, we conclude that reversal is not required because the order on appeal was issued following a subsequent evidentiary hearing at which the father was represented by counsel (*see generally Matter of Owens v Garner*, 63 AD3d 1585, 1585-1586; *Matter of Darryl B.W. v Sharon M.W.*, 49 AD3d 1246, 1247).

Contrary to the father's further contention, the court properly determined that it was in the best interests of the children to award sole custody to the mother. The court's custody determination following a hearing is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). Here, the court's written decision establishes that the court engaged in a " 'careful weighing of [the] appropriate factors' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1422), and the court's determination has a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110, 1110; *Matter of Thayer v Ennis*, 292 AD2d 824, 825).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1235

CA 13-00395

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

SANDIE YOUNG, PLAINTIFF,

V ORDER

LENNOX HEARTH PRODUCTS, INC., AEROPOSTALE, INC., DEFENDANTS-APPELLANTS, DRY CREEK PRODUCTS, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR DEFENDANT-APPELLANT LENNOX HEARTH PRODUCTS, INC.

GOERGEN, MANSON & MCCARTHY, BUFFALO (JOSEPH G. GOERGEN OF COUNSEL), FOR DEFENDANT-APPELLANT AEROPOSTALE, INC.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 19, 2012. The order, inter alia, converted the cross claims of defendant Dry Creek Products, Inc., against defendants Lennox Hearth Products, Inc. and Aeropostale, Inc., into third-party claims.

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: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1236

CA 13-00813

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

JASON T. PILKENTON, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

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

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

JASON T. PILKENTON, PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered April 3, 2013. The order granted the petition seeking, inter alia, to direct respondent to submit to the appraisal process set forth in its policy of insurance.

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

Memorandum: Respondent appeals from an order that granted the petition seeking, inter alia, to direct respondent to submit to the appraisal process set forth in its policy of insurance. Assuming without deciding that the petition was timely filed and procedurally proper, we agree with respondent that the insurance coverage dispute precludes the application of the appraisal process set forth in the policy (*see Kawa v Nationwide Mut. Fire Ins. Co.*, 174 Misc 2d 407, 408-409; *see generally Amerex Group, Inc. v Lexington Ins. Co.*, 678 F3d 193, 204 [2d Cir]). Insurance Law § 3408 (c) provides for an appraisal in the event of a covered loss, and here there is a pending declaratory judgment action in which the parties dispute whether this is a covered loss.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1237

CAF 12-00876

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

IN THE MATTER OF THE ADOPTION OF ROBERTO C., JR.

SHARON W. AND BRIAN W., PETITIONERS-RESPONDENTS,

ORDER

V

ROBERTO C., SR., RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONERS-RESPONDENTS.

MICHAEL N. KALIL, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 7, 2012. The order, among other things, adjudged that the petition for the adoption of the subject child may proceed without the respondent's consent.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1238

CA 13-00478

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

PATRICIA M. SUPPA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK J. SUPPA, DEFENDANT-APPELLANT.

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS F. O'BRIEN, CLINTON, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), entered December 3, 2012 in a divorce action. The judgment, among other things, dissolved the marriage between the parties and determined the equitable distribution of the marital assets.

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

Memorandum: On appeal from a judgment of divorce that, inter alia, distributed marital property, defendant contends that Supreme Court erred in finding that he committed fraud because the court failed to set forth any basis for that finding. We reject that contention. The basis for that finding is set forth in the court's findings of fact, which are supported by the record, i.e., that defendant agreed to add plaintiff's name to his bank accounts containing a certain amount of money in exchange for plaintiff adding his name to the deed of her separate property, but that defendant withdrew those funds from the bank accounts the following week. While we agree with defendant that the court erred in considering whether to impose a constructive trust because defendant did not seek that remedy, we reject his contention that the court's decision on equitable distribution was flawed as a result of its mere consideration of such a remedy.

Contrary to defendant's contention, the court's valuation of the marital home was appropriate. The value was within the range of values provided by the parties' experts (*see generally Atwal v Atwal* [appeal No. 2], 270 AD2d 799, 799, *lv denied* 95 NY2d 761; *Francis v Francis*, 262 AD2d 1065, 1066). Inasmuch as defendant did not establish that the value of the marital home increased as a result of his work on the property, the court did not err in failing to provide defendant with a credit for that work (*see Vanyo v Vanyo*, 79 AD3d

1751, 1751-1752; *Juhasz v Juhasz*, 59 AD3d 1023, 1024-1025, *lv dismissed* 12 NY3d 848). In addition, the court properly held that defendant did not establish that the cost of the improvements to the home were made from separate as opposed to marital funds (*see Reed v Reed*, 55 AD3d 1249, 1250). Indeed, defendant testified that the household expenses were paid from one account and that at least some of plaintiff's income as well as his income was deposited in that account. The court credited defendant with the down payment he made on the house from his separate property, but properly declined to credit defendant with his payment toward the closing costs because those expenses were not a part of the home's value (*see generally Mirand v Mirand*, 53 AD3d 1149, 1150).

The court properly exercised its discretion in awarding plaintiff approximately half the amount of her counsel fees. Defendant contends that plaintiff had enough income and assets to pay her own counsel fees, but we note that there is no requirement that a party must demonstrate an inability to pay (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881). Indeed, defendant failed to rebut the presumption that the less monied spouse is entitled to counsel fees (*see* Domestic Relations Law § 237 [a]; *Leonard v Leonard*, 109 AD3d 126, 129-130). The circumstances of the case, including the relative merit of the parties' positions, support the award (*see Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509; *see generally DeCabrera*, 70 NY2d at 881). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1239

CA 13-00971

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

CHARLES E. BADDING AND ANN G. BADDING,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BRUCE D. INGLIS, KATHY I. BENTON, LORI I. SESSA, DEFENDANTS-APPELLANTS,
CENTURY BRICK, INC., ET AL., DEFENDANTS.

HOGAN WILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent-Panepinto, J.), entered September 21, 2012. The order, among other things, denied the cross motion of defendants Bruce D. Inglis, Kathy I. Benton and Lori I. Sessa for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and defendants-appellants' cross motion seeking summary judgment dismissing the amended complaint against them is granted.

Memorandum: Plaintiffs and defendants-appellants (defendants) entered into a contract for the sale of residential real property owned by defendants. Pursuant to the contract defendants agreed, inter alia, to convey to plaintiffs good and marketable title and to deliver to plaintiffs a warranty deed at closing, which took place on April 30, 2007. More than four years after closing, plaintiffs commenced this action alleging that the bricks on the exterior of the residence are defective and have been progressively deteriorating during the period of their ownership of the property. The amended complaint asserts three causes of action against defendants, for breach of contract, breach of the covenant of quiet enjoyment in the contract and the deed, and unjust enrichment.

Supreme Court erred in denying that part of defendants' cross motion seeking summary judgment dismissing the first cause of action against them, for breach of contract arising from defendants' alleged failure to convey marketable title. Defendants are correct that, "because title to the property had closed and the deed was delivered,

the doctrine of merger extinguished any claim [plaintiffs] may have had regarding the contract of sale" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 521; *see Arnold v Wilkins*, 61 AD3d 1236, 1236). Even assuming, arguendo, that plaintiffs raised a triable issue of fact whether the parties intended that the provision concerning marketable title would survive the transfer of title (*see Cerand v Burstein*, 72 AD3d 1262, 1264-1265; *cf. Arnold*, 61 AD3d at 1236-1237), we agree with defendants that the presence of the allegedly defective exterior bricks does not implicate their agreement to convey marketable title, because "such a situation affects the property's value, not one's right to unencumbered ownership and possession" (*Cone v Stranahan*, 44 AD3d 1145, 1147 [internal quotation marks omitted]; *see generally Bank of N.Y. v Segui*, 91 AD3d 689, 690-691).

The court also erred in denying that part of the cross motion seeking summary judgment dismissing the second cause of action, for breach of the covenant of quiet enjoyment in the contract and the deed. The same analysis for the first cause of action applies to the second with respect to the breach of the covenant in the contract. With respect to the deed, although that covenant is contained therein and thus survives closing, it " 'can be broken only by an eviction, actual or constructive, from the premises conveyed, or some portion thereof' " (*Rajchandra Corp. v Tom Sawyer Motor Inns*, 106 AD2d 798, 801, *appeal dismissed* 65 NY2d 784, 925, quoting *Scriver v Smith*, 100 NY 471, 477). A constructive eviction may be found where property is subject to an easement, as in *Scriver*, a servitude, as in *Rajchandra Corp.*, or a restrictive covenant (*see Tomanek v Shumway*, 248 AD2d 927), each of which substantially impairs the value of the property and the use or enjoyment thereof (*see generally White v Long*, 204 AD2d 892, 894, *mod on other grounds* 85 NY2d 564). In those situations, however, the owner's possession is disturbed by the actions of someone with a superior right to use the property, whether the grantor or a third party. The presence of a defective condition on the property is not equivalent to the impairment of the value of the property based on the existence of such superior rights (*see id.*). Here, defendants established that there was no such actual or constructive eviction, and plaintiffs failed to raise an issue of fact (*see generally Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120, *rearg denied* 4 NY2d 1046).

Finally, we conclude that the court also erred in denying that part of the cross motion seeking summary judgment dismissing the third cause of action, for unjust enrichment. Unjust enrichment arises from an obligation that the law imposes in the absence of an agreement between the parties (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572). Here, the respective obligations of the parties are defined in the deed and by those provisions in the contract, if any, that the parties intended to survive transfer of title (*see Hunt v Kojac*, 245 AD2d 858, 858-859). Recovery is not available to plaintiffs under their unjust enrichment cause of action inasmuch as that cause of action merely duplicates the breach of contract causes of action (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791,

rearg denied 19 NY3d 937; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1241

CA 13-00937

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

IBC SALES CORPORATION, UNITED REALTY & DEVELOPMENT, LLC AND FLORIDA FINE CARS AND TRUCKS, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

VILLAGE OF BLACK RIVER, DEFENDANT-RESPONDENT.

BANSBACH ZOGHLIN P.C., ROCHESTER (BRIDGET A. O'TOOLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SHANTZ & BELKIN, LATHAM (DEREK L. HAYDEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 24, 2012. The order denied the motion of plaintiffs for leave to file a late notice of claim on defendant.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1243

TP 13-01048

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

IN THE MATTER OF STEPHEN PUMP, PETITIONER,

V 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 (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, Wyoming County [Mark H. Dadd, A.J.], entered June 10, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1244

KA 12-00659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY E. WHITE, 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 R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 21, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Memorandum: Defendant appeals from two judgments convicting him, respectively, upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), and upon his plea of guilty of grand larceny in the fourth degree (§ 155.30 [5]). Contrary to defendant's contention in each appeal, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence in each appeal (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1245

KA 12-00658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY E. WHITE, 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 R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 21, 2012. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1246

KA 13-00378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY SLOTMAN, DEFENDANT-APPELLANT.

LAW OFFICE OF SIMON F. MANKA, BUFFALO (SIMON F. MANKA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered May 3, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified in the interest of justice by vacating defendant's designation as a sexually violent offender and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's determination is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). We reject that contention. The court properly considered statements in the case summary and presentence report in assessing risk factor points against him inasmuch as those statements constituted reliable hearsay (*see People v Shepard*, 103 AD3d 1224, 1224, *lv denied* 21 NY3d 856; *People v Perrah*, 99 AD3d 1257, 1257-1258, *lv denied* 20 NY3d 854; *see also People v Mingo*, 12 NY3d 563, 572-573).

Contrary to defendant's contention, the court properly assessed 20 points against him under risk factor 4, for continuing course of sexual misconduct, despite the fact that defendant pleaded guilty to only one count of rape in the second degree (Penal Law § 130.30 [1]). "[T]he court is 'not limited to the crime of conviction' " in assessing points for that risk factor (*People v Hubel*, 70 AD3d 1492, 1493; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]). Defendant also challenges the assessment of those points on the ground that they were not assessed based on reliable hearsay. We reject that challenge and conclude that the court properly considered as reliable hearsay defendant's

statement in the presentence report, as clarified by defense counsel during the hearing, that defendant had been having "inappropriate relations" with the victim for three years (*see Mingo*, 12 NY3d at 572-573; *see generally People v Chico*, 90 NY2d 585, 589). Contrary to defendant's further contention, the court also properly assessed 10 points against him under risk factor 8, for the age at which defendant committed his first act of sexual misconduct, based upon defendant's admission in the presentence report that he began abusing the victim when he was 19 years old (*see Mingo*, 12 NY3d at 572-573; *Chico*, 90 NY2d at 589). We therefore conclude that the People met their " 'burden of proving the facts supporting the risk level classification sought by clear and convincing evidence' " (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703). We further conclude that, under the circumstances of this case, the court properly rejected defendant's request for a downward departure inasmuch as defendant failed to present clear and convincing evidence of special circumstances justifying such treatment (*see id.*).

Finally, defendant contends that the court incorrectly designated him a "sexually violent offender" inasmuch as he was not convicted of a sexually violent offense within the meaning of Correction Law § 168-a (7) (b) (*see* § 168-a [3] [a]). Although defendant failed to preserve that contention for our review (*see People v Young*, 108 AD3d 1232, 1232, *lv denied* 22 NY3d 853, *rearg denied* ___ NY3d ___ [Dec. 17, 2013]), we nevertheless agree with him, and we therefore modify the order accordingly.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1248

KA 12-01721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SMITH, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN SMITH, DEFENDANT-APPELLANT PRO SE.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered June 7, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings 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 adjudicate him a youthful offender. We note at the outset that the People do not dispute defendant's assertion that he is a "youth . . . eligible to be found a youthful offender" (CPL 720.10 [2]). "Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the 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]; *see People v Rudolph*, 21 NY3d 497, 503). Here, despite defendant's application during the plea colloquy to be found an eligible youth, the court failed to address the issue of defendant's eligibility during the sentencing proceeding. Furthermore, "we cannot deem the court's failure to rule on the . . . [application] as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *see People v Ingram*, 18 NY3d 948, 949; *People v Chattley*, 89 AD3d 1557, 1558). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a

youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1250

KA 11-02337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE MCCLAIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN 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 (Russell P. Buscaglia, A.J.), rendered August 9, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, unlawful possession of marihuana and failure to obey a stop sign.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), unlawful possession of marihuana (§ 221.05), and failure to obey a stop sign (Vehicle and Traffic Law § 1172 [a]). We reject defendant's contention that his waiver of the right to appeal was invalid. "[T]rial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights, including the right to appeal" (*People v Mitchell*, 93 AD3d 1173, 1173-1174, *lv denied* 19 NY3d 999 [internal quotation marks omitted]; *see People v Fisher*, 94 AD3d 1435, 1435, *lv denied* 19 NY3d 973). The record establishes that defendant waived his right to appeal in order to secure a sentencing commitment, and Supreme Court properly " 'describ[ed] the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty' " (*People v Tabb*, 81 AD3d 1322, 1322, *lv denied* 16 NY3d 900, quoting *People v Lopez*, 6 NY3d 248, 257). Defendant's valid waiver of the right to appeal encompasses his challenge to the court's suppression rulings (*see Mitchell*, 93 AD3d at 1174).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1251

KA 12-01819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID O. NEIL, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered September 26, 2011. The judgment convicted defendant, upon his guilty plea, of attempted arson 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 guilty plea, of attempted arson in the second degree (Penal Law §§ 110.00, 150.15). Even assuming, arguendo, that defendant's challenge to the factual sufficiency of the plea allocution has been preserved for our review (*see generally People v Lopez*, 71 NY2d 662, 665), we conclude that defendant's challenge lacks merit. Defendant "pleaded guilty to a crime lesser than that charged in the indictment," and thus no factual colloquy was required (*People v Richards*, 93 AD3d 1240, 1240, *lv denied* 20 NY3d 1014). Defendant further contends that he was denied effective assistance of counsel because defense counsel did not explore or address a possible defense of intoxication. Although defendant's contention "survives his guilty plea . . . to the extent that [he] contends that his plea was infected by the alleged ineffective assistance," we conclude that defendant received meaningful representation inasmuch as he received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631 [internal quotation marks omitted]; *see People v Campbell*, 106 AD3d 1507, 1508, *lv denied* 21 NY3d 1002).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1252

CA 13-00824

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

JERAD M. ZARNOCH,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT W. LUCKINA, INDIVIDUALLY AND DOING
BUSINESS AS ROB LUCKINA CONSTRUCTION,
DEFENDANT-APPELLANT-RESPONDENT.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

EDWARD C. COSGROVE, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered August 14, 2012 in a personal injury action. The order, inter alia, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) on the condition that, at trial, plaintiff was not determined to be a special employee of defendant, and granted that part of defendant's cross motion for summary judgment dismissing the complaint with respect to the Labor Law § 241 (6) cause 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 while assisting defendant in raising an 18-by-18-foot exterior wall as part of the construction of a single-family residence. Plaintiff was an employee of the general contractor, and defendant was the framing subcontractor. Instead of using a crane, wall jack, or similar piece of equipment, defendant, plaintiff, and four other men began to raise the wall by hand. After they had lifted the edge of the wall above their heads, the men began to "walk the wall up." When the wall was at a 35-to-40-degree angle from the ground, defendant determined that it was too heavy to continue to raise and instructed the men to lower the wall. According to plaintiff, he was injured when the wall fell on him as the men attempted to lower it. Plaintiff subsequently moved for partial summary judgment on liability pursuant to Labor Law § 240 (1), and defendant cross-moved for summary judgment dismissing the complaint or, alternatively, for leave to amend the answer pursuant to CPLR 3025 (b) asserting as an affirmative defense that plaintiff was his special employee. Supreme Court granted plaintiff's motion on the

condition that it was determined at trial that plaintiff was not "defendant's special employee at the time of the accident," and granted that part of defendant's cross motion for summary judgment dismissing the Labor Law § 241 (6) cause of action. In addition, the court granted defendant's alternative request for relief, i.e., leave to amend the answer. Defendant appeals, and plaintiff cross-appeals. We affirm.

Contrary to defendant's contention, we conclude that the court properly granted plaintiff's motion. Plaintiff met his initial burden by establishing that he "suffered harm that 'flow[ed] directly from the application of the force of gravity' " to the wall that struck him (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7), and that his injury was " 'the direct consequence of [defendant's] failure to provide adequate protection against' " the gravity-related accident (*DiPalma v State of New York*, 90 AD3d 1659, 1660, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603; *see Wilinski*, 18 NY3d at 6; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929), and defendant failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject defendant's contention that the elevation differential was de minimis. Although the wall was at only a 30-degree angle from the ground when it fell on plaintiff, that elevation differential "cannot be viewed as de minimis, particularly given the weight of the [wall] and the amount of force it was capable of generating, even over the course of a relatively short descent" (*Runner*, 13 NY3d at 605; *see Wilinski*, 18 NY3d at 10; *DiPalma*, 90 AD3d at 1660).

We reject defendant's further contention that the court erred in denying those parts of his cross motion seeking summary judgment dismissing the causes of action for common-law negligence and for the violation of Labor Law § 200. Contrary to defendant's contention, the hazard of being injured while lifting an 18-by-18-foot wall is not an "open and obvious hazard inherent in the . . . work" of a construction worker (*Landahl v City of Buffalo*, 103 AD3d 1129, 1131 [emphasis omitted]). Defendant's further contentions that plaintiff assumed the risk of lifting the wall and that lifting the wall was a superseding cause of plaintiff's injury are similarly without merit.

Finally, contrary to plaintiff's contention, the court properly granted defendant's cross motion insofar as it sought leave to amend the answer. " 'Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend . . . is committed to the sound discretion of the court' " (*Palaszynski v Mattice*, 78 AD3d 1528, 1528; *see* CPLR 3025 [b]). Here, plaintiff failed to establish that he will be prejudiced by the proposed amendment, particularly in view of the fact that discovery has not been completed (*see A.W. v County of Oneida*, 34 AD3d 1236, 1238). Furthermore, the proposed amendment is "not patently lacking in merit" (*id.*; *see Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1253

CA 13-00517

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

CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER
TO ALBANK, FSB, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. MILLS, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

RICHARD F. MILLS, DEFENDANT-APPELLANT PRO SE.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered January 13, 2012. The order denied the respective motions of defendant Richard F. Mills for permission to proceed as a poor person and for recusal.

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

Memorandum: Plaintiff commenced this action in 2001 to foreclose upon a mortgage given by defendants and, in 2002, a judgment of foreclosure was entered upon defendants' default. In 2011, Richard F. Mills (defendant) moved to vacate the default judgment pursuant to, inter alia, CPLR 5015. At the same time, defendant filed a separate motion seeking permission to proceed as a poor person pursuant to CPLR 1101. A month later, defendant filed a separate motion for recusal.

By the order in appeal No. 1, Supreme Court denied defendant's motion seeking permission to proceed as a poor person inasmuch as defendant failed to file an attorney's certificate of merit pursuant to CPLR 1101 (b), as required by the court, and also denied defendant's motion for recusal. Defendant subsequently moved for leave to renew or reargue and, by the order in appeal No. 2, the court denied the motion. By the order in appeal No. 3, the court denied defendant's motion to vacate the 2002 default judgment.

With respect to appeal No. 1, we conclude that the court did not abuse its discretion in denying defendant's motion for permission to proceed as a poor person. The statute unequivocally states that "[t]he court may require the moving party to file . . . a certificate of an attorney stating that the attorney has examined the action and

believes there is merit to the moving party's contentions" (CPLR 1101 [b]). Here, defendant failed to file the certificate required by the court (*see Abreu v Hutchings*, 71 AD3d 1254, 1254-1255, *appeal dismissed* 15 NY3d 836; *Matter of McNear v State of New York*, 38 AD3d 1093, 1094, *lv denied* 9 NY3d 801), and he otherwise failed to establish that his motion to vacate the default judgment has " 'arguable merit' " (*Jefferson v Stubbe*, 107 AD3d 1424, 1424, *appeal dismissed*, *lv denied* 22 NY3d 928; *cf. Popal v Slovis*, 82 AD3d 1670, 1670-1671, *lv dismissed* 17 NY3d 842).

Contrary to defendant's further contention in appeal No. 1, we conclude that the court did not abuse its discretion in denying his motion for recusal. "Absent a legal disqualification under Judiciary Law § 14, a [t]rial [j]udge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1482-1483 [internal quotation marks omitted]). Defendant has not alleged any legal disqualification, and we perceive no abuse of discretion in the denial of his motion. The mere fact that defendant commenced an action in federal court against the court herein does not require the court to recuse itself (*see Ashmore v Ashmore*, 92 AD3d 817, 820, *lv denied* 19 NY3d 807), particularly where, as here, "nothing in the record indicates that the [court] had a direct, personal, substantial, or pecuniary interest in the outcome [of the instant case]," and the court's status as a defendant in the federal civil action did not result in a "clash in judicial roles" (*Matter of Khan v Dolly*, 39 AD3d 649, 650-651; *see also Matter of Petkovsek v Snyder*, 251 AD2d 1086, 1086-1087).

With respect to appeal No. 2, we dismiss the appeal from the order therein to the extent that it denied leave to reargue. No appeal lies from such an order (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984). With respect to the remainder of the order in appeal No. 2, even assuming, arguendo, that the court in fact granted leave to renew, in light of our determination in appeal No. 1, we conclude that the court did not err in adhering to its prior decision.

With respect to appeal No. 3, we reject defendant's contention that the court erred in entering the default judgment without first appointing a guardian ad litem to protect his interests. Although a court should appoint a guardian ad litem to protect the rights of, inter alia, "an adult incapable of adequately prosecuting or defending his rights" (CPLR 1201), the evidence submitted by defendant "failed to set forth any professional medical opinion that the defendant . . . may have lacked the mental ability to adequately protect [his] rights and interests during the relevant time period" (*Mohrmann v Lynch-Mohrmann*, 24 AD3d 735, 736), and otherwise failed to establish that he required a guardian ad litem at the time that the default judgment was entered. Finally, although defendant raised several other contentions in the motion court, he has not raised those contentions in his brief and thus is deemed to have abandoned them (*see generally Huen N.Y., Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1337-1338; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We have considered defendant's remaining contentions with respect to all three appeals and conclude that they are not properly before us or lack merit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1254

CA 13-00518

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

CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER
TO ALBANK, FSB, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. MILLS, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

RICHARD F. MILLS, DEFENDANT-APPELLANT PRO SE.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), rendered March 14, 2012. The order denied the motion of defendant Richard F. Mills for leave to reargue or renew his prior motions seeking permission to proceed as a poor person and for recusal, respectively.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same Memorandum as in *Charter One Bank v Mills* ([appeal No. 1] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1255

CA 12-02062

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

CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER
TO ALBANK, FSB, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. MILLS, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

RICHARD F. MILLS, DEFENDANT-APPELLANT PRO SE.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), rendered October 10, 2012. The order denied the motion of defendant Richard F. Mills to vacate a default judgment of foreclosure.

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

Same Memorandum as in *Charter One Bank v Mills* ([appeal No. 1] ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1256

CA 13-00221

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

JOSEPH P. SAWYER, SR. AND DONNA L. SAWYER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-RESPONDENT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK D. ARCARA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.) entered November 13, 2012. 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 reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries allegedly sustained by Joseph P. Sawyer, Sr. (plaintiff) when one of defendant's employees inserted a catheter into plaintiff in connection with defendant's treatment of plaintiff. We conclude that Supreme Court erred in granting defendant's motion seeking summary judgment dismissing the complaint. Defendant had " 'the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (*Gagnon v St. Joseph's Hosp.*, 90 AD3d 1605, 1605; *see Humphrey v Gardner*, 81 AD3d 1257, 1258). Although defendant's expert, i.e., plaintiff's treating nurse, averred that neither she nor any of defendant's employees deviated from accepted medical practice, we agree with plaintiffs that the medical records submitted by defendant in support of the motion raise an issue of fact on that point with respect to plaintiff's treating nurse (*see Valenti v Camins*, 95 AD3d 519, 522; *see generally Humphrey*, 81 AD3d at 1258). In view of our determination, we do not consider the sufficiency of plaintiffs' submissions in opposition to the motion (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1257

CA 13-01002

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

BEIT SHALOM, INC. AND STEPHEN GALILEY,
PLAINTIFFS-RESPONDENTS,

V ORDER

VERIZON NEW YORK, INC., NEW YORK TELEPHONE CO.,
INC., VERIZON COMMUNICATION, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

DAVID G. GOLDBAS, UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 6, 2013. The order granted the motion of plaintiffs for leave to reargue their opposition to that part of the cross motion of defendants Verizon New York, Inc., New York Telephone Co., Inc. and Verizon Communication, Inc. to dismiss the first cause of action and, upon reargument, denied the cross motion with respect to that cause of action.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1258

CA 13-00772

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

JAWAN CHAMBLISS, PLAINTIFF-APPELLANT,

V ORDER

ISAAC STEPHEN DAVIS, DEFENDANT-RESPONDENT,
ASTRO HOMES OF CENTRAL NY INC., FORMERLY KNOWN
AS MOR-LOU CORPORATION, ET AL., DEFENDANTS.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 18, 2013. The order granted the motion of defendant Isaac Stephen Davis for summary judgment dismissing the complaint against him.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1259

CA 13-00094

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

IN THE MATTER OF DANIEL HOLMES,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 3, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1260

OP 13-00924

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

IN THE MATTER OF MARY SICOLI, AS EXECUTRIX
OF THE ESTATE OF BENJAMIN M. SICOLI, DECEASED,
AND ANGELO MASSARO, AS TRUSTEE OF THE
TESTAMENTARY TRUST UNDER THE WILL OF BENJAMIN M.
SICOLI, DECEASED, PETITIONERS,

V MEMORANDUM AND ORDER

TOWN OF LEWISTON, RESPONDENT.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR PETITIONERS.

MICHAEL J. DOWD, LEWISTON, FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent to condemn certain real property by eminent domain.

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

Memorandum: Petitioners commenced this proceeding pursuant to EDPL 207, seeking judicial review of respondent's determination to condemn certain real property, owned in part by petitioners, for the alleged purpose of completing the dedication of a public road. As a preliminary matter, we note that, pursuant to EDPL 207 (C), our review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with SEQRA and EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546; *see Matter of Pfohl v Village of Sylvan Beach*, 26 AD3d 820, 820). Petitioners, as the parties challenging the condemnation, bear the "burden of establishing that the determination was without foundation and baseless (*see Matter of Waldo's Inc. v Village of Johnson City*, 74 NY2d 718, 720), or that it was violative of any of the applicable statutory criteria" (*Broadway Schenectady Entertainment v County of Schenectady*, 288 AD2d 672, 673; *see Matter of Dudley v Town Bd. of Town of Prattsburgh*, 59 AD3d 1103, 1104; *Pfohl*, 26 AD3d at 820-821).

Here, we conclude that petitioners have failed to meet their burden. Petitioners contend, inter alia, that the proposed taking

served no valid, nonpretextual public purpose. We reject that contention. "[I]t is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill [a public] purpose" (*Matter of Rafferty v Town of Colonie*, 300 AD2d 719, 723; *see Matter of Doyle v Schuylerville Cent. School Dist.*, 35 AD3d 1058, 1059, *lv denied* 9 NY3d 804, *rearg denied* 9 NY3d 939; *Matter of Gyrodyne Co. of Am., Inc. v State Univ. of N.Y. at Stony Brook*, 17 AD3d 675, 676, *lv denied* 5 NY3d 716). Contrary to petitioners' contention, we conclude that respondent did not abuse or improvidently exercise its discretion in determining that "a public use, benefit or purpose will be served by the proposed acquisition" (EDPL 207 [C] [4]).

Finally, we reject petitioners' contention that the proceeding was constitutionally unsound. Petitioners adduced no evidence "to support a finding that [they] have 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment' " (*Matter of Gray v Town of Oppenheim*, 289 AD2d 743, 745, *lv denied* 98 NY2d 606, quoting *Village of Willowbrook v Olech*, 528 US 562, 564). We therefore conclude that respondent did not violate petitioners' equal protection rights, and thus "the proceeding was in conformity with the federal and state constitutions" (EDPL 207 [C] [1]). Consequently, we confirm the determination and dismiss the petition.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1264

CA 13-00231

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

IN THE MATTER OF ARMAND SUAREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 26, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking to annul the Parole Board's determination denying him parole release. We conclude that the "appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release" (*Matter of Robles v Evans*, 100 AD3d 1455, 1455 [internal quotation marks omitted]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1265

KA 11-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVANS M. RODRIGUEZ, DEFENDANT-APPELLANT.

JOHN R. LEWIS, SLEEPY HOLLOW, 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 (Joan S. Kohout, A.J.), rendered October 12, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion for a mistrial (*see People v DeJesus*, 110 AD3d 1480, 1481-1482). Defendant contends that he was deprived of a fair trial when the court permitted an undercover police officer to testify that he observed defendant speaking to an identified person known by the officer because of the implication, based upon the work of the officer, that the person to whom defendant was speaking was a drug dealer. Defendant contends that the testimony violated the court's *Molineux* ruling that the People could not present evidence "of a prior sale with the defendant." As a preliminary matter, we note that the record is not clear that the court's ruling applied to the interaction between defendant and the person identified by the police officer, and we further note that the police officer did not testify that he observed a sale but, rather, he testified only that he observed the two men speaking. In any event, the determination whether to grant a motion for a mistrial is within the discretion of the trial court (*see People v Ortiz*, 54 NY2d 288, 292; *People v Scott*, 107 AD3d 1635, 1636, *lv denied* 21 NY3d 1077), and such a motion must be granted if an error occurs during the trial that is prejudicial and deprives a defendant of a fair trial (*see* CPL 280.10 [1]; *see generally People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078).

That is not the case here. The police officer testified that he was familiar with defendant, and thus any alleged implication that defendant was a drug dealer based upon the familiarity of the police officer with the person with whom defendant was speaking is not so prejudicial as to deprive defendant of a fair trial.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1266

KA 11-02613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBY PRICE, JR., 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 12, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the fourth 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 fourth degree (Penal Law § 265.01 [1]). Defendant contends that County Court erred in refusing to suppress tangible evidence that the police seized from his person after stopping his vehicle. Defendant failed to preserve for our review his contention that the evidence must be suppressed based on the use of excessive force by the police because he failed to raise that specific contention in his motion papers or at the hearing (*see People v Gomez*, 193 AD2d 882, 883, *lv denied* 82 NY2d 708; *see generally People v Jacquin*, 71 NY2d 825, 826-827; *People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846).

In any event, that contention lacks merit. "Claims that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other seizure of a person are properly analyzed under the Fourth Amendment's objective reasonableness standard . . . Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake . . . The test of reasonableness under the Fourth Amendment requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the

safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight" (*People v Smith*, 95 AD3d 21, 26 [internal quotation marks omitted]; *see Graham v Connor*, 490 US 386, 388).

Here, the officers stopped the vehicle being driven by defendant, removed defendant from the vehicle at gunpoint, and immediately asked him where the gun was located. Defendant was being sought in connection with the crime of burglary in the first degree, a class B violent felony, and was believed to be in possession of a handgun, based upon information provided by an identified citizen. Furthermore, although he did not actively resist the police upon being stopped, he had left the crime scene and thus was attempting to evade arrest by flight. Consequently, applying the *Graham* test, we conclude that the officers' use of force was reasonable under the Fourth Amendment. Finally, insofar as defendant contends that the officers stopped him without probable cause, we agree with the court that the information available to the police justified a level three intrusion under *People v De Bour* (40 NY2d 210, 223; *see People v Hollman*, 79 NY2d 181, 184-185; *cf. People v Moore*, 6 NY3d 496, 498-499), and that the actions of the police required only that level of knowledge.

We have considered defendant's remaining contention and conclude that it is without merit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1268

KA 13-00055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN TALLEY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), rendered July 11, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.09 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. The record demonstrates, however, that Supreme 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 Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]), and that defendant also signed a written waiver of the right to appeal (*see People v Pulley*, 107 AD3d 1560, 1561, *lv denied* 21 NY3d 1076). We thus conclude that the waiver is enforceable and that defendant is thereby foreclosed from challenging the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256; *People v Suttles*, 107 AD3d 1467, 1468, *lv denied* 21 NY3d 1046).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1269

KA 10-02441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLARENCE WILSON, 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 (Anthony F. Aloi, J.), rendered July 2, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, attempted robbery in the first degree and assault in the second degree.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1270

KA 11-00174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER M. DIAZ, DEFENDANT-APPELLANT.

CHRISTOPHER M. DIAZ, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER 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 (Patricia D. Marks, J.), dated January 6, 2011. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1271

KA 09-01624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN COLVIN, 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 a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 3, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second 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: On appeal from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that Supreme Court erred in refusing to allow him to present evidence that a codefendant wrote a letter admitting that he committed the crimes charged in the indictment. We reject that contention. It is well settled that, "[b]efore statements of a nontestifying third party are admissible as a declaration against penal interest, the proponent must satisfy the court that four prerequisites are met [, including that] . . . the declarant must be aware at the time of its making that the statement was contrary to his penal interest" (*People v Brensic*, 70 NY2d 9, 15, *mot to amend remittitur granted* 70 NY2d 722; *see People v Shabazz*, 22 NY3d 896, 898). Here, defendant failed to establish that the author of the letter wrote it before pleading guilty, and defendant thus failed to establish that the admission contained in the letter was against the author's penal interest when he wrote it (*see generally People v Ortiz*, 81 AD3d 513, 514, *lv denied* 16 NY3d 898).

With respect to his contentions regarding the *Huntley* hearing, we note that defendant failed to preserve for our review his contention that the court "unduly limited his cross-examination of a police officer concerning . . . statements" that defendant made to that officer (*People v Rookey*, 292 AD2d 783, 783, *lv denied* 98 NY2d 701).

In any event, that contention is without merit. "It is well settled that '[a]n accused's right to cross-examine witnesses . . . is not absolute' . . . [and that t]he trial court has discretion to determine the scope of the cross-examination of a witness" (*People v Corby*, 6 NY3d 231, 234, quoting *People v Williams*, 81 NY2d 303, 313). Here, we conclude that the court did not abuse its discretion in limiting the scope of defendant's cross-examination of the officer at issue (*see People v Baker*, 294 AD2d 888, 889, *lv denied* 98 NY2d 708; *People v Herner*, 212 AD2d 1042, 1045, *lv denied* 85 NY2d 974).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1272

KA 11-00990

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. ROBINSON, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 8, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree and driving while ability impaired by drugs.

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 assault in the second degree (Penal Law §§ 110.00, 120.05 [3]) and driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). The challenge by defendant to County Court's suppression ruling is encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Goossens*, 92 AD3d 1282, 1283, *lv denied* 19 NY3d 960). Although defendant's contention that his guilty plea was not knowing, voluntary, or intelligent survives his valid waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground and thus failed to preserve that contention for our review (*see People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930). Contrary to defendant's further contention, this case does not fall within the rare exception to the preservation requirement because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon his guilt (*People v Lopez*, 71 NY2d 662, 666; *see People v Cubi*, 104 AD3d 1225, 1226, *lv denied* 21 NY3d 1003).

To the extent that defendant's further contention that the court erred in denying his application for a subpoena duces tecum survives

the guilty plea and his valid waiver of the right to appeal (*see generally People v Morris*, 94 AD3d 1450, 1451, *lv denied* 19 NY3d 976), we conclude that it lacks merit. Inasmuch as the records sought pertain solely to the credibility of a witness, the court did not abuse its discretion in denying defendant's subpoena request (*see People v Gissendanner*, 48 NY2d 543, 548; *People v Scott*, 60 AD3d 1396, 1397, *lv denied* 12 NY3d 821; *People v Reddick*, 43 AD3d 1334, 1335, *lv denied* 10 NY3d 815).

Although defendant's challenge to the amount of restitution " 'is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement' " (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104), he failed to preserve that challenge for our review inasmuch as he did not object to the amount of restitution at sentencing or request a hearing on that issue (*see People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043; *People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889). Indeed, defendant expressly consented to the amount of restitution at sentencing (*see People v Harris*, 31 AD3d 1194, 1195, *lv denied* 7 NY3d 848; *People v Solerwitz*, 172 AD2d 780, 781, *lv denied* 78 NY2d 947).

Finally, defendant failed to preserve for our review his contention that the court erred in imposing a collection surcharge of 10% of the amount of restitution (*see Kirkland*, 105 AD3d at 1338). In any event, Penal Law § 60.27 (8) provides that a court must impose a surcharge of 5% of the amount of restitution and may impose an additional surcharge of up to 5% "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution or reparation in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected" (*see Kirkland*, 105 AD3d at 1338-1339) and, here, the record includes such an affidavit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1273

KAH 12-01904

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NORMAN JENKINS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RIKERS ISLAND CORRECTIONAL FACILITY WARDEN AND
NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Orleans County (James P. Punch, A.J.), dated August 9, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: On appeal from a judgment denying his petition for a writ of habeas corpus, petitioner contends that the actions of the Parole Board violated his right to due process. While this appeal was pending, however, petitioner was released to parole supervision, and thus this appeal has been rendered moot (*see People ex rel. Briecke v New York State Dept. of Corr. Servs.*, 107 AD3d 1459, 1459; *People ex rel. Moore v Lempke*, 101 AD3d 1665, 1665-1666, *lv denied* 20 NY3d 863). Although petitioner contends otherwise, the exception to the mootness doctrine does not apply because, inter alia, the issue he raises on appeal is not likely to recur (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1275

OP 13-00836

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

IN THE MATTER OF GM COMPONENTS HOLDINGS, LLC,
PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF LOCKPORT INDUSTRIAL DEVELOPMENT
AGENCY, RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRODY D. SMITH OF COUNSEL), FOR PETITIONER.

JONES, HOGAN & BROOKS, LLP, LOCKPORT (MORGAN L. JONES, JR., OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent to condemn certain real property by eminent domain.

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

Memorandum: Petitioner, GM Components Holdings, LLC (GMCH), commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Town of Lockport Industrial Development Agency (LIDA), authorizing the condemnation of 91 acres of vacant land owned by GMCH for the purpose of expanding LIDA's industrial park. It is undisputed that the parties had been unsuccessful in negotiating an agreement for LIDA's purchase of the subject property. LIDA determined that a public purpose would be served by increasing its inventory of industrial-zoned sites available for sale to potential purchasers/developers, particularly sites of 25 or more acres, thereby providing jobs for residents of the area and a broader tax base for the Town of Lockport. With respect to the required review of the environmental impact of the proposed condemnation pursuant to the State Environmental Quality Review Act ([SEQRA] ECL article 8; *see* EDPL 207 [C] [3]), LIDA issued a negative declaration based upon its determination that the acquisition of the property would not result in a negative impact on the environment. GMCH contends, inter alia, that LIDA's determination that the acquisition would serve a public use is illusory because potential developers have the option to purchase the property from GMCH. GMCH further contends that LIDA failed to comply with SEQRA because it improperly segmented the review by considering only the acquisition,

and not the future development, of the parcel.

It is well settled that the scope of our review of LIDA's determination is "very limited" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546). We must " 'either confirm or reject [LIDA's] determination and findings,' and [our] review is confined to whether (1) the proceeding was constitutionally sound; (2) [LIDA] had the requisite authority; (3) its determination complied with SEQRA and EDPL article 2; and (4) the acquisition will serve a public use" (*id.*; *see* EDPL 207 [C]). "The burden is on the party challenging the condemnation to establish that the determination 'was without foundation and baseless' . . . Thus, '[i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination should be confirmed' " (*Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1271-1272).

Addressing first the public use factor, we note that, in support of its determination authorizing the condemnation, LIDA found that since the creation of the 201-acre industrial park in 1981 it has assisted 30 businesses, accounting for investments totaling $399,164,000 and employment of 491 area residents. LIDA also found that as of early 2013 there were only 56 acres of vacant land in the industrial park and only 33 acres thereof were suitable for sale and development, with the single largest parcel measuring 14 acres total. Since 2008, LIDA has conducted five sales, including a total of 42 acres to Yahoo! in 2009 and 2012. LIDA also found that the property, which is bordered by a state highway and a railroad, is in proximity to the industrial park and is zoned for industrial use. We therefore conclude that LIDA's determination to exercise eminent domain power "is rationally related to a conceivable public purpose" (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 303, *lv denied* 99 NY2d 508 [internal quotation marks omitted]; *cf. Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1434-1435, *appeal dismissed and lv denied* 14 NY3d 924).

We conclude with respect to the statutory compliance factor that, contrary to GMCH's contention, LIDA "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" that there would be no negative impact on the environment as a result of the acquisition of the property (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [internal quotation marks omitted]; *see Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348). Although LIDA considered only the impact of the acquisition and not the impact of potential development, we reject GMCH's contention that LIDA thereby improperly segmented the SEQRA review process (*see* 6 NYCRR 617.2 [ag]). Although LIDA intends to sell the property to a potential developer, there was no identified purchaser or specific plan for development at the time the SEQRA review was conducted (*cf. Matter of Riverso v Rockland County Solid Waste Mgt. Auth.*, 96 AD3d 764, 765-766; *Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1019-1020), and thus we conclude that under these facts the

acquisition is not a "separate part[] 'of a set of activities or steps' in a single action or project" (*Matter of Settco, LLC v New York State Urban Dev. Corp.*, 305 AD2d 1026, 1027, *lv denied* 100 NY2d 508; *see Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 620-621, *lv denied* 98 NY2d 609; *see generally Matter of Center of Deposit, Inc. v Village of Deposit*, 90 AD3d 1450, 1453). We have reviewed GMCH's remaining contentions and conclude that they are without merit. We therefore conclude that GMCH failed to sustain its burden of establishing that the determination of LIDA to condemn the parcel is "without foundation and baseless" (*Butler*, 39 AD3d at 1272).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1279

CA 13-00586

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

TOM TRALA, PLAINTIFF-APPELLANT,

V ORDER

DELTA SONIC CARWASH SYSTEMS, INC., DELTA SONIC SALES & SERVICE, INC., DELTA SONIC CAR WASH CORPORATION AND BENDERSON DEVELOPMENT COMPANY, LLC, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (COURTNEY G. SCIME OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered September 19, 2012. The order denied the motion of plaintiff to strike the answer of defendants.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on December 12, 2013,

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1281

CA 13-00845

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

ONE FLINT ST., LLC AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MCCUSKER, ANSELMI, ROSEN & CARVELLI, P.C., NEW YORK CITY (PATRICIA PREZIOSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 1, 2012. The order denied the motion of plaintiffs for partial summary judgment seeking, inter alia, a determination that defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation are strictly liable for the discharge of petroleum products.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it seeks a determination that defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation are strictly liable as dischargers under Navigation Law § 181 (1) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to Navigation Law article 12, seeking indemnification or contribution from defendants for the environmental response conducted by plaintiffs to remediate two parcels on Flint Street in the City of Rochester that were part of the former oil refinery operations of Vacuum Oil Company (Vacuum Oil), a predecessor of Exxon Mobil Corporation and ExxonMobil Oil Corporation (defendants). Plaintiffs moved for partial summary judgment seeking, inter alia, a determination that defendants are strictly liable for the discharge of petroleum products by Vacuum Oil, which was operating on the sites from 1890 to 1935. We conclude that plaintiffs established their entitlement to a determination that defendants are contributing "dischargers" pursuant to Navigation Law § 172 (8) and thus are strictly liable under section 181 (1) for, inter alia, the cleanup and removal costs (*see State of New York v Green*, 96 NY2d 403, 406; *Patel v Exxon Corp.*, 43 AD3d 1323, 1323-1324), despite

the fact that the parcels subsequently were the sites for various commercial operations that also may have contributed to the contamination of the properties, including a scrap yard. We therefore modify the order accordingly.

In support of their motion, plaintiffs submitted, inter alia, evidence of the undisputed historical uses of the property, which included the refinery operations of Vacuum Oil. Plaintiffs provided the affidavits of two experts explaining that samples taken from depths of 6 to 14 feet below the surface contained contaminants that are consistent with refinery operations and that, based upon the age and depths of the samples, could only have been caused by the refinery operations. In particular, paraffin wax was located at a depth of 10 feet, and it is undisputed that Vacuum Oil manufactured paraffin wax beginning in 1884. In addition, a strong odor of petroleum was detected at a depth of 14 feet. One expert observed foaming water, which is consistent with long-term biodegradation of hydrocarbons. The other expert opined, inter alia, that the presence of kerosene, also produced by Vacuum Oil, without the presence of lubricating oils that would be expected to be released from the scrap yard operations, supported the conclusion that the contamination at those depths was caused by the Vacuum Oil operations, and not by the scrap yard operations. Defendants failed to raise an issue of fact sufficient to defeat that part of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, defendants submitted environmental reports acknowledging that Vacuum Oil manufactured kerosene and paraffin wax and that "residuals [were] left from the refinery operations," but noting that it "will be difficult to distinguish between [such] residuals . . . and wastes released by the material in the junkyard." Although defendants also submitted the affidavit of a project manager for environmental services, the affidavit "is speculative and unsupported by any evidentiary or expert proof excluding defendant[s] as . . . contributing discharger[s]" (*State of New York v Slezak Petroleum Prods., Inc.*, 96 AD3d 1200, 1204, *lv denied* 19 NY3d 814).

We further conclude, however, that plaintiffs failed to meet their initial burden of establishing their entitlement to partial summary judgment on the issue whether they are entitled to indemnification rather than contribution (*see White v Long*, 85 NY2d 564, 568), and thus the court properly denied their motion to that extent. Plaintiffs failed to eliminate any issue of fact whether petroleum products were discharged during the period of their ownership (*see 1093 Group, LLC v Canale*, 72 AD3d 1561, 1562; *Sweet v Texaco, Inc.*, 67 AD3d 1322, 1323; *see generally State of New York v Speonk Fuel, Inc.*, 3 NY3d 720, 723-724, *rearg denied* 4 NY3d 740).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1282

CA 13-00587

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

JOHN F. MIKULSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL M. BATTAGLIA, DEFENDANT-APPELLANT.

DIANE M. CIURCZAK, BUFFALO, FOR DEFENDANT-APPELLANT.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (RICHARD S. JUDA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 30, 2012. The order, among other things, denied the cross motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for fraudulent inducement and fraudulent misrepresentation, arising from his purchase of a home from defendant. Defendant appeals from an order that, inter alia, denied his cross motion for summary judgment dismissing the amended complaint. We note at the outset that defendant's contention that he was entitled to dismissal of the amended complaint pursuant to CPLR 3211 (a) (11) was raised for the first time in his reply papers in Supreme Court. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417). Thus, defendant's contention was not properly before the court (*see Zolfaghari v Hughes Network Sys., LLC*, 99 AD3d 1234, 1235, *lv denied* 20 NY3d 861).

Even assuming, arguendo, that defendant met his initial burden on that part of the cross motion with respect to the fraudulent concealment cause of action by submitting evidence that he did not knowingly fail to disclose any defects in the property (*see generally Sample v Yokel*, 94 AD3d 1413, 1415), we conclude that plaintiff raised a triable issue of fact in opposition (*see generally Jablonski v Rapalje*, 14 AD3d 484, 485-486).

We reject defendant's contention that the court erred in denying that part of the cross motion with respect to the fraud cause of

action on the ground that it fails to meet the requirements of CPLR 3016 (b). The statute "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of" (*Lanzi v Brooks*, 43 NY2d 778, 780, *mot to amend remittitur granted* 43 NY2d 947, *rearg denied* 44 NY2d 733; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178), and that standard was met here. Furthermore, we agree with plaintiff that the court otherwise properly denied that part of defendant's cross motion for summary judgment dismissing the fraud cause of action on the merits. It is well settled that, "[t]o establish a cause of action for fraud, plaintiff must demonstrate that defendant[] knowingly misrepresented a material fact upon which plaintiff justifiably relied and which caused plaintiff to sustain damages" (*Klafehn v Morrison*, 75 AD3d 808, 810). False representation in a property condition disclosure statement mandated by Real Property Law § 462 (2) "may constitute active concealment in the context of fraudulent nondisclosure . . . , [but] to maintain such a cause of action, 'the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor' " (*Klafehn*, 75 AD3d at 810). Here, although defendant met his initial burden on that part of the cross motion with respect to the fraud cause of action by submitting evidence that he did not knowingly fail to disclose any defects in the property (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), plaintiff raised a triable issue of fact (*see generally id.*).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1285

CA 13-00373

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

IN THE MATTER OF JOHN D. JUSTICE,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

JOHN D. JUSTICE, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 1, 2013 in a proceeding pursuant to CPLR article 78. The order denied the motion of petitioner for leave to renew.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see generally Matter of Davidson v Alexander*, 67 AD3d 1219).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1287

TP 13-00922

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

IN THE MATTER OF DEREK JOSEY, PETITIONER,

V 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 (MARCUS J. MASTRACCO 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 May 22, 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: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1289

KA 12-00436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SMIKLE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Erie County Court (Michael F. Pietruszka, J.), rendered January 19, 2012. Defendant was resentenced by imposing periods of postrelease supervision upon his conviction of attempted murder in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), four counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]), and five counts of criminal possession of a weapon in the fourth degree (§ 265.01 [2]), and he appeals from a resentence with respect to that conviction. County Court originally sentenced defendant to, inter alia, consecutive and concurrent determinate terms of imprisonment of eight years for the attempted murder counts, and we affirmed the judgment of conviction (*People v Smikle*, 1 AD3d 883, *lv denied* 1 NY3d 634). The sentencing court had failed, however, to impose periods of postrelease supervision with respect to the attempted murder counts as required by Penal Law § 70.45 (1). To remedy that error (*see* Correction Law § 601-d), the court resentenced defendant prior to the completion of his sentence to the same terms of imprisonment and imposed the requisite periods of postrelease supervision.

We reject defendant's contentions that the imposition of postrelease supervision was irrational and that by our prior decision we implicitly affirmed the legality of his sentence, thus precluding the court from imposing periods of postrelease supervision at resentencing. To the contrary, as noted above, postrelease supervision is mandated by statute (*see* Penal Law § 70.45 [1]; *see generally People v Davis*, 37 AD3d 1179, 1180), and we conclude that " 'in resentencing defendant the court simply corrected the error . .

. made at the time of the original sentence and thus that the resentence was proper' " (*People v Fomby*, 103 AD3d 1100, 1100, *lv denied* 21 NY3d 1073; *see People v Sparber*, 10 NY3d 457, 472; *see generally People v Howard*, 96 AD3d 1691, 1692, *lv denied* 19 NY3d 1103).

Defendant failed to preserve for our review his contention that the 10½-year gap between his original sentence and his resentence violated his statutory right to have his sentence pronounced "without unreasonable delay" (CPL 380.30 [1]; *see People v Diggs*, 98 AD3d 1255, 1256, *lv denied* 20 NY3d 986), and his constitutional due process rights (*see People v Thomas*, 68 AD3d 514, 515), 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]). Finally, the periods of postrelease supervision do not render the sentence unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1291

KA 13-00393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM M. WARD, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 10, 2012. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1292

KA 11-00817

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE SINKLER, DEFENDANT-APPELLANT.

MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

MAURICE SINKLER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 6, 2010. 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 [3]). Contrary to defendant's contention, Supreme Court properly discharged a sworn juror. A court must discharge a sworn juror who is grossly unqualified to serve in the case, i.e., a juror who "possesses a state of mind which would prevent the rendering of an impartial verdict" (*People v Buford*, 69 NY2d 290, 298 [internal quotation marks omitted]; *see* CPL 270.35 [1]). The juror here was grossly unqualified inasmuch as she indicated that she was having personal problems at home that prevented her from giving her undivided attention to the case, she had anxiety, and she stated that she could not be fair and impartial (*see People v Daniels*, 59 AD3d 730, 730-731, *lv denied* 12 NY3d 852; *People v Cook*, 275 AD2d 1020, 1020-1021, *lv denied* 95 NY2d 933).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient with respect to the element of possession in both crimes inasmuch as his motion for a trial order of dismissal was not "specifically directed" at the alleged error now asserted on appeal (*People v Gray*, 86 NY2d 10, 19). In any event, his contention is without merit inasmuch as defendant admitted in his

statement to the police that his codefendant told him that she wanted to rob a store and handed him the handgun after he asked to see it. Contrary to defendant's further contention, 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).

Defendant next contends that the court erred in denying his request to instruct the jury on the defense of temporary innocent possession of the handgun. We reject that contention. That instruction is warranted only where there is "proof in the record showing a legal excuse for [the defendant] having the weapon in his [or her] possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045; *see People v Ward*, 104 AD3d 1323, 1324-1325, *lv denied* 21 NY3d 1011). Viewing the evidence in the light most favorable to defendant (*see Williams*, 50 NY2d at 1044), we conclude that the jury could not have found that defendant's possession was innocent and, indeed, the evidence "is 'utterly at odds with . . . [a] claim of innocent possession' " (*People v Snyder*, 73 NY2d 900, 902, quoting *Williams*, 50 NY2d at 1045). We reject defendant's further contention that the sentence is unduly harsh and severe.

In his pro se supplemental brief, defendant contends that the court failed to make a proper inquiry regarding a conflict with his assigned counsel. We reject that contention. It is well settled that courts must " 'carefully evaluate serious complaints about counsel' " and should substitute counsel in situations where defendant demonstrates " 'good cause,' " such as a conflict of interest or other irreconcilable conflict with counsel (*People v Linares*, 2 NY3d 507, 510, quoting *People v Medina*, 44 NY2d 199, 207; *see People v Sides*, 75 NY2d 822, 824). Here, when defendant sought to "fire" defense counsel, the court's duty to inquire was not triggered inasmuch as defendant made only "generalized complaints about counsel" (*People v Augustine*, 89 AD3d 1238, 1240, *affd* 21 NY3d 949; *see Medina*, 44 NY2d at 208). It was not until defense counsel received a copy of a complaint sent by defendant to the Grievance Committee approximately two months later that an irreconcilable conflict arose, at which time the court assigned new counsel.

We reject defendant's further contentions in his pro se supplemental brief that the court erred in denying his request to withdraw his waiver of the probable cause and *Huntley* hearings and that defense counsel was ineffective for allowing him to waive those hearings. The record establishes that the waiver was made knowingly, voluntarily, and intelligently (*see People v Boyd*, 27 AD3d 1124, 1124, *lv denied* 7 NY3d 752; *People v Ford*, 249 AD2d 978, 978, *lv denied* 92 NY2d 924), and defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's waiver of those hearings (*People v Rivera*, 71 NY2d 705, 709; *see People v Dennis*, 206 AD2d 843, 844, *lv denied* 84 NY2d 867; *People v Flemming*, 191 AD2d 987, 988, *lv denied* 82 NY2d 717; *People v Brown*,

122 AD2d 546, 546, *lv denied* 68 NY2d 810).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1296

CA 13-00464

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

IN THE MATTER OF THE ESTATE OF MOOSHI R. NAMORDI, DECEASED.

NICOLE NAMORDI, PETITIONER-APPELLANT;

CLIFFORD FORSTADT, ESQ., EXECUTOR OF THE ESTATE OF MOOSHI R. NAMORDI, DECEASED, RESPONDENT-RESPONDENT.

MEMORANDUM AND ORDER

THE LAW OFFICES OF PHILIP A. BAUMGARTEN, LARCHMONT (PHILIP A. BAUMGARTEN OF COUNSEL), FOR PETITIONER-APPELLANT.

CLIFFORD FORSTADT, DEWITT, FOR RESPONDENT-RESPONDENT.

Appeal from a decree (denominated order) of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered May 15, 2012. The decree dismissed the petition seeking, inter alia, vacatur of a decree of probate.

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

Memorandum: Mooshi R. Namordi died on February 11, 2009, leaving a will in which he created residuary trusts for the benefit of his daughter (petitioner) and her son, and devised real property to petitioner's former husband. Petitioner signed a waiver of process and consent to probate on March 3, 2009, and the will was subsequently admitted to probate on April 3, 2009. On April 5, 2012, petitioner sought vacatur of the decree of probate on the ground of "newly-discovered evidence," and Surrogate's Court dismissed the petition without a hearing. We affirm. We reject petitioner's contention that the Surrogate erred in dismissing the petition. Although a party seeking to set aside a decree of probate entered upon that party's waiver of process and consent to probate may indeed submit newly-discovered evidence as a ground for justifying the reopening of the decree (*see Matter of Leeper*, 53 AD2d 1054, 1055, *appeal dismissed* 42 NY2d 910), here petitioner failed to do so. In light of our determination, we conclude that petitioner's remaining contentions are without merit.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1297

CA 13-00507

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

AMERICAN TOWER ASSET SUB, LLC AND AMERICAN TOWER ASSET SUB II, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

BUFFALO-LAKE ERIE WIRELESS SYSTEMS, CO., LLC, DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), AND HOFFNER PLLC, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, NEW YORK CITY (WILLIAM N. AUMENTA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 3, 2012. The order, among other things, granted the motion of plaintiffs for partial summary judgment dismissing the first counterclaim and denied the cross motion of defendant for partial summary judgment.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1301

CA 12-01669

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

L.D. BURTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MANUFACTURERS AND TRADERS TRUST COMPANY,
DEFENDANT-RESPONDENT.

L.D. BURTON, PLAINTIFF-APPELLANT PRO SE.

THOMAS K. FREDERICK, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 1, 2012. 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 in September 2011 to recover monies that he had on deposit with defendant, alleging that the monies were wrongfully distributed by defendant to his former legal guardian. Defendant moved for summary judgment dismissing the complaint on the ground that the action was time-barred, and we conclude that Supreme Court properly granted the motion. "As a general principle, the statute of limitations begins to run when a cause of action accrues (*see* CPLR 203 [a]), that is, 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court' " (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770, quoting *Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175). Contrary to plaintiff's contention, his cause of action accrued, at the latest, on December 28, 2000, when his former legal guardian closed the account (*see Gonzalez v Anchor Bank Corp.*, 245 AD2d 132, 132; *see generally Hahn Automotive Warehouse, Inc.*, 18 NY3d at 770). Plaintiff's action, which is governed by a six-year statute of limitations (*see* CPLR 213 [2]; *Gonzalez*, 245 AD2d at 132-133; *see also Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39-40) is therefore untimely. Plaintiff's additional contention based on UCC 4-406 is raised for the first time on appeal and is therefore not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1305

CA 13-01063

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

IN THE MATTER OF BATTAGLIA DEMOLITION, INC., BATTAGLIA TRUCKING, INC. AND PETER BATTAGLIA, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO COMMON COUNCIL, CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT & INSPECTION SERVICES AND PATRICK SOLE, JR., AS DIRECTOR OF PERMIT & INSPECTION SERVICES, RESPONDENTS-RESPONDENTS.

JOSEPH F. GERVASE, JR., BUFFALO, FOR PETITIONERS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JOEL C. MOORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 19, 2013 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent City of Buffalo Common Council denying the application of petitioner Battaglia Demolition, Inc. (Battaglia Demolition) for a transfer station license (*see* Buffalo City Code § 263-27). They also sought a determination that Battaglia Demolition does not require a transfer station license in light of the fact that petitioners possess other licenses and permits, and they sought to annul the determination of respondent Patrick Sole, Jr., as director of permit and inspection services for respondent City of Buffalo, denying the application of petitioner Battaglia Trucking, Inc. for a collector license (*see* § 263-26). We conclude that Supreme Court properly granted respondents' motion to dismiss the petition (*see* CPLR 7804 [f]). Contrary to petitioners' contention, the determinations with respect to the applications were neither "affected by an error of law [n]or . . . arbitrary and capricious" (CPLR 7803 [3]). Petitioners' request for a determination that their possession of other licenses and permits obviates Battaglia Demolition's need for a transfer station license is not properly sought in a CPLR article 78 proceeding, which may not be used to

challenge the validity of a legislative act such as the Buffalo City Code provision requiring Battaglia Demolition to obtain such a license (*see generally* CPLR 7803; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202). We note in any event that there is no authority for petitioners' position that multiple other licenses may substitute for a transfer station license.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1306

CA 13-00807

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

CELESTE SWIETLIK, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF HAMBURG, DEFENDANT-APPELLANT.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 19, 2013. 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.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1307

KA 12-00295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PEDRO RAMOS-ROMAN, ALSO KNOWN AS EDGAR,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 21, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that the oral and written waivers of his right to appeal from his conviction of that crime do not encompass his challenge to the severity of his sentence and thus do not foreclose our review of that challenge (*see People v Maracle*, 19 NY3d 925, 927-928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1308

KA 12-01905

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. DOXEY, DEFENDANT-APPELLANT.

MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered July 13, 2012. 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: On appeal 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 contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory 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 Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1312

KAH 11-01845

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHARD MILLS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, ERIC SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

RICHARD MILLS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered July 25, 2011 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Memorandum: On appeal from a judgment that denied and dismissed the habeas corpus petition, petitioner initially contends that Supreme Court erred in applying the doctrine of res judicata. Although it appears that the court intended to apply the doctrine of collateral estoppel, and the use of that doctrine would have been proper under these circumstances, we agree that the court erred in applying the doctrine of res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action [or proceeding] between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269). Here, inasmuch as the parties opposing petitioner in the habeas corpus proceeding are not identical to those opposing him in the resentencing proceeding, the court erred in applying the doctrine of res judicata (*see Matter of Josato, Inc. v Wright*, 288 AD2d 384, 385; *Matter of State of New York v Town of Hardenburgh*, 273 AD2d 769, 772). We nevertheless conclude, however, that the court properly denied and dismissed the petition on the merits.

We reject petitioner's contention that he is unlawfully detained based on the court's failure to file an amended order of commitment after resentencing him on one of the charges of which he was

convicted. "Irregularities or defects in an order of commitment would not entitle petitioner to immediate release where, as here, there is a valid judgment of conviction underlying the commitment" (*People ex rel. Burr v Clark*, 278 AD2d 938, 938, *lv denied* 96 NY2d 707; *see People ex rel. Reed v Travis*, 12 AD3d 1102, 1103, *lv denied* 4 NY3d 704). Petitioner's contention that he is unlawfully detained because the court violated his right to due process in resentencing him is also unavailing. Even assuming, arguendo, that his right to due process was violated, we conclude that petitioner would only be entitled to a new sentencing proceeding, and thus habeas corpus relief does not lie (*see People ex rel. McGourty v Senkowski*, 213 AD2d 954, 954, *lv denied* 85 NY2d 812). Petitioner's further contention that Correction Law § 601-d and Penal Law § 70.85 are ex post facto laws is raised for the first time on appeal and thus is unpreserved for our review and, in any event, that contention is without merit (*see People v Pruitt*, 74 AD3d 1366, 1367, *lv denied* 15 NY3d 855).

Petitioner's remaining contentions may be raised on direct appeal or by a motion pursuant to CPL article 440, and thus habeas corpus relief is unavailable with respect to those contentions (*see People ex rel. Smith v Burge*, 11 AD3d 907, 907-908, *lv denied* 4 NY3d 701; *People ex rel. Pitts v McCoy*, 11 AD3d 985, 985, *lv denied* 4 NY3d 705).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1315

KA 09-01799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERETT M. DURANT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 10, 2009. 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: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [1]). Viewing the evidence in light of the contested element of larcenous intent as charged to the jury (*see generally 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). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give [g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v McMillon*, 77 AD3d 1375, 1376, *lv denied* 16 NY3d 897 [internal quotation marks omitted]). While a finding that defendant did not have the requisite intent would not have been unreasonable, "it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*id.*). The victim testified that defendant stole his wallet during a group assault on him, and the People presented evidence establishing that defendant "knowingly participated and continued to participate even after his companion[s'] intentions [to take the victim's cell phone] became clear" and thus "shared a 'community of purpose' with his companion[s]" (*People v Allah*, 71 NY2d 830, 832). Contrary to defendant's further contention, County Court properly denied his request for an adverse inference charge concerning the failure of the police to record his interrogation electronically (*see McMillon,* 77

AD3d at 1375; *People v Hammons*, 68 AD3d 1800, 1801, *lv denied* 14 NY3d 801).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1316

CAF 12-01175

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

IN THE MATTER OF AMODEA D. AND BARON D.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON D., RESPONDENT-APPELLANT.

FARES A. RUMI, ROCHESTER, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

LINDA M. JONES, ATTORNEY FOR THE CHILDREN, BATAVIA

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 19, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent father appeals from an order of fact-finding and disposition adjudging that he neglected the subject children. Contrary to the father's contention, Family Court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345). The testimony presented at the fact-finding hearing established that one child witnessed, and the other was in proximity to, a physical altercation between the parties wherein the father kicked the mother in the face and placed his hands around her neck to prevent her from breathing. The child who witnessed the altercation told a caseworker for petitioner later that day that she was "very sad and scared" upon seeing the mother's bloodied face after the altercation, and both children indicated to the caseworker that they were afraid of the father. We conclude that the children's proximity to the altercation, "together with the evidence of a pattern of ongoing domestic violence in the home, placed [the children] in imminent risk of emotional harm" (*Jayden B.*, 91 AD3d at 1345). We reject the father's further contention that he was denied effective assistance of counsel, which is "impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf" (*Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1819).

Indeed, " '[i]t is not the role of this Court to second-guess the attorney's tactics or trial strategy' " (*Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1317

CAF 12-02086

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

IN THE MATTER OF GADA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CARLOS B., RESPONDENT,
AND VIANEZ V., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 15, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Vianez V. had neglected 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 10 of the Family Court Act, respondent mother appeals from an order in which Family Court found that she neglected the subject child. We note at the outset that it appears that the mother surrendered her parental rights to the subject child during a subsequent court appearance. Assuming, arguendo, that this appeal is not moot because "the finding of neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings" (*Matter of Jamiar W.*, 84 AD3d 1386, 1386-1387; *cf. Matter of Simeon F.*, 58 AD3d 1081, 1081-1082, *lv denied* 12 NY3d 709), we affirm. In this neglect proceeding, petitioner's burden was to "demonstrate by a preponderance of the evidence 'first, that [the] child'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 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' " (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter*

of Kaleb U. [Heather V.—Ryan U.], 77 AD3d 1097, 1098; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862). Here, based upon the evidence presented by petitioner, combined with the adverse inference that the court properly drew based upon the mother's failure to testify (*see Matter of Christine II.*, 13 AD3d 922, 923), we conclude that there is a sound and substantial basis to support the court's finding that "the child was in imminent danger of impairment as a result of [the mother's] failure to exercise a minimum degree of care" (*Matter of Paul U.*, 12 AD3d 969, 971; *see Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324; *see generally Nicholson*, 3 NY3d at 368-370).

Finally, "[e]ven assuming, arguendo, that we agree with the [mother] that the court did not adequately state the grounds for its determination, we conclude that the error is harmless because the determination is amply support[ed] by the record" (*Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612, *lv denied* 15 NY3d 705 [internal quotation marks omitted]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1318

CAF 12-00649

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

IN THE MATTER OF ALESHA P. AND MACKENZIE P.

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

AUDREY B., RESPONDENT-APPELLANT,
AND MICHAEL B., RESPONDENT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered April 3, 2012 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Audrey B. had abused her 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 and disposition determining that she abused her two daughters. Contrary to the mother's contention, Family Court's findings of abuse are supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Peter C.*, 278 AD2d 911, 911; *Matter of Sarah C.*, 245 AD2d 1111, 1111-1112; *Matter of Rhiannon B.*, 237 AD2d 935, 935). "We accord great weight and deference to [the c]ourt's determinations, 'including its drawing of inferences and assessment of credibility,' and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862; *see Peter C.*, 278 AD2d at 911).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1321

CAF 12-00970

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

IN THE MATTER OF AMANDA R. DIETZMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. DIETZMAN, RESPONDENT-APPELLANT.

FARES A. RUMI, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

LINDA M. JONES, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 26, 2012 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to article 8 of the Family Court Act, respondent, the former husband of petitioner and the father of her two children, appeals from an order of protection directing him, inter alia, to stay away from petitioner. Contrary to respondent's contention, Family Court's finding that he committed the family offenses of assault in the third degree (Penal Law § 120.00 [1]), harassment in the second degree (§ 240.26 [1]), and disorderly conduct (§ 240.20 [1]) is supported by a preponderance of the evidence (*see Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113; *see generally* Family Ct Act § 812 [1]). The testimony presented at the fact-finding hearing established that respondent kicked petitioner in the face, resulting in bruises, swelling, and a cut lip requiring stitches, and that while on top of petitioner he put his hands around her neck to prevent her from breathing. The court's determination that respondent was not acting in self-defense is supported by the record and will not be disturbed (*see Matter of Medranda v Mondelli*, 74 AD3d 972, 972). We reject respondent's further contention that he was denied effective assistance of counsel (*see Matter of Amodea D.*, ___ AD3d ___ [Dec. 27, 2013]).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1323

CA 13-00275

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

ADELE SEUBERT, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

JOHN D. MARCHIONI AND JEFFREY D. GRAVELLE,
DEFENDANTS-RESPONDENTS.

ADELE SEUBERT, PLAINTIFF-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 13, 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.

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages based on defendants' representation of them in their purchase of a membership interest in a limited liability company. Defendants moved for summary judgment dismissing the complaint, and Supreme Court granted the motion. We affirm. In order to establish their entitlement to judgment as a matter of law, defendants had to present evidence in admissible form establishing that plaintiffs are "unable to prove at least one necessary element of the legal malpractice action" (*Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702; *see Ginther v Rosenhoch*, 57 AD3d 1414, 1414-1415, *lv denied* 12 NY3d 707), e.g., " 'that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community' " (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045; *see generally McCoy v Feinman*, 99 NY2d 295, 301; *Williams v Kublick*, 302 AD2d 961, 961). Here, defendants met their initial burden on the motion with respect to that element (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Inasmuch as plaintiffs did not submit expert testimony or, indeed, any opposition to defendants' motion, they failed to raise an issue of fact concerning defendants' compliance with the applicable standard of care (*see Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen, LLP*, 23 AD3d 243, 243; *see also Zeller v Copps*, 294 AD2d 683, 684-685). Plaintiffs' remaining contentions are raised for the first time on appeal and thus are not properly before us (*see*

Ciesinski v Town of Aurora, 202 AD2d 984, 985).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1326

CA 13-00229

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

IN THE MATTER OF ANTHONY AMAKER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 6, 2012 in a CPLR article 78 proceeding. The judgment, inter alia, denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated three inmate rules. Contrary to petitioner's contention, the record does not establish that the Hearing Officer was biased or that the determination flowed from the alleged bias (*see Matter of Rodriguez v Herbert*, 270 AD2d 889, 890). Also contrary to petitioner's contention, the Hearing Officer did not improperly deny petitioner his right to call the superintendent of the facility or the pharmacist as witnesses inasmuch as the subject of their proposed testimony was irrelevant to the proceedings (*see Matter of Lewis v Lape*, 90 AD3d 1259, 1260, *lv denied* 18 NY3d 809). Finally, petitioner's contention that he should have been able to admit Directive 4910 in evidence because the search was improper is not properly before us, inasmuch as he failed to exhaust his administrative remedies with respect to that contention (*see Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals*, 83 AD3d 711, 713), and we conclude that the Hearing Officer did not act improperly in removing petitioner from the hearing (*see Matter of Barnes v Prack*, 101 AD3d 1277, 1278).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1327

KA 12-00814

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. BOYDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 20, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts) and obstructing governmental administration in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [3]) in connection with an altercation with deputies at the Cayuga County Jail and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of, inter alia, robbery in the first degree (§ 160.15 [3]) in connection with his robbery of a convenience store. Defendant pleaded guilty to all counts of the two indictments in exchange for a sentence promise of concurrent determinate terms of imprisonment, to be followed by a period of postrelease supervision. By failing to move to withdraw his plea or to vacate the judgment of conviction in each appeal, defendant failed to preserve for our review his contention in each appeal that his plea of guilty was not voluntarily entered (*see People v Toxey*, 86 NY2d 725, 726, *rearg denied* 86 NY2d 839; *People v Theall*, 109 AD3d 1107, 1107). In any event, defendant's contention is belied by the record of the plea proceeding in each appeal (*see People v Weakfall*, 108 AD3d 1115, 1115, *lv denied* 21 NY3d 1078). The bargained-for sentence is not unduly harsh and severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1331

KA 12-00157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WINFORD T.D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an adjudication of the Monroe County Court (Stephen T. Miller, A.J.), rendered January 7, 2009. The adjudication convicted defendant, upon his plea of guilty, of robbery in the second degree as a youthful offender.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1332

KA 12-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. BOYDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 20, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, robbery in the second degree, assault in the second degree, burglary in the second degree (two counts), unlawfully fleeing a police officer in a motor vehicle in the third degree and reckless driving.

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

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1336

KA 12-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WINFORD T.D., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Stephen T. Miller, A.J.), rendered January 7, 2009. The judgment convicted defendant, upon his plea of guilty, of forgery in the second degree.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1337

CA 13-00851

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

MARY HERBST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAKEWOOD SHORES CONDOMINIUM ASSOCIATION,
DEFENDANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (RAUL EMILIO MARTINEZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (AMANDA BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 11, 2013 in a personal injury action. The order denied the cross motion of plaintiff for partial summary judgment on liability, and granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the handrail in the stairway, which provided access from the garage to the first floor of the building in which she lived, pulled out from the wall, causing her to fall backward down the stairs. Plaintiff alleges that defendant's negligence may be inferred based upon the doctrine of res ipsa loquitur. We note at the outset that plaintiff improperly alleges res ipsa loquitur as a separate cause of action (*see Abbott v Page Airways*, 23 NY2d 502, 512; *Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 428-429). We therefore deem plaintiff's complaint, as amplified by the bill of particulars, to state a single cause of action for negligence.

Supreme Court properly denied plaintiff's cross motion for partial summary judgment on liability but erred in granting defendant's motion for summary judgment dismissing the complaint on the ground that defendant established as a matter of law that it did not have exclusive control of the handrail, i.e., one of the necessary conditions herein for the applicability of the doctrine of res ipsa loquitur (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We conclude that plaintiff raised an issue of fact whether the handrail

was in the exclusive control of defendant, and thus that the court erred in granting defendant's motion (*see Brink v Anthony J. Costello & Son Dev., LLC*, 66 AD3d 1451, 1452-1453). We therefore modify the order accordingly.

"The exclusive control requirement . . . is that evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it . . . The purpose is simply to eliminate within reason all explanations for the injury other than defendant's negligence" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [internal quotation marks omitted]). Here, plaintiff established that access to the internal stairway is limited to the residents of the three units in the building and defendant's maintenance staff (*see Hoffman v United Methodist Church*, 76 AD3d 541, 543; *cf. Anderson v Justice*, 96 AD3d 1446, 1448; *Heckman v Skelly*, 63 AD3d 1712, 1712-1713), and a former maintenance staff person testified that railings in other buildings had become loose and were tightened as needed. We therefore conclude that plaintiff raised an issue of fact "that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it" (*Dermatossian*, 67 NY2d at 227).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1340

CA 13-01034

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

GLORY FOLMSBEE AND MARK FOLMSBEE,
PLAINTIFFS-RESPONDENTS,

V ORDER

THE GOODYEAR TIRE & RUBBER COMPANY, DOING
BUSINESS AS GOODYEAR AUTO SERVICE CENTERS,
DEFENDANT,
AND BENDERSON PROPERTIES, INC., FORMERLY KNOWN
AS BENDERSON DEVELOPMENT COMPANY, LLC,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 14, 2012 in a personal injury action. The order, inter alia, denied the motion of defendant Benderson Properties, Inc., formerly known as Benderson Development Company, LLC, for summary judgment dismissing the complaint against it and granted plaintiffs partial summary judgment dismissing the affirmative defense alleging assumption of risk.

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: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1342

KA 12-01536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE VAILLANCOURT, 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 August 2, 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 he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We reject defendant's contention that Supreme Court erred in relying upon facts set forth in the case summary prepared by the Board of Examiners of Sex Offenders in determining his risk level. "The case summary may constitute clear and convincing evidence of the facts alleged therein and, where, as here, the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination" (*People v Guzman*, 96 AD3d 1441, 1441-1442, *lv denied* 19 NY3d 812; *see People v Young*, 108 AD3d 1232, 1232, *lv denied* 22 NY3d 853, *rearg denied* ___ AD3d ___ [Dec. 17, 2013]; *People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703). Contrary to defendant's further contention, defense counsel's statement at the hearing that the court should not rely solely upon the case summary was not the equivalent of disputing the facts contained therein. Furthermore, defendant's contention that the court violated his due process rights by relying solely upon the case summary is without merit (*see People v Latimore*, 50 AD3d 1604, 1605, *lv denied* 10 NY3d 717; *cf. People v David W.*, 95 NY2d 130, 138-140; *see generally People v Montanez*, 88 AD3d 1278, 1279).

Contrary to defendant's further contention, "[t]he court's discretionary upward departure [to a level three risk] was based on

clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537, *lv denied* 15 NY3d 707; *see People v Miller*, 48 AD3d 774, 775, *lv denied* 10 NY3d 711; *People v Sanford*, 47 AD3d 454, 454, *lv denied* 10 NY3d 707). The court properly relied upon several factors that, "as a matter of law, . . . tend[ed] to establish a higher likelihood of reoffense or danger to the community" (*People v Wyatt*, 89 AD3d 112, 123, *lv denied* 18 NY3d 803; *see People v Campbell*, 98 AD3d 5, 13, *lv denied* 20 NY3d 853). Those factors included the number of defendant's prior sex-related offenses, committed in a variety of settings and spanning nearly a quarter of a century, his diagnosis of voyeurism, his admission to committing additional sex acts for which he was not prosecuted, his prior violations of community-based supervision, and his earlier failures to complete sex offender treatment.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1344

KA 12-02177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES P. KEMP, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 4, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]), defendant contends that the sentence imposed, a determinate term of incarceration of two years plus five years' postrelease supervision, is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal does not preclude him from challenging the severity of his sentence, inasmuch as "the record establishes that defendant waived his right to appeal before County Court advised him of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271; *see People v Adams*, 94 AD3d 1428, 1429, *lv denied* 19 NY3d 970). Nevertheless, we perceive no basis to exercise our power to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]).

Although defendant was only 19 years old when he was sentenced, he already had a criminal record, along with a youthful offender adjudication and extensive contact with the criminal justice system as a juvenile. We also note that defendant was previously sentenced to probation in connection with the youthful offender adjudication but failed to comply with its terms and conditions, thus resulting in his being resentenced to incarceration. Finally, we note that the certificate of conviction incorrectly reflects that defendant was sentenced to a two-year period of postrelease supervision and therefore must be amended to correct that error (*see People v Saxton*,

32 AD3d 1286, 1286-1287).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1345

KA 12-00046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V ORDER

VALFANSO DEWITT, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered November 10, 2011. The order denied the motion of defendant for resentencing pursuant to the Drug Law Reform Acts of 2004, 2005 and 2009.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1349

KA 10-01047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHANTEL L. RUSH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 3, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant and the attorneys for the parties on December 2, 2013,

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1351

CAF 12-01077

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

IN THE MATTER OF JACQUELINE GOLDA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LILLIAN RADTKE, RESPONDENT-RESPONDENT.

IN THE MATTER OF LILLIAN RADTKE,
PETITIONER-RESPONDENT,

V

JACQUELINE GOLDA, RESPONDENT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

CLAIR A. MONTROY, III, ORCHARD PARK, FOR RESPONDENT-RESPONDENT AND 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 (Margaret O. Szczur, J.), entered May 18, 2012. The order, among other things, adjudged that petitioner-respondent, Jacqueline Golda, is to have three visits per year with the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed insofar as it concerns the oldest child of petitioner-respondent and the order is affirmed without costs.

Memorandum: Petitioner-respondent mother (petitioner) commenced this proceeding seeking to modify visitation with respect to her four biological children. Respondent-petitioner (respondent), petitioner's sister, has custody of the children, and she in turn sought to reduce petitioner's visitation. Following a hearing and an in camera interview with the children, Family Court granted the relief sought by respondent and reduced petitioner's visitation. Initially, we note that any issues concerning visitation with the oldest child are moot because she is now 18 years old (*see Matter of Woodruff v Adside*, 26 AD3d 866, 866). There is no dispute that there was a sufficient change in circumstances since the prior order, and thus the issue before us is whether the court properly determined that the best

interests of the children would be served by a change in visitation (*see Matter of Robert AA. v Colleen BB.*, 101 AD3d 1396, 1397, *lv denied* 20 NY3d 860). " '[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record' " (*id.*). Here, we conclude that the court's determination has ample support in the record. Respondent, who supervised petitioner's visits with the children, testified that petitioner did not regularly avail herself of the opportunity to visit the children despite an order allowing her monthly visitation. Respondent further testified that, when petitioner did visit with the children, the visitation was a negative experience for the children. Finally, contrary to petitioner's contention, the court "gave proper weight to the children's wishes which, although not controlling, must be considered, particularly where, as here, the children are of sufficient age to articulate their needs and preferences to the court" (*Matter of Lozada v Lozada*, 270 AD2d 422, 422).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1353

CAF 12-00116

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

IN THE MATTER OF ALEXANDER J.S.

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

DAVID J.S., JR., RESPONDENT-APPELLANT,
AND ALECIA P., RESPONDENT.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (MICHELLE COOKE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered December 13, 2011 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent David J.S., Jr. to dismiss the neglect petition against him.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1359

CA 13-01056

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

SYRACUSE UNIVERSITY, PLAINTIFF-RESPONDENT,

V ORDER

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., DEFENDANT-APPELLANT.

BRESSLER, AMERY & ROSS, P.C., NEW YORK CITY (ROBERT NOVACK OF COUNSEL), FOR DEFENDANT-APPELLANT.

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, NEW YORK CITY (KENNETH H. FRENCHMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 7, 2013. The judgment, among other things, denied the motion of defendant for summary judgment dismissing the complaint and granted the cross motion of plaintiff for partial summary judgment on the second cause of action seeking declaratory relief.

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: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1362

KA 12-02097

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK BRIDENBAKER, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, 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 (Kenneth F. Case, J.), rendered October 25, 2012. The judgment convicted defendant, upon his plea of guilty, of reckless assault 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 his plea of guilty of reckless assault of a child (Penal Law § 120.02 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). "Although County Court's colloquy was brief, defendant signed a detailed written waiver of the right to appeal . . . , and he acknowledged to the court that he understood that he was foregoing the right to appeal" (*People v Luper*, 101 AD3d 1668, 1668, *lv denied* 20 NY3d 1101; *see People v Ramos*, 7 NY3d 737, 738; *cf. People v Bradshaw*, 18 NY3d 257, 267). The valid waiver encompasses defendant's challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827).

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1364

KA 10-00679

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CASEY A. JEFFERSON, ALSO KNOWN AS CASEY RIGGINS,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 13, 2009. 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.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1368

KA 12-00763

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD HUGHES, DEFENDANT-APPELLANT.

FRANK POLICELLI, 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 (Barry M. Donalty, J.), rendered February 29, 2012. The judgment convicted defendant, upon a jury verdict, of attempted criminal sexual act in the first degree, sexual abuse in the first degree (three counts) and course of sexual conduct against a child in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision imposed on the first count of the indictment to a period of 15 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [4]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]), and three counts of sexual abuse in the first degree (§ 130.65 [3]). Defendant contends that County Court erred in refusing to suppress his statement to the police on the ground that he gave the statement involuntarily. We reject that contention. A statement "is 'involuntarily made' when it is obtained by [the police] by means of any promise or statement of fact which creates a substantial risk that the defendant might falsely incriminate himself" (*People v Mateo*, 2 NY3d 383, 413, *cert denied* 542 US 946). "To determine voluntariness, courts review all of the surrounding circumstances to see whether the defendant's will has been overborne" (*id.*; *see People v Collins*, 106 AD3d 1544, 1545, *lv denied* 21 NY3d 1072).

Here, the evidence at the *Huntley* hearing, including the videotaped interrogations, establishes that defendant's statement was voluntarily made and that coercive police activity did not occur (*see Mateo*, 2 NY3d at 414). The fact that defendant was told that he failed a polygraph examination did not render the statement involuntary (*see People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d

851; *People v Melendez*, 149 AD2d 918, 918-919). Defendant's claim that he was under duress and confused because of an illness is not supported by the evidence at the *Huntley* hearing. In arguing otherwise, defendant improperly relies on his testimony at trial (*see People v McCurty* [appeal No. 2], 60 AD3d 1406, 1407, *lv denied* 12 NY3d 856).

We conclude that the sentence is illegal insofar as it imposes a 20-year period of postrelease supervision for attempted criminal sexual act in the first degree (*see* Penal Law § 70.45 [2-a] [e]). " 'Although [that] issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). We therefore modify the judgment by reducing the period of postrelease supervision on the first count of the indictment to a period of 15 years. The sentence as modified is not unduly harsh or severe.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1378

CA 13-00854

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

IN THE MATTER OF SUBURBAN PARK DEVELOPMENT ASSOCIATION, LLC, PETITIONER-APPELLANT,

V ORDER

TOWN OF MANLIUS, TOWN OF MANLIUS PLANNING BOARD, FREDERICK GILBERT, DONALD CROSSETT, RICHARD ROSSETTI, ANN KELLY, TOM BYRNES, SUSAN MOLISKI AND JOSEPH LUPIA, JR., RESPONDENTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 5, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1384

KA 10-01085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHNNY CANNON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 3, 2010. 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.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1394

CAF 13-00780

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

IN THE MATTER OF KENNETH R. TIDD,
PETITIONER-RESPONDENT,

V ORDER

MICHELLE L. HACKETT, RESPONDENT-APPELLANT.

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

ADAM W. KOCH, WARSAW, FOR PETITIONER-RESPONDENT.

JAMES ANDREW MUSACCHIO, ATTORNEY FOR THE CHILD, GOWANDA.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered December 3, 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 for reasons stated in the decision at Family Court.

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1398

CA 13-01062

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

JILL D. KLIMASEWSKI,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

COUNTY OF MONROE,
DEFENDANT-RESPONDENT-APPELLANT.

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MICHELE ROMANCE CRAIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 19, 2013. The order denied the motion of defendant to bifurcate the trial, granted those parts of the cross motion of plaintiff for partial summary judgment with respect to the issue of serious injury and defendant's third and fifth affirmative defenses, and otherwise denied the cross motion.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on October 8 and 10, 2013, and filed in the Monroe County Clerk's Office on October 11, 2013,

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

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

1399

CA 13-00353

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

NORTH SYRACUSE CENTRAL SCHOOL DISTRICT,
PLAINTIFF-APPELLANT,

V ORDER

ASHLEY MCGRAW ARCHITECTS, P.C., ET AL.,
DEFENDANTS.

NEP GLASS CO., LTD., THIRD-PARTY PLAINTIFF,

V

MARC DONAHUE, INDIVIDUALLY AND MJD
ASSOCIATES OF C.N.Y. INC.,
THIRD-PARTY DEFENDANTS-RESPONDENTS.

LINDENFELD LAW FIRM, P.C., CAZENOVIA (HARRIS LINDENFELD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (P. DAVID TWICHELL OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 10, 2012. The order denied the motion of plaintiff for leave to amend the complaint and caption.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 14 and 22, 2013,

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

Entered: December 27, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1518/91) KA 04-00648. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BARRY ARKIM, ALSO KNOWN AS ED MASON, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1303/96) KA 13-01676. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES DAVIS WILSON, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (484/97) KA 04-00304. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1009/99) KA 98-08383. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL TIRADO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND WHALEN, JJ. (Filed Dec. 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 Dec. 27, 2013.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (44/08) KA 03-00150. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND CLAIR CIMINO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND WHALEN, JJ. (Filed Dec. 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 Dec. 27, 2013.)

MOTION NO. (691/10) KA 09-01326. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RODNEY BANKS, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (390/11) KA 10-00665. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICKY L. WINTERS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND LINDLEY, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1012/11) KA 09-01372. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PAUL A. OSBORNE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (225/12) KA 09-00903. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD E. AIKEY, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (507/12) KA 08-02457. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON TARO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1009/12) CA 11-00477. -- IN THE MATTER OF STATE OF NEW YORK, PETITIONER-RESPONDENT, V JODY JAMES TROMBLEY, RESPONDENT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1044.1/12) CA 11-02000. -- MICHAEL JAMES OLSEN, PLAINTIFF-RESPONDENT, V LOUIS F. KOZLOWSKI, DEFENDANT, AND SHIRLEY F. KOZLOWSKI, DEFENDANT-APPELLANT. -- Motion for clarification denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1373/12) KA 11-00287. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL HOWARD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1470/12) KA 11-00927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ENNIS E. RUFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (330/13) CAF 12-01556. -- IN THE MATTER OF JENNIFER MCLAUGHLIN, PETITIONER-RESPONDENT, V TIMOTHY MCLAUGHLIN, RESPONDENT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (575/13) CAF 12-01060. -- IN THE MATTER OF CAYDEN L.R. JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MELISSA R., RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (854/13) KAH 12-00565. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JAMES SMITH, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (956/13) CA 13-00262. -- JOSEPH SAINT AND SHEILA SAINT, PLAINTIFFS-RESPONDENTS, V SYRACUSE SUPPLY COMPANY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (970/13) CA 13-00254. -- RICHARD POTTER, PLAINTIFF-RESPONDENT, V STEVENS VAN LINES, INC. AND DAVID J. FISK, DEFENDANTS-APPELLANTS. -- Motion for correction, clarification or reargument denied. PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (972/13) CA 12-01849. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V NATIONAL FUEL CORPORATION, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (973/13) CA 12-01850. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V NATIONAL FUEL CORPORATION, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (996/13) CA 12-01911. -- 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, 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.) -- Motions for reargument and leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Dec. 27, 2013.)

MOTION NO. (1062/13) CA 12-02061. -- JUDY MILLS, PLAINTIFF-RESPONDENT, V RICHARD MILLS, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

KA 12-00881. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT BUCKMAN, 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 Livingston County Court, Robert B. Wiggins, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)

KAH 11-01160. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. WALTER ROACHE, PETITIONER-APPELLANT, V DONALD SAWYER, EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT. -- Motion for reargument denied. (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 Dec. 27, 2013.)

KA 12-00711. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HENRY M. WRIGHT, DEFENDANT-APPELLANT. -- Resentence unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Erie County Court, Michael F. Pietruszka, J. - Assault, 2nd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ. (Filed Dec. 27, 2013.)