SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 13, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 13-00928

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

JAMES R. FRENCH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAUN M. SYMBORSKI AND FRANK L. SYMBORSKI,
DEFENDANTS-RESPONDENTS.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 4, 2013. The order, insofar as appealed from, granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this personal injury action arising from a motor vehicle accident, plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint. According to plaintiff, Supreme Court erred in determining that he did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We reject that contention. In support of the motion, defendants established that plaintiff's pain in his neck and shoulders was related to preexisting degenerative conditions and that there was no evidence of an acute traumatic injury arising from the subject accident (*see Spanos v Fanto*, 63 AD3d 1665, 1666). Defendants also established that plaintiff sustained "only a mild injury as a result of the accident," as opposed to a significant or permanent injury (*Gallo v Rieske*, 77 AD3d 1343, 1344; *see Beaton v Jones*, 50 AD3d 1500, 1501). We note that, following the accident, plaintiff was able to walk around and, although he was taken to the hospital, he was released that same day with a prescription for pain medication. An X ray or CT scan taken at the hospital showed no broken bones or other abnormalities. We further note that plaintiff did not miss any work as a result of his injuries, and examinations by his own physicians showed that he regularly had a full range of motion in his neck and back, albeit with a degree of pain.

The burden of proof thus shifted to plaintiff "to come forward

with evidence addressing defendant[s'] claimed lack of causation" (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Wilson v Colosimo*, 101 AD3d 1765, 1766), and plaintiff failed to meet that burden. Contrary to plaintiff's contention, the affidavit of his treating physician was insufficient to raise a triable issue of fact. Although plaintiff's physician stated that plaintiff has a "disability related to his neck . . . in the range of 30 to 60 percent," she did not identify the range of motion tests she conducted upon plaintiff or otherwise explain how she arrived at that conclusion. Moreover, plaintiff's physician, who acknowledged plaintiff's preexisting conditions, "failed to specify how plaintiff's conditions were caused or further exacerbated" by the subject accident (*Hedgecock v Pedro*, 93 AD3d 1143, 1144; *see Webb v Bock*, 77 AD3d 1414, 1415).

All concur except WHALEN, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent because I disagree with the majority's conclusion that defendants met their initial burden with respect to the 90/180-day category of serious injury (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). I would thus modify the order by denying in part defendants' motion for summary judgment and reinstating the complaint with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d).

Defendants' submissions failed to establish that plaintiff suffered only some " 'slight curtailment' " of his usual activities during no less than 90 of the 180 days immediately following the accident, inasmuch as they did not demonstrate what plaintiff's usual and customary daily activities were, much less that plaintiff could not perform substantially all of those activities (*Gaddy v Eyler*, 79 NY2d 955, 958; *see Paolini v Sienkiewicz*, 262 AD2d 1020, 1020; *Russell v Knop*, 202 AD2d 959, 960). Defendants, instead, chose to rely almost exclusively on the fact that plaintiff did not miss any work as a result of his injuries. While plaintiff testified that he continued to work after the accident and took time off from work only to attend appointments with his doctors, plaintiff's duties at work were different after the accident than they were before it (*cf. Gaddy*, 79 NY2d at 958; *Licari v Elliott*, 57 NY2d 230, 238). At the time of the accident, plaintiff was a technician at a nuclear power plant and he performed calibrations, testing and repairs on equipment. Subsequent to the accident, he was assigned a supervisory position as an outage coordinator, i.e., a desk job. Plaintiff's daily and customary activities at work had changed and become much more sedentary. I further note that plaintiff's deposition occurred nearly three years after the accident, long after the relevant 180-day time frame (*see generally Lowell v Peters*, 3 AD3d 778, 780). This fact is important because defendants' attorney asked plaintiff at the deposition, "Is there anything that you can't do today that you could do prior to the accident, any activities at all?" What plaintiff could do as of the date of the deposition is irrelevant; the relevant inquiry concerns what he could or could not do in the 180 days immediately following the accident. Therefore, any information gleaned about plaintiff's daily activities as a result of that question is irrelevant to the analysis of whether he sustained a serious injury under the 90/180-day

category. Without establishing a baseline of plaintiff's activities during the relevant time frame, defendants did not meet their initial burden (*see Ames v Paquin*, 40 AD3d 1379, 1380).

Additionally, when viewing the evidence in the light most favorable to plaintiff, the nonmoving party (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502), I note that there was evidence that plaintiff's work duties had changed significantly and, thus, a question of fact exists regarding whether plaintiff was able to perform his usual daily activities for 90 of the 180 days immediately following the accident.

I also note my concern with the majority's apparent reliance upon the affirmed report of defendants' medical expert, who opined that plaintiff suffers from a "multilevel degenerative" condition "with no indication of any acute traumatic injury" and "is obviously not disabled" in determining that defendants met their initial burden, while at the same time concluding that the affidavit of plaintiff's treating physician is insufficient to raise an issue of fact with respect to causation. Defendants' expert based his opinion on the findings contained in what may be an unsworn MRI report, not included in the record, interpreting an MRI film that he did not review and that is also not included in the record. Plaintiff's treating physician, on the other hand, disagreed with the assessment of defendants' expert that there was no evidence of traumatic injury, based on her review of plaintiff's MRI films and medical records and the fact that plaintiff was asymptomatic prior to the accident, as demonstrated by plaintiff's "medical history" and the fact that his "pre-existing degenerative changes" did not "prompt him to seek any medical attention" (*see generally Fanti v McLaren*, 110 AD3d 1493, 1494; *Verkey v Hebard*, 99 AD3d 1205, 1206; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543-1544; *Terwilliger v Knickerbocker*, 81 AD3d 1350, 1351; *Mack v Pullum*, 37 AD3d 1063, 1063). Only plaintiff's treating physician appears to have reviewed plaintiff's medical records prior to the accident, there are no pre-accident MRIs for comparison, and, contrary to the majority's conclusion, plaintiff's "submissions in opposition to the motion did . . . adequately address how [the neck injury], in light of [his] past medical history, [is] causally related to the subject accident" (*Webb v Bock*, 77 AD3d 1414, 1415 [internal quotation marks omitted]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 11-01121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL BRADFORD, JR., DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), 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 April 7, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal contempt in the first degree (two counts), aggravated criminal contempt, offering a false instrument for filing in the first degree and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and the law by reversing that part convicting defendant of tampering with physical evidence and dismissing count six of the indictment, and by vacating the sentences imposed on the remaining counts, and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for resentencing on those counts.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), aggravated criminal contempt (§ 215.52 [1]), and tampering with physical evidence (§ 215.40 [2]). Defendant failed to preserve for our review his contention regarding the selection of juror number one inasmuch as he did not exercise a challenge for cause or a peremptory challenge against her (*see People v Forino*, 65 AD3d 1259, 1260, *lv denied* 13 NY3d 907; *People v Berry*, 43 AD3d 1365, 1366, *lv denied* 9 NY3d 1031; *People v Howington*, 284 AD2d 1009, 1009-1010, *lv denied* 97 NY2d 683). Even assuming, arguendo, that defendant had challenged the prospective juror and his challenge had merit, we note that defendant's contention would not require reversal because he failed to exhaust his peremptory challenges prior to the completion of jury selection (*see* CPL 270.20 [2]; *People v Lynch*, 95 NY2d 243, 248; *People v Arguinzoni*, 48 AD3d 1239, 1241, *lv denied* 10 NY3d 859).

We reject defendant's contention that County Court erred in denying his requests for substitution of assigned counsel. A trial court must carefully evaluate serious complaints about counsel, and "should substitute counsel when a defendant can demonstrate 'good cause' " for removal of his current attorney (*People v Linares*, 2 NY3d 507, 510). Here, the court carefully evaluated defendant's first request, made after the first witness testified, and properly concluded that defense counsel was "reasonably likely to afford . . . defendant effective assistance" of counsel (*People v Medina*, 44 NY2d 199, 208; *see generally People v Smith*, 18 NY3d 588, 592-593). The court also properly denied defendant's second request for assignment of new counsel later in the trial, which was based on defendant's unsubstantiated allegation of a conspiracy between defense counsel, the court, the prosecutor and law enforcement agencies, as well as defense counsel's alleged failure to file appropriate motions and cross-examine certain witnesses in accordance with defendant's wishes, and the frequent arguments between defendant and defense counsel. "At most, defendant's allegations evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution" (*People v Agard*, 107 AD3d 613, 613, *lv denied* 21 NY3d 1039; *see Linares*, 2 NY3d at 511; *Medina*, 44 NY2d at 209).

Defendant further contends that he was denied effective assistance of counsel based on various errors made by defense counsel. With respect to defendant's contention that defense counsel failed to move to suppress certain items seized from the former marital residence, we note that defendant was barred from the premises by an order of protection "and thus had neither a legitimate expectation of privacy therein nor standing to challenge the police entry into the house" (*People v Robinson*, 205 AD2d 836, 837, *lv denied* 84 NY2d 831). "Given that the governing law was unfavorable, we cannot say on this record that the failure to make [that suppression motion] rendered counsel's otherwise competent performance constitutionally deficient" (*People v Brunner*, 16 NY3d 820, 821). Defendant's remaining "alleged instances of ineffective assistance concerning defense counsel's failure to make various objections [or certain motions or requests] 'are based largely on [defendant's] hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies' " (*People v Douglas*, 60 AD3d 1377, 1377, *lv denied* 12 NY3d 914; *see People v Lane*, 106 AD3d 1478, 1480, *lv denied* 21 NY3d 1043; *People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968). Viewing the evidence, the law, and the circumstances of this case in totality and at the time of representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the court properly granted the prosecutor's *Ventimiglia/Molineux* application, thereby permitting the People to introduce evidence that defendant had previously threatened to kill the victim, that the victim planned to enforce the order of protection that had been issued against defendant, and that defendant had engaged in assaultive conduct toward the victim in the past. The evidence was admissible because it tended

to prove defendant's intent and the absence of mistake or accident, and its probative value outweighed its potential for prejudice (*see People v Alvino*, 71 NY2d 233, 242; *People v Siplin*, 66 AD3d 1416, 1417, *lv denied* 13 NY3d 942; *People v Gonzalez*, 62 AD3d 1263, 1265, *lv denied* 12 NY3d 925). The evidence also established the victim's state of mind (*see People v Gorham*, 17 AD3d 858, 860-861; *People v McClain*, 250 AD2d 871, 872, *lv denied* 92 NY2d 901; *see generally People v Cook*, 93 NY2d 840, 841), which tended to disprove the defense advanced at trial that the victim was accidentally injured while riding an ATV with defendant.

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence because he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is against the weight of the evidence only with respect to the crime of tampering with physical evidence (*see generally Bleakley*, 69 NY2d at 495). We therefore modify the judgment accordingly. The record establishes that, after the other crimes in the indictment had been committed, defendant may have cleaned part of the scene of the crime. Inasmuch as that is the only evidence that relates to the tampering charge, we conclude that it was unreasonable for the jury to conclude, as was charged in the indictment, that the People established beyond a reasonable doubt that defendant, "believing that certain physical evidence was to be produced or used in a prospective official proceeding and intending to prevent such production or use, . . . suppressed [that property] by an act of concealment, alteration or destruction" (*cf. People v Porpiglia*, 215 AD2d 784, 784-785, *lv denied* 86 NY2d 800).

Defendant failed to preserve for our review his contention that remarks made by the prosecutor during summation constituted prosecutorial misconduct that deprived him of a fair trial (*see People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959), 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]).

The sentence is not unduly harsh or severe. We note, however, that a discrepancy between the sentencing minutes and the certificate of conviction requires vacatur of the sentences imposed on the remaining counts. Although the sentencing minutes indicate that the sentence imposed on count two is to run consecutively to the sentences imposed on counts three through five, the minutes are silent with respect to whether the sentence imposed on count two is to run consecutively or concurrently to the sentence imposed on count one.

Thus, by operation of law, those sentences shall run concurrently (*see* Penal Law § 70.25 [1] [a]). The certificate of conviction, however, indicates that the sentences imposed on counts one and two are to run consecutively. Inasmuch as the record leaves open the possibility that the court's failure to specify at sentencing that those sentences are to run consecutively was accidental (*cf. People v Vasquez*, 88 NY2d 561, 580-581), we further modify the judgment by vacating the sentences imposed on the remaining counts, and we remit the matter to County Court for resentencing on those counts (*see People v Jacobson*, 60 AD3d 1326, 1329, *lv denied* 12 NY3d 916; *People v Sinkler*, 288 AD2d 844, 845, *lv denied* 97 NY2d 761).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01640

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

ELLA MAE ALLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JERRY P. LOWCZUS, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (ANGELO GAMBINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 7, 2013 in a personal injury action. The order granted plaintiff's motion to set aside the verdict and granted a new trial on the issues of liability and damages.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. Following a trial, the jury found that plaintiff sustained a fracture as a result of the accident, that defendant was negligent, and that defendant's negligence was a substantial factor in causing plaintiff's injuries. The jury further found that plaintiff was also negligent, but that her negligence was not a substantial factor in causing her injuries. Nonetheless, the jury apportioned 30% of the fault to plaintiff and 70% of the fault to defendant. The jury then awarded plaintiff the sum of $6,000 for past pain and suffering, but did not award her any damages for future pain and suffering. Neither party objected to the verdict before the jury was discharged.

Plaintiff thereafter moved to increase the damages award or, in the alternative, to set aside the verdict as inconsistent pursuant to CPLR 4404 (a). Defendant opposed plaintiff's request for an additur, but did not address the alleged inconsistency of the verdict. Supreme Court determined that the jury's apportionment of fault was inconsistent with the jury's factual finding that plaintiff's negligence was not a substantial cause of her injuries. The court therefore granted plaintiff's motion to set aside the verdict and granted a new trial on the issues of liability and damages. We affirm.

Contrary to the contention of defendant, we conclude that the verdict was internally inconsistent inasmuch as the jury found that plaintiff's negligence was not a substantial factor in causing her injuries, but also attributed 30% of the fault to plaintiff (*see e.g. Kelly v Greitzer*, 83 AD3d 901, 902; *Palmer v Waters*, 29 AD3d 552, 553; *Mateo v 83 Post Ave. Assocs.*, 12 AD3d 205, 206; *see generally Kim v Cippola*, 231 AD2d 886, 886). Such an internal inconsistency in a verdict can be remedied "only . . . upon further consideration by the jury . . . or by a new trial" (*Vera v Bielomatik Corp.*, 199 AD2d 132, 133). Here, of course, the jury had been discharged by the time of plaintiff's motion, and thus it was too late to require the jury to reconsider its answers to the interrogatories on the verdict sheet.

Although plaintiff failed to object to the inconsistency in the verdict before the jury was discharged (*see Schley v Steffans*, 79 AD3d 1753, 1753; *Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734), we conclude that, under the circumstances of this case, the court did not abuse its discretion in setting aside the verdict and ordering a new trial (*see generally Kim*, 231 AD2d at 886-887). Given the jury's inconsistent findings on proximate cause and the apportionment of fault, it is not clear, without resorting to speculation, whether the jury intended to award plaintiff the sum of $6,000 or $4,200, i.e., 70% of $6,000.

Finally, we reject defendant's alternative contention that the damages award should be reinstated and a new trial ordered on the issue of negligence only. The evidence of preexisting injuries to plaintiff's neck and back is relevant both to liability, i.e., proximate cause, and to the damages that plaintiff sustained as a result of defendant's negligence, and therefore a new trial is required on liability and damages (*see generally Oakes v Patel*, 20 NY3d 633, 647; PJI 2:70).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01082

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

KIMBERLY OWENS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BARR MIESCH, ROCHESTER HOUSING AUTHORITY,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (ASHLEY FASSO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CRAMER, SMITH & MILLER, P.C., SYRACUSE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT BARR MIESCH.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (RICHARD A. KAUL OF COUNSEL), FOR DEFENDANT-RESPONDENT ROCHESTER HOUSING AUTHORITY.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 12, 2013. The order granted the motions of defendants Barr Miesch and Rochester Housing Authority for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she slipped and fell on an icy public sidewalk in front of her house, which is owned by Barr Miesch (defendant). Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint against him. "Unless a statute or ordinance '*clearly imposes liability* upon' an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk" (*Smalley v Bemben*, 12 NY3d 751, 752, quoting *Roark v Hunting*, 24 NY2d 470, 475; *see Schroeck v Gies*, 110 AD3d 1497, 1497). Here, there is no question that the Charter of the City of Rochester (Charter) and the Municipal Code of the City of Rochester (Code) "do not clearly subject landowners to such liability" (*Smalley*, 12 NY3d at 752; *see* Charter § 7-10; Code § 104-11 [c]). The court therefore properly granted defendant's motion.

We reject plaintiff's contention that defendant's motion should have been denied pursuant to CPLR 3212 (f) on the ground that it was premature. We conclude that the facts she sought to obtain were not

in defendant's exclusive knowledge and control and, in any event, would not have provided a basis to impose liability on defendant (*see Cueva v 373 Wythe Realty, Inc.*, 111 AD3d 876, 877).

The court also properly granted the motion of defendant Rochester Housing Authority (RHA) seeking summary judgment dismissing the complaint against it. RHA established as a matter of law that its duties with respect to defendant's premises did not encompass inspecting the sidewalk for snow and ice removal (*see generally Jablonski v Rapalje*, 14 AD3d 484, 488), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, the court properly took judicial notice of the applicable HUD regulations with respect to RHA's motion (*see* CPLR 4511 [b]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01099

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

ELIJAH HAMILTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE PICARDO, DEFENDANT-RESPONDENT.

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN NED LIPSITZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS E. REIDY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered March 1, 2013. The judgment and order granted defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of his exposure to lead paint as a child between 1991 and 1997. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Defendant and his wife acquired the property by deed in January 1993, and they took title to the property as tenants by the entirety. Defendant's wife died in 2004. Defendant testified at his deposition that his participation in the acquisition of the property was as an accommodation to the financial situation of his wife's son and her nephew. Defendant denied that he had anything to do with the property and asserted that he was only an owner "on paper." Defendant never saw the property, never went there, never received any rent, did not know that a child resided there and never received any correspondence related thereto. Defendant did not execute any lease agreements with respect to the property. "To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition" (*Rodriguez v Trakansook*, 67 AD3d 768, 768-769). Defendant met his burden of establishing that he had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the Monroe County Department of Health, and plaintiff failed to raise a triable issue of fact (*see Joyner v Durant*, 277 AD2d 1014, 1014-1015; *see also Sanders v Patrick*, 94 AD3d 1514, 1515, *lv denied*

19 NY3d 814; *see generally Chapman v Silber*, 97 NY2d 9, 15). We reject plaintiff's contention that actual or constructive notice of the dangerous lead condition may be imputed to defendant because of a general awareness of the hazards of lead paint (*see Boler v Malik*, 267 AD2d 998, 998-999; *Hines v RAP Realty Corp.*, 258 AD2d 440, 441, *lv denied* 93 NY2d 812). We likewise reject plaintiff's further contention that the alleged communications concerning the management of the property between defendant's wife and her son, reflected in the record by the double hearsay deposition testimony of her nephew, should be imputed to defendant. With respect to the dissent's reliance upon that double hearsay, we note that defendant's nephew testified that he never spoke with defendant concerning the day-to-day management or maintenance of the property, the leasing of the property or the collection and retention of rent. The sole basis for the deposition testimony was a conversation between defendant's wife and her son, but defendant's nephew neither participated in nor heard that conversation. Thus, while the record suggests that defendant's nephew may have acted as an agent for defendant's wife with respect to the premises, the double hearsay of defendant's nephew was insufficient to raise an issue of fact concerning his authority to act as defendant's agent (*see Baldo v Patton*, 65 AD3d 765, 767). " 'No agency is to be implied as between husband and wife from the mere fact of marriage' " (*Falk v Krumm*, 39 Misc 2d 448, *affd* 22 AD2d 911). Nor does joint ownership evidenced by tenancy by the entirety create such a relationship under agency law (*see Matter of Baker v Westfall*, 30 Misc 2d 946, 948). The dissent's reliance upon a Monroe County Department of Social Services "Landlord Statement" is similarly misplaced. The statement is signed by defendant's nephew in three capacities: "Owner of Property," "Landlord" and "Agent for Landlord." That document contains no reference or entry with respect to defendant. To the extent that the document may be relied upon to create an implied agency, we note that the only "agency" relationship discernable from its face is based on one person acting in various capacities. Moreover, neither plaintiff nor the dissent point to any evidence of words or conduct by *defendant* communicated to a third party, i.e., plaintiff or his mother as tenant of the rental unit, giving rise to an appearance and reasonable belief that an agency relationship had been created (*see Pyramid Champlain Co. v R.P. Brosseau & Co.*, 267 AD2d 539, 544, *lv denied* 94 NY2d 760).

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would reverse the judgment and order, deny the motion and reinstate the complaint. " '[I]n order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected' " (*Heyward v Shanne*, 114 AD3d 1212, 1213, quoting *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646). In my view, under the circumstances of this case, there is an issue of fact whether defendant "had notice of the dangerous lead paint condition in the subject [house] 'for such a period of time that, in the exercise of reasonable care, it should have been corrected' " (*id.*, quoting *Juarez*, 88 NY2d at 646).

Chapman v Silber (87 NY2d 9) is familiar if not seminal lead-based paint jurisprudence, and there the Court of Appeals taught that constructive notice of a hazardous, lead-based paint condition may be established by evidence "that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the [residence] was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*id.* at 15). Defendant concedes the fourth *Chapman* factor, i.e., that he was aware of the hazards of lead-based paint, and in my view there are issues of fact with respect to the remaining *Chapman* factors. Here, the record established that the house at issue was owned by defendant and his wife at the time plaintiff lived at that residence and was allegedly exposed to lead-based paint hazards therein. The record also establishes that defendant's nephew testified that, based on his recollection of descriptions of conversations between defendant's stepson and defendant's wife, he and defendant's stepson acted with the authority of defendant and defendant's wife with respect to the maintenance and upkeep of the house, interactions with tenants, receipt of rent money, possession of keys, repairs, and the overall management of the house. That evidence, together with the deposition testimony of defendant's nephew concerning a signed landlord statement showing defendant's nephew as both owner and agent for the house in question, creates issues of fact whether defendant's nephew acted as defendant's agent with respect to the house (*see* 2A NY Jur 2d, Agency and Independent Contractors § 23), and whether plaintiff may satisfy the *Chapman* factors contested by defendant.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 06-03135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS D. HOGAN, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, 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 August 4, 2006. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment that convicted him following a nonjury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). We reject defendant's contention that the presumption of knowing possession set forth in Penal Law § 220.25 (2) was inapplicable because he was not in proximity to the packaged and unpackaged drugs and drug trafficking paraphernalia that were found in open view in the kitchen/living room area of the small apartment in question (*see People v Snow*, 225 AD2d 1031, 1031-1032). Upon entering the apartment, the police observed defendant running from the kitchen/living room area not more than 15 feet from where the drugs and drug trafficking paraphernalia were found. Although defendant was apprehended in a hallway bathroom of the apartment, "proximity is not limited to the same room" (*id*. at 1032; *see People v Pressley*, 294 AD2d 886, 887, *lv denied* 98 NY2d 712; *People v Miranda*, 220 AD2d 218, 218, *lv denied* 87 NY2d 849). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that he was denied effective assistance of counsel based on his attorney's failure to notify him of his right to testify before the grand jury (*see People v Nobles*, 29 AD3d 429, 430, *lv denied* 7 NY3d 792). Defendant also was

not denied effective assistance of counsel by his attorney's failure to make a timely motion to dismiss the indictment based on the People's alleged violation of CPL 190.50 (5) (a). That failure, without more, is insufficient to demonstrate ineffective assistance, "particularly where defendant failed to demonstrate an absence of strategic or legitimate reasons for counsel's failure to pursue this course of action" (*People v Wright*, 5 AD3d 873, 874, *lv denied* 3 NY3d 651; *see People v Hibbard*, 27 AD3d 1196, 1196-1197, *lv denied* 7 NY3d 790).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

386

KA 12-01529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN J. DAVIS, DEFENDANT-APPELLANT.

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

KEVIN J. DAVIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered June 18, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) for firing 19 shots from an AK-47 assault rifle at a house in Buffalo. One of the bullets entered the living room and struck the victim, a 15-year-old girl who was sitting at the computer doing her homework. We reject defendant's contentions that the evidence is legally insufficient to establish that he was the shooter, and that the verdict is against the weight of the evidence in that regard. Defendant was identified as the shooter by a fellow gang member who drove him to the scene of the crime, and the police found the assault rifle used in the shooting in the attic of an apartment defendant shared with his girlfriend. Moreover, shortly after the shooting, defendant told another gang member that "it went down" and that he "shot the house up." A week and a half later, defendant told another gang member that he had done "something stupid" and that he felt bad about what happened to that "innocent little girl." Finally, when questioned by investigators while in police custody, defendant initially stated that he had nothing to do with the shooting. After he gave that statement, however, defendant told the investigator, "If I can talk to my father, I'll tell you the truth and give you another statement." Although defendant did not in fact give another statement to the police after speaking to his father, the latter statement indicates that defendant was not being

truthful when he initially denied involvement in the shooting.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found' " that defendant was the person who fired the assault weapon at the victim's residence (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), and giving appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, 1782-1783, *lv denied* 15 NY3d 805), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant asserts that his fellow gang members framed him and testified falsely at trial, we accord great deference to the jury's resolution of credibility issues (*see People v Mosley*, 59 AD3d 961, 962, *lv denied* 12 NY3d 918, *reconsideration denied* 13 NY3d 861), and nothing in the record suggests that the prosecution witnesses in question were "so unworthy of belief as to be incredible as a matter of law" (*People v Miller*, 115 AD3d 1302, 1305 [internal quotation marks omitted]). Indeed, we note that none of those witnesses received anything in return for such testimony.

We reject defendant's further contention that the evidence is legally insufficient to establish that he acted with the mental state of depraved indifference. The firing of numerous bullets "into a house in which [defendant] had reason to believe people would be present" is a quintessential example of depraved indifference (*People v Shackelford*, 100 AD3d 1527, 1528, *lv denied* 21 NY3d 1009; *see People v McGee*, 87 AD3d 1400, 1401, *affd* 20 NY3d 513; *People v Payne*, 3 NY3d 266, 271, *rearg denied* 3 NY3d 767, citing *People v Jernatowski*, 238 NY 188; *People v Heesh*, 94 AD3d 1159, 1160-1162, *lv denied* 19 NY3d 961; *People v Callender*, 304 AD2d 426, 427, *lv denied* 100 NY2d 641). We note that defendant opened fire on the house at approximately 8:45 on a weeknight, multiple lights were on inside, and there was a vehicle parked in the driveway. There were five people inside, including four children. The police counted 14 bullet holes in the house and collected 19 spent AK-47 cartridges outside.

Defendant next contends that he was denied due process of law by the admission of evidence that he made the aforementioned statement to the police about giving another statement and telling the truth if he were allowed to speak to his father. According to defendant, County Court should have precluded that statement because it was not included in the People's CPL 710.30 notice. Because defendant did not object to the admission of the statement on that ground, he failed to preserve his contention for our review (*see People v Finley*, 42 AD3d 917, 918, *mod on other grounds* 10 NY3d 647). In any event, defendant moved for and was granted a *Huntley* hearing on the noticed statements, and during the hearing the investigator testified about the unnoticed statement at issue on appeal. Defendant therefore "waived preclusion on the ground of lack of notice because [he] was given a full

opportunity to be heard on the voluntariness of that statement at the suppression hearing" (*People v Dean*, 299 AD2d 892, 893, *lv denied* 99 NY2d 613; *see People v Garcia*, 290 AD2d 299, 300, *lv denied* 98 NY2d 730; *see generally People v Rodriguez*, 21 AD3d 1400, 1401; *People v Griffin*, 12 AD3d 458, 459, *lv denied* 4 NY3d 886).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they lack merit.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01974

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

IN THE MATTER OF ROSEANN KILDUFF,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT, BOARD OF EDUCATION OF ROCHESTER CITY SCHOOL DISTRICT AND DR. BOLGEN VARGAS, IN HIS CAPACITY AS ACTING SUPERINTENDENT OF ROCHESTER CITY SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR PETITIONER-APPELLANT.

EDWIN LOPEZ-SOTO, GENERAL COUNSEL, ROCHESTER (CARA M. BRIGGS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 25, 2013 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted, the determinations are annulled and respondents are directed to reinstate petitioner to her position as a tenured teacher forthwith with full back pay and benefits and to remove all references to the discipline imposed from petitioner's personnel file.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determinations suspending her for two days and five days, respectively, without pay from her position as a tenured teacher with respondent Rochester City School District. Supreme Court erred in denying the petition (*see Matter of Kilduff v Rochester City Sch. Dist.*, 107 AD3d 1536, 1537, *lv granted* 22 NY3d 854). As we wrote in *Kilduff*, "petitioner was entitled to choose whether to be disciplined under the procedures set forth in the [collective bargaining agreement] or those set forth in [Education Law §] 3020-a," and respondents "incorrectly denied petitioner's written request for a section 3020-a hearing" (*id.*; *see* §§ 3020 [1]; 3020-a).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

397

CA 13-01248

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

RICHARD W. MAHUSON AND WALTER ROBERT BECKLUND,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VENTRAQ, INC. AND ARISTON GLOBAL HOLDING, LLC,
DEFENDANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), AND DENTONS US LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 2, 2013. The order and judgment, among other things, granted the motion of plaintiffs for summary judgment, dismissed defendants' counterclaims and awarded plaintiffs money damages.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying those parts of the motion seeking summary judgment on the complaint and dismissing the first and third counterclaims, and by reinstating the first and third counterclaims, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs were the majority shareholders in 10e Solutions LLC (10e), a software company sold to the predecessor of defendant Ventraq, Inc. (Ventraq) pursuant to a Securities Purchase Agreement (Agreement). The Agreement contemplated that Ventraq would employ plaintiffs, and plaintiffs entered into employment agreements with Ventraq. Under the non-competition and non-solicitation covenants in the Agreement and employment agreements, plaintiffs agreed not to compete with Ventraq or solicit its customers or employees for a specified period of time. The Agreement further provided that plaintiffs and other former members of 10e were eligible to receive payment of "Earn-Out Amounts" that were calculated in accordance with the post-closing performance of 10e.

Based upon the post-closing performance of 10e, the members of 10e were entitled to such earn-out amounts. Ventraq agreed to pay plaintiffs their respective shares of those amounts in monthly installments, as evidenced by a Subordinated Note (Note). Ventraq,

however, was unable to make the scheduled payments, and the parties renegotiated the payment terms set forth in the Note.

After Ventraq defaulted in making payment under the renegotiated terms of the Note, plaintiffs commenced the instant action alleging, inter alia, breach of contract and seeking the balance of the earn-out amounts remaining due to them. Ventraq and defendant Ariston Global Holding, LLC, its parent company, asserted counterclaims for breach of contract, breach of fiduciary duty and misappropriation of trade secrets based upon plaintiffs' alleged violation of the non-competition and non-solicitation covenants in the Agreement and employment agreements, and their alleged misappropriation of trade secrets acquired by Ventraq through its purchase of 10e. Defendants allege, inter alia, that during their employment with Ventraq plaintiffs formed Preclarity Capital LLC (Preclarity), which competes directly with Ventraq, and that plaintiffs solicited three employees who thereafter left their employment with Ventraq for employment with Preclarity.

Supreme Court properly granted that part of plaintiffs' motion seeking summary judgment dismissing the second counterclaim, alleging misappropriation of trade secrets. Plaintiffs established their entitlement to judgment by submitting evidence that they did not take and Preclarity had not used any of the trade secrets identified by defendants, and defendants' submission in opposition to that evidence, "consist[ing] of nonspecific conclusory statements" that plaintiffs must have misappropriated trade secrets, did not raise a triable issue of fact (*Moser v Devine Real Estate, Inc. [Florida]*, 42 AD3d 731, 736).

The court erred, however, in granting that part of plaintiffs' motion seeking summary judgment dismissing the first counterclaim, alleging breach of contract, and we therefore modify the order and judgment accordingly. Plaintiffs' own submissions raise triable issues of fact whether they violated the non-competition and non-solicitation covenants at issue (*see generally Micro-Link, LLC v Town of Amherst*, 109 AD3d 1130, 1131). Contrary to the court's conclusion, moreover, we conclude that plaintiffs did not establish their entitlement to judgment as a matter of law on their affirmative defenses of waiver and estoppel. " '[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances' " (*Townley v Emerson Elec. Co.*, 269 AD2d 753, 753-754), and "waiver 'should not be lightly presumed' and must be based upon 'a clear manifestation of intent' to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104). Plaintiffs' submissions do not eliminate issues of fact with respect to either estoppel (*see Reeve v General Acc. Ins. Co. of N.Y.*, 239 AD2d 759, 761) or waiver (*see Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104). Plaintiffs, moreover, cannot establish their entitlement to judgment dismissing the first counterclaim by pointing to alleged gaps in defendants' proof (*see Burke, Albright, Harter & Rzepka, LLP v Sills*, 83 AD3d 1413, 1413).

The court also erred in granting that part of plaintiffs' motion

seeking summary judgment dismissing the third counterclaim, alleging breach of fiduciary duty, and we therefore further modify the order and judgment accordingly. "It is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties" (*Wallack Frgt. Lines v New Day Express*, 273 AD2d 462, 463), and triable issues of fact remain whether plaintiffs made improper use of Ventraq's time, facilities or proprietary secrets while they were in Ventraq's employ (*see Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277, 278-279).

We further conclude that the court erred in granting that part of plaintiffs' motion seeking summary judgment on the causes of action alleged in the complaint, and granting all of the relief sought therein. We thus further modify the order and judgment accordingly. The Agreement provides that, in the event of a breach of the non-competition or non-solicitation covenants by plaintiffs, defendants may assert any rights or remedies available to them "at law or in equity." Thus, although plaintiffs established that they are entitled to certain earn-out amounts pursuant to the Agreement and the Note, the Agreement also provides for offsets in the event of plaintiffs' violation of the non-competition and non-solicitation covenants (*see Fiore v Oakwood Plaza Shopping Ctr.*, 164 AD2d 737, 739, *affd* 78 NY2d 572, *rearg denied* 79 NY2d 916, *cert denied* 506 US 823; *Vecchio v Colangelo*, 274 AD2d 469, 471). Triable issues of fact remain with respect to defendants' right to an offset (*see Vecchio*, 274 AD2d at 471).

Finally, we note that defendants' request for leave to amend the answer to assert a counterclaim alleging tortious interference with contractual relations is improperly made for the first time on appeal (*see Flax v Lincoln Natl. Life Ins. Co.*, 54 AD3d 992, 995).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

406

KA 12-00376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS A. WEAVER, DEFENDANT-APPELLANT.

DOUGLAS A. WEAVER, DEFENDANT-APPELLANT PRO SE.

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 April 12, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). Defendant's contention that he was deprived of a fair trial based on prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, is without merit (*see People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078). Although the prosecutor improperly vouched for the credibility of the confidential police informant once during his summation, such conduct was not so egregious as to deny defendant a fair trial (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). Furthermore, the prosecutor's comment that the evidence was "unrefuted" does not constitute a comment on defendant's failure to testify (*see People v Tascarella*, 227 AD2d 888, 888, *lv denied* 89 NY2d 867; *People v Staples*, 212 AD2d 1052, 1052-1053). "The remaining instances of alleged prosecutorial misconduct on summation were either a fair response to defense counsel's summation or fair comment on the evidence" (*Lyon*, 77 AD3d at 1339 [internal quotation marks omitted]).

Defendant contends that the prosecutor also engaged in misconduct by failing to comply with disclosure requirements. Specifically, defendant contends that the prosecutor provided him with an "extremely inaccurate" transcript of tape-recorded conversations between himself, the accomplice, and the informant, who was carrying the tape recorder provided to him by the police in his pocket during the controlled buy.

That contention is likewise unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, is without merit. Although the transcript contained several errors, defendant was not prejudiced thereby inasmuch as he was also provided with a copy of the tape recording, and the transcript ultimately was deemed inadmissible at trial (*see generally People v Bradley*, 48 AD3d 1145, 1146, *lv denied* 10 NY3d 860). Contrary to defendant's additional contention, the prosecutor did not engage in misconduct by permitting the informant to review the transcript and tape recording prior to trial (*see generally People v Neff*, 287 AD2d 809, 810).

We reject defendant's contention that County Court erred in admitting the tape recording in evidence. "Although portions of the recording[] are less than clear, they are not 'so inaudible and indistinct that the jury would have to speculate concerning [their] contents' and would not learn anything relevant from them" (*People v Jackson*, 94 AD3d 1559, 1561, *lv denied* 19 NY3d 1026). Defendant's related contention that a proper foundation was not laid for the introduction of the tape recording in evidence, or for the introduction of a surveillance video in evidence depicting the events giving rise to the controlled buy, is conclusory and unsupported by the record. Finally, because the tape recording was properly admitted in evidence, we reject defendant's contention that the court interfered with his right to testify when it ruled that such evidence could be used by the prosecutor in cross-examining him (*see generally People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864). We have reviewed defendant's additional contentions regarding the court's rulings on other motions, and we conclude that they are lacking in merit.

Defendant failed to preserve for our review his further contention that the evidence is legally insufficient to support the conviction on the grounds that "the testimony of an alleged accomplice was both uncorroborated and incredible as a matter of law," inasmuch as he "failed to move for a trial order of dismissal on either of those grounds" (*People v Holloway*, 97 AD3d 1099, 1099, *lv denied* 19 NY3d 1026). In any event, there was sufficient independent evidence tending to connect defendant to the crime (*see People v Moses*, 63 NY2d 299, 306; *People v Kaminski*, 90 AD3d 1692, 1692, *lv denied* 20 NY3d 1100; *see also* CPL 60.22 [1]), and the accomplice's testimony was not incredible as a matter of law (*see generally People v Thibodeau*, 267 AD2d 952, 953, *lv denied* 95 NY2d 805). Defendant's contention that there was no evidence indicating that he ever possessed the drugs is belied by the record.

With respect to defendant's challenge to the weight of the evidence, we note that "[t]he jury had the opportunity to assess the testimony and credibility of the accomplice, who received favorable treatment in exchange for [her] testimony and who admitted that [she had] lied" about defendant's participation in the crime to other witnesses (*People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). 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 conclude that the verdict is not against the weight of the evidence (*see People*

v Bleakley, 69 NY2d 490, 495).

We further conclude that, contrary to defendant's contention, he was not denied effective assistance of counsel. Defendant's assertions that defense counsel did not adequately investigate and prepare for trial, failed to introduce exculpatory evidence, and failed to communicate with him are largely "based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10" (*People v Roman*, 107 AD3d 1441, 1443, *lv denied* 21 NY3d 1045). To the extent that those assertions are reviewable on this appeal, we conclude that they lack merit (*see generally People v Baldi*, 54 NY2d 137, 147).

We likewise reject defendant's challenge to defense counsel's representation on the basis of defense counsel's failures to object to admission of the tape recording in evidence, to object to prosecutorial misconduct, to make additional motions, and to object to an alleged violation of the court's *Sandoval* ruling. None of those failures requires reversal. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Lastly, defendant's contention that defense counsel failed to adequately cross-examine the People's witnesses is contradicted by the record. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see Baldi*, 54 NY2d at 147).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

410

KA 12-00680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON M. BOOP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 7, 2009. The judgment convicted defendant, upon a jury verdict, of vehicular manslaughter in the first degree (two counts), manslaughter in the second degree, aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated (two counts) and aggravated driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of vehicular manslaughter in the first degree (Penal Law § 125.13 [1], [2] [b]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]). The charges arose from an incident in which defendant, while in an intoxicated condition, drove a pickup truck that went off of the road and struck a tree, causing the death of the front seat passenger.

Defendant failed to object when the prosecutor elicited testimony from a deputy sheriff that defendant looked away instead of answering certain questions about the death of the victim, and thus failed to preserve for our review his contention that the prosecutor improperly used his postarrest silence against him at trial (*see People v Jackson*, 108 AD3d 1079, 1079, *lv denied* 22 NY3d 997; *People v Ray*, 63 AD3d 1705, 1707, *lv denied* 13 NY3d 838). In any event, any error in the admission of that testimony is harmless beyond a reasonable doubt because there is "no reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237; *see Jackson*, 108 AD3d at 1079-1080; *People v Murphy*, 79 AD3d 1451, 1453, *lv denied* 16 NY3d 862; *People v Mosby*, 239 AD2d 938, 938-939, *lv denied* 90 NY2d 942).

Defendant further contends that County Court erred in admitting in evidence photographs of the tree that the vehicle struck, because flowers had been laid at the base of the tree. Defendant contends that the photographs were an improper appeal to the emotions of the jurors because the flowers constituted a "shrine" to the victim. Contrary to the contention of the People, we conclude that defendant preserved his contention for our review. Defense counsel objected to the photographs, noted the presence of the flowers, and argued that defendant would be prejudiced by the admission of the photographs in evidence. Consequently, the issue is preserved for our review because "the court 'was aware of, and expressly decided, the [issue] raised on appeal' " (*People v Collins*, 106 AD3d 1544, 1546, *lv denied* 21 NY3d 1072, quoting *People v Hawkins*, 11 NY3d 484, 493; *see People v Roberts*, 110 AD3d 1466, 1467-1468; *People v Duncan*, 177 AD2d 187, 190-191, *lv denied* 79 NY2d 1048). We nevertheless reject defendant's contention on the merits. "The general rule is stated in *People v Pobliner* (32 NY2d 356, 369[, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905]; *see also People v Stevens*, 76 NY2d 833): photographs are admissible if they tend 'to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered.' They should be excluded 'only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant' " (*People v Wood*, 79 NY2d 958, 960; *see People v Lawson*, 114 AD3d 962, 963). Here, we agree with the People that the sole purpose of the evidence was not to arouse the emotions of the jury. To the contrary, the photographs established the relative positions of the tree and the roadway, the visibility of the tree, and the straight nature of the roadway, all of which were relevant to the jury's factual determinations, including whether defendant was driving while in an intoxicated condition.

Defendant did not object when the court directed the prosecutor to turn off the overhead projector upon which certain evidence was displayed to the members of the public seated in the courtroom, and thus failed to preserve for our review his contention that the court thereby closed the courtroom in violation of defendant's right to a public trial (*see People v George*, 20 NY3d 75, 80-81, *cert denied* ___ US ___, 133 S Ct 1736; *People v Spears*, 94 AD3d 498, 500, *lv denied* 19 NY3d 1001). In any event, defendant's right to a public trial was not violated because the record reflects that a laptop computer screen was still visible to the members of the public seated in the courtroom after the overhead projector was turned off. Contrary to defendant's further contention, we conclude that "the court's efforts to prevent disruption in the courtroom during [the Medical Examiner]'s sensitive testimony provides no basis upon which to upset defendant's conviction" (*People v Glover*, 60 NY2d 783, 785, *cert denied* 466 US 975; *see People v Chase*, 265 AD2d 844, 844, *lv denied* 94 NY2d 902).

Defendant further contends that the court prevented him from presenting evidence in his own behalf, and thereby violated his right to present a defense, when it refused to allow defense counsel to cross-examine the Medical Examiner with respect to whether the victim could have sustained certain injuries while moving within the vehicle. We reject that contention, as well as defendant's further contention

that the court's ruling constituted an abuse of discretion. There was an insufficient foundation for defense counsel's line of questioning, and thus the testimony that defense counsel sought to elicit from the Medical Examiner "would have been speculative and misleading" (*People v Banks*, 33 AD3d 385, 385, *lv denied* 7 NY3d 923; *see People v Frazier*, 233 AD2d 896, 897; *see also People v Walker*, 223 AD2d 414, 415, *lv denied* 88 NY2d 887). In addition, "[t]he minor limitations imposed by the court precluded repetitive inquiries into possible [causes of the injuries] in hypothetical situations. Defendant [otherwise] received wide latitude to explore the matters about which the [Medical Examiner] had provided expert testimony" (*People v Allende*, 38 AD3d 470, 471, *lv denied* 9 NY3d 839; *see generally Crane v Kentucky*, 476 US 683, 689-690).

Defendant failed to preserve for our review his contention that he was deprived of his right to a fair trial because the court improperly denigrated a defense witness by making certain comments to the jury (*see People v Fudge*, 104 AD3d 1169, 1170, *lv denied* 21 NY3d 1042; *see generally People v Charleston*, 56 NY2d 886, 887-888). In any event, that contention is without merit inasmuch as the record establishes that the court did not denigrate the defense witness.

Finally, defendant waived his contentions that the court erred in providing the jurors with a verdict sheet for their use during summations, and that the court erred in providing the jurors with a slightly different verdict sheet for their use during deliberations, because he consented to the use of those procedures at trial (*see People v Hicks*, 12 AD3d 1044, 1045, *lv denied* 4 NY3d 799; *see also People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809; *see generally People v Colon*, 90 NY2d 824, 826).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

412

CA 13-01873

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

IN THE MATTER OF JEFFREY A. THOMPSON,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY SHERIFF JOHN P. BURNS AND
COUNTY OF JEFFERSON,
RESPONDENTS-RESPONDENTS-APPELLANTS.

ENNIO J. CORSI, NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, ALBANY, FOR PETITIONER-APPELLANT-RESPONDENT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (JOHN L. SABIK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered December 21, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by confirming the determination in its entirety and dismissing the petition and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, made after an advisory arbitration hearing, suspending him for 45 days without pay from his employment as a correction officer in the Sheriff's Office of respondent County of Jefferson based on his violation of three departmental rules and regulations. Supreme Court confirmed the determination with respect to charge one, which alleged that petitioner had violated section 4.2 of the Sheriff's Department's Unified Code of Conduct (Conduct Unbecoming Members and Employees), and charge two, which alleged that he had violated section 4.3 of the Code of Conduct (Consorting with Persons of Ill Repute). The court granted that part of the petition seeking to vacate the finding of guilt with respect to charge three, which alleged that petitioner violated section 4.12 of the Code of Conduct (Membership and Organizations), and remitted the matter to respondents "to determine whether the penalty should be adjusted as a result." We conclude that the determination should be confirmed in its entirety and that the petition should be dismissed, and we therefore modify the judgment accordingly.

Initially, we agree with respondents that the proper standard of review is whether there is a rational basis for the determination or whether it is arbitrary and capricious, and not whether the determination is supported by substantial evidence (*see Matter of Fortune v State of N.Y., Div. of State Police*, 293 AD2d 154, 157; *Matter of Pierino v Brown*, 281 AD2d 960, 960; *Matter of Marin v Benson*, 131 AD2d 100, 103; *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, 231). Here, the hearing was mandated by a collective bargaining agreement and not required by statute or law, thereby making the former standard the appropriate standard of judicial review (*see* CPLR 7803 [4]; *Matter of Colton v Berman*, 21 NY2d 322, 329; *Pierino*, 261 AD2d at 960). Contrary to respondents' contention, however, we conclude that both the determination of guilt and the penalty imposed are subject to judicial review (*cf. Antinore v State of New York*, 49 AD2d 6, 8, *affd* 40 NY2d 921; *see generally Matter of Plainedge Fedn. of Teachers v Plainedge Union Free Sch. Dist.*, 58 NY2d 902, 903-904).

With respect to the merits, "[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431). An agency's determination "is entitled to great deference" (*Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059, *lv denied* 5 NY3d 713 [internal quotation marks omitted]) and, "[i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Peckham*, 12 NY3d at 431; *see Matter of Diocese of Rochester v Planning Bd. of Town of Brighton*, 1 NY2d 508, 520). Moreover, it is well settled that law enforcement officers may be "held to higher standards than ordinary civil service employees" (*Matter of Batista v Kelly*, 16 AD3d 182, 182), and that "an administrative determination regarding discipline will be afforded heightened deference where a law enforcement agency . . . is concerned" (*Fortune*, 293 AD2d at 157; *see Trotta v Ward*, 77 NY2d 827, 828, *rearg dismissed* 79 NY2d 887).

Here, we conclude that the determination with respect to the three disciplinary charges is neither arbitrary nor capricious, and that there is a rational basis for such determination (*see Fortune*, 293 AD2d at 157; *Marin*, 131 AD2d at 103; *see generally Plainedge*, 58 NY2d at 903-904). All three charges arise from petitioner's voluntary, off-duty attendance at a social event hosted and/or sponsored by the Hells Angels Motorcycle Club (Hells Angels). With respect to charge one, for unbecoming conduct, respondents rationally determined that petitioner's attendance at an event organized by Hells Angels brought disrepute on and/or discredited the Sheriff's Department and petitioner as a correction officer and employee thereof in violation of section 4.2 of the Code of Conduct. Respondents established that Hells Angels has a reputation in the law enforcement community as an outlaw motorcycle club, and that its members are known to be involved in criminal activity, including drug smuggling, violent

crime, and weapons trafficking. Indeed, petitioner acknowledged during the hearing that he was aware that Hells Angels members have been involved in criminal activity, that the federal government considers it an outlaw motorcycle gang, and that it is "perceived as a criminal organization." Respondents further established that petitioner's conduct "impair[ed] the operation or efficiency of the department or the member/employee" in violation of section 4.2. The county jail administrator testified at the hearing that Hells Angels is classified as a "security threat group" in the correction community, and that its members are known to be involved in criminal activity in jails and prisons.

With respect to charge two, for consorting with persons of ill repute, the jail administrator testified that he considered any member of Hells Angels to be "a person of ill repute, regardless of the person's criminal history, because the organization itself has close ties to organized crime." A detective who was involved in police surveillance of the event testified that he observed Hells Angels members at the event, and that he recognized another attendee as "a person known in the area to be associated with Hells Angels" and who has a criminal history. In any event, even if petitioner did not in fact "consort" with a person of ill repute at the event, we conclude that there is a rational basis for the determination that a Hells Angels-sponsored event is a place where "persons of questionable character" would be likely to congregate within the meaning of section 4.3 of the Code of Conduct.

As for charge three, concerning membership and organizations, although it is undisputed that the motorcycle club to which petitioner belongs is not affiliated with Hells Angels, we conclude that there is a rational basis for the determination that petitioner's attendance at an official Hells Angels-sponsored event constituted a "knowing[ ] . . . connect[ion]" with a "subversive organization," i.e., "an[] organization . . . whose object or purpose, either directly or indirectly, would adversely affect the discipline or conduct of the members/employees" in violation of section 4.12 of the Code of Conduct.

Finally, we agree with respondents that the penalty is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Pell*, 34 NY2d at 237; *see Matter of Fodera v Daines*, 85 AD3d 1452, 1456, *lv denied* 17 NY3d 714; *Marin*, 131 AD2d at 103-104; *see generally Matter of Gamma v City of Newburgh*, 277 AD2d 236, 237). As a law enforcement officer with over 20 years of experience as a correction officer, petitioner should have known that his participation in a Hells Angels-sponsored event would raise, at the very least, an appearance of impropriety, and that such participation could potentially jeopardize his authority and effectiveness as a correction officer. As the Sheriff argued during the hearing, "[t]he special trust bestowed upon correction officers requires that they abide by strict rules of behavior, as it is the high moral character upon which the safety of the jail and the individuals housed and working there depends." Inasmuch as the record establishes that petitioner was "unrepentant, insisting that his personal opinion of

[Hells Angels] and its members was the only criterion upon which his conduct should be judged," we see no basis to disturb the penalty imposed (*see Pell*, 34 NY2d at 237; *see generally Trotta*, 77 NY2d at 827; *Batista*, 16 AD3d at 182).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

415

CA 13-01820

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

DENISE APPLEBEE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY BECK, DEFENDANT-APPELLANT.

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

WILLIAM MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 7, 2013. The order denied the motion of defendant for summary judgment.

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

Memorandum: In this action to recover damages for injuries that plaintiff allegedly sustained as the result of a motor vehicle accident, defendant appeals from an order denying her motion for summary judgment dismissing the complaint. In support of her motion, defendant alleged, inter alia, that plaintiff did not sustain a serious injury as a result of the accident within the meaning of Insurance Law § 5102 (d), i.e., under the permanent consequential limitation of use, significant limitation of use, or 90/180-day categories. We agree with defendant that Supreme Court erred in denying the motion.

Defendant met her initial burden of establishing as a matter of law that plaintiff's injuries do not qualify under the above categories of serious injury by submitting plaintiff's medical records, plaintiff's deposition testimony, and the affidavit and affirmed report of the physician who examined plaintiff on defendant's behalf. Notably, the physician opined that the alleged injuries were not causally related to the accident but instead were the result of plaintiff's preexisting degenerative disc disease (*see Dorrian v Cantalicio*, 101 AD3d 578, 578; *Carfi v Forget*, 101 AD3d 1616, 1617-1618; *Hartley v White*, 63 AD3d 1689, 1690).

The burden then shifted to plaintiff to submit competent medical evidence, based on objective findings and diagnostic tests, raising a

triable issue of fact (*see Franchini v Palmieri*, 307 AD2d 1056, 1057, *affd* 1 NY3d 536; *Yoonessi v Givens*, 39 AD3d 1164, 1165). In particular, in light of defendant's "persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation" (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Lux v Jakson*, 52 AD3d 1253, 1254; *cf. Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195; *Coleman v Wilson*, 28 AD3d 1198, 1198). Plaintiff failed to meet her burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, plaintiff failed to submit any expert medical evidence in opposition to the motion, and thus failed to "address the conclusion of defendant's expert that the changes in the spine of plaintiff were degenerative in nature" (*Briody v Melecio*, 91 AD3d 1328, 1329). We reject plaintiff's contention that the evidence establishing that she had bulging discs is sufficient to raise a triable issue of fact whether she sustained a serious injury under one of the three asserted categories of serious injury. Even assuming, arguendo, that she raised an issue of fact whether she had bulging discs that were causally related to the motor vehicle accident at issue, we note that "[p]roof of a herniated [or bulging] disc, without additional objective medical evidence establishing . . . significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574; *see Carfi*, 101 AD3d at 1618).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

418

CA 13-01512

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

NON-INSTRUCTION ADMINISTRATORS AND SUPERVISORS RETIREES ASSOCIATION, BY ITS PRESIDENT, JOHN H. TATTERSALL, JOHN H. TATTERSALL, INDIVIDUALLY, BARBARA JOYCE, LAWRENCE BEYER, MARIE MAYNARD, NICHOLAS MARCHELOS, ROBERT HUGHES, NEIL MORT, JOSEPH LEO, JAMES INGRASCI, MARY RUTH BARBER, ROSEMARY BETTINO, ERNEST DELABIO, VINCENT FASSO, ANTHONY GIOANNINI, DAVID SUNDERLIN, MICHAEL AIDAK, GAIL STECK, AND BRIAN O'DONNELL, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCHOOL DISTRICT OF CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT.

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

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 9, 2012. The judgment granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of defendant's motion to dismiss the declaratory judgment cause of action, reinstating that cause of action and granting judgment in favor of defendant as follows:

> It is ADJUDGED AND DECLARED that the individual plaintiffs are not entitled to the health insurance coverage provided in the collective bargaining agreement in effect at the time each individual plaintiff retired,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs, 18 retired employees of defendant School District of City of Niagara Falls (District), and their retirees association commenced this breach of contract/declaratory judgment action seeking, inter alia, a declaration that the individual

plaintiffs are entitled to the health insurance benefits provided in the collective bargaining agreement (CBA) in effect at the time each individual plaintiff retired. Supreme Court granted the District's motion to dismiss the complaint, and plaintiffs appeal. We note at the outset that, although the court properly determined that plaintiffs were not entitled to judgment in their favor, the court erred in dismissing the declaratory judgment cause of action rather than declaring the rights of the parties (*see Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047; *see also Teague v Automobile Ins. Co. of Hartford, Conn.*, 71 AD3d 1584, 1586; *Ward v County of Allegany*, 34 AD3d 1288, 1289). We therefore modify the judgment by denying that part of the District's motion to dismiss the declaratory judgment cause of action, reinstating that cause of action, granting judgment in favor of the District, and declaring that the individual plaintiffs are not entitled to the health insurance coverage provided in the CBA in effect at the time each individual plaintiff retired.

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278; *see Greenfield*, 98 NY2d at 569). Further, " 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' " (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163). Where, however, contract language "is 'reasonably susceptible of more than one interpretation,' . . . extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language" (*Fernandez v Price*, 63 AD3d 672, 675, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573).

Here, we agree with the District that the language in the CBAs at issue is clear and unambiguous, and thus that extrinsic evidence may not be considered (*see South Rd. Assoc.*, 4 NY3d at 278). Each of the subject CBAs provides that the District "shall assume the full cost of health insurance coverage and major medical . . . for each employee in the negotiating unit covered by this Agreement lawfully retiring in the future." The CBAs further state that "[t]he coverage so provided *shall be the same type that the employee would have had if he/she had continued employment*. When the retiree reaches his/her sixty-fifth (65th) birthday and qualifies for Medicare . . . , the type of health insurance and major medical coverage shall be changed to cover his/her new circumstances" (emphasis added).

Contrary to the contention of plaintiffs, we conclude that the plain meaning of that provision is that, upon retirement, a retiree will receive health insurance coverage of the same type received by active employees at that point in time. Thus, if health insurance for active employees changes over the years based on rising health care costs and successive collective bargaining agreements, the health

insurance provided to retirees also will change because the health insurance of the retirees would be subject to the same changes if they had continued employment. Plaintiffs' proffered interpretation of the disputed provision—that retirees are "entitled to the benefits they received *at the time they each retired*" (emphasis added)—contravenes the plain meaning of the contractual language. Rather than fixing retiree coverage as of the date of retirement, the use of the word "would," a conditional verb indicating the consequence of an imagined or theoretical event or situation (*see* www.oxforddictionaries.com), expressly contemplates that the coverage provided to retirees will mirror the coverage provided to active employees. A retiree is therefore entitled to the type of health insurance that he or she would have had if the retiree had never left the District's employ, i.e., the health insurance coverage negotiated by the active employees and the District at any given point in time (*cf. Kolbe v Tibbetts*, 22 NY3d 344, 353; *Della Rocco v City of Schenectady*, 252 AD2d 82, 83-84, *lv dismissed* 93 NY2d 1000).

Plaintiffs concede that the individual plaintiffs receive the same health insurance coverage as active employees. Inasmuch as the individual plaintiffs are receiving the health care benefits to which they are contractually entitled, we conclude that the court properly dismissed the breach of contract cause of action (*see* CPLR 3211 [a] [7]; *cf. Della Rocco*, 252 AD2d at 84-85).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

436

CA 13-00588

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

BUFFAMANTE WHIPPLE BUTTAFARO, CERTIFIED PUBLIC ACCOUNTANTS, P.C., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KELLY A. DAWSON, DEFENDANT, AND JOHN S. TRUSSALO, CERTIFIED PUBLIC ACCOUNTANTS, P.C., DEFENDANT-RESPONDENT. (APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SPOTO, SLATER & SIRWATKA, JAMESTOWN (KEVIN J. SIRWATKA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 5, 2012. The order, insofar as appealed from, denied in part the motion of plaintiff to compel discovery.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and plaintiff's motion is granted in its entirety.

Memorandum: Plaintiff, a public accounting firm, executed an Asset Purchase Agreement (Agreement) with another public accounting firm, Lloyd and Company C.P.A., P.C. (Lloyd), that contained covenants by the shareholders of Lloyd that they would not solicit specified clients of plaintiff. The Agreement also contemplated that plaintiff would thereafter employ Lloyd shareholders, and defendant Kelly A. Dawson, a Lloyd shareholder, entered into an employment agreement with plaintiff that included a provision that she would continue to be bound by the non-solicitation covenants in the Agreement. Dawson thereafter left plaintiff's employ to work for defendant John S. Trussalo, Certified Public Accountants, P.C. (Trussalo), a competitor of plaintiff.

Plaintiff commenced this action alleging, among other things, that Dawson solicited certain clients in violation of the Agreement. The complaint alleges causes of action for breach of the Agreement by Dawson and unfair competition and tortious interference with contract by Trussalo. In appeal No. 1, plaintiff appeals from an order that denied in part its motion to compel disclosure and, in appeal No. 2,

plaintiff appeals from an order that granted Trussalo's motion seeking summary judgment dismissing the complaint against it.

In appeal No. 1, we agree with plaintiff that Supreme Court abused its discretion in denying in part plaintiff's motion inasmuch as the disclosure sought was "material and necessary" for the prosecution of plaintiff's action (CPLR 3101 [a]; *see Riordan v Cellino & Barnes, P.C.*, 84 AD3d 1737, 1738-1739). Contrary to the contention of Trussalo, the information regarding the identities of its clients is not privileged in these circumstances (*see First Interstate Credit Alliance v Andersen & Co.*, 150 AD2d 291, 292), and Trussalo failed to establish that the information sought constitutes a trade secret (*see Mann v Cooper Tire Co.*, 33 AD3d 24, 30, *lv denied* 7 NY3d 718, *rearg denied* 8 NY3d 956). We therefore conclude that the court should have granted plaintiff's motion in its entirety.

In appeal No. 2, we conclude that the court erred in granting Trussalo's motion seeking summary judgment dismissing the complaint against it. At the time of the motion, Trussalo had not complied with the order in appeal No. 1 insofar as it had granted plaintiff's motion to compel disclosure in part. Thus, summary judgment was premature inasmuch as information necessary to oppose the motion remained within Trussalo's exclusive knowledge (*see* CPLR 3212 [f]; *Yu v Forero*, 184 AD2d 506, 507-508). We further conclude that, in any event, Trussalo's own submissions raise triable issues of fact whether it intentionally interfered with the Agreement between plaintiff and Dawson (*see Lawley Serv., Inc. v Progressive Weatherproofing, Inc.*, 30 AD3d 977, 978), or engaged in unfair competition with plaintiff (*see Mitzvah Inc. v Power*, 106 AD3d 485, 487).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

437

CA 13-00590

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

BUFFAMANTE WHIPPLE BUTTAFARO, CERTIFIED PUBLIC ACCOUNTANTS, P.C., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KELLY A. DAWSON, DEFENDANT, AND JOHN S. TRUSSALO, CERTIFIED PUBLIC ACCOUNTANTS, P.C., DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SPOTO, SLATER & SIRWATKA, JAMESTOWN (KEVIN J. SIRWATKA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 4, 2013. The order granted the motion of defendant John S. Trussalo, Certified Public Accountants, P.C., for summary judgment and dismissed the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendant John S. Trussalo, Certified Public Accountants, P.C. is reinstated.

Same Memorandum as in *Buffamante Whipple Buttafaro, Certified Pub. Accountants, P.C. v Dawson* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

443

CA 13-01875

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

MICHAEL JACOBI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MELANIE JACOBI, DEFENDANT-RESPONDENT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (DAVID V. SANCHEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 11, 2013. The order, insofar as appealed from, denied that part of plaintiff's motion seeking summary judgment determining that he is entitled to $143,000 as his separate property upon the sale of the marital residence in Indiana and granted that part of defendant's cross motion seeking summary judgment determining that the proceeds of the sale of the marital residence in Indiana are to be divided equally between the parties.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking summary judgment determining that plaintiff is entitled to $143,000 as his separate property upon the sale of the marital residence in Indiana is granted and that part of the cross motion seeking summary judgment determining that the proceeds of the sale of the marital residence in Indiana are to be divided equally between the parties is denied.

Memorandum: The parties were married in New York shortly after they entered into a prenuptial agreement (Agreement). They subsequently relocated to Indiana, and defendant initiated a divorce action there. During the pendency of the divorce action, plaintiff commenced this action seeking, among other things, a determination of his separate property and the parties' marital property pursuant to the terms of the Agreement. As limited by his brief, plaintiff appeals from an order insofar as it denied that part of his motion seeking summary judgment determining that he is entitled to $143,000 as his separate property upon the sale of the marital residence in Indiana and granted defendant's cross motion for summary judgment to the extent that it sought summary judgment determining that the marital residence constitutes marital property in its entirety pursuant to the Agreement, and that the equity or proceeds of the sale

of the marital residence are to be divided equally between the parties. Although the Agreement states that "distribution of all marital property will not be governed by Section 236 of the New York Domestic Relations Law," it otherwise provides that it "shall be interpreted in accordance with New York law." Under New York law, " '[i]t is well settled that a spouse is entitled to a credit for his or her contribution toward the purchase of the marital residence, including any contributions that are directly traceable to separate property' . . . , even where, as here, the parties held joint title to the marital residence" (*Pelcher v Czebatol*, 98 AD3d 1258, 1259). Plaintiff established that he contributed $143,000 to the purchase of the marital residence that was directly traceable to property defined in the Agreement as separate property. We therefore reverse the order insofar as appealed from.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

446

KA 12-02202

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB E. WARE, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 12, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [1]). In a separate indictment, defendant was charged with burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the fourth degree (§ 155.30) in connection with an unrelated incident. Prior to sentencing on the robbery conviction, defendant pleaded guilty to burglary in the second degree in satisfaction of the separate indictment on the "very specific condition" that he waive his right to appeal that conviction and, further, that he waive his right to appeal his robbery conviction. In exchange, the People agreed not to seek a persistent felony offender adjudication in either case, and County Court promised to sentence defendant to concurrent terms of incarceration.

Contrary to the contention of defendant, we conclude that the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal the robbery conviction (*see People v Colucci*, 94 AD3d 1418, 1419, *lv denied* 19 NY3d 959; *see generally People v Lopez*, 6 NY3d 248, 256). Defendant's contention that his waiver of the right to appeal was coerced is belied by the record (*see People v Hayes*, 71 AD3d 1187, 1188, *lv denied* 15 NY3d 852, *reconsideration denied* 15 NY3d 921). Further, the fact that defendant waived his right to appeal in exchange for favorable sentencing terms and the People's withdrawal of their persistent felony offender application does not render the waiver invalid (*see People v Thacker*,

47 AD3d 423, 423, *lv denied* 10 NY3d 817; *People v Greene*, 7 AD3d 923, 923, *lv denied* 3 NY3d 659; *see generally People v Gast*, 114 AD3d 1270, 1270-1271).

Defendant's contentions that, during the robbery trial, the court erred in refusing to admit his codefendant's out-of-court statement as a declaration against penal interest, and that the court should have provided a missing witness charge, are encompassed by his valid waiver of the right to appeal (*see generally Lopez*, 6 NY3d at 255; *People v Muniz*, 91 NY2d 570, 574; *People v Mercer*, 81 AD3d 1159, 1160, *lv denied* 19 NY3d 999).

Finally, although defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 927; *People v Milon*, 114 AD3d 1130, 1131; *People v Peterson*, 111 AD3d 1412, 1412), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

447

KA 12-02292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PARISH M. STREETER, DEFENDANT-APPELLANT.

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

PARISH M. STREETER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered September 10, 2012. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), sexual abuse in the second degree, criminal sexual act in the second degree, attempted coercion in the first degree and criminal contempt 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 two counts of predatory sexual assault against a child (Penal Law § 130.96), sexual abuse in the second degree (§ 130.60 [2]), criminal sexual act in the second degree (§ 130.45 [1]), attempted coercion in the first degree (§§ 110.00, 135.65 [1]), and criminal contempt in the second degree (§ 215.50 [3]). The charges for the sexual crimes arose from allegations that defendant touched the complainant's vagina with his fingers and then, on three separate occasions, had oral contact with her vagina. The sexual contact took place when the victim was 12 and 13 years old.

We reject defendant's contention that the evidence is legally insufficient to support the conviction. The absence of scientific or medical evidence corroborating the complainant's testimony, as noted by defendant, is not dispositive, particularly where, as here there was no penetration, defendant did not ejaculate, and the crimes were not immediately reported to the police. Indeed, this case turned largely upon the credibility of the complainant and defendant, who testified in his own defense and denied the allegations. The jury credited the testimony of the complainant and, contrary to defendant's

contention, her testimony was not "incredible as a matter of law," i.e., "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Ponzo*, 111 AD3d 1347, 1348 [internal quotation marks omitted]; *see People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In support of his weight of the evidence contention, defendant asserts that his alibi witnesses, all of whom have felony records, were more credible than the People's witnesses. Where, as here, " 'witness credibility is of paramount importance to the determination of guilt or innocence,' " we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor (*People v Scott*, 107 AD3d 1635, 1636, *lv denied* 21 NY3d 1077; *see People v Roman*, 107 AD3d 1441, 1442-1443, *lv denied* 21 NY3d 1045; *People v Allen*, 93 AD3d 1144, 1147, *lv denied* 19 NY3d 956). We perceive no basis in the record for us to substitute our credibility determinations for those of the jury.

Defendant next contends that County Court erred in allowing the People to call a rebuttal witness who was present in court when defendant testified. Because the court did not issue a sequestration order, however, there was no basis to preclude the rebuttal witness from taking the stand. Moreover, it cannot be said that the court abused its discretion in failing "to exclude witnesses from the courtroom while other witnesses are testifying" (*People v Santana*, 80 NY2d 92, 100; *see People v Baker*, 14 NY3d 266, 274).

Defendant contends in his pro se supplemental brief that he was deprived of effective assistance of counsel because, among other reasons, his attorney failed to call witnesses at trial who could have provided testimony that was helpful to him. That contention is based primarily on matters outside the record and must be raised pursuant to a CPL 440.10 motion (*see People v Rivera*, 71 NY2d 705, 709; *People v Merritt*, 115 AD3d 1250, 1251). We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they lack merit.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

448

KA 13-01271

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. ENGLANT, DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (GEFFREY GISMONDI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Orleans County Court (James P. Punch, J.), dated April 9, 2013. 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 under the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We reject defendant's contention that County Court's assessment of 15 points for history of drug or alcohol abuse, which was based upon the recommendation in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, is not supported by clear and convincing evidence. The court was entitled to reject defendant's assertions that his prior drug or alcohol use was recreational, occasional, and did not constitute abuse, inasmuch as those assertions are contradicted by his admissions to the Probation Department, as well as his participation in alcohol and substance abuse treatment prior to and during his incarceration (*see People v St. Jean*, 101 AD3d 1684, 1684; *People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *cf. People v Palmer*, 20 NY3d 373, 378-379).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

450

KA 12-00584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TWAN CONWAY, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated January 30, 2012. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order that summarily denied his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). This Court previously affirmed the judgment of conviction (*People v Conway*, 43 AD3d 635, *lv denied* 9 NY3d 990). We note at the outset that defendant's brief addresses only his claims concerning actual innocence and ineffective assistance of counsel, and we thus deem abandoned his contention that the People committed a *Brady* violation (*see People v Hoffler*, 74 AD3d 1632, 1633 n 2, *lv denied* 17 NY3d 859; *see also People v Dombrowski*, 87 AD3d 1267, 1267).

We reject defendant's contention that he was entitled to a hearing on his claim of actual innocence. Although the court erred in determining that a claim of actual innocence may not properly be raised pursuant to CPL 440.10 (1) (h) (*see People v Hamilton*, 115 AD3d 12, 15), the court properly determined that defendant's claim of actual innocence was "belied by his admission of guilt during the plea colloquy" (*People v Conde*, 34 AD3d 1347, 1347; *see People v Garner*, 86 AD3d 955, 955; *see also People v Crawford*, 106 AD3d 832, 833, *lv denied* 21 NY3d 1014). Indeed, "[t]he 'solemn act' of entering a plea, itself sufficing as a conviction, . . . should not be permitted to be used as a device for a defendant to avoid a trial while maintaining a

claim of factual innocence" (*People v Plunkett*, 19 NY3d 400, 406, quoting *People v Thomas*, 53 NY2d 338, 345).

With respect to defendant's claim of ineffective assistance of counsel, however, we conclude that nonrecord facts may support defendant's contention that his trial counsel unreasonably refused to investigate two potential alibi witnesses and the statements of a third party admitting to the crime, and that trial counsel's ineffectiveness subsequently rendered defendant's plea involuntary. We therefore reverse the order and remit the matter to Supreme Court to conduct a hearing pursuant to CPL 440.30 (5) on defendant's claim of ineffective assistance of counsel.

Preliminarily, although we previously rejected on direct appeal defendant's contention that he was denied effective assistance of counsel (*see Conway*, 43 AD3d at 636), we note that his present contention is properly raised by way of a motion pursuant to CPL 440.10 because it concerns matters outside the record that was before us on his direct appeal (*see generally People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800). We also note that, although defendant contended in his CPL 440.10 motion that his federal "Sixth Amendment right to effective assistance of counsel was denied," defendant's reliance upon New York jurisprudence demonstrates his intent to invoke the greater protection afforded by the New York Constitution, and we therefore address his claim of ineffective assistance of counsel in that context.

It is well settled that "[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses" (*People v Jenkins*, 84 AD3d 1403, 1408, *lv denied* 19 NY3d 1026; *see People v Mosley*, 56 AD3d 1140, 1140-1141; *People v Nau*, 21 AD3d 568, 569). Here, defendant's CPL 440.10 motion was supported by the affidavits of the two alibi witnesses, and of defendant's prior attorney, who allegedly obtained a tape recording of the third-party admission. While a hearing may ultimately reveal that subsequent "counsel made reasonably diligent efforts to locate the [alibi] witness[es]" and the third party (*People v Gonzalez*, 25 AD3d 357, 358, *lv denied* 6 NY3d 833), or that there was a strategic reason for her failure to do so (*see People v Coleman*, 10 AD3d 487, 488), we "agree with defendant that his submissions 'support[ ] his contention that he was denied effective assistance of counsel . . . and raise[ ] a factual issue that requires a hearing' " (*People v Frazier*, 87 AD3d 1350, 1351).

Finally, we reject the People's contention that the allegations of fact essential to support defendant's motion were "conclusively refuted by unquestionable documentary proof" (CPL 440.30 [4] [c]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

452

KA 11-00408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAKEEM ARCHIE, 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 December 17, 2010. The judgment convicted defendant, upon jury verdicts, of murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following two jury trials, of murder in the second degree (Penal Law § 125.25 [2]), assault in the first degree (§ 120.10 [3]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The jury at the first trial convicted defendant of one weapons offense and acquitted defendant of another weapons offense, but was unable to reach a verdict on the remaining counts. At the retrial, defense counsel stipulated to the admission of evidence regarding the weapons offense for which defendant had been convicted, and the jury convicted defendant of depraved indifference murder and depraved indifference assault, along with the remaining weapons offense.

Defendant contends that the evidence at the first trial was legally insufficient to establish that he committed depraved indifference murder and assault and thus that the second trial was barred by double jeopardy with respect to those two crimes (*see People v Scerbo*, 74 AD3d 1730, 1731, *lv denied* 15 NY3d 757). According to defendant, the shooting was "manifestly intentional" and thus not reckless, as is required for the depraved indifference crimes. He further contends that, in any event, the evidence at the second trial, which is substantially similar to that admitted at the first trial, is likewise not supported by legally sufficient evidence. We reject

defendant's contentions. The evidence at both trials, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), establishes that on October 15, 2007, defendant was "jumped" at school by a fellow student who lived in Syracuse in the Pioneer Homes housing development, which is colloquially referred to as "the Bricks." Three days later, defendant borrowed his friend's .22 caliber semi-automatic pistol. According to defendant's friend, defendant was angry because "some guys from the Bricks" had "jumped" him. Later that night, defendant had someone drive him to Pioneer Homes. After exiting the vehicle, defendant walked across the street and entered the courtyard of the housing development, where he observed three people walking together. Another person was in the vicinity. Standing less than 20 feet away from the group of people, defendant fired between three and six shots in their direction. One of the three people walking together was struck in the arm by a bullet and was seriously injured, and another person in the group was shot in the neck and died. The victim who died had three bullet fragments in her neck, but it is unclear from the record whether she was struck by three separate bullets or one bullet that broke into pieces upon impact. Defendant returned to the waiting vehicle and went home. Defendant later told his friend from whom he had obtained the firearm that he "aired out the PH," referring to Pioneer Homes. Defendant also said that, while in the courtyard, he saw a group of "dudes" and started shooting. The .22 caliber handgun used in the shooting was recovered by the police from the home of defendant's friend, who testified against defendant at both trials in return for a promise of leniency on a drug charge in federal court. Laboratory tests subsequently established that defendant's DNA was on the firearm. When questioned by the police following his arrest, defendant admitted that he possessed the firearm on the night in question, but he denied shooting at anyone. At both trials, the People called a witness who testified that he was in the vehicle with defendant when he was driven to Pioneer Homes on the night of the shooting. In return for his testimony, that witness was allowed to plead guilty to a misdemeanor on a pending felony charge.

The relevant legal principles for evaluating the above trial evidence are well settled. Depraved indifference is a mental state " 'best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not' " (*People v Heidgen*, 22 NY3d 259, 275, quoting *People v Feingold*, 7 NY3d 288, 296). "Circumstantial evidence can be used to establish the necessary mens rea" (*Heidgen*, 22 NY3d at 275; *see People v Green*, 104 AD3d 126, 129). Although shooting into a crowd of people is a " '[q]uintessential example[ ]' " of depraved indifference (*People v Ramos*, 19 NY3d 133, 136; *see People v Suarez*, 6 NY3d 202, 214; *People v Payne*, 3 NY3d 266, 272, *rearg denied* 3 NY3d 767; *People v Callender*, 304 AD2d 426, 426, *lv denied* 100 NY2d 641), the mere presence of others does not transform an otherwise intentional shooting into a depraved indifference murder or assault (*see generally People v Garrison*, 39 AD3d 1138, 1139-1140, *lv denied* 9 NY3d 844). Rather, the point of distinction between a criminal act committed with intent and a criminal act committed with depraved indifference is that the former

is motivated by the "conscious objective" to cause death or serious physical injury, while the latter is "recklessly indifferent, depravedly so, to whether death [or serious physical injury] occurs" (*People v Gonzalez*, 1 NY3d 464, 468).

We conclude that this case is one of those "rare" cases where the defendant properly could have been charged with both intentional and depraved indifference murder (*Suarez*, 6 NY3d at 215). Stated otherwise, and contrary to defendant's contention, he is not "guilty of an intentional shooting or no other" (*People v Wall*, 29 NY2d 863, 864). The evidence summarized above, when viewed in the light most favorable to the People, establishes a "valid line of reasoning and permissible inferences which could lead a rational person" to conclude that defendant, by shooting indiscriminately at a group of people that he did not know, acted with depraved indifference to human life rather than with intent to kill (*People v Bleakley*, 69 NY2d 490, 495; *see People v Campbell*, 33 AD3d 716, 718-719, *lv denied* 8 NY3d 879; *Callender*, 304 AD2d at 426). In addition, viewing the evidence at the second trial in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict with respect to the depraved indifference counts 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.*; *People v Lowe*, 113 AD3d 1133, 1133-1134).

We reject defendant's further contention that he was deprived of effective assistance of counsel at the second trial, during which his defense counsel stipulated that, three days after the shooting at the Pioneer Homes, defendant possessed a loaded .22 caliber semi-automatic pistol and fired it nine times in the vicinity of a gas station in Syracuse. Defendant had been convicted of criminal possession of a weapon in the second degree for that incident at the first trial. We agree with defendant that evidence that he had fired the weapon on another occasion would have been inadmissible at the second trial absent defense counsel's stipulation, and thus that there was no legitimate strategy behind defense counsel's decision to enter into the stipulation. Nevertheless, we deem defense counsel's performance not otherwise deficient, and we conclude that the above single error was not so egregious as to deprive defendant of his right to a fair trial (*see People v Turner*, 5 NY3d 476, 480; *People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857). Defendant does not take issue with defense counsel's performance at the first trial, which resulted in a hung jury on three of the five counts and, viewing defense counsel's representation at the second trial in its entirety, we conclude that she provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Williams*, 98 AD3d 1234, 1235-1236, *lv denied* 21 NY3d 947).

Finally, we perceive no basis to modify defendant's sentence as a

matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

454

KA 13-00064

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHUVON J. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 3, 2012. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree, criminal contempt in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal contempt in the second degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), criminal contempt in the second degree (§ 215.50 [3]), and endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that her conviction under count two of the indictment, charging criminal contempt in the second degree, must be reversed and that count dismissed as a lesser inclusory concurrent count of count one, charging criminal contempt in the first degree (*see People v Mingo*, 66 AD3d 1043, 1044-1045, *lv denied* 14 NY3d 843; *see also People v Dupperoy*, 88 AD3d 606, 607, *lv denied* 18 NY3d 957). We therefore modify the judgment accordingly.

We reject defendant's contention that the testimony of the police officer at the *Wade* hearing was incredible as a matter of law (*see generally People v Spann*, 82 AD3d 1013, 1014; *People v Donaldson*, 35 AD3d 1242, 1243, *lv denied* 8 NY3d 984). Defendant preserved for our review her contention that the evidence is legally insufficient only to the extent that she contends that she did not have knowledge of the order of protection and its terms (*see generally People v Gray*, 86 NY2d 10, 19). We reject that contention inasmuch as "defendant's signature acknowledging receipt of the order of protection establishes

that it was served and that [s]he was on notice as to its contents" (*People v Soler*, 52 AD3d 938, 940, *lv denied* 11 NY3d 741; *cf. People v Bulgin*, 105 AD3d 551, 551, *lv denied* 21 NY3d 1002). Defendant's contention that the order of protection was improperly admitted in evidence is not preserved for our review (*see People v Huntsman*, 96 AD3d 1387, 1388-1389, *lv denied* 20 NY3d 1099), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, the verdict is not against the weight of the evidence. The minor inconsistencies in the testimony of two prosecution witnesses did not render their testimony incredible as a matter of law (*see People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778; *People v McAvoy*, 70 AD3d 1467, 1468, *lv denied* 14 NY3d 890). 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 jury was justified in finding . . . defendant guilty beyond a reasonable doubt" (*id.* at 348).

Defendant contends that the conviction of criminal contempt in the first degree must be reversed because she may have been convicted of an act for which she was not indicted (*see generally People v McNab*, 167 AD2d 858, 858). Specifically, defendant contends that the grand jury may have indicted her based on her conduct toward one of the prosecution witnesses, rather than that witness's son. We reject that contention. Although the indictment did not name the victim, the order of protection was issued in favor of the son and not his mother, and the grand jury therefore could not have indicted defendant for her conduct toward the mother.

Defendant failed to preserve for our review her contention that she was denied a fair trial based on prosecutorial misconduct during summation (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, to the extent that the prosecutor's remarks were improper, we conclude that they were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Heck*, 103 AD3d 1140, 1143, *lv denied* 21 NY3d 1074). Defendant also failed to preserve for our review her contentions that County Court gave a misleading jury instruction regarding a confession that was never made by defendant (*see People v Long*, 100 AD3d 1343, 1345, *lv denied* 20 NY3d 1063), and that the court erred in failing to give a missing witness charge (*see People v Merrill*, 60 AD3d 1376, 1376, *lv denied* 12 NY3d 856). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that she was denied effective assistance of counsel based on various errors made by defense counsel. We conclude that defendant failed to meet her burden of demonstrating the absence of strategic or other legitimate explanations for many of defense counsel's alleged errors (*see People v Benevento*, 91 NY2d 708, 712). In addition, defendant was "not denied effective assistance of . . . counsel merely because counsel [failed to] make a motion or argument that ha[d] little or no chance of success" (*People v Stultz*,

2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

In light of defendant's lengthy criminal history, we conclude that the sentence is not unduly harsh or severe. Defendant failed to preserve for our review her contention that the court erred in failing to take into account three days of jail time credit to which she is entitled in determining the duration of the order of protection, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Hoyt*, 107 AD3d 1426, 1426, *lv denied* 21 NY3d 1042; *People v Owens*, 66 AD3d 1428, 1428-1429, *lv denied* 14 NY3d 772). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

455

KA 09-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT FULLEN, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (David D. Egan, J.), rendered July 30, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the second degree and criminal sexual act in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him of rape in the second degree (Penal Law § 130.30 [1]) and criminal sexual act in the second degree (§ 130.45 [1]), defendant contends that Supreme Court committed reversible error in denying him access to the victim's psychiatric records. Those records, which the court reviewed in camera, have not been included in the record on appeal. Inasmuch as the present record on appeal does not permit us to review defendant's contention, we hold the case, reserve decision and remit the matter to Supreme Court to conduct a reconstruction hearing with respect to the missing records (*see generally People v Yavru-Sakuk*, 98 NY2d 56, 60).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

460

CA 13-01735

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

THOMAS GILEWICZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO GENERAL PSYCHIATRIC PHYCIATRIC (SIC) UNIT AND BUFFALO GENERAL HOSPITAL, DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ADAM P. DEISINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAMES P. DAVIS, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 12, 2012. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the fourth cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action by filing a summons with notice stating that the nature of the action was for medical malpractice, assault, and emotional distress. After plaintiff served a complaint and then an amended complaint, defendants moved, inter alia, to dismiss the second and third causes of action, alleging constitutional violations, for failure to comply with CPLR 305 (b) and, pursuant to CPLR 3211 (a) (7), to dismiss the fourth cause of action, for intentional infliction of emotional distress.

Supreme Court properly denied that part of the motion seeking to dismiss the second and third causes of action. CPLR 305 (b) provides in relevant part that, if a complaint is not served with the summons, "the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought." The failure to comply with this requirement is a jurisdictional defect warranting dismissal of the action (*see Parker v Mack*, 61 NY2d 114, 115-116; *Micro-Spy, Inc. v Small*, 9 AD3d 122, 125-126; *Drummer v Valeron Corp.*, 154 AD2d 897, 897, *lv denied* 75 NY2d 705). Defendants contend that plaintiff's constitutional causes of action should be dismissed for failure to comply with CPLR 305 (b) because the notice did not state that plaintiff would allege constitutional causes of action, and

plaintiff therefore should be precluded from asserting those causes of action in the amended complaint. We reject that contention. Inasmuch as the notice here was adequate under CPLR 305 (b) (*see Miller v Cambria Car Wash, LLC*, 68 AD3d 827, 828), we perceive no basis to dismiss the constitutional causes of action.

We agree with defendants, however, that the court erred in denying that part of their motion seeking to dismiss the fourth cause of action, for intentional infliction of emotional distress, and we therefore modify the order accordingly. On a CPLR 3211 motion to dismiss, "plaintiff's complaint is to be afforded a liberal construction, . . . the facts alleged therein are accepted as true, and . . . plaintiff is to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable legal theory' " (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451, quoting *Leon v Martinez*, 84 NY2d 83, 87-88; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152). In order to state a cause of action for intentional infliction of emotional distress, plaintiff must allege: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121). In addition, we note that "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 122 [internal quotation marks omitted]; *see Harville v Lowville Cent. School Dist.*, 245 AD2d 1106, 1106, *lv denied* 92 NY2d 808).

We conclude that the facts alleged by plaintiff "fall far short" of the standard (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303). The allegations in the amended complaint, liberally construed, are that defendants withdrew blood from plaintiff over his religious objection and that they continued their treatment of him despite his objections. In the context of this case, we conclude that plaintiff has not thereby alleged the type of extreme and outrageous conduct that is actionable (*see generally Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362-363), and we therefore conclude that the amended complaint fails to state a cause of action for intentional infliction of emotional distress (*see Baumann v Hanover Community Bank*, 100 AD3d 814, 816-817; *Hart v Child's Nursing Home Co.*, 298 AD2d 721, 722; *Harville*, 245 AD2d at 1106-1107). Moreover, the amended complaint does not adequately allege that plaintiff suffered severe emotional distress because of defendants' conduct. Indeed, plaintiff alleged in conclusory fashion only that defendants "intentionally caused the plaintiff . . . emotional distress."

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

461

CA 13-00627

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

JEFFREY KOCH AND ELIZABETH KOCH, INDIVIDUALLY AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DRAYER MARINE CORPORATION AND ASHVILLE BAY MARINA, DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 19, 2012. The order granted defendants' motion for summary judgment and dismissed plaintiffs' amended complaint in its entirety.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jeffrey Koch (plaintiff) when a plank collapsed while he was fishing from a dock at defendant Ashville Bay Marina (Marina), which was owned and previously operated by defendant Drayer Marine Corporation (Drayer). Defendants moved for summary judgment dismissing the amended complaint on the ground, inter alia, that a judgment of foreclosure had been entered against the Marina several months prior to the accident. We conclude that Supreme Court properly granted the motion.

Initially, we agree with plaintiffs that the court erred in concluding that defendants were entitled to summary judgment on the ground that the judgment of foreclosure extinguished their ownership of the Marina. Rather, "[t]he entry of a judgment of foreclosure and sale does not divest the mortgagor of its title and interest in the property until [a] sale is actually conducted" (*Bethel United Pentecostal Church v Westbury 55 Realty Corp.*, 304 AD2d 689, 692-693, *lv denied* 100 NY2d 510; *see Prudence Co. v 160 W. 73rd St. Corp.*, 260 NY 205, 210-211; *Nutt v Cuming*, 155 NY 309, 312-313). Because the Marina's property was not sold until August 2007, defendants retained title to the property at the time of the accident in May 2007.

We nevertheless conclude that the court properly granted defendants' motion. It is well settled that an out-of-possession titleholder lacking control over the property is not liable for injuries occurring thereon (*see Johnson v First Fed. Sav. & Loan Assn.*, 19 AD3d 1085, 1086; *Bowles v City of New York*, 154 AD2d 324, 324-325). Here, defendants met their initial burden of establishing that they were out-of-possession titleholders lacking control over the property. Defendants submitted the deposition testimony and an affidavit of Drayer's sole owner, who stated that, shortly after the foreclosure, she and her employees were present at the Marina in order to finish putting their customers' boats in storage, but that they undertook no further activities on the premises after October 12, 2006. Defendants further established that, in April 2007, the foreclosing bank denied their request for permission to remove customers' boats from storage for summer use. The bank also refused to permit defendants to send out dockage renewal notices to customers as they had done prior to the foreclosure. At that time, the bank informed defendants that it had hired the owner of another local marina to run the Marina and to remove the boats from storage for a fee. Defendants therefore established that, by the date of the accident, they no longer possessed, maintained or controlled the Marina's property, and plaintiffs failed to raise an issue of fact in opposition (*cf. Johnson*, 19 AD3d at 1086; *Bowles*, 154 AD2d at 324-325; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

462

CA 13-01800

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

IN THE MATTER OF NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF MARCY ASSESSOR, TOWN OF MARCY BOARD OF ASSESSMENT REVIEW AND TOWN OF MARCY, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ALBANY (KARLA M. CORPUS OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 14, 2012 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, granted respondents-defendants' cross motion for summary judgment dismissing the petitions-complaints.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the petitions-complaints and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that the imposition of ad valorem levies for garbage collection and sewer services against the subject properties is valid,

and as modified the judgment is affirmed without costs.

Memorandum: In this hybrid CPLR article 78 proceeding/declaratory judgment action, petitioner-plaintiff (plaintiff) contends that various parcels of real property it owns in respondent-defendant Town of Marcy (Town) should not be subject to special ad valorem levies imposed by the Town's sewer and garbage districts because the subject properties are not benefitted by the districts' services, and that Supreme Court therefore erred in denying its motion for summary judgment seeking a declaration to that effect and in granting the cross motion of respondents-defendants (defendants) for summary judgment. We reject that contention. "The

test for determining whether real properties are benefitted, thus warranting special district assessment, is whether the properties are 'capable of receiving the service funded by the special ad valorem levy' " (*Matter of Niagara Mohawk Power Corp. v Town of Tonawanda Assessor*, 17 AD3d 1090, 1091, *affd sub nom. Matter of Niagara Mohawk Power Corp. v Town of Watertown*, 6 NY3d 744, quoting *New York Tel. Co. v Supervisor of Town of Oyster Bay*, 4 NY3d 387, 393). "An ad valorem tax will not be deemed invalid unless the taxpayer's benefit received from the imposition of the tax is reduced to the point where it is, in effect, nonexistent" (*Water Club Homeowner's Assn., Inc. v Town Bd. of Town of Hempstead*, 16 AD3d 678, 679 [internal quotation marks omitted]; *see Matter of Sperry Rand Corp. v Town of N. Hempstead*, 53 Misc 2d 970, 971-973, *affd* 29 AD2d 968, *affd* 23 NY2d 666).

Here, " 'there is a sufficient theoretical potential of the properties to be developed in a manner that will result in the generation of garbage [and sewage]' " (*Town of Watertown*, 6 NY3d at 748, quoting *Town of Tonawanda Assessor*, 17 AD3d at 1092). Unlike the plaintiff in *Long Is. Water Corp. v Supervisor of Town of Hempstead* (77 AD3d 795, *lv denied* 16 NY3d 711), plaintiff herein owns the land on which its "mass" properties sit, and we conclude that it is theoretically possible that such land, if put to a different use, could generate garbage and sewage.

Supreme Court therefore properly denied plaintiff's motion and properly granted defendants' cross motion. Because plaintiff sought declaratory relief, however, the court erred in dismissing the petitions-complaints without declaring the rights of the parties (*see New York Tel. Co. v Supervisor of Town of Oyster Bay*, 6 AD3d 511, 512, *affd* 4 NY3d 387; *Restuccio v City of Oswego*, 114 AD3d 1191, 1191), and we therefore modify the judgment accordingly.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

472

KA 13-01736

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS J. GOTTSCHE, DEFENDANT-APPELLANT.

J. MICHAEL MARION, TONAWANDA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of marihuana 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, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that defense counsel and Supreme Court treated as determinative his personal opinion with respect to whether to submit lesser-included offenses to the jury and thus that he was denied effective assistance of counsel within the meaning of *People v Colville* (20 NY3d 20). We reject that contention.

The Court of Appeals held in *Colville* (20 NY3d at 23) that "the decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel." The defendant in *Colville*, like the defendant herein, was charged with murder in the second degree (*id.* at 23). The defendant's attorney asked the court to submit the lesser-included offenses of first- and second-degree manslaughter to the jury, and the court agreed (*id.*). The defendant, however, later decided that he did not want the jury to consider any lesser-included offenses (*id.* at 25). Defense counsel "repeatedly voiced his professional judgment that it was in the client's best interests for the jury to be instructed on the[ ] lesser-included offenses" and, "*despite the defense attorney's clearly stated views and advice to the contrary*," the judge "made plain that he would be guided solely by defendant's choice in the matter" (*id.* at 32 [emphasis added]). The Court concluded that the trial court erred because the decision with respect to lesser-included offenses "was for the attorney, not the accused, to make" (*id.*).

According to the Court, "[b]y deferring to defendant, the judge denied him the expert judgment of counsel to which the Sixth Amendment entitles him" (*id.*).

Here, unlike in *Colville*, there is nothing in the record to establish that the decision to forgo the submission of lesser-included offenses was made solely in deference to defendant, that it was against the advice of defendant's counsel, or that it was inconsistent with defense counsel's trial strategy. After the People rested, the court asked defense counsel whether he intended to request any lesser-included offenses. Defense counsel indicated that he did, but that he "just need[ed] to confirm that with my client." During the charge conference, defense counsel informed the court that, after discussing the issue with defendant over the last several weeks, counsel "made [his] suggestions to [defendant] and [it was counsel's] understanding that we are not asking for the lesser charge of manslaughter in the second degree." Defense counsel indicated that there was nothing else he wished to say with respect to the lesser-included offense issue. After the court denied defense counsel's request for a justification charge, the court again raised the issue of lesser-included offenses, noting that defendant's decision had been made without the benefit of the court's ruling on justification. Defense counsel advised the court that defendant "still does not want me to ask for any lesser included offenses. I did speak to him after the Court made its ruling last week Friday about it to see if it would change his mind. I spoke to him again this morning for a few moments and it's still my understanding that he does not wish that I ask for any lesser included offenses." Again, defense counsel declined to make any further comment on the issue.

While it is clear from the record that defendant was opposed to the submission of lesser-included offenses to the jury, there is no indication in the record that defense counsel's position differed from that of his client. Rather, the record is equally consistent with the inference that, after discussing the issue at length, defense counsel agreed with or acceded to defendant's position (*cf. People v Alvarez*, 106 AD3d 568, *lv denied* 21 NY3d 1013). This case is therefore distinguishable from *Colville*, in which "[t]he record show[ed] that the defense attorney never deviated from his position that 'going for broke' was tactically unwise . . . In short, the defense attorney never '*acceded' or 'acquiesc[ed]' to defendant's decision* . . . except to the extent the judge impermissibly left him no alternative" (20 NY3d at 32 [emphasis added]). Here, by contrast, the record supports the conclusion that, "after consulting with and weighing the accused's views along with other relevant considerations, [defense counsel] decide[d] to forgo submission of lesser-included offenses to the jury" (*id.*). We thus conclude that, on the record before us, it cannot be said that defendant was "denied . . . the expert judgment of counsel to which the Sixth Amendment entitles him" (*id.*).

Contrary to the further contention of defendant, we conclude that the evidence is legally sufficient to establish his intent to kill, and that the verdict is not against the weight of the evidence with respect to that element of the crime. It is well established that

"[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231, *lv denied* 8 NY3d 926; *see People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998; *People v Badger*, 90 AD3d 1531, 1532, *lv denied* 18 NY3d 991). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant intended to kill the victim (*see People v Thomas*, 96 AD3d 1670, 1674; *People v Lucas*, 94 AD3d 1441, 1441, *lv denied* 19 NY3d 964). The People presented evidence that, shortly before the shooting, defendant and the victim were involved in a heated argument and physical altercation, which escalated into a standoff with knives (*see Lucas*, 94 AD3d at 1441; *People v Evans*, 242 AD2d 948, 949, *lv denied* 91 NY2d 834; *see also Lopez*, 96 AD3d at 1622). Defendant then went upstairs and grabbed a loaded .22-caliber semi-automatic rifle from the side of his bed. The record reflects that defendant had four firearms in his house. In addition to the rifle at issue, defendant had a .308 caliber French military rifle, which was not readily operable, and two BB guns, one of which was in the kitchen where the altercation occurred. Defendant, however, chose the most lethal option available to him, i.e., the loaded .22-caliber rifle from his bedroom. With respect to the shooting itself, a witness testified that, after firing a single shot into the ground from the staircase, defendant turned and fired a second shot "towards the front door," out of which the victim was fleeing. Indeed, in his statement to the police, defendant stated that he remembered "shooting once at [the victim] as she went out the door." We therefore conclude that "there is [a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial," i.e., that defendant intended to kill the victim (*People v Bleakley*, 69 NY2d 490, 495; *see Lucas*, 94 AD3d at 1441; *Evans*, 242 AD2d at 949).

We further conclude that, although a different verdict would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). It is well established that " '[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*Lopez*, 96 AD3d at 1622), and we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Johnson*, 38 AD3d 1327, 1328, *lv denied* 9 NY3d 866; *People v Phong T. Le*, 277 AD2d 1036, 1036, *lv denied* 96 NY2d 762).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation. We note that defendant failed to object to most of the alleged instances of misconduct, and thus his challenges to those remarks are unpreserved for our review (*see* CPL 470.05 [2]; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, we conclude that the majority of the prosecutor's comments "were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Goupil*, 104 AD3d 1215, 1216, *lv denied* 21 NY3d 943 [internal quotation marks omitted]; *see*

People v Wilson, 104 AD3d 1231, 1233, *lv denied* 21 NY3d 1011, *reconsideration denied* 21 NY3d 1078). While the prosecutor's repeated comments to the effect that defendant "aimed" the rifle at the fleeing victim may have been an overstatement of the facts, we nonetheless conclude that those comments "remained within the broad bounds of rhetorical comment permissible during summations" (*People v Wellborn*, 82 AD3d 1657, 1658, *lv denied* 17 NY3d 803 [internal quotation marks omitted]). We further conclude that any improper remarks were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583 [internal quotation marks omitted]; *see People v Willis*, 79 AD3d 1739, 1741, *lv denied* 16 NY3d 864), and thus that defense counsel's failure to object to the allegedly improper comments did not constitute ineffective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1278-1279).

Finally, we conclude that the sentence is not unduly harsh or severe under the circumstances of this case.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01986

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

VICTORIA SCHNORR, ADMINISTRATOR OF THE ESTATE OF WALTER VAGA, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EMERITUS CORPORATION, DOING BUSINESS AS BELLEVUE MANOR, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

ADORANTE, TURNER & ASSOC., CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BONNER KIERNAN TREBACH & CROCIATA, LLP, NEW YORK CITY (KENNETH A. SCHOEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered March 25, 2013. The order granted the motion of defendant Emeritus Corporation, doing business as Bellevue Manor, for summary judgment and dismissed the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint against defendant Emeritus Corporation, doing business as Bellevue Manor, is reinstated.

Memorandum: Plaintiff, as administrator of the estate of her father (decedent), commenced this action seeking damages for personal injuries allegedly inflicted upon decedent by a fellow resident at an assisted living facility owned and operated by Emeritus Corporation, doing business as Bellevue Manor (defendant). We agree with plaintiff that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint against it.

Defendant, as the operator of an assisted living facility, had "a duty to safeguard patients and residents, even from injuries inflicted by third parties, 'measured by the capacity of the patient [or resident] to provide for his or her own safety' " (*Dawn VV. v State of New York*, 47 AD3d 1048, 1050, quoting *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252; *see Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918). "This sliding scale of duty . . . does not render a [facility] an insurer of patient safety or require it to keep each patient under constant surveillance" (*N.X.*, 97 NY2d at 253). Rather, "[a]s with any liability in tort, the scope of a [facility]'s duty is circumscribed by those risks which are reasonably foreseeable" (*id.*; *see Piazza v*

Regeis Care Ctr., L.L.C., 47 AD3d 551, 553; *see generally Mays v City of Middletown*, 70 AD3d 900, 902). Here, defendant owed a heightened duty of care to decedent and other residents of the memory care unit given the nature of their ailments, i.e., Alzheimer's, dementia, and memory loss (*see Dawn VV.*, 47 AD3d at 1050).

We conclude that the court erred in granting defendant's motion because defendant "failed to come forward with any proof to rebut plaintiff['s] allegations and merely focused on the claimed deficiency in plaintiff['s] proof" (*Landahl v Chrysler Corp.*, 144 AD2d 926, 927; *see Borowski v Ptak*, 107 AD3d 1498, 1499, *appeal dismissed* 21 NY3d 1036). In support of its motion, defendant repeatedly argued that plaintiff "failed to satisfy [her] burden" of establishing a prima facie case of negligence because of the "absence of proof[]" with respect to duty, breach of duty, foreseeability, and proximate cause. Those arguments are misplaced, however, because "defendant, not plaintiff, moved for summary judgment and defendant cannot meet its burden by relying on 'claimed deficienc[ies] in plaintiff['s] proof' " (*Borowski*, 107 AD3d at 1499). Although plaintiff will bear the burden of establishing defendant's negligence at trial, "on this motion for summary judgment, defendant has the burden of establishing its entitlement to judgment as a matter of law" (*Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1128), and we conclude that defendant failed to meet that burden (*see generally id.* at 1128-1129; *Landahl*, 144 AD2d at 927).

Defendant concedes that there was an altercation between decedent and another resident, and that such altercation resulted in decedent's injuries. With respect to the foreseeability of the resident's alleged conduct, "defendant[], as the part[y] seeking summary judgment, bore the burden of establishing that the assault on [decedent] was not foreseeable" (*Brown v City of New York*, 95 AD3d 1051, 1052). Defendant, however, "failed to submit any evidence to show that [it] lacked knowledge of any danger presented by the [resident]," and thus failed to establish its entitlement to judgment as a matter of law (*id.*; *see Navarra v Four Winds Hospital-Westchester*, 95 AD3d 850, 851, *lv dismissed* 19 NY3d 953). Although defendant submitted an affidavit from the assistant director of the facility, who averred that she was unaware of any prior altercation between decedent and the resident at issue, notably absent from the affidavit is an assertion that the assistant director was unaware of any prior altercations or incidents between the resident at issue and other residents, or that she lacked notice of the resident's alleged violent or aggressive tendencies (*see Hranek v United Methodist Homes of Wyo. Conference*, 27 AD3d 879, 881; *cf. Royston v Long Is. Med. Ctr., Inc.*, 81 AD3d 806, 807; *Liang v Rosedale Group Home*, 19 AD3d 654, 655-656).

Even assuming, arguendo, that defendant met its initial burden of proof, we conclude that plaintiff raised an issue of fact with respect to whether defendant had "notice of any prior similar incidents or similar aggressive behavior by the [resident] such that it should have anticipated the alleged incident and protected [decedent] from it"

(*Royston*, 81 AD3d at 807; *see Dawn VV.*, 47 AD3d at 1050-1051; *cf. McCreary v St. Luke's-Roosevelt Hosp. Ctr.*, 80 AD3d 499, 500; *Liang*, 19 AD3d at 656). In opposition to the motion, plaintiff submitted, inter alia, excerpts from defendant's records relating to the resident at issue, which arguably show a history of escalating, aggressive conduct on his part. Plaintiff also submitted the affidavit of an expert who opined, based upon his review of defendant's records, that defendant should have removed the resident from the facility well before the alleged assault on decedent because "the series of physical encounters with residents and staff prior to the time that he injured [decedent] should have disqualified him as an appropriate resident of a facility such as Bellevue Manor."

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-02358

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

IN THE MATTER OF CRYSTAL ABBOTT,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MERRITT, RESPONDENT-RESPONDENT-APPELLANT.

LESLEY C. GERMANOW, FULTON, FOR PETITIONER-APPELLANT-RESPONDENT.

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

A.J. BOSMAN, ATTORNEY FOR THE CHILDREN, ROME.

Appeal and cross appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered November 14, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole legal custody of the children of the parties to respondent.

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

Memorandum: In October 2011, petitioner mother and respondent father agreed to a stipulated order that, inter alia, gave them joint legal custody of their children, with the father having primary physical custody and the mother having liberal visitation. At the time, the father lived in North Carolina and the mother was in the process of relocating to North Carolina. The mother, however, returned to New York in December and filed a petition seeking to enforce the stipulated order in January 2012. The mother thereafter filed a petition seeking to modify the stipulated order by requesting that Family Court grant her primary physical custody of the children. After a hearing, the court granted the father sole legal and primary physical custody of the children and granted the mother liberal visitation. The mother appeals and the father cross-appeals.

We reject the father's threshold procedural contention on his cross appeal that the stipulated order vested jurisdiction in the North Carolina courts. The stipulated order merely allowed either party to petition a North Carolina court to modify visitation; it did not require a party to do so. In any event, "parties cannot, by agreement, confer jurisdiction on either state" (*DeJac v DeJac*, 17 AD3d 1066, 1068; *see Arnold v Harari*, 4 AD3d 644, 646). We reject the father's further contention on his cross appeal that the court erred

in denying his motion to stay the mother's enforcement petition and to transfer the proceeding to North Carolina on the ground that New York was an inconvenient forum. The record supports the court's determination that the factors set forth in Domestic Relations Law § 76-f (2) favored New York retaining jurisdiction. In particular, the record establishes that the children have not resided in North Carolina for very long; the father has more financial resources than the mother to enable him to travel to New York for court proceedings; and the New York courts have had prior involvement with the parties (*see Matter of Mercado v Frye*, 104 AD3d 1340, 1341, *lv denied* 21 NY3d 859; *Matter of Sutton v Sutton*, 74 AD3d 1838, 1839-1840). While the father asserted that much of the evidence needed at the hearing would come from North Carolina, we note that the court allowed the father to present the testimony of several witnesses via telephone (*see Mercado*, 104 AD3d at 1341; *DeJac*, 17 AD3d at 1067-1068). We also reject the father's contention on his cross appeal that the final ordering paragraph of the court's order must be stricken. In that paragraph, the court stated that it would "maintain exclusive, continuing jurisdiction over th[e] matter," but it was "pursuant to Domestic Relations Law § 76-a." The court's reference to section 76-a indicates that the court would not continue to exercise jurisdiction over the matter if it becomes inappropriate to do so. We reject the father's final contention on his cross appeal that the visitation schedule grants excessive visitation to the mother (*cf. Cesario v Cesario*, 168 AD2d 911, 911). Indeed, we note that the visitation schedule ordered by the court was in large part proposed by the father during his testimony.

Contrary to the mother's contention on her appeal, we conclude that the court's custody determination has a sound and substantial basis in the record (*see Mercado*, 104 AD3d at 1341-1342). The record establishes the requisite change in circumstances inasmuch as the mother has moved back to New York, thus rendering the visitation schedule set forth in the stipulated order impractical (*see Matter of Rohan AA. v Lonna CC.*, 109 AD3d 1051, 1053). In addition, the record further establishes that the parties are unable to communicate or make joint decisions (*see Matter of Murphy v Wells*, 103 AD3d 1092, 1093, *lv denied* 21 NY3d 854; *Matter of Anthony MM. v Jacquelyn NN.*, 91 AD3d 1036, 1037). Contrary to the mother's further contention on her appeal, the court did not err in awarding the father sole legal custody despite the absence of a petition seeking that relief. "[T]he issue of an award of custody to any party was properly before the court [because, i]n a child custody proceeding, a court has the authority to enter orders for custody . . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child" (*Matter of Hall v Porter*, 52 AD3d 1289, 1289 [internal quotation marks omitted]).

The mother's contention on her appeal that the stipulated order should have been vacated on the ground of fraud is not preserved for our review because she did not move to vacate the stipulated order (*see generally Matter of York v Zullich*, 89 AD3d 1447, 1448; *cf. Matter of Di Fiore v Scott*, 2 AD3d 1417, 1418). The mother further

contends that the court erred in finding that her enforcement petition was moot and that the father should be held in contempt for failing to comply with the stipulated order. We note, however, that the mother never filed a violation petition or requested that the father be held in contempt. Inasmuch as the court modified the stipulated order, we conclude that it properly held that the mother's petition seeking to enforce that order was moot. The mother failed to object to the court taking telephonic testimony of witnesses and therefore failed to preserve for our review her contention with respect to that telephonic testimony (*see generally York*, 89 AD3d at 1448). In any event, that contention is without merit (*see* Domestic Relations Law § 75-j [2]; *Matter of Kelly v Krupa*, 63 AD3d 1395, 1396). Finally, the mother's challenge to one of the court's temporary orders of visitation was rendered moot by the final order of custody and visitation (*see Matter of Ramirez v Velez*, 78 AD3d 1062, 1062-1063; *Posporelis v Posporelis*, 41 AD3d 986, 988; *Moody v Sorokina*, 40 AD3d 14, 19, *appeal dismissed* 8 NY3d 978, *reconsideration denied* 9 NY3d 887).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

503

CAF 12-01884

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

IN THE MATTER OF MAKAYLA S.

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

DAVID S., RESPONDENT-APPELLANT,
AND ALECIA P., RESPONDENT.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

JAMES DOYLE, III, BATH, 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 September 25, 2012 pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child and ordered that the child be freed for adoption. We reject the father's contention that Family Court erred in finding that the child is a permanently neglected child and in terminating the father's parental rights with respect to her. Petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [father] and [the child] by providing 'services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the father's] care' . . . , and that the [father] failed substantially and continuously to plan for the future of the child although physically and financially able to do so . . . Although the [father] participated in the services offered by petitioner, [he] did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see* § 384-b [7] [a]). Contrary to the father's further contentions, we conclude that the court properly denied his request for a suspended judgment (*see Matter of Lilliana G. [Orena G.]*, 104

AD3d 1224, 1225; *Matter of Dahmani M. [Jana M.]*, 104 AD3d 1245, 1246), and that he received meaningful representation (*see Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704; *Matter of Nathaniel W.*, 24 AD3d 1240, 1241, *lv denied* 6 NY3d 711). Finally, we have reviewed the father's remaining contention and conclude that it lacks merit.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

506

CA 13-01858

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

IN THE MATTER OF THE ESTATE OF WILLIAM H. SEWARD, ALSO KNOWN AS WILLIAM H. SEWARD, III, DECEASED.

---------- MEMORANDUM AND ORDER

RAY S. MESSENGER, PETITIONER-RESPONDENT;

FRED L. EMERSON FOUNDATION, INC., APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR APPELLANT.

BOYLE & ANDERSON, P.C., AUBURN (ROBERT K. BERGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Cayuga County (Thomas G. Leone, A.S.), dated June 28, 2013. The decree denied the motion of Fred L. Emerson Foundation, Inc., to dismiss the petition for appointment of an administrator c.t.a. and granted Letters of Administration c.t.a. to petitioner, limited to enforcement of a charitable gift under the last will and testament of William H. Seward, also known as William H. Seward, III.

It is hereby ORDERED that the decree so appealed from is unanimously reversed on the law without costs, the motion is granted and the petition is dismissed without prejudice in accordance with the following Memorandum: William H. Seward, III (decedent) is the grandson of William H. Seward, a former governor of the State of New York and the United States Secretary of State during the Civil War. Decedent devised to appellant, Fred L. Emerson Foundation, Inc. (Emerson Foundation), the Seward family home in Auburn, and also bequeathed such of its contents that decedent's wife chose not to keep. Included in the bequest was a painting by Thomas Cole entitled "Portage Falls on the Genesee," which was presented to William H. Seward when he was governor of the State of New York. Decedent's estate was closed in 1955. With the approval of Surrogate's Court by decree, the Emerson Foundation transferred ownership of the realty and its contents, with the exception of the painting, to the Seward House Museum (museum) in 2008. The Emerson Foundation retained ownership of the painting, which was displayed at the museum. The decree provides that the "painting will not be transferred to any person or entity other than [the museum] without first obtaining leave of the court." In 2013, the Emerson Foundation's board of directors and the museum's board of directors determined that it was not practical or prudent to keep the valuable artwork in the museum, whereupon the painting was

removed from the museum to an undisclosed location and a reproduction was commissioned. This proceeding followed.

Petitioner, the great-great-grandson of William H. Seward and great-nephew of decedent, sought letters of administration c.t.a. in order to commence an action to seek an injunction to prevent the sale or transfer of the painting to any person or entity other than the museum (*see* SCPA 1418 [3]). By order to show cause, the Emerson Foundation sought to intervene in the proceeding and to dismiss the petition. According to the Emerson Foundation, the petition should be dismissed because there are no assets left to be administered inasmuch as the estate has been closed for nearly 60 years and, in any event, the Attorney General is the person charged with enforcing a charitable disposition (*see* EPTL 8-1.1). The Surrogate did not expressly rule on that part of the motion seeking intervention, but denied the motion to dismiss and granted petitioner letters of administration c.t.a., "limited to the enforcement of the terms of the charitable gift under Article Fourth of the Last Will and Testament of William H. Seward [III]," pursuant to SCPA 702 (1). Petitioner concedes that the issue whether he has standing in any proceeding or action involving the disposition of the painting, in either Surrogate's Court or Supreme Court, was not addressed by the Surrogate, and the Attorney General has expressly reserved his right to contest the issue of standing.

Although the Surrogate properly determined that petitioner was eligible for appointment as administrator c.t.a. pursuant to SCPA 1418 (3), because those persons authorized by SCPA 1418 (1) and (2) for appointment either are deceased or have declined to seek letters, we nevertheless conclude that he erred in granting letters of administration c.t.a. to petitioner. It is undisputed that there are no assets of the estate that have not been administered (*see Matter of Moran*, 145 NYS2d 241, 243, *affd* 1 AD2d 1003; *see also Van Giessen v Bridgford*, 83 NY 348, 355). As the Court of Appeals has written, "[t]here may be cases where letters of administration are necessary to be granted for other purposes than the recovery and distribution of assets[,]" including a "claim in respect to them which can be enforced" (*Van Giessen*, 83 NY at 355). Nevertheless, we conclude that any claim with respect to the painting is to be "enforced by the [Attorney General], pursuant to his duty to effectuate the donor's wishes" (*Lefkowitz v Lebensfeld*, 68 AD2d 488, 496, *affd* 51 NY2d 442; *see St. Joseph's Hosp. v Bennett*, 281 NY 115, 119; *see generally Matter of Alaimo*, 288 AD2d 916, 916, *lv denied* 97 NY2d 609), and we conclude that letters of administration c.t.a. are not "necessary" (*Van Giessen*, 83 NY at 355).

We further conclude that limited letters of administration also are not "appropriate or necessary in respect of the affairs of the estate" (SCPA 702 [10]; *cf. Smithers v St. Luke's-Roosevelt Hosp.*, 281 AD2d 127, 134-135). Notably, the Surrogate denied petitioner's request that the letters grant petitioner the authority to commence an action (*cf. Smithers*, 281 AD2d at 134-135). Moreover, the Surrogate has previously prohibited the disposition of the painting without court approval, and there is no basis to conclude that the Attorney General is not properly fulfilling his duty to protect the decedent's

wishes with respect to the bequest to the Emerson Foundation (*cf. id.* at 134; *see generally Lucker v Bayside Cemetery*, 114 AD3d 162, 169). We therefore reverse the decree and grant the motion to dismiss the petition, without prejudice to file a petition seeking appropriate letters in the event that circumstances change and it becomes "appropriate or necessary" for decedent's estate to seek to participate in a proceeding or action regarding the disposition of the painting (SCPA 702 [10]; *see Smithers*, 281 AD2d at 134-135; *see generally Van Giessen*, 83 NY at 355).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

523

CA 13-01990

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

IN THE MATTER OF BUFFALO NIAGARA BUSINESS PARK, LLC, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF ASSESSMENT REVIEW FOR CITY OF BUFFALO, ASSESSOR OF CITY OF BUFFALO, CITY OF BUFFALO, RESPONDENTS-RESPONDENTS, AND COUNTY OF ERIE, INTERVENOR-RESPONDENT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CAVETTE A. CHAMBERS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

MOSEY PERSICO LLP, BUFFALO (MARGARET A. HURLEY OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 20, 2013 in a proceeding pursuant to RPTL article 7. The order granted the motions of respondents and intervenor to dismiss.

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

Memorandum: Petitioner appeals from an order that, inter alia, granted the motions of respondents and intervenor to dismiss the petition in this tax certiorari proceeding pursuant to the Real Property Tax Law article 7. On appeal, petitioner contends that Supreme Court erred in granting the motions because the petition was timely filed and service was proper. We reject that contention. It is undisputed that petitioner never served the original petition on any party herein and, pursuant to RPTL 702 (3), the failure to file and serve the petition "shall constitute a complete defense to the petition and the petition must be dismissed." In view of our decision, we need not address petitioner's remaining contentions.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

525

CA 13-01285

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

TERESA E. MYERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY J. MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LISA A. SADINSKY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), entered November 9, 2012 in a divorce action. The judgment, inter alia, directed defendant to pay maintenance to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by ordering that defendant is entitled to claim the parties' children as dependents for tax purposes, provided that he remains current in his child support and maintenance obligations, and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, defendant appeals from a judgment of divorce and, in appeal No. 2, he appeals from a subsequent order requiring that he pay a portion of plaintiff's attorney's fees.

With respect to the judgment in appeal No. 1, we reject defendant's contention that Supreme Court abused its discretion in awarding maintenance for a 10-year period. It is well established that, " '[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court' " (*Frost v Frost*, 49 AD3d 1150, 1150-1151; *see Gately v Gately*, 113 AD3d 1093, 1093; *Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810), and we perceive no abuse of discretion here. As the court noted, there is a "vast discrepancy" in the incomes of the parties, with plaintiff's sole source of income consisting of Social Security Disability (SSD) payments (*see Gilliam v Gilliam*, 109 AD3d 871, 872). During most of the 13-year marriage, plaintiff raised the parties' two children while defendant was the sole wage earner (*see Carpenter v Carpenter*, 202 AD2d 813, 814-815). The parties enjoyed a relatively comfortable standard of living during the marriage. In setting the duration of maintenance, the court determined that, even if plaintiff were able to find a job, she would never approach her

pre-divorce standard of living, while defendant "clearly can." Plaintiff testified at trial that she is permanently disabled as a result of bilateral carpal tunnel syndrome and a severed nerve in her left hand. Although plaintiff did not submit medical evidence or testimony concerning her disability, we conclude that the undisputed fact that the Social Security Administration determined that she was disabled as of 2000 and that she continues to receive SSD, coupled with her testimony, is sufficient to support the court's maintenance determination (*see Mazzone v Mazzone*, 290 AD2d 495, 496; *Battinelli v Battinelli*, 174 AD2d 503, 504; *cf. Grasso v Grasso*, 47 AD3d 762, 764; *Palestra v Palestra*, 300 AD2d 288, 289).

Contrary to the further contention of defendant in appeal No. 1, the court properly set forth the statutory grounds for termination of maintenance in its bench decision, which is incorporated in and attached to the judgment of divorce (*see* Domestic Relations Law § 248). We agree with defendant, however, that he should be allowed to claim the parties' children as dependents for tax purposes, provided that he remains current in his child support and maintenance obligations (*see Rooney*, 92 AD3d at 1296; *see also Ochoa v Ochoa*, 159 AD2d 285). We therefore modify the judgment in appeal No. 1 accordingly.

Finally, we reject defendant's contention in appeal No. 2 that the court erred in ordering defendant to pay a portion of plaintiff's attorney's fees in light of, inter alia, the gross disparity in the parties' incomes (*see Alecca v Alecca*, 111 AD3d 1127, 1130; *Rooney*, 92 AD3d at 1296).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

526

CA 13-01286

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

TERESA E. MYERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY J. MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LISA A. SADINSKY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered November 20, 2012. The order directed defendant to pay certain attorney's fees of plaintiff.

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

Same Memorandum as in *Myers v Myers* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

527

CA 13-01320

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

THOMAS MAGGIO AND DIANE MAGGIO,
PLAINTIFFS,

V MEMORANDUM AND ORDER

EYE CARE PROFESSIONALS OF WESTERN NEW YORK, LLP, DEFENDANT-RESPONDENT, AND 4703 TRANSIT ROAD REALTY, LLC, DEFENDANT-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 15, 2013. The order, among other things, granted that part of the motion of defendant Eye Care Professionals of Western New York, LLP, for summary judgment dismissing the contractual indemnification cross claim of defendant 4703 Transit Road Realty, LLC, and denied that part of the motion of defendant 4703 Transit Road Realty, LLC, for summary judgment on its contractual indemnification cross claim.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Thomas Maggio (plaintiff) while working in the attic above an unoccupied commercial rental space owned by defendant 4703 Transit Road Realty, LLC (landlord). According to his deposition testimony, plaintiff was in the process of building a plywood platform or walkway in the attic above the unoccupied space when he slipped off a joist and fell through the ceiling to the cement floor in the unoccupied space, 11 feet below. Defendant Eye Care Professionals of Western New York, LLP (tenant) leased the adjacent separate commercial space from the landlord. The lease contains an indemnification provision providing that the tenant is to indemnify the landlord for any accident that occurs “in or about the Leased Premises and common areas.” The lease does not define or identify any common areas within the building, and a diagram of the “Leased Premises” appended to the lease does not depict any common areas in the building. Supreme Court, as relevant on appeal, granted that part of the tenant’s motion

for summary judgment dismissing the cross claim for contractual indemnification and denied that part of the landlord's motion for summary judgment on that cross claim, and the landlord appeals. We affirm.

The threshold issue for our determination is whether the indemnification provision in the contract was triggered, i.e., whether "the contractual language evinces an 'unmistakable intent' " on the part of the tenant to indemnify the landlord (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417), and we conclude that it was not triggered. Although the phrase "in or about the Leased Premises and common areas" may be construed in appropriate circumstances to include locations outside of a demised premises, such as a sidewalk (*see e.g. Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 159), we conclude that here the indemnification provision cannot be construed as an agreement to indemnify the landlord for accidents occurring within a separate but unoccupied rental unit of a commercial building over which the landlord has exclusive control and in which the tenant has no beneficial interest (*see Corrado v 80 Broad, LLC*, 101 AD3d 631, 631). Having concluded that the indemnification provision was not triggered (*cf. Great N. Ins. Co.*, 7 NY3d at 418), we do not reach the landlord's contentions regarding its alleged enforceability under General Obligations Law § 5-321.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

530

CA 13-01664

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

SUSAN ANGONA, AS GUARDIAN AD LITEM OF
BENJAMIN ANGONA, AND SUSAN ANGONA,
INDIVIDUALLY, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, CONMED CORP., KATECHO, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

HANCOCK ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT CONMED CORP.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT KATECHO, INC.

SANOCKI NEWMAN & TURRET, LLP, NEW YORK CITY (DAVID B. TURRET OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 12, 2013. The order granted in part and denied in part the motions of defendants City of Syracuse, ConMed Corp. and Katecho, Inc., for summary judgment.

It is hereby ORDERED that said appeal by defendant City of Syracuse is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff, individually and as guardian ad litem for Benjamin Angona (Angona), commenced these consolidated actions seeking damages for injuries Angona sustained after he suffered a heart attack and collapsed. Angona was then an off-duty firefighter for defendant City of Syracuse (City). Firefighters from the City's Fire Department responded first to the emergency call, and shortly following their arrival they set up a defibrillator. The firefighters were unable, however, to connect the electrodes to the defibrillator. Employees of a private ambulance company arrived at the scene and, using their company's defibrillator and electrodes, were able to defibrillate Angona. He was resuscitated but suffered severe neurological damage.

Plaintiff alleges that Angona was injured as the result of the delay in initiating defibrillation, which was caused by the failure of the electrodes to connect properly to the defibrillator used by the City firefighters. That failure, plaintiff further alleges, was the result of a bent pin or misshapen connector housing of one of the electrodes, which prevented that defibrillator from operating properly. Defendant ConMed Corp. (ConMed) manufactured and designed the wire assembly for the electrodes, and defendant Katecho, Inc. (Katecho) manufactured the chest pads and affixed the wire assembly to the pads at the final stage of the manufacturing process. Plaintiff asserts causes of action against all defendants for negligence, and she asserts additional causes of action against ConMed and Katecho for, inter alia, strict products liability and breach of implied warranty. Defendants' various third-party actions also were consolidated with the main action, the parties having stipulated that each defendant asserted cross claims against each other, for contribution.

By the order in appeal No. 1, Supreme Court, inter alia, granted in part and denied in part the motions of the City, ConMed and Katecho seeking summary judgment dismissing the respective amended complaint, complaint and cross claims against them. By the order in appeal No. 2, the court granted the City's motion for leave to renew and, upon renewal, granted the City's motion in its entirety. The City, ConMed and Katecho appeal and plaintiff cross-appeals from the order in appeal No. 1, and plaintiff, ConMed and Katecho appeal from the order in appeal No. 2. We note at the outset that the City's appeal from the order in appeal No. 1 must be dismissed as academic because the City was granted summary judgment upon renewal in appeal No. 2 (*see IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577).

We conclude in appeal No. 1 with respect to the City that the court properly granted that part of the City's motion seeking summary judgment dismissing plaintiff's claim of negligence based upon the City's alleged failure to respond to the scene of Angona's heart attack with operable and functional equipment. We likewise conclude in appeal No. 2 with respect to the City that the court, upon granting leave to renew, properly granted the remainder of the City's motion, which sought summary judgment dismissing plaintiff's claims of negligence and all cross claims based upon the City's alleged failure to render proper resuscitative care and treatment at the scene. All of those claims of negligence arise from the City's exercise of governmental functions (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 427-428). Thus, "[t]o sustain liability against [the City], the duty breached must be more than that owed the public generally" (*Lauer v City of New York*, 95 NY2d 95, 100). The City met its burden of establishing the absence of a special duty owed to Angona in these circumstances (*see Laratro v City of New York*, 8 NY3d 79, 83-84; *Kircher v City of Jamestown*, 74 NY2d 251, 258), and plaintiff failed to raise a triable issue of fact. We reject plaintiff's contention that the City owed a special duty to Angona by virtue of his status as an off-duty firefighter.

The remainder of our decision concerns the order in appeal No. 1. We conclude that the court properly denied those parts of the motions of ConMed and Katecho seeking summary judgment dismissing plaintiff's strict liability claims against them based on a manufacturing defect. Neither defendant met its initial burden of establishing that the alleged defect in the electrode did not exist at the time it left its control (*see generally Rosado v Proctor & Schwartz*, 66 NY2d 21, 25-26). In any event, the opinion of plaintiff's expert was sufficient to raise triable issues of fact with respect to the adequacy of the quality control and inspection procedures undertaken by those defendants to prevent a defective product from leaving their facilities (*cf. Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1324). We reject the further contention of Katecho that the evidence establishes as a matter of law that it is not subject to liability for a manufacturing defect inasmuch as it manufactured only a component part, i.e., the electrode pad, that was not itself defective (*see generally Gray v R.L. Best Co.*, 78 AD3d 1346, 1349). Katecho's own submissions establish that, in addition to manufacturing a component, it was involved in the installation of the wire assemblies and the inspection, testing and assembly of the electrodes.

The court also properly denied that part of ConMed's motion seeking summary judgment dismissing plaintiff's claims against it based upon failure to warn. Triable issues of fact remain whether ConMed should have warned users to pre-connect the electrodes "in light of the nature of the product and the potential danger" (*Warsaw v Rexnord, Inc.*, 221 AD2d 933, 933), and whether such failure to warn was a proximate cause of Angona's injuries (*see Rickicki v Borden Chem.*, 60 AD3d 1276, 1277-1278). Finally, even assuming, arguendo, that ConMed met its burden of establishing its entitlement to judgment dismissing the breach of implied warranty cause of action against it, we conclude that plaintiff raised a triable issue of fact whether the electrodes were not "fit for the ordinary purposes for which they are used" (*Episcopal Church Home of W. N.Y. v Bulb Man*, 274 AD2d 961, 961; *see Martin v Chuck Hafner's Farmers' Mkt., Inc.*, 28 AD3d 1065, 1066-1067).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

531

CA 13-01665

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

SUSAN ANGONA, AS GUARDIAN AD LITEM OF
BENJAMIN ANGONA AND SUSAN ANGONA, INDIVIDUALLY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT,
CONMED CORP., KATECHO, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

SANOCKI NEWMAN & TURRET, LLP, NEW YORK CITY (DAVID B. TURRET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANT-APPELLANT CONMED CORP.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-APPELLANT KATECHO, INC.

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

Appeals from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered August 13, 2013. The order granted the motion of defendant City of Syracuse for renewal of its summary judgment motion and, upon renewal, granted the motion for summary judgment and dismissed the amended complaint and all cross claims against the City of Syracuse.

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

Same Memorandum as in *Angona v City of Syracuse* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

540

KA 12-01248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. ROSS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT KEMP 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 (Christopher J. Burns, J.), rendered June 12, 2012. The judgment convicted defendant, upon a jury verdict, of attempted murder 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 following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that Supreme Court erred in denying his *Batson* challenge. The challenge was made with respect to an African-American male prospective juror who was peremptorily struck from the venire panel by the prosecutor. In response to the challenge, the prosecutor offered two race-neutral reasons for striking the prospective juror, and defendant did not contend that those reasons were pretextual. Defendant thus failed to preserve his contention for our review (*see People v Jackson*, 57 AD3d 1463, 1464, *lv denied* 12 NY3d 817; *People v Cooley*, 48 AD3d 1091, 1092, *lv denied* 10 NY3d 861).

In any event, by denying defendant's *Batson* challenge, the court "thereby implicitly determined" that the race-neutral explanations given by the prosecutor for striking the prospective juror were not pretextual (*People v Parker*, 304 AD2d 146, 156-157, *lv denied* 100 NY2d 585), and the court was in the best position to determine whether the prosecutor was being truthful (*see People v Lawrence*, 23 AD3d 1039, 1039, *lv denied* 6 NY3d 835; *People v Williams*, 13 AD3d 1214, 1215, *lv denied* 4 NY3d 857). We note that the prosecutor struck Caucasian prospective jurors for the same reasons he claimed to have struck the African-American prospective juror in question. There is therefore no

basis in the record for us to conclude that the prosecutor struck the prospective juror because of his race.

Defendant further contends that the court erred in failing to suppress statements he made during telephone calls that he initiated while in jail awaiting trial. According to defendant, his telephone calls should not have been recorded without an eavesdropping warrant. We reject that contention. "[A]n eavesdropping warrant is not required when one of the parties to the conversation consents to the eavesdropping" (*People v Koonce*, 111 AD3d 1277, 1279; *see People v Lasher*, 58 NY2d 962, 963; *People v Wood*, 299 AD2d 739, 740-741, *lv denied* 99 NY2d 621) and, here, defendant "impliedly consented to the recording[s]" inasmuch as he was notified via a recorded message that telephone calls are subject to monitoring and recording (*Koonce*, 111 AD3d at 1279).

Finally, we reject defendant's challenges to the sufficiency and weight of the evidence. Defendant concedes that he twice fired his .22 caliber rifle after exchanging words with the victim, but he contends that he aimed toward the sky and intended only to scare the victim. The victim testified, however, that defendant fired six shots at him, one of which almost struck his head and another of which was deflected by the cell phone in his coat pocket, and the police found five shell casings in the area where the shooting occurred. Although the victim discarded his coat and cell phone while running away from defendant, and the police could not find either item, the victim had a welt on the left side of his abdomen where the cell phone had been located. Moreover, two eyewitnesses testified that defendant appeared to aim the gun directly at the victim. Although those witnesses are related to the victim, the "credibility of the witnesses was an issue for the jury to determine, and we perceive no basis for disturbing that determination" (*People v Newman*, 87 AD3d 1348, 1350, *lv denied* 18 NY3d 926; *see People v Shelton*, 111 AD3d 1334, 1336). In addition, defendant made an incriminating statement to the police after he had been arrested. When asked if he knew why he was at the police station, defendant said that he had "shot at some white boy."

Viewing the above evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Frances E. Cafarell

Entered: June 13, 2014

Clerk of the Court

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

545

CAF 12-02266

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

IN THE MATTER OF JOSEPH E.K.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LITHIA K., RESPONDENT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered October 26, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent mother contends that her admission of neglect was involuntarily entered because she stated during the colloquy that she would do or say anything to get her child back. Because the mother "did not move to vacate or withdraw her admission" in Family Court, however, she failed to preserve for our review her challenge to the voluntariness of her admission (*Matter of Michael B.*, 256 AD2d 1208, 1209; *see Matter of Cora J. [Kenneth J.]*, 72 AD3d 1170, 1171; *Matter of Nasir H.*, 251 AD2d 1010, 1010, *lv denied* 92 NY2d 809). We note in any event that, before accepting the mother's admission, the court made clear that it did not want her to admit to something that was not true, and that the mother thereafter admitted to the facts underlying the neglect petition.

The mother further contends that the court, in removing the child from her custody following the temporary removal hearing, improperly relied on evidence of her past conduct regarding an older child. That contention has been rendered moot by the court's subsequent finding of neglect (*see Matter of Mary YY. [Albert YY.]*, 98 AD3d 1198, 1198), and

the dispositional order (*see Matter of John S.*, 26 AD3d 870, 870).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

549

CA 13-01832

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

SHANA FUENTES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEITH A. HOFFMAN, ET AL., DEFENDANTS,
MARIO BEVIVINO AND ANTONIA BEVIVINO,
DEFENDANTS-RESPONDENTS.

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

BAILEY, KELLEHER & JOHNSON, P.C., ALBANY (MARC J. KAIM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 23, 2013. The order granted the motion of defendants Mario Bevivino and Antonia Bevivino to dismiss the complaint against them as abandoned.

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

Memorandum: Plaintiff commenced this action on October 17, 2011 seeking damages for injuries she sustained as a result of her alleged exposure to lead-based paint as a child. Mario Bevivino and Antonia Bevivino (defendants) owned one of the premises at which plaintiff claimed to have been exposed to lead-based paint, and plaintiff served defendants with the summons and complaint in this action on October 26, 2011. Defendants never joined issue; instead, on January 13, 2013, they moved to dismiss the complaint against them as abandoned (*see* CPLR 3215 [c]). Supreme Court granted the motion, and we affirm.

"CPLR 3215 (c) provides that, '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the [defendant's] default, the court shall . . . dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed' " (*Zenzillo v Underwriters at Lloyd's London*, 78 AD3d 1540, 1541; *see Livingston v Livingston*, 303 AD2d 975, 975). This Court has defined "sufficient cause" as evidence "that (1) the failure to seek a default judgment within one year after the default is excusable[,] and (2) the cause of action is meritorious" (*Turner v Turner*, 216 AD2d 910, 911; *see Dobbins v County of Erie*, 58 AD2d 733, 733).

We reject at the outset plaintiff's contention that defendants were not in default, and thus that CPLR 3215 (c) does not apply. During oral argument on the motion, plaintiff's attorney argued that she did not move for a default judgment because defendants were not in fact in default inasmuch as plaintiff had granted them an extension of time in which to answer. Specifically, plaintiff's attorney asserted that it was her understanding that another attorney at the law office that represented plaintiff had "verbally" made an "informal" stipulation with defendants' attorney to extend defendants' time to serve an answer. Plaintiff, however, failed to submit any evidence of that alleged extension of time, and thus failed to establish that there was any procedural impediment to pursuing a default judgment against defendants.

Contrary to plaintiff's alternative contention, we conclude that the court properly determined that plaintiff's failure to seek a default judgment against defendants within one year after the default is not excusable. "The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court" (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308; *see Butindaro v Grinberg*, 57 AD3d 932, 932-933). Here, defendants are only two of the six defendants named in the complaint, and the record reflects that plaintiff served discovery demands on other defendants in June 2012 and filed a request for judicial intervention with respect to other defendants in August 2012. By that time, plaintiff also had contacted at least two insurance companies to investigate whether defendants had insurance that would cover her claims for damages. In September 2012, plaintiff had contact with an attorney retained by defendants to represent them. Defendants' attorney contacted plaintiff to advise of his representation, and plaintiff subsequently forwarded an electronic copy of the complaint to him. Thus, the record establishes that there was approximately 14 months between service of the complaint on defendants and defendants' motion to dismiss, during which time plaintiff had minimal contact with defendants with respect to the case. Under those circumstances, we conclude that plaintiff failed to show "sufficient cause" why the complaint should not be dismissed as abandoned (*Zenzillo*, 78 AD3d at 1541; *see Livingston*, 303 AD2d at 975), and that the court did not err in granting the motion (*see Ryant v Bullock*, 77 AD3d 811, 811-812).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

550

CA 13-01816

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

MARLYN PRZESIEK AND ROBERT A. PRZESIEK,
CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 112217.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

HALL, RICKETTS, MARKY & GURBACKI, P.C., EAST AURORA (ROBERT H. GURBACKI OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered December 19, 2012. The interlocutory judgment apportioned liability for negligence after a trial.

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

Memorandum: Claimants commenced this action against defendant, the State of New York (State), seeking damages for injuries that Marlyn Przesiek (claimant) sustained in a motor vehicle accident that occurred at the intersection of Bullis Road and Two Rod Road in the Town of Marilla. At the time of the accident, claimant was a passenger in a vehicle operated by Mary Ann Kiczewski. While traveling east on Bullis Road, a county road, Kiczewski stopped at the intersection of Two Rod Road, a State-owned highway. There was a stop sign and a flashing red traffic light facing motorists on Bullis Road as they approached the intersection, which is regulated by the State. After coming to a complete stop and then entering the intersection, Kiczewski's vehicle was struck on the passenger's side by a dump truck operated by Richard Martin, who was traveling north on Two Rod Road and faced a flashing yellow traffic light at the intersection. Kiczewski evidently did not see the approaching truck, and claimant, sitting in the front passenger's seat, sustained severe injuries in the accident, rendering her totally disabled.

Claimants alleged in their claim that the State negligently maintained the intersection. Following a nonjury trial on the issue of liability, the Court of Claims determined that the State was negligent in allowing dangerous sight-line and sight-distance problems to exist at the intersection; in placing the stop sign on Bullis Road

too far from the intersection, thereby making it difficult for stopped motorists to see northbound vehicles on Two Rod Road; and in failing to reduce the speed limit on Two Rod Road. The court thereafter apportioned fault at 70% for Kiczewski, 20% for the State, and 10% for Martin, and indicated that it would schedule a separate trial on the issue of damages. That trial has not yet been conducted. We now affirm.

We note at the outset that the State's contention that the stop sign was not negligently placed is not properly before us inasmuch as it is raised for the first time in its reply brief (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144; *see Stubbs v Capellini*, 108 AD3d 1057, 1059). We reject the State's contention that claimants failed to meet their burden of establishing that its negligence was a proximate cause of claimant's injuries. "In order to prevail at trial in a negligence case, a [claimant] . . . is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550). Here, based on our review of the record, we conclude that a fair interpretation of the evidence supports the court's determination that the State's failure to remedy a known dangerous condition at the intersection was a substantial factor in bringing about the accident (*see generally Brown v State*, 79 AD3d 1579, 1582).

Although it is true, as the State contends, that the accident was caused primarily by the negligence of Kiczewski, who failed to yield the right-of-way to the truck, it is well settled that there may be more than one proximate cause of the accident (*see Aloi v Ellis*, 96 AD3d 1564, 1565; *Anastasi v Terio*, 84 AD3d 992, 992), and it cannot be said on this record that Kiczewski's negligence, or that of Martin, was a superseding cause of the accident that severed any causal connection between claimant's injuries and the State's negligence (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784). Because claimants proved that the State's negligence "increased the likelihood of an accident," we conclude that the court properly determined that the State's negligence was a "concurring cause" of the accident (*Vasquez v Figueroa*, 262 AD2d 179, 182).

Finally, for the reasons stated by the court in its decision, we reject the State's contention that claimants failed to prove by a preponderance of the evidence that it was negligent in failing to reduce the speed limit on Two Rod Road before it intersects with Bullis Road.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

555

KA 12-01168

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN LEWICKI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 12, 2012. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20).

In both appeals, defendant contends that Supreme Court failed to make a sufficient inquiry into his request for new counsel. We note at the outset that, to the extent that defendant challenges the court's failure to assign him new counsel prior to the plea, that contention is "encompassed by his plea and his valid waiver of the right to appeal in each appeal except to the extent that it implicates the voluntariness of the plea" (*People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004). In any event, although defendant made vague, conclusory assertions that there was a "lack of representation" with respect to his case and that defense counsel had not visited him in jail as promised mere days before the scheduled trial on the murder charge, the record establishes that defendant did not express any further concerns with defense counsel before pleading guilty, and he confirmed during the plea colloquy that he was satisfied with his attorney's representation. Defendant therefore "abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*id.*).

With respect to defendant's post-plea request for substitution of counsel, we conclude that 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 Wilson*, 112 AD3d 1317, 1318; *People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010). Defendant's "form motion did not contain any specific factual allegations that would indicate a serious conflict with counsel" (*Porto*, 16 NY3d at 100-101), but rather it contained only general assertions of dissatisfaction with defense counsel's representation (*see People v Hopkins*, 67 AD3d 471, 471, *lv denied* 14 NY3d 771; *see generally People v Sides*, 75 NY2d 822, 824). Defendant's further allegations that defense counsel "lied" to him and talked him into pleading guilty are belied by the record (*see People v Carter*, 304 AD2d 771, 771-772).

Contrary to the further contention of defendant in each appeal, we conclude that the court did not abuse its discretion in denying his motion to set aside his guilty pleas. "The determination whether to permit a defendant to withdraw a guilty plea rests within the sound discretion of the court" (*People v Said*, 105 AD3d 1392, 1393, *lv denied* 21 NY3d 1019), and "a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*People v Williams*, 103 AD3d 1128, 1128, *lv denied* 21 NY3d 915). Here, defendant's claim that defense counsel "told" him to plead guilty is belied by defendant's statements during the plea colloquy that he was satisfied with the representation of defense counsel, that he had sufficient time to consider the plea, that no one had forced him to plead guilty, and that he was entering the plea voluntarily (*see People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045; *People v Ivey*, 98 AD3d 1230, 1231, *lv dismissed* 20 NY3d 1012; *People v Garner*, 86 AD3d 955, 955-956). Contrary to the further assertions of defendant, there is no indication in the plea proceeding that he was confused by the plea offers, that he did not understand the terms of the plea offers or the consequences of pleading guilty, or that he was suffering from extreme emotional distress. Both the prosecutor and the court reviewed the terms of the plea offers in detail, and defendant repeatedly confirmed that he understood. Moreover, defendant's "conclusory and unsubstantiated claim of innocence is belied by his admissions during the plea colloquy" (*Garner*, 86 AD3d at 955; *see Williams*, 103 AD3d at 1129).

We reject the contention of defendant that his waiver of the right to appeal is ineffective with respect to the severity of the sentence imposed in each appeal. The court made clear to defendant that his waiver of the right to appeal would encompass any challenge to the severity of the sentence, and defendant confirmed that he understood (*see generally People v Maracle*, 19 NY3d 925, 927-928). We note in any event that the sentence in each appeal is not unduly harsh or severe in light of the brutal nature of the crime and defendant's

utter lack of remorse.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

556

KA 12-01169

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN LEWICKI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 12, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same Memorandum as in *People v Lewicki* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

572

CA 13-01876

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

CHERYL PATERSON, AS PARENT AND NATURAL GUARDIAN OF ROBERT PATERSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JODY L. SIKORSKI, DAVID CODDINGTON, KEITH CODDINGTON, DEFENDANT-RESPONDENTS, JOSEPH CACCHIO AND JUANITA CACCHIO, DEFENDANTS-APPELLANTS.

LAW OFFICE OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MATTHEW T. MOSHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 15, 2013. The order denied the motion of defendants Joseph Cacchio and Juanita Cacchio for summary judgment dismissing the complaint and all cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendants Joseph Cacchio and Juanita Cacchio are dismissed.

Memorandum: In this action seeking damages for personal injuries allegedly arising from a motor vehicle accident, Joseph Cacchio (Cacchio) and his wife (defendants) appeal from an order denying their motion for summary judgment dismissing the complaint and all cross claims against them. There is no dispute regarding the facts. The accident occurred when the vehicle operated by Cacchio and owned by his wife stopped on a highway on-ramp, and a second vehicle, operated by defendant David Coddington (Coddington) came to a complete stop behind it. A third vehicle, operated by defendant Jody L. Sikorski, failed to stop and rear-ended the Coddington vehicle, propelling it into defendants' vehicle. Plaintiff commenced this action on behalf of her son, a passenger in the Coddington vehicle.

We agree with defendants that Supreme Court erred in denying their motion. "It is well established that, absent extraordinary circumstances not present here . . . , injuries resulting from a rear-end collision are not proximately caused by any negligence on the part

of the operator of a preceding vehicle when the rear-ended vehicle had successfully and completely stopped behind such vehicle prior to the collision" (*Schmidt v Guenther*, 103 AD3d 1162, 1162-1163; *see Princess v Pohl*, 38 AD3d 1323, 1323-1324, *lv denied* 9 NY3d 802). Inasmuch as plaintiff does not dispute that Coddington's vehicle, in which plaintiff's son was a passenger, came to a full stop behind defendants' vehicle before being rear-ended by Sikorski's vehicle, and in the absence of extraordinary factors not present here (*cf. Tutrani v County of Suffolk*, 10 NY3d 906, 907-908), the court erred in denying defendants' motion.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

573

CA 13-00220

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered March 29, 2012 in a divorce action. The order, among other things, directed plaintiff to cooperate with defendant regarding a life insurance policy on plaintiff's life and ordered both parties to name their children as beneficiaries on their existing life insurance policies.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the parties' obligation to maintain life insurance naming the children as beneficiaries ceases upon the termination of their respective child support obligations, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, plaintiff appeals from an order that, inter alia, directed him to cooperate with defendant regarding a life insurance policy on plaintiff's life, and ordered both parties to name the children as beneficiaries on their existing life insurance policies. In appeal No. 2, plaintiff appeals from an order that, inter alia, denied his motion for leave to renew and/or reargue, and granted defendant's request for attorney's fees. In appeal No. 3, plaintiff appeals from an order that, inter alia, directed him to sign any and all authorizations and/or forms necessary to name the parties' children as beneficiaries of his existing life insurance policy, and to cooperate with defendant in obtaining life insurance on his life. In appeal No. 4, plaintiff appeals from an order granting defendant's further request for attorney's fees incurred in opposing a subsequent motion by plaintiff to hold defendant in contempt. Finally, in appeal No. 5, plaintiff appeals from a letter decision advising that the court intended defendant to be the owner of the insurance policy on plaintiff's life. We note at the outset that we dismiss the appeal

from the order in appeal No. 2 to the extent that it denied leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984), and we dismiss appeal No. 5 inasmuch as " '[n]o appeal lies from a mere decision' " (*Meenan v Meenan*, 103 AD3d 1277, 1277).

In appeal Nos. 1, 2 and 3, plaintiff contends that Supreme Court erred in ordering him to cooperate with defendant in procuring an insurance policy on his life for the benefit of defendant because the parties did not agree to the imposition of such an obligation, nor did they intend to impose one. We reject that contention. It is well settled that "[a]n oral stipulation of settlement that is made in open court and stenographically recorded is enforceable as a contract and is governed by general contract principles for its interpretation and effect" (*Argento v Argento*, 304 AD2d 684, 684-685; *see Attea v Attea*, 30 AD3d 971, 972, *affd* 7 NY3d 879; *De Gaust v De Gaust*, 237 AD2d 862, 862). "The role of the court is to determine the intent and purpose of the stipulation based on the examination of the record as a whole" (*Argento*, 304 AD2d at 685; *see Walker v Walker*, 42 AD3d 928, 928, *lv dismissed* 9 NY3d 947; *De Gaust*, 237 AD2d at 862). "Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used" (*Ayers v Ayers*, 92 AD3d 623, 624; *see Rainbow v Swisher*, 72 NY2d 106, 109). "Whether a [contract] is ambiguous is a matter of law for the court, and the proper inquiry is whether the agreement on its face is reasonably susceptible of more than one interpretation" (*Ayers*, 92 AD3d at 625 [internal quotation marks omitted]).

Here, plaintiff acknowledges that the parties' oral stipulation, which was incorporated but not merged in the judgment of divorce, provides that defendant may purchase insurance on plaintiff's life. He contends, however, that the parties agreed that the children, not defendant, would be the beneficiaries of any such policy. We reject that contention. In support thereof, plaintiff relies upon the statements of counsel prior to an off-the-record conversation, specifically, the statement of defendant's attorney that "I didn't say anything about the spouse. I said the children only." That statement, however, is taken out of context. Plaintiff's attorney began the discussion about life insurance by stating that both parties possessed life insurance policies, and that each party would retain his or her respective policy as separate property "free and clear from any and all claims" of the other party. After a discussion about child support, defendant's attorney asked plaintiff's attorney whether the parties were "going to merge their life insurance for the children as beneficiary till they're twenty-one," and plaintiff's counsel replied, "No. That wasn't discussed." After further discussion, plaintiff's counsel stated that, in the absence of an agreement, the parties could still "nam[e] their children as beneficiaries. There's no need to name the other spouse." Defendant's counsel replied: "Judge, I didn't say anything about the spouse. I said the children only." The record thus establishes that counsel's statements pertained to the parties' *existing* life insurance policies and whether the children would be named as beneficiaries on those policies to secure the parties' respective child support obligations (*see* Domestic Relations Law § 236 [B] [8] [a]).

After an off-the-record discussion and the discussion of an unrelated issue, the parties returned to the issue of life insurance, and agreed that, if "[defendant] wants to take out term insurance on [plaintiff], [plaintiff] will cooperate with any necessary paperwork to do that," provided that it was at "no cost or expense to him." Defendant's counsel agreed that defendant would "pay for it." Unlike the earlier discussion about naming the children as beneficiaries on the parties' existing life insurance polices, the parties' agreement clearly contemplates a *new* policy not in existence at the time of the stipulation. The new policy would be a term life insurance policy as opposed to the parties' existing, permanent whole life policies. Although plaintiff is correct that the parties did not explicitly state that defendant would be the owner and beneficiary of the new policy, we conclude that, upon "examin[ing] the entire contract and consider[ing] the relation of the parties and the circumstances under which the contract was executed" (*Ayers*, 92 AD3d at 625), the only reasonable interpretation of the stipulation is that the new insurance policy was for defendant's benefit.

We thus conclude, with respect to appeal Nos. 1 and 3, that the court did not err in ordering plaintiff "to cooperate with the Defendant regarding the life insurance policy on the Plaintiff's life, naming the Defendant as beneficiary there[of]," and, with respect to appeal No. 2, that the court did not err in denying that part of plaintiff's motion for leave to renew that issue.

Plaintiff further contends in appeal No. 1 that the court erred in requiring the parties to name their children as beneficiaries on their existing life insurance policies. We reject that contention. "Domestic Relations Law § 236 (B) (8) (a) authorizes an order directing the purchase of an insurance policy on the life of either spouse in order to protect maintenance and child support recipients" (*Holterman v Holterman*, 307 AD2d 442, 443, *affd* 3 NY3d 1, citing *Hartog v Hartog*, 85 NY2d 36, 50; *see Wilbur v Wilbur*, 116 AD2d 953, 955). The decision "whether to direct the maintenance of a life insurance policy pursuant to this statutory provision lies within the discretion of the court" (*Wilbur*, 116 AD2d at 955; *see Hartog*, 85 NY2d at 50). Contrary to plaintiff's contention, we conclude that the court properly required both parties to name the children as beneficiaries on their individual life insurance policies in order to secure their respective child support obligations (*see Martin v Martin*, 115 AD3d 1315, 1316; *Gately v Gately*, 113 AD3d 1093, 1094; *Kelly v Kelly*, 19 AD3d 1104, 1107, *appeal dismissed* 5 NY3d 847, *reconsideration denied* 6 NY3d 803). We agree with plaintiff's alternate contention, however, that the life insurance obligation must cease upon termination of the child support obligation (*see* § 236 [B] [8] [a]; *Ciampa v Ciampa*, 47 AD3d 745, 748; *see generally Kelly*, 19 AD3d at 1107). We therefore modify the order in appeal No. 1 accordingly.

Finally, we conclude with respect to appeal Nos. 2 and 4 that the court did not abuse its discretion in ordering plaintiff to pay a portion of defendant's counsel fees (*see Zufall v Zufall*, 109 AD3d

1135, 1138, *lv denied* 22 NY3d 859; *Reed v Reed*, 55 AD3d 1249, 1252). The decision to award counsel fees in a matrimonial action is a matter committed to the discretion of the trial court (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; *Zufall*, 109 AD3d at 1138) and, "in exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera*, 70 NY2d at 881). We note that, of the multiple motions and cross motions in this matter, the court awarded defendant counsel fees only in connection with plaintiff's motion for leave to renew/reargue, which we conclude lacked merit. Otherwise, the court denied both parties' applications for counsel fees in connection with each of the postjudgment motions.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

574

CA 13-00909

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered October 3, 2012 in a divorce action. The order, among other things, denied plaintiff's motion for leave to renew and/or reargue.

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 *Gay v Gay* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

575

CA 13-00910

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

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

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered November 16, 2012 in a divorce action. The order, among other things, directed plaintiff to cooperate with defendant in obtaining life insurance on the plaintiff's life.

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

Same Memorandum as in *Gay v Gay* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

576

CA 13-00911

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

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

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered November 21, 2012 in a divorce action. The order granted defendant's request for attorney's fees and directed plaintiff to pay defendant's attorney the sum of $2,678.90.

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

Same Memorandum as in *Gay v Gay* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

577

CA 13-00912

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.
(APPEAL NO. 5.)

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

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered December 10, 2012 in a divorce action. The decision advised that the court intended that defendant be the owner of an insurance policy.

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

Same Memorandum as in *Gay v Gay* ([appeal No. 1] ___ AD3d ___ [June 13, 2014]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

579

TP 13-02117

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

IN THE MATTER OF DAVID REDMOND, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI 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 November 27, 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: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

580

KA 12-00897

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHADAJE MOBLEY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 26, 2011. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We agree with defendant that her waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Hamilton*, 49 AD3d 1163, 1164). Indeed, on this record there is no basis upon which to conclude that the court ensured "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256).

Defendant did not move to withdraw the plea or vacate the judgment of conviction, and therefore failed to preserve for our review her contention that the plea was not knowingly, voluntarily, and intelligently entered (*see People v Robinson*, 112 AD3d 1349, 1349). Contrary to her 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 [her] guilt" (*id.*, quoting *People v Lopez*, 71 NY2d 662, 666).

Finally, defendant contends that the court abused its discretion

in denying her request for youthful offender status and that the sentence, a determinate term of imprisonment of seven years plus five years of postrelease supervision, is unduly harsh and severe. We reject those contentions.

In her initial statement to the police, defendant stated that she, her fiancé and her fiancé's brother burglarized a home. She entered the home through a window late at night, and proceeded to open the door for the codefendants. Defendant acted as a lookout while the codefendants took numerous items of property, including a credit card with a woman's name on it. The next day defendant used that credit card multiple times, amassing over $6,000 in charges. Defendant agreed to plead guilty to the burglary charge, promising that she would cooperate in the prosecution of the codefendants. In exchange for her truthful testimony, she would receive a youthful offender adjudication and a sentence of probation. Defendant was granted pretrial release. Due to problems the prosecutor was encountering, defendant was returned to court for an amplified allocution, during which defendant was sworn. At that time defendant again implicated the codefendants, while specifically denying that her brother was involved. The week before the codefendants' trial, defendant was returned to court, whereupon she was again informed that her plea agreement was conditioned on her truthful testimony at the codefendants' trial.

Nevertheless, at the codefendants' trial, defendant testified that she was unable to recall any of the details of the burglary or even her own involvement in that burglary. Specifically, she did not remember ever committing a burglary with the codefendants. With respect to her use of the credit card, defendant testified that her brother gave her the card and that the codefendants had nothing to do with it. Defendant explained that her statement to the police was her attempt to cover for her brother.

Based on " 'the gravity of the crime[,] . . . [the] manner in which it was committed . . . , defendant's attitude toward society and [her lack of] respect for the law' " (*People v Amir W.*, 107 AD3d 1639, 1640), we conclude that the court did not abuse its discretion in denying defendant's request for youthful offender status (*see People v Lowe*, 113 AD3d 1133, 1134; *People v Jones*, 107 AD3d 1611, 1611, *lv denied* 21 NY3d 1043, *reconsideration denied* 22 NY3d 956). We further conclude that the sentence is not unduly harsh or severe. Defendant perjured herself, made a mockery of the criminal justice system and chose to violate her extremely advantageous plea agreement in an attempt to protect her fiancé and his brother. While we recognize that defendant was only 18 years old at the time of the offense and had no prior convictions, she was an intelligent young woman who made a deliberate choice, yet again, to violate the law for her own personal interests.

All concur except CENTRA and LINDLEY, JJ., who dissent and vote to modify in the following Memorandum: We respectfully dissent in part because we believe that the sentence is unduly harsh and severe, and we therefore would modify the judgment by reducing the sentence of

imprisonment as a matter of discretion in the interest of justice. Defendant gave a statement to the police admitting her involvement in the burglary and implicated the two codefendants. Defendant was promised a sentence of youthful offender treatment and probation as part of the plea bargain, which required her to cooperate in the prosecution of the case against the codefendants. At the codefendants' trial, however, defendant testified that she did not remember committing a burglary with the codefendants. We agree with County Court that defendant violated the plea agreement and further conclude that the court did not abuse its discretion in denying defendant's request for youthful offender status (*see People v Lowe*, 113 AD3d 1133, 1134). Nevertheless, in our view the sentence, a determinate term of imprisonment of seven years plus five years of postrelease supervision, is unduly harsh and severe. Defendant was 18 years old at the time of the offense and had no prior convictions. Defendant reported to the probation officer that she graduated as valedictorian of a prepatory high school and attended college for two semesters. The codefendants were brothers, and one of them was the father of one of defendant's two young children. Defendant was granted pretrial release after pleading guilty, and she notes on appeal that she was under tremendous pressure at the codefendants' trial. Under the circumstances, we would reduce the sentence of imprisonment imposed to a determinate term of four years (*see generally* CPL 470.15 [6] [b]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

581

KA 12-02193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH D. AYER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 8, 2012. The judgment convicted defendant, upon his plea of guilty, of criminally negligent homicide.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

584

KA 11-01018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. MOBLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 21, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) in connection with the shooting death of a non-participant in a home invasion burglary by two masked men. We conclude that the verdict, when viewed in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that there is no basis upon which to conclude that the jury failed to give the evidence the weight it should be accorded (*see id.*). The eyewitness to the shooting did not identify defendant and could identify only one of the participants by his voice. The eyewitness identified, by his voice, the nephew of another witness who observed him enter the back yard of the victim's home with defendant. That witness testified that she was in the room with her brother, defendant and her nephew when they planned to rob a person staying in a house across the street. The witness saw her brother give defendant a gun, and defendant and her nephew then left the house. Through the window, she watched them go to the back of a house where, she later learned, one of the residents was fatally shot, and she watched as they ran back to her house 10 to 15 minutes later and went to the basement with her brother. The following day, she observed her brother hand defendant the gun, and he placed it in his pocket. Police witnesses testified that a canine tracker led the police from the victim's house

to the witness's house, where defendant was found hiding in a bed, although the police left the house without making any arrests. There is no basis upon which to disturb the credibility determinations of the jury (*see generally id.*).

We reject defendant's further contention that Supreme Court failed to provide a meaningful response to a note from the jury during deliberations asking, "Does [defendant] need to be in the house . . . to be part of the felony[?]" In response to the court's statement to the prosecutor and defense counsel that defendant did not need to be in the house, defense counsel stated that the People's theory was that defendant was the second intruder and that "you can't have it both ways." The court declined to provide a "yes" or "no" answer, and instead responded to the note by again reading the instructions on felony murder and accessorial liability. Contrary to defendant's contention, the reiteration of those instructions was appropriate under the circumstances presented here (*see People v Santi*, 3 NY3d 234, 248-249), and was a meaningful response to the jury's question (*see People v Malloy*, 55 NY2d 296, 302-304, *cert denied* 459 US 847; *see generally People v O'Rama*, 78 NY2d 270, 276).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

585

KA 12-02148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORGE DEJESUS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 19, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Supreme Court properly refused to suppress defendant's statements and the weapons seized from the basement of his mother's home. Contrary to defendant's contention, the People established that defendant's mother voluntarily consented to the search of her home (*see People v May*, 100 AD3d 1411, 1412, *lv denied* 20 NY3d 1063; *People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104). Defendant's remaining contentions regarding the suppression hearing are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). "To the extent that defendant contends that defense counsel was ineffective for failing to raise [those issues] at the suppression hearing, we reject that contention because [t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868 [internal quotation marks omitted]).

Defendant next contends that the verdict is against the weight of the evidence because he had only temporary innocent possession of the weapons. We reject that contention (*see People v Hicks*, 110 AD3d

1488, 1488, *lv denied* 22 NY3d 1156). A person may be found to have had temporary and lawful possession of a weapon if, for example, "he found the weapon shortly before his possession of it was discovered and he intended to turn it over to the authorities" (*People v Almodovar*, 62 NY2d 126, 130). The court here rejected that defense inasmuch as defendant did not turn over the weapons to the police despite the opportunity to do so. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

589

CAF 13-02118

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

IN THE MATTER OF PAUL F. GUGINO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DIANA TSVASMAN, RESPONDENT-RESPONDENT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

LACY KATZEN LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered March 15, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that respondent shall continue to have sole custody and primary physical residency of the child.

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

Memorandum: Petitioner father appeals from an order denying his petition, following a hearing, seeking to modify a prior custody order that granted sole custody of the parties' daughter to respondent mother. It is axiomatic that the party "seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704 [internal quotation marks omitted]; *see Matter of Maher v Maher*, 1 AD3d 987, 988). Family Court did not specifically address whether the father established a change of circumstances; however its determination that the father failed to establish that sole custody should be granted to him, rather than to the mother, "is the product of 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011; *see Fox v Fox*, 177 AD2d 209, 211). We reject the father's contention that the court erred in referencing in its decision information that it obtained in the hearing it conducted two years earlier, inasmuch as a court has the power to take judicial notice of its own prior proceedings (*see Matter of A.R.*, 309 AD2d

1153, 1153).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

590

CAF 13-01114

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

IN THE MATTER OF STEVEN J. EASTMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LISA M. EASTMAN, RESPONDENT-APPELLANT.

IN THE MATTER OF LISA M. EASTMAN,
PETITIONER-APPELLANT,

V

STEVEN J. EASTMAN, RESPONDENT-RESPONDENT.

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

SCOLARO, FETTER, GRIZANTI, MCGOUGH & KING, P.C., SYRACUSE (AMY B. EGITTON OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered September 18, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that the parties shall have joint legal custody of the subject child and that primary residence will be with Steven J. Eastman.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, modified a judgment of divorce incorporating the parties' separation agreement by transferring primary physical custody of the parties' child from the mother to petitioner-respondent father. Initially, although we agree with the mother that Family Court failed to state whether there was a change in circumstances to warrant a change in the existing arrangement, we note that the court's written decision "reveals extensive findings of fact . . . which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the [prior judgment]" (*Matter of Murphy v Wells*, 103 AD3d 1092, 1093, *lv denied* 21 NY3d 854 [internal quotation marks

omitted]). Specifically, the mother moved several times, including one move three hours away from the father, to South Glens Falls, and we therefore conclude that there was a sufficient change in circumstances to warrant a modification of the existing custody arrangement (*see Matter of Yelton v Froelich*, 82 AD3d 1679, 1679).

The mother contends that the court's determination to award primary physical custody to the father is not in the child's best interests. We reject that contention and conclude that the court's determination is supported by a sound and substantial basis in the record (*see Matter of Cross v Caswell*, 113 AD3d 1107, 1107; *Matter of Stearns v Crawford*, 112 AD3d 1325, 1326, *lv denied* 22 NY3d 865; *Matter of Weekley v Weekley*, 109 AD3d 1177, 1178). Although the mother had moved back to Sherrill from South Glens Falls at the time of the hearing, the record supports the court's determination that the mother's various relocations had been made to further her own interests, rather than to benefit the child. There was testimony that the child, who has Down syndrome, would benefit from a stable home environment, which the father could better provide (*see Cross*, 113 AD3d at 1107-1108).

Finally, the mother contends that the Attorney for the Child (AFC) improperly substituted her judgment for that of the child. That contention is not preserved for our review because the mother did not move to remove the AFC (*see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208). In any event, the mother's contention lacks merit. The record supports a finding that the child, who was seven years old at the conclusion of the hearing and functioned at a kindergarten level, "lack[ed] the capacity for knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]; *see Mason*, 103 AD3d at 1208).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

596

CA 13-01786

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

IN THE MATTER OF SANGERTOWN SQUARE, L.L.C.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR OF TOWN OF NEW HARTFORD, TOWN OF
NEW HARTFORD AND NEW HARTFORD CENTRAL SCHOOL
DISTRICT, RESPONDENTS-APPELLANTS-RESPONDENTS.

TABNER, RYAN AND KENIRY, LLP, ALBANY (BRIAN M. QUINN OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C.,, SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 3, 2013. The order and judgment granted in part and denied in part the motion of petitioner to confirm the Referee's report and the cross motion of respondents to reject the Referee's report.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the motion in its entirety and denying the cross motion in its entirety, and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner, the owner of a mall in New Hartford, commenced proceedings to challenge the real estate tax assessments on its property for the tax years 2007/2008, 2008/2009, and 2009/2010. A hearing was held before a Referee, who issued a report reducing the tax assessments for all three years. Petitioner moved pursuant to CPLR 4403 to confirm the report, and respondents cross-moved to reject it, in whole or in part. Supreme Court granted in part and denied in part both the motion and cross motion, and this appeal and cross appeal ensued.

Contrary to respondents' contention, petitioner met its initial burden of establishing by substantial evidence that the property was overvalued, thus rebutting the presumption of validity of respondents' valuation (*see generally Matter of Roth v City of Syracuse*, 21 NY3d 411, 417; *Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188; *Matter of Alexander's Dept. Store of Val. Stream v Board of Assessors*, 227 AD2d 549, 550). We reject respondents' further contention that petitioner's appraiser did not use an accepted

method of appraisal. Although the appraisers for both petitioner and respondents utilized the income capitalization approach to value this income-producing property (*see Matter of Senpike Mall Co. v Assessor of Town of New Hartford*, 136 AD2d 19, 21), the appraisers differed in their method of calculating market rent. Petitioner's appraiser estimated total market rental income by multiplying projected sales by the occupancy cost ratio, i.e., what tenants are willing to pay in total occupancy costs, such as base rent, real estate taxes, and common area charges, as a percentage of their retail sales. The Referee and the court properly concluded that petitioner's appraiser utilized a recognized appraisal method (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 508-511; *Matter of White Plains Props. Corp. v Tax Assessor of City of White Plains*, 50 NY2d 839, 840-841).

Respondents further contend that the appraisal and testimony of petitioner's expert was unreliable because he failed to disclose the necessary facts, figures, and calculations that support his conclusion, in compliance with 22 NYCRR 202.59 (g) (2). We reject that contention (*cf. Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, ___ NY3d ___, ___ [May 1, 2014]).

Contrary to respondents' contention, petitioner met its ultimate burden of establishing by a preponderance of the evidence that the property was overvalued (*see generally FMC Corp. [Peroxygen Chems. Div.]*, 92 NY2d at 188), and we agree with petitioner that the court erred in declining to confirm the report of the Referee in its entirety (*see Nager v Panadis*, 238 AD2d 135, 135-136; *see also Matter of Gargano v City of N.Y. Dept. of Fin.*, 26 AD3d 329, 330). The Referee's findings were supported by the record, whereas the findings of the court wherein it rejected the Referee's findings were not supported by the record. The Referee properly concluded that the inclusion of actual tenant tax reimbursements by respondents' appraiser in his calculation of gross income distorted the economic value of the property, as respondents' appraiser essentially conceded during his cross-examination with respect to the 2009/2010 tax year (*see generally Senpike Mall Co.*, 136 AD2d at 23). While the Referee was able to make adjustments to the gross income estimate of respondents' appraiser in the 2009/2010 tax year, there was no testimony or evidence to support an appropriate adjustment to the tax reimbursements for the two prior tax years. The Referee thus relied on the estimation of gross income as calculated by petitioner's appraiser for those tax years. In relying on the estimation of gross income of respondents' appraiser for the 2007/2008 and 2008/2009 tax years, the court made an adjustment to the tax reimbursements that both parties now agree had no support in the record.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

603

CA 13-00415

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

IN THE MATTER OF ROBERT RAFFIANI,
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 (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 4, 2013 in a CPLR article 78 proceeding. 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 pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him release to community supervision. Because petitioner has again appeared before the Parole Board during the pendency of this appeal, and was again denied release to community supervision, we dismiss the appeal as moot (*see Matter of Suarez v Fischer*, 112 AD3d 1344, 1344; *Matter of Sanchez v Evans*, 111 AD3d 1315, 1315). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Sanchez*, 111 AD3d at 1315; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

605

KA 10-02398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TOMMY DOWNING, 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 (Anthony F. Aloi, J.), rendered October 26, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (five counts).

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

615

CA 12-02222

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

NORMAN M. PERRY, INDIVIDUALLY, NORMAN M. PERRY, AS EXECUTOR OF THE ESTATE OF WANDA M. PERRY, DECEASED, AND THE ESTATE OF WANDA M. PERRY, DECEASED, PLAINTIFFS-APPELLANTS,

V ORDER

JAMES EDWARDS AND DIANNE EDWARDS, DEFENDANTS-RESPONDENTS.

UAW LEGAL SERVICES PLAN, LOCKPORT (BOOKER T. WASHINGTON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 15, 2012. The order granted the motion of defendants for summary judgment and dismissed the second amended complaint of plaintiffs.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court (*see generally King's Ct. Rest., Inc. v Hurondel I, Inc.*, 87 AD3d 1361, 1362).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

626

CA 13-00485

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

IN THE MATTER OF WILLIE LEON HALL,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 27, 2013 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 as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610*).*

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

628

KA 10-01247

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN B. ROSEBOROUGH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered April 14, 2010. The judgment convicted defendant, upon a jury verdict, of burglary 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 burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, we conclude under the circumstances of this case that County Court (McCarthy, J.), properly denied that part of defendant's motion seeking dismissal of the indictment pursuant to CPL 30.30 (*see People v Freeman*, 38 AD3d 1253, 1253, *lv denied* 9 NY3d 875, *reconsideration denied* 10 NY3d 811; *People v Smith*, 1 AD3d 955, 956, *lv denied* 1 NY3d 634). Viewing the evidence in the light most favorable to defendant, as we must (*see People v Martin*, 59 NY2d 704, 705), we further conclude that County Court (DeMarco, J.), properly denied defendant's request to charge criminal trespass in the third degree as a lesser included offense (Penal Law § 140.10). Criminal trespass in the third degree is a lesser included offense of burglary in the third degree inasmuch as "it is impossible to commit the greater offense without at the same time committing the lesser" (*People v Blim*, 63 NY2d 718, 720; *see People v Collier*, 258 AD2d 891, 892). Nevertheless, the court properly denied defendant's request because, "[i]f defendant's version of the events were believed, defendant would not be guilty of any crime" (*People v Sheldon*, 262 AD2d 1060, 1061, *lv denied* 93 NY2d 1045). Thus, "under no reasonable view of the evidence could the jury have found that defendant committed the lesser offense but not the greater" (*Blim*, 63 NY2d at 720). Finally, we conclude that the court did not abuse its discretion in refusing to permit surrebuttal testimony from defendant's wife, part of which concerned a collateral matter (*see*

generally People v Petty, 7 NY3d 277, 287), and the other part of which constituted inadmissible hearsay (*see generally People v Burwell*, 159 AD2d 407, 408-409, *lv denied* 76 NY2d 785).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

630

KA 13-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD SCHULTZ, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (DAVID G. MASHEWSKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered November 20, 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]), 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 it is not clear based on the record before us that County Court ensured " 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Johnson*, 109 AD3d 1191, 1191, *lv denied* 22 NY3d 997), we nevertheless reject defendant's challenge to the severity of the sentence.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

631

KA 10-01782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN M. FISHER, ALSO KNOWN AS BRYAN MAURICE FISHER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Daniel J. Doyle, J.), rendered June 14, 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that 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 Supreme 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: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

632

KA 13-00310

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD LEE BURDEN, ALSO KNOWN AS LB,
DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 31, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), defendant contends that County Court erred in enhancing his sentence without affording him the opportunity to withdraw his plea (*see generally People v Selikoff*, 35 NY2d 227, 241-242, *cert denied* 419 US 1122). "Defendant, however, failed to preserve that contention for our review because he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground" (*People v Epps*, 109 AD3d 1104, 1105; *see People v Gerald*, 103 AD3d 1249, 1250). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we conclude that the sentence, as imposed, is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

635

KA 12-00588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNIE E. SMALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered September 6, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny 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 after a jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Defendant raises contentions identical to those raised by his codefendent on his appeal (*People v Robinson*, 111 AD3d 1358, *lv denied* 22 NY3d 1141), and "defendant has failed to offer any persuasive reason for this [C]ourt to depart from its prior determination[s] of [those] issue[s]" (*People v Thomas*, 177 AD2d 728, 728, *lv denied* 79 NY2d 1055). We therefore affirm the judgment for the reasons stated in our decision in *Robinson*, and add only that defendant's sentence is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

647

CA 13-00567

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

IN THE MATTER OF RASHID STAFFORD,
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 BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 23, 2013 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of DeJesus v Evans*, 111 AD3d 1340).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

649

KA 12-01895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUON SNELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 5, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). We reject defendant's contention that Supreme Court erred in refusing to suppress an identification of defendant based on an allegedly suggestive photo array identification procedure conducted by the police. The People met their initial burden of establishing the reasonableness of the police conduct at issue, and defendant failed to meet his ultimate burden of proving that the identification procedure was unduly suggestive (*see People v Alston*, 101 AD3d 1672, 1672-1673; *see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). Contrary to defendant's further contention, the sentence is not unduly harsh and severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

652

KA 12-01640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL J. MASSUCCO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 21, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts), petit larceny (two counts), grand larceny in the fourth degree (two counts) and criminal possession of a weapon in the second degree.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

654

KA 13-00819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRED VANGORDER, 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 Monroe County Court (John L. DeMarco, J.), entered March 18, 2013. 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 affirmed without costs.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

661

CA 12-02396

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

IN THE MATTER OF JAMES ADAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUPERINTENDENT BOLLINIER, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

JAMES ADAMS, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated July 5, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed 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 a prison disciplinary rule. Supreme Court properly denied the petition. Inasmuch as petitioner has served the entirety of the imposed 30-day penalty, his contention that the penalty was unlawful is moot (*see Matter of Ellison v Coughlin*, 191 AD2d 778, 778-779), and we conclude that the exception to the mootness doctrine does not apply (*cf. id.* at 779; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Petitioner's contention that the absence of the hearing transcript precluded the court's meaningful review is not preserved for our review and, in any event, is without merit (*see Matter of Sessoms v Commissioner of Correctional Servs.*, 63 AD3d 1400, 1400). We reject petitioner's further contention that the absence of the hearing transcript from the record on appeal prevents this Court from conducting a meaningful appellate review, inasmuch as the missing transcript "is not relevant to the issues before us" (*Matter of Gold v Masse*, 256 AD2d 981, 981-982, *lv denied* 93 NY2d 803; *see Matter of Borrero v Goord*, 268 AD2d 853, 854).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

663

CA 13-01582

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

JENNIFER MANGANIELLO, PLAINTIFF-APPELLANT,

V ORDER

GREAT ARROW MANAGEMENT, LLC, AND GREAT ARROW ACQUISITION, LLC, DEFENDANTS-RESPONDENTS.

FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF BRADY & CARAFA, SYRACUSE (THOMAS P. CARAFA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered February 22, 2013 in a personal injury action. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

665

CA 13-00623

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

LISA M. GUY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC E. GUY, DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN P. PIERI, BUFFALO (JOHN P. PIERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 9, 2013 in a divorce action. The judgment, among other things, adjudged that neither party shall pay spousal maintenance to the other.

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

Memorandum: Defendant husband appeals from a judgment of divorce that, insofar as appealed from, confirmed in relevant part the report of the Matrimonial Referee (Referee) appointed to hear and report with respect to the issues of maintenance and equitable distribution. In the judgment, Supreme Court ordered that neither party shall pay spousal maintenance to the other and equitably distributed the marital debt. Contrary to defendant's contention, the court did not abuse its discretion in failing to award him maintenance. The Referee properly considered the factors set forth in Domestic Relations Law § 236 (B) (6) (a) in determining that an award of maintenance to defendant was not warranted (*see Hartog v Hartog*, 85 NY2d 36, 51; *Sofien v Noel*, 60 AD3d 1387, 1387), and the court properly confirmed that part of the Referee's report. Although plaintiff earns more than defendant and although defendant pays child support, neither fact, by itself or in combination with the other, requires the court to award maintenance to defendant (*see generally* § 236 [B] [6] [a]).

Defendant further contends that the court erred in failing to allocate between the parties certain marital debt consisting of credit card balances in his name. Defendant, however, failed to submit evidence that a balance transfer to one credit card and the outstanding balances on two other credit cards reflected marital expenses (*see Lopez v Saldana*, 309 AD2d 655, 656). The record therefore supports the Referee's finding, as confirmed by the court, that those amounts did not constitute marital debt to be allocated

(*see Cabeche v Cabeche*, 10 AD3d 441, 441; *see also Greenwald v Greenwald*, 164 AD2d 706, 720-721, *lv denied* 78 NY2d 855).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

672

TP 13-02218

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

IN THE MATTER OF EDGARDO BOLANOS, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING 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 December 16, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

673

KA 12-01934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KIMBERLY M. DOYLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 7, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

674

KA 12-01935

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KIMBERLY M. DOYLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 7, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

675

KA 12-01936

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KIMBERLY M. DOYLE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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 PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 7, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

679

KA 12-01166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH JONES, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 (Jeffrey R. Merrill, A.J.), rendered February 1, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of burglary in the third degree (Penal Law § 140.20). We agree with defendant that he did not knowingly waive his right to appeal. "Although the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between County Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered" (*People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060; *see People v Briggs*, 115 AD3d 1245, 1246). Although defendant's contention that the plea was not knowingly, voluntarily, and intelligently entered thus is not precluded by the invalid waiver, he failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Robinson*, 112 AD3d 1349, 1349). Contrary to his 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" (*id.* at 1349, quoting *People v Lopez*, 71 NY2d 662, 666). The court did not abuse its discretion in terminating defendant from the drug treatment program after he violated the conditions of the program (*see* CPL 216.05 [9] [c]; *People v Dawley*, 96 AD3d 1108, 1109, *lv denied* 19 NY3d

1025). The sentence is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

684

CAF 13-01440

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

IN THE MATTER OF NOAH G.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANTHONY G., RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

WENDY S. SISSON, GENESEO, FOR PETITIONER-RESPONDENT.

TERESA KOWALCZYK, ATTORNEY FOR THE CHILD, WARSAW.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered July 23, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of abandonment. Contrary to the contention of the father, petitioner established by the requisite clear and convincing evidence that he abandoned his child (*see* Social Services Law § 384-b [4] [b]; [5] [a]; *Matter of Dennis K.A.*, 63 AD3d 1638, 1638). Petitioner's caseworker testified that the father was required to contact her prior to any visitation with the child, which was to be supervised by the child's grandfather. The father contacted the caseworker before visits that took place commencing in October 2011, but last contacted her concerning a visit in May 2012. He did not contact her again before petitioner filed the abandonment petition in December 2012. In addition, the father failed to appear at court proceedings with respect to the child during the relevant time period, although he had notice of those proceedings. The father's testimony that he visited with the child during the relevant time period and that he believed that only the grandfather was required to contact the caseworker concerning the visits merely raised a credibility issue that Family Court was entitled to resolve against the father (*see Matter of Kaitlin R.*, 28 AD3d 1243, 1244, *lv denied* 7 NY3d 706; *Matter of Joseph E.*, 16 AD3d 1148, 1148-1149).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

690

OP 13-01823

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

IN THE MATTER OF ERIC W. WIEGAND, PETITIONER,

V MEMORANDUM AND ORDER

HONORABLE JOHN H. CRANDALL, RESPONDENT.

TODD D. BENNETT, HERKIMER, FOR PETITIONER.

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

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

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his pistol permit. We conclude that the proceeding must be dismissed as time-barred. "A proceeding pursuant to CPLR article 78 'must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner' " (*Matter of Silvestri v Hubert*, 106 AD3d 924, 924-925, quoting CPLR 217 [1]). Here, respondent's determination became final and binding upon petitioner once he received notice of it (*see id.* at 925). The record establishes that petitioner had notice of the determination at least by May 10, 2013, the date on which he improperly filed a notice of appeal in an attempt to seek review of respondent's determination. This proceeding was not commenced until October 17, 2013, and thus the petition must be dismissed as time-barred (*see id.*; *Matter of Dalton v Drago*, 72 AD3d 1243, 1243; *Matter of Fowler v Marks*, 241 AD2d 928, 928, *lv denied* 91 NY2d 801). The fact that petitioner filed an improper notice of appeal within the four-month statute of limitations does not alter our decision (*see generally* CPLR 201; *McCoy v Feinman*, 99 NY2d 295, 301-302; *Dalton*, 72 AD3d at 1243).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

695

KA 10-01600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAMELL S. MITCHELL, 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 June 22, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

698

KA 13-00069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KELLY L. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered December 19, 2012. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

700

KA 12-01328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH LYMAN, ALSO KNOWN AS KEITH J. LYMAN, ALSO KNOWN AS KEITH JOSEPH LYMAN, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), rendered January 12, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted assault on a peace officer.

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 on a peace officer (Penal Law §§ 110.00, 120.08). We are unable to review defendant's contentions that his plea was not voluntary or that the sentence is unduly harsh and severe inasmuch as the stipulated record on appeal does not include the transcript of the plea proceeding, nor has defendant complied with this Court's request to provide the presentence report (*see Matter of Planned Parenthood of Niagara County v Maerten*, 6 AD3d 1162, 1163; *Matter of Santoshia L.*, 202 AD2d 1027, 1028; *cf. People v Douglas*, 288 AD2d 859, 859, *lv denied* 97 NY2d 681; *see generally People v Kinchen*, 60 NY2d 772, 774).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

702

KAH 13-00417

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DOMINIC M. FRANZA, PETITIONER-APPELLANT,

V ORDER

RANDY K. JAMES, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

DOMINIC M. FRANZA, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered January 28, 2013 in a proceeding pursuant to CPLR article 70. The judgment dismissed the petition.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

708

CAF 13-02031

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

IN THE MATTER OF TERIZA SHEHATOU,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMAD LOUKA, RESPONDENT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN BASILE JANOWSKI, ATTORNEY FOR THE CHILDREN, LIVERPOOL.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 14, 2013 in a proceeding pursuant to Family Court Act article 4. The order applied the fugitive disentitlement doctrine and dismissed the "petition" of respondent to vacate various court orders.

It is hereby ORDERED that said appeal is unanimously dismissed without costs and respondent is granted leave to move to reinstate the appeal upon the posting of an undertaking with Family Court, Onondaga County, in the amount of $25,000 within 60 days of service of a copy of the order of this Court with notice of entry.

Memorandum: Family Court issued an order, entered upon respondent's default, in which it determined that respondent is in willful violation of a prior support order. As a consequence thereof, the court issued a further order committing respondent to six months of incarceration, and also issued a warrant for respondent's arrest. Respondent filed an application by order to show cause seeking, inter alia, to vacate both orders. The court refused to sign the order to show cause seeking to vacate the orders and, in its "order of dismissal," determined that the fugitive disentitlement doctrine applies to respondent inasmuch as respondent — a California resident who is now the subject of an arrest warrant in this State, but who refuses to return to this State — was attempting to "evade the law while simultaneously seeking its protection" (*Matter of Skiff-Murray v Murray*, 305 AD2d 751, 752-753; *see Matter of Gerald G.G.*, 46 NY2d 813, 813). Respondent appeals from the order of dismissal.

Contrary to respondent's contention, the court properly

determined that the fugitive disentitlement theory applied to his application (*see Wechsler v Wechsler*, 45 AD3d 470, 473), and we conclude that the fugitive disentitlement doctrine also applies to this appeal (*see id*. at 474; *Matter of Joshua M. v Dimari N.*, 9 AD3d 617, 619). By respondent's "default and absence, [he] is evading the very orders from which [he] seeks appellate relief and 'has willfully made [himself] unavailable to obey the mandate of the [court] in the event of an affirmance' " (*Joshua M.*, 9 AD3d at 619; *see Skiff-Murray,* 305 AD2d at 752-753). We therefore dismiss the appeal and grant leave to respondent to move to reinstate it on the condition that, within 60 days of service of a copy of the order of this Court with notice of entry, he posts an undertaking with the court in the amount of $25,000, i.e., the amount of child support respondent owed at the time the court determined that he willfully violated the prior support order (*see Wechsler*, 45 AD3d at 474; *see generally Gerald G.G.*, 46 NY2d at 813). In light of our determination, we decline to reach respondent's remaining contentions.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

709

CAF 13-00347

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

IN THE MATTER OF JOSEPH CHENEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA CHENEY, RESPONDENT-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH CHENEY, PETITIONER-RESPONDENT PRO SE.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, WILLIAMSVILLE.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, R.), entered January 7, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated petitioner as the primary residential parent.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner father primary physical custody of the parties' child and granted visitation to her. Although the mother is correct that, in seeking a change in the established custody arrangement, the father was required to show " 'a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704), we conclude, contrary to her contention, that the father established such a change in circumstances. It is well settled that a " 'change in circumstances may be demonstrated by, inter alia, . . . interference with the noncustodial parent's visitation rights and/or telephone access' " (*Goldstein v Goldstein*, 68 AD3d 717, 720; *see Matter of Dubiel v Schaefer*, 108 AD3d 1093, 1093-1094). Here, the record establishes that the mother repeatedly took away the child's cell phone, thereby preventing the father from communicating with the child by telephone, and that, on one such occasion, she made a video recording of the child's tearful response. The record also supports Family Court's determination that, although the child had been outgoing in nature with a sunny disposition, she became withdrawn, sad and subject to emotional outbursts after the mother moved in with her current

boyfriend and his three children. In addition, the court properly considered the preference of the child to alter the existing custody arrangement in determining whether there had been a change in circumstances because, although the "child's preference regarding the parent with which he or she would like to reside is not dispositive, it is a factor to consider in determining whether there has been a change in circumstances" (*Matter of Cole v Nofri*, 107 AD3d 1510, 1511, *appeal dismissed* 22 NY3d 1083; *see generally Matter of Goodfriend v Devletsah-Goodfriend*, 29 AD3d 1041, 1042).

We reject the mother's contention that the court placed too much emphasis upon the wishes of the child and that awarding primary physical custody to the father was not in the child's best interests. Although the wishes of the child are "but one factor to be considered" when determining the relative fitness of the parties and the custody arrangement that serves the best interests of the child (*Eschbach v Eschbach*, 56 NY2d 167, 173), the court's determination is "entitled to great deference" and will not be disturbed where, as here, "the record establishes that it is the product of 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011; *see Matter of Radley v Radley*, 107 AD3d 1578, 1579, *lv denied* ___ NY3d ___ [Oct. 10, 2013]).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

716

CA 13-01526

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

STEVEN HERBERT, PLAINTIFF-RESPONDENT,

V ORDER

EASTERN WAREHOUSE, INC. AND JOHN CARROLL, INDIVIDUALLY AND AS PRESIDENT OF EASTERN WAREHOUSE, INC., DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL D. CALARCO, NEWARK (JESSICA L. BRYANT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered November 28, 2012. The order, among other things, denied the motion of defendants to dismiss the complaint.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

717

CA 13-02187

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

IN THE MATTER OF LISA DIFRANCESCO, KELLY EARNST, BRENDA HIGGINS, MICHAEL JANOWSKY, MICHELLE MARASCHIELLO AND RAYMOND YUREK, PETITIONERS-RESPONDENTS,

V ORDER

COUNTY OF NIAGARA, JAMES R. VOUTOUR, AS SHERIFF OF COUNTY OF NIAGARA, CITY OF NORTH TONAWANDA, NIAGARA COUNTY DEPUTY SHERIFF'S ASSOCIATION, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLEY S. BRAUN OF COUNSEL), FOR RESPONDENTS-APPELLANTS COUNTY OF NIAGARA AND JAMES R. VOUTOUR, AS SHERIFF OF COUNTY OF NIAGARA.

SHAWN P. NICKERSON, CITY ATTORNEY, NORTH TONAWANDA, FOR RESPONDENT-APPELLANT CITY OF NORTH TONAWANDA.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR RESPONDENT-APPELLANT NIAGARA COUNTY DEPUTY SHERIFF'S ASSOCIATION.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeals from a judgment (denominated order) of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered February 28, 2013 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

718

CA 13-00858

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

THOMAS ROCHE, PLAINTIFF-APPELLANT,

V ORDER

J. THOMAS SPIER, DEFENDANT-RESPONDENT.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 13, 2013. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

719

KA 11-01075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROCKIE JONES, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 October 12, 2010. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Erie County Court for further proceedings on the superior court information.

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of one count of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]), defendant contends his plea was not knowingly, voluntarily or intelligently entered because County Court failed to inform him of a direct consequence of his plea. We agree. We therefore reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the superior court information.

Even though defendant was required to preserve his contention for our review through a motion "to withdraw the plea or to vacate the judgment of conviction" (*People v Dillon*, 90 AD3d 1468, 1468, *lv denied* 19 NY3d 1025; *see People v Gerald*, 103 AD3d 1249, 1249), we note that the People do not oppose reversal, and we exercise our power to review this contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea (*see People v Harnett*, 16 NY3d

200, 205; *People v Catu*, 4 NY3d 242, 244). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, *a fine*" (*Harnett*, 16 NY3d at 205 [emphasis added]). The People concede that defendant was not informed that a fine, i.e., a direct consequence of the plea, would be imposed at any time before sentencing was pronounced and, therefore, reversal is required (*see id.*).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

720

KA 11-01086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROCKY JONES, ALSO KNOWN AS ROCKIE JONES,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 October 12, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for criminal possession of a weapon in the third degree and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment entered upon his admission that he violated the terms and conditions of his probation, revoking his probation and sentencing him to concurrent terms of incarceration on the underlying conviction of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and criminal possession of a weapon in the third degree ([CPW 3d] § 265.02 [1]). As the People correctly note, CPW 3d under section 265.02 (1) is not a violent felony (*see* Penal Law § 70.02 [former (1) (c)]), and, therefore the determinate term of incarceration imposed on that count of the indictment is illegal (*see* § 70.00 [2] [d]; [3] [b]). " 'Although this issue was not raised before the [sentencing] court or [by defendant] 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 vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to accept an amended lawful sentence or to withdraw his admission to the violation of probation (*see People v Dexter*, 104 AD3d 1184, 1185).

Defendant contends that the sentence is unduly harsh and severe. Inasmuch as there is no waiver of the right to appeal applicable to

the revocation of probation contained in this record on appeal, we address defendant's contention on the merits. We conclude, however, that the sentence is not unduly harsh or severe.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

721

KA 13-00775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD D. SACKEL, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CARL J. ROSENKRANZ OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered February 8, 2013. 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 affirmed without costs.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

722

KA 11-01727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HANNIBAL SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 11, 2011. The judgment convicted defendant, after a nonjury trial, of attempted robbery in the second degree.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

729

CAF 13-00448

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

IN THE MATTER OF KIRSTEN MILLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN JANTZI, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RUPAK R. SHAH OF COUNSEL), FOR PETITIONER-APPELLANT.

GILLES R.R. ABITBOL, ATTORNEY FOR THE CHILDREN, LIVERPOOL.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 19, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint legal custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, awarded the parties joint physical custody of their younger son, awarded respondent father sole physical custody of their older son and established a visitation schedule. We reject the mother's contention that Family Court erred in determining that split custody was in the best interests of the children. Initially, we note that we "afford 'great deference' to the determination of the hearing court . . . , with its 'superior ability to evaluate the character and credibility of the witnesses' " (*Matter of Cross v Caswell*, 113 AD3d 1107, 1107). "While keeping children together is often in [their] best interests . . . , the court must be cognizant of the individual needs of each child" in determining their best interests (*Matter of Roulo v Roulo*, 201 AD2d 937, 937, citing *Eschbach v Eschbach*, 56 NY2d 167, 172-173). Here, split custody is warranted in the best interests of each son, and the visitation schedule affords the siblings substantial time together. The parties are able to share physical custody of their younger son because he is not yet enrolled in school, and thus alternating weekly residency is in his best interests. The award of sole physical custody of the older son to the father permits that son to remain in school where he is enrolled and performing well. Although the court must consider the effects of domestic violence in determining the best interests of the children, here, the mother

failed to prove her allegations of domestic violence by a preponderance of the evidence (*see Matter of Frankiv v Kalitka*, 105 AD3d 1045, 1046).

Contrary to the mother's further contention, she was not deprived of " 'significant quality time' " with the children as a result of the summer vacation schedule (*Matter of Rivera v Fowler*, 112 AD3d 835, 836).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

736

CA 13-00626

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

IN THE MATTER OF NATHANIEL JAY,
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 February 4, 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated multiple 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" (*Matter of Amaker v Fischer*, 112 AD3d 1371, 1372; *see Matter of Alvarez v Fischer*, 94 AD3d 1404, 1406). "The mere fact that the Hearing Officer ruled against the petitioner is insufficient to establish bias" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [internal quotation marks omitted]). Also contrary to petitioner's contention, the Hearing Officer did not improperly deny petitioner his right to present evidence inasmuch as the evidence petitioner sought to present, i.e., petitioner's prison disciplinary history, was not relevant to the instant charges against petitioner (*see Matter of Pujals v Fischer*, 87 AD3d 767, 767). In any event, the failure of the Hearing Officer to permit petitioner to submit that evidence "does not require annulment of the administrative determination, especially in light of the overwhelming evidence of petitioner's guilt" (*Matter of Auricchio v Goord*, 275 AD2d 842, 842).

Finally, petitioner challenges the penalty imposed. Inasmuch as petitioner failed to raise that challenge in his administrative appeal, he "thereby failed to exhaust his administrative remedies and

this Court has no discretionary power to reach that issue" (*Matter of Medina v Coughlin*, 202 AD2d 1000, 1000; *see Matter of Francisco v Coombe*, 231 AD2d 917, 917; *see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

738

CA 13-02020

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

VALERIE REUMAN, AS PARENT AND NATURAL GUARDIAN OF HANNAH FINCH, AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

HONEOYE FALLS LIMA CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (ROBERT E. BRENNAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 12, 2013. The order denied defendant's motion for summary judgment dismissing plaintiff's amended complaint.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on March 18, 2014, and filed in the Monroe County Clerk's Office on May 8, 2014,

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

752

CA 13-00416

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

IN THE MATTER OF MICHAEL RAMSEY,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 4, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

753

CA 13-02221

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

SHIRLEY WEST, AS EXECUTRIX OF THE ESTATE OF
WILLIAM H. WEST, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

CAROUSEL FOOD SERVICE, INC., RUSSELL
DIPASQUALE, INDIVIDUALLY AND DOING BUSINESS AS
WATERING TROUGH, LITTLE FILLYS AND CAROUSEL
ROOM AT THE FAIR, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARK R. UBA, WILLIAMSVILLE (MARK UBA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered March 14, 2013. The order and judgment, among other things, granted plaintiff’s motion for partial summary judgment.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

758

CA 13-02103

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

IN THE MATTER OF GARY S. ROSIMINI, PATRICIA M. ROSIMINI, MORGAN CADY AND PETER GROCHOLSKI, PETITIONERS-APPELLANTS,

V ORDER

TOWN OF WESTERN, MARY J. CENTRO, TOWN OF WESTERN CLERK, THOMAS STEVENS, INDIVIDUALLY AND AS TOWN OF WESTERN HIGHWAY SUPERINTENDENT, LAWRENCE MIEREK, TOWN OF WESTERN COUNCILPERSON, LEONARD CHARNEY, TOWN OF WESTERN COUNCILPERSON, EDWARD MADER, TOWN OF WESTERN COUNCILPERSON, VERONICA MURPHY, TOWN OF WESTERN COUNCILPERSON, AND ROBIN DAVIS, TOWN OF WESTERN SUPERVISOR, RESPONDENTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, UTICA (RAYMOND A. MEIER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CHARLES W. ENGELBRECHT, ROME, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), dated March 11, 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 for reasons stated in the decision at Supreme Court.

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

761

CA 13-00467

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

IN THE MATTER OF JESUS VALDEZ,
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 (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.) entered February 4, 2013 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 (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

769

CAF 12-01915

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

IN THE MATTER OF TERRENCE LAMONT PEASE,
PETITIONER-RESPONDENT,

V ORDER

AMBER MARIE GRAY, RESPONDENT-APPELLANT.

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

WILLIAM J. BARRETT, ATTORNEY FOR THE CHILD, MANLIUS.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered September 14, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded 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: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

781

CA 13-02083

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

HILDA WALTERS AND STEPHEN WALTERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

THE CLEVELAND PLANT AND FLOWER COMPANY
AND ANTHONY F. MUOLO, DEFENDANTS-APPELLANTS.

RAWLE & HENDERSON LLP, NEW YORK CITY (ANTHONY D. LUIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (SCOTT D. CARLTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered October 10, 2013 in a personal injury action. The order granted plaintiffs' motion for summary judgment on the issue of defendants' negligence.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 18, 2014,

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

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

782

CA 13-02124

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

IN THE MATTER OF OBSESSION BAR AND GRILL, INC.
AND JOAN ORTIZ, PETITIONERS-RESPONDENTS,

V ORDER

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

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (SARA L. VALENCIA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an amended judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered February 26, 2013. The amended judgment and order, among other things, determined that the decision of respondent Zoning Board of Appeals of City of Rochester limiting the weekday closing hours of petitioner Obsession Bar and Grill, Inc. is null and void.

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

Entered: June 13, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1751/00) KA 99-05499. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAWRENCE A. MOORE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (1713/04) KA 02-00981. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN FULTON, JR., ALSO KNOWN AS SHAIK S., ALSO KNOWN AS SHAIKH S. ABDMUQTADIR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed June 13, 2014.)

MOTION NO. (445/06) KA 05-00193. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. –- Motion to vacate denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (234/09) KA 05-02074. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID J. SINGLETON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (624/10) KA 08-02379. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V VARNER HARRIS, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 13, 2014.)

MOTION NO. (1361/10) KA 09-00580. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD J. MCKEON, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (1416/10) KA 07-01179. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MAURICE DELEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (1176/13) KA 11-01120. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (1375/13) CA 13-00784. -- TAUSHIEYA KEENE, PLAINTIFF-APPELLANT, V THE MARKETPLACE AND WILMORITE MANAGEMENT GROUP, LLC, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ. (Filed June 14, 2014.)

MOTION NO. (27/14) KA 12-01343. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBIN DROUIN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (85/14) CA 13-00856. -- RICHARD PIOTROWSKI, PLAINTIFF-RESPONDENT, V MCGUIRE MANOR, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied (*see Concepcion v New York City Health & Hosps. Corp.*, 97 NY2d 674; *Maynard v Greenberg*, 82 NY2d 913). PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (136/14) CA 13-00839. -- MICHAEL A. LAWLER, PLAINTIFF-APPELLANT, V KST HOLDINGS CORPORATION, ET AL., DEFENDANTS, AND KEVIN S. TAILLIE, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (159/14) CA 13-01309. -- CHRISTOPHER M. BOWER, PLAINTIFF-RESPONDENT-APPELLANT, V CITY OF LOCKPORT, DENNIS ZABROWSKI AND GREGORY CHAMBERS, DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (189/14) KAH 12-02327. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. NICHOLAS ROBLES, PETITIONER-APPELLANT, V WARDEN ORLEANS STATE PRISON, ET AL., RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (202/14) CA 13-01558. -- IN THE MATTER OF SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK, JOHN MARVIN, THERESA FINNERAN, MICHAEL FINNERAN, VIRGINIA HAUFF AND JEAN WOSINSKI, PETITIONERS-RESPONDENTS, V VILLAGE OF PAINTED POST, PAINTED POST DEVELOPMENT, LLC, SWEPI, LP, RESPONDENTS-APPELLANTS, AND WELLSBORO AND CORNING RAILROAD, LLC, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (206/14) CA 13-01373. -- IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. JOANN H. SUTTNER, EXECUTRIX OF THE ESTATE OF GERALD W. SUTTNER, DECEASED, PLAINTIFF-RESPONDENT, V A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS, AND CRANE CO., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (208/14) TP 13-01474. -- IN THE MATTER OF ARRELLO BARNES, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for reconsideration denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (235/14) KAH 13-00283. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. RONALD ACKRIDGE, PETITIONER-APPELLANT, V MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY AND NEW YORK STATE

DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 13, 2014.)

MOTION NO. (273/14) KA 12-00926. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JIMMY DEAN RUSSELL, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed June 13, 2014.)

MOTION NO. (369/14) CA 13-01638. -- KRISTOPHER SPAIN, PLAINTIFF-APPELLANT, V VICTOR HOLL AND ROBERT M. SMITH, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed June 13, 2014.)

MOTION NO. (421/14) TP 13-01828. -- IN THE MATTER OF ARRELLO BARNES, PETITIONER, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ. (Filed June 13, 2014.)

KA 09-2213. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN FARNSWORTH, DEFENDANT-APPELLANT. KA 09-02214. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN FARNSWORTH, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matters are

remitted to Livingston County Court to vacate the convictions and dismiss the indictment and the amended statement of violation dated June 5, 2009 either sua sponte or on application of either the District Attorney or counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed June 13, 2014.)

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

MATTER OF LISA M. YAEGER, A SUSPENDED ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on June 27, 1991. On September 20, 2013, she was convicted upon her plea of guilty in the United States District Court for the Western District of New York of three counts of filing a false income tax return in violation of 26 USC § 7207, a federal misdemeanor. Respondent admitted in the plea colloquy that she filed federal personal income tax returns for the tax years 2005 through 2007 wherein she failed to report all of the income that she had earned from her practice of law, with the result that she had avoided income taxes in the total amount of $22,905. This Court thereafter determined that respondent had been convicted of a "serious crime" within the meaning of Judiciary Law § 90 (4) (d) and, by order entered October 23, 2013, the Court suspended respondent on an interim basis pursuant to Judiciary Law § 90 (4) (f) and directed her to show cause why a final order of discipline should not be entered. On February 10, 2014, respondent was sentenced in District Court to supervised release for a period of six months. Respondent subsequently appeared before this Court and was heard in mitigation.

In determining an appropriate sanction, we have considered respondent's expression of remorse to this Court, her otherwise unblemished record and the fact that she has made restitution in full. We note, however, that respondent has committed a fraud on the government in direct contravention of the obligation of all attorneys to comply with the laws, particularly those so fundamental to our form of government as the filing of income tax returns and the payment of the determined tax (*see Matter of Mahon*, 15 AD2d 232, 234). Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of two years, effective October 23, 2013, and until further order of this Court. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed May 16, 2014.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF VINCENT P. CIGNARALE, AN ATTORNEY, RESPONDENT.
GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, PETITIONER.
-- Order of disbarment entered. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed May 28, 2014.)

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

MATTER OF SAMUEL J. IANACONE, JR., AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on July 9, 1975. On October 3, 2013, he was convicted upon his plea of guilty in Monroe County Court to criminal tax fraud in the fifth degree in violation of Tax Law § 1802, a class A misdemeanor. Respondent admitted during the plea colloquy that he willfully failed to file his state personal income tax return for the year 2009. This Court thereafter determined that respondent had been convicted of a "serious crime" within the meaning of Judiciary Law § 90 (4) (d) and, by order entered December 20, 2013, directed him to show cause why a final order of discipline should not be entered. On March 4, 2014, respondent was sentenced in County Court to a three-year period of probation, which included the condition that he file and pay state income taxes in a timely fashion during the period of probation. Respondent subsequently appeared before this Court and was heard in mitigation.

In determining an appropriate sanction, we have considered the serious nature of the misconduct, as well as the matters submitted by respondent in mitigation, which include his otherwise unblemished record and the fact that he has paid the delinquent taxes arising from the misconduct. We have further considered that the misconduct was unrelated to his practice of law. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of three years, and until further order of this Court. We direct, however, that the period of suspension be stayed on condition that respondent, during that period, shall comply with the conditions of probation that were imposed by County Court. Furthermore, in accordance with the order entered herewith, respondent during the period of suspension must submit to the Grievance Committee documentation establishing that he has timely filed his state and federal income tax returns and paid any income taxes due therewith, whether in full or by installment agreement (*see Matter of Kolodziej*, 84 AD3d 1584, 1584). The Grievance Committee shall report to this Court any substantial failure by respondent to comply with the aforementioned conditions, whereupon the Grievance Committee may move before this Court to vacate the stay of respondent's suspension. Respondent may apply to this Court for an order terminating the period of suspension after three years. PRESENT: SMITH, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed June 13, 2014.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF DAVID S. WIDENOR, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, PETITIONER. -- A certified copy of plea minutes having been filed showing that David S. Widenor was convicted of grand larceny in the third degree, a class D felony, he is disbarred and his name is stricken from the roll of attorneys. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed May 27, 2014.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF JOHN M. DICKINSON, AN ATTORNEY, RESIGNOR. -- Voluntary resignation accepted and name removed from roll of attorneys. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed May 22, 2014.)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF MICHAEL HENRY, AN ATTORNEY, RESIGNOR. -- Voluntary resignation accepted and name removed from roll of attorneys. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Jun. 10, 2014.)