SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 2, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED OCTOBER 2, 2020

_____	1163	CA 19 00929	JARED N. UNDERBERG V DRYDEN MUTUAL INSURANCE CO.
_____	1299	CA 18 02343	CLAUDE TORTORA V FEDERAL NATIONAL MORTGAGE ASSOCIA
_____	1300	CA 19 00064	FEDERAL NATIONAL MORTGAGE ASSOCIATI V CLAUDE TORTORA
_____	79	CA 19 00410	ELIZABETH VOTSIS V ADP, LLC
_____	81	CA 19 01542	ANDREW BROWN V TOWN OF WATERLOO
_____	109	CA 19 00735	CHRISTIANA TRUST V JOHNNY L. RICE
_____	110	CA 19 01664	CHRISTIANA TRUST V JOHNNY L. RICE
_____	111	CA 19 01665	CHRISTIANA TRUST V JOHNNY L. RICE
_____	178	CA 19 00457	JEANINE D. SCHWALLIE V GREGORY T. FARNAN
_____	240	CA 19 00819	NHJB, INC. V UTICA FIRST INSURANCE COMPANY
_____	241	CA 19 01132	NHJB, INC. V UTICA FIRST INSURANCE COMPANY
_____	242	CA 19 01237	NHJB, INC. V UTICA FIRST INSURANCE COMPANY
_____	242.1	CA 19 01879	NHJB, INC. V UTICA FIRST INSURANCE COMPANY
_____	258	KA 17 02139	PEOPLE V JOSE HERNANDEZ
_____	263	CA 19 01548	BURKE, ALBRIGHT, HARTER, & RZEPKA L V AUDREY ELAINE SILLS
_____	265	CA 19 00135	TOWN OF WEST SENECA V KIDENEY ARCHITECTS, P.C.
_____	266	CA 19 01139	TOWN OF WEST SENECA V KIDENEY ARCHITECTS, P.C.
_____	267	CA 19 01034	CASSANDRA MONNIN V CLOVER GROUP, INC.
_____	271	CA 18 02366	TOWN OF WEST SENECA V LOUIS DESIGN SOLUTIONS ARCH
_____	272	CA 19 00833	TOWN OF WEST SENECA V LOUIS DESIGN SOLUTIONS ARCH
_____	273	CA 19 00850	TOWN OF WEST SENECA V LOUIS DESIGN SOLUTIONS ARCH
_____	279	KA 17 02211	PEOPLE V REGINALD ALLS
_____	312	CA 19 01092	ROBERT M. WEICHERT V VILLAGE OF EVANS MILLS
_____	314	CA 19 01672	BATAVIA TOWNHOUSES, LTD. V COUNCIL OF CHURCHES HO

_____	332	CA 19 00581	JOHN T. DILLON V PEAK ENVIRONMENTAL, LLC
_____	355	CA 19 01778	JEFFREY D. CONRAD V HOLIDAY VALLEY, INC.
_____	364	CA 19 00729	CALVIN WILLIAMS V STATE OF NEW YORK
_____	369	CA 19 01883	MICHAEL MAZZEO V MICHAEL CIMINELLI
_____	374	CA 19 01746	NATIONWIDE AGRIBUSINESS INSURANCE C V KYLE A. HEATH
_____	382	KA 16 02302	PEOPLE V JOHN W. WALLS
_____	389	CA 18 01429	BENJAMIN L. JOLLEY V AGOSTINHA R. LANDO
_____	391	CA 19 01333	LOUIS MICHAEL MAGNANO V ALLEGANY CO-OP INSURANCE C
_____	394	CA 19 01517	BENJAMIN L. JOLLEY V AGOSTINHA R. LANDO
_____	395	CA 19 01520	BENJAMIN L. JOLLEY V AGOSTINHA R. LANDO
_____	397	CA 19 01774	RICK NASH V GARY R. SCHOPFER, DDS
_____	402	KA 18 01048	PEOPLE V RUSSELL ADAMS
_____	417	CA 19 01852	BRENDA C. MORRIS-WILTON V EUPHORIA SALON & SPA
_____	436	CA 19 00261	THOMAS POLKA V MOUNT ST. MARY'S HOSPITAL OF NIAGAR
_____	439	CA 19 02079	ANDREW KOWALYK V JOHN J. JONES, III
_____	462	CA 19 01355	MELANIE TURCSIK V PHILLIP GRIFFIN
_____	464	CA 19 01106	CIRCLE T STERLING, LLC V TOWN OF STERLING ZONING
_____	509	CA 19 01238	ERIC BARKER V UNION CORRUGATING COMPANY
_____	510	CA 19 02022	DEBRA GINSBERG V BJ'S WHOLESALE CLUB, INC.
_____	513	CA 19 01470	BRENDA J. BARNETT V JOHN J. DISALVO
_____	515	CA 19 01705	ROBERT BARRON V TYLER BLASETTI
_____	516	CA 19 01583	ERIK D. SWANSON V DAVID DOMINESEY
_____	523	KA 19 01423	PEOPLE V DAMION R. RUVALCABA
_____	525	KA 18 00492	PEOPLE V JASON E. CARPENTER
_____	532	CA 19 01995	MICHAEL CHURCHILL V TOWN OF HAMBURG
_____	537	CA 19 01801	DELAWARE OPERATIONS ASSOCIATES LLC V NEW YORK STATE DEPARTMENT OF HEALTH
_____	547	CA 19 01382	AL DIRSCHBERGER, PH.D. V CALVIN LAWSON
_____	556	CA 19 01531	HELENE F. VANEPPS V DAVID D. MANCUSO
_____	562	KA 18 01026	PEOPLE V JONATHAN WILLIAMS

_____	589	KA 15 01596	PEOPLE V JOHNNY BOYDE
_____	591	KA 19 01781	PEOPLE V TROY GRIFFIN
_____	599	CA 20 00002	MARLENE CORNELL V COUNTY OF MONROE
_____	603	CA 19 01814	MARGARET WEED V ERIE COUNTY MEDICAL CENTER
_____	632	KA 19 01118	PEOPLE V ADAM KIBLER
_____	645	CAF 19 00060	Mtr of MARIANYS I.
_____	646	CAF 19 00174	Mtr of YANUEL D.
_____	663	KA 19 01119	PEOPLE V FAHRUDIN OMEROVIC
_____	664	KA 17 00155	PEOPLE V JODI DOLAN
_____	670	CAF 18 01663	THOMAS J. FOSTER V MELISSA M. OUDERKIRK
_____	680.3	KA 18 01835	PEOPLE V DENNIS L. THOMPSON
_____	697	TP 19 02277	ALFONSO RIZZUTO V D. VENETTOZZI
_____	703	KA 17 00969	PEOPLE V RICARDO NELLONS
_____	709	CA 19 00892	FREDERICK P. BRADLEY V ROBERT REXCOAT
_____	721	KAH 18 01512	GEORGE WARD V AKINYEMI AWOPETU
_____	746	TP 20 00251	JOHN HINSPETER V ANTHONY ANNUCCI
_____	752	KA 16 01593	PEOPLE V WALTER ZANDERS
_____	756	KAH 19 01485	TIMOTHY D. BUSH V AKINYEMI AWOPETU
_____	757	CA 20 00008	ALBERT G. FRACCOLA, JR. V CHAD CARSTENSEN
_____	767	TP 20 00222	REGINALD ROSS V ANTHONY ANNUCCI
_____	768	TP 20 00252	DWANE L. COX V ANTHONY ANNUCCI
_____	777	CAF 19 00998	Mtr of CAMERON M.
_____	778	CAF 19 00287	KIMBERLY CHATT V JUSTIN T. ALLEN
_____	779	CA 19 02256	ANDREA L. HENDERSHOT V PAUL S. HENDERSHOT
_____	793	KA 16 00641	PEOPLE V ROBERT G. WILSON
_____	795	KA 19 00664	PEOPLE V JASMINE HARLEE
_____	799	KA 17 01700	PEOPLE V MARCELL BROOKS
_____	801	KA 17 00027	PEOPLE V TODD MIRABELLA
_____	802	CAF 19 00395	VICTOR MORALES V YAIMEL VAILLANT
_____	803	CAF 19 00408	VICTOR MORALES V YAIMEL VAILLANT
_____	806	CAF 19 00615	CRYSTAL L. RICHTER V JOSEPH T. RICHTER

_____	807	CAF 19 01509	AIMEE KERR V DENNIS KERR
_____	808	CAF 19 00187	DEBRA M. WILLIAMS V DARLENE I. REID
_____	814	CA 19 01134	COUNTY OF OSWEGO V CHA CONSULTING, INC.
_____	815	CA 19 02189	GEOFFREY DUBEY V RONEN ZOUR
_____	820	TP 20 00253	TREMAINE A. GREEN V ANTHONY ANNUCCI
_____	834	CA 19 01554	SOLVAY BANK V FEHER RUBBISH REMOVAL, INC.
_____	843	TP 20 00307	TREMAINE A. GREEN V ANTHONY ANNUCCI
_____	849	CAF 19 01622	BETH A. JOHNSON V JOHN A. JOHNSON
_____	852	CAF 19 01570	DANIEL J. LINDSEY V ALISON M. LINDSEY
_____	855	CA 19 01950	NFR GATEWAY, LLC (NABISCO) V CITY OF NIAGARA FALL
_____	862	KA 18 01780	PEOPLE V JESUS CASTRO-UBILES
_____	866	TP 19 01519	CHARLES SMITH V ANTHONY ANNUCCI
_____	872	CAF 18 01672	Mtr of ZAIRE S.
_____	873	CAF 19 00175	KEONA S. WATKINS V STEPHANIE M. HART
_____	874	CA 19 00848	JEFFREY C. ALLES V JEANNE L. DE KEYSERLING
_____	878	CA 19 01918	JOSEPH ROESCH V DEBORAH MCCULLOCH
_____	895	CA 19 00917	JOSEPH ROESCH V DEBORAH MCCULLOCH

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

1163/19

CA 19-00929

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

JARED N. UNDERBERG, AS ASSIGNEE OF 236 DELAWARE ASSOCIATES, LLC, PLAINTIFF-RESPONDENT,

V ORDER

DRYDEN MUTUAL INSURANCE CO., DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (KEVIN D. SZCZEPANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 26, 2018. The order denied the motion of defendant to dismiss the complaint and granted the cross motion of plaintiff for leave to serve an amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 12, 2020,

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

1299/19

CA 18-02343

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE"), A CORPORATION ORGANIZED AND
EXISTING UNDER THE LAWS OF THE UNITED STATES
OF AMERICA, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

CLAUDE TORTORA, ALSO KNOWN AS CLAUDE TOTORA,
ALSO KNOWN AS CLAUDE T. TORTORA,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

CLAUDE TORTORA, INDIVIDUALLY, AND AS EXECUTOR
OF THE ESTATE OF JACQUELINE SQUITIERI, DECEASED,
PLAINTIFF-RESPONDENT,

V

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE"), A CORPORATION ORGANIZED AND
EXISTING UNDER THE LAWS OF THE UNITED STATES
OF AMERICA, DEFENDANT-APPELLANT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

HOGAN LOVELLS US LLP, NEW YORK CITY (CHAVA BRANDRISS OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

WEBSTER & DUBS, P.C., BUFFALO (DANIEL WEBSTER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered December 13, 2018. The amended order, inter alia, granted summary judgment in action No. 1 to defendant Claude Tortora, also known as Claude Totora, also known as Claude T. Tortora, and determined that the subject mortgage is unenforceable.

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

Opinion by CURRAN, J.:

The main issue on appeal in these consolidated actions is whether in action No. 1 the applicable statute of limitations has expired, precluding Federal National Mortgage Association, the plaintiff in action No. 1 and the defendant in action No. 2 (Fannie Mae), from foreclosing a mortgage given by decedent Jacqueline Squitieri, mother of the plaintiff in action No. 2, who is also a defendant in action No. 1 (Tortora). In particular, this appeal presents a novel question for this Court: whether a reinstatement provision in the subject mortgage that gives the mortgagor the option, under some circumstances, to de-accelerate the full mortgage debt prevented the mortgagee from validly accelerating the full mortgage debt and thereby prevented accrual of the foreclosure action for statute of limitations purposes. We answer that question in the negative.

I

The subject property, a residence located in Amherst, New York, was purchased in 2007 by Squitieri by means of a loan secured by a 30-year mortgage. The mortgage is a uniform instrument issued by Fannie Mae, among others, for use in New York State and contains several provisions that are relevant on appeal. Section 22 (acceleration provision) permits the lender to require immediate payment of the loan in full upon the borrower's default, provided certain conditions are met. Section 19 (reinstatement provision) grants a borrower in default the right to effectively de-accelerate the maturity of the mortgage debt by paying in full the past due amount, thereby returning the loan to its pre-default status. Additionally, section 3 (a) requires the borrower to pay certain amounts necessary for taxes and insurance, and sections 4 and 9 require the borrower to pay certain liens on the property and to reimburse the lender for amounts spent to protect the lender's rights in the property should the borrower fail to comply with the mortgage (collectively, authorized advances). In this case, authorized advances were paid by the lender's loan servicers on behalf of the borrower.

Squitieri defaulted on the loan in October 2008. In April 2009, Fannie Mae's predecessor in interest commenced a foreclosure action (first foreclosure action), stating in the complaint that it "elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal" on the mortgage debt. In July 2012, Supreme Court dismissed the first foreclosure action, without prejudice, based on the predecessor in interest's failure to supply a reasonable explanation for its inactivity in prosecuting the action.

In April 2013, the predecessor in interest commenced another foreclosure action (second foreclosure action) against, among others, Squitieri and Tortora, the latter of whom was initially named as a John Doe occupant of the property, based again on the 2008 default. Following assignment of the mortgage to it in 2014, Fannie Mae was substituted as plaintiff in the second foreclosure action and obtained a default judgment against Tortora and Squitieri, among others. Fannie Mae subsequently moved for a judgment of foreclosure and sale. In March 2015, however, the court denied that motion and instead dismissed the complaint with prejudice based on Fannie Mae's repeated

failure to appear in support of its motion.

In August 2016, Squitieri commenced action No. 2—an action to quiet title to the subject property—seeking, inter alia, a determination that the mortgage was void and should be cancelled. Squitieri asserted that the full amount of the mortgage debt had been accelerated in 2009 and could no longer be enforced due to the expiration of the six-year statute of limitations. In its answer, Fannie Mae asserted, inter alia, a counterclaim to recover the amount of authorized advances paid by the loan servicer on behalf of Squitieri plus interest on those advances. Squitieri died in April 2017. She had previously transferred the subject property to Tortora by quitclaim deed dated May 2015, which was filed with the county clerk's office following her death.

In February 2018, Fannie Mae commenced action No. 1, a foreclosure action predicated on a default dating back to March 2012, seeking the principal amount of the mortgage debt, with interest. In his answer, Tortora alleged, as his only affirmative defense, that action No. 1 was barred by the statute of limitations because the debt had been accelerated in 2009 and more than six years had elapsed since then. Tortora thereafter moved for, inter alia, consolidation of the actions, substitution as plaintiff in action No. 2, summary judgment on the complaint in action No. 2, and summary judgment dismissing the complaint against him in action No. 1 as time-barred. Fannie Mae cross-moved, inter alia, to strike the statute of limitations defense in action No. 1 and for summary judgment dismissing the complaint in action No. 2 or, alternatively, summary judgment on its counterclaim in action No. 2.

Fannie Mae appeals from an amended order that, inter alia, denied the cross motion and granted that part of the motion seeking dismissal of the complaint in action No. 1 against Tortora as time-barred. We affirm.

II

A

The court did not err in granting that part of the motion seeking summary judgment dismissing the complaint against Tortora in action No. 1, insofar as Fannie Mae sought to recover the principal amount of the mortgage debt, as barred by the applicable six-year statute of limitations (*see* CPLR 213 [4]). The statute of limitations in an action to foreclose on a mortgage "begins to run once the debt has been accelerated by a demand" (*Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). "Acceleration occurs, inter alia, by the commencement of a foreclosure action" (*Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]; *see U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]; *Fannie Mae v 133 Mgt., LLC*, 126 AD3d 670, 670 [2d Dept 2015]). Moreover, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the [s]tatute of [l]imitations begins to run on the *entire debt*" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001] [emphasis added]; *see*

Wilmington Sav. Fund Socy., FSB v Gustafson, 160 AD3d 1409, 1410 [4th Dept 2018]).

Here, we conclude that Tortora met his initial burden on the motion of establishing, "prima facie[,] that the time in which to sue ha[d] expired" (*Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019] [internal quotation marks omitted]; *see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]). He did so by submitting evidence establishing that the full amount of the mortgage debt was accelerated in April 2009, when Fannie Mae's predecessor in interest commenced the first foreclosure action (*see U.S. Bank N.A.*, 163 AD3d at 1483-1484; *Wilmington Sav. Fund Socy., FSB*, 160 AD3d at 1410; *EMC Mtge. Corp.*, 279 AD2d at 605). Indeed, the predecessor in interest specifically stated in its complaint in that action that it "elected and hereby elects to declare immediately due and payable the *entire* unpaid balance of principal" on the mortgage debt (emphasis added). Because Fannie Mae did not commence action No. 1 until 2018, more than six years after the debt was accelerated, Tortora established that the statute of limitations had expired, requiring dismissal of that action (*see* CPLR 213 [4]; *Larkin*, 81 AD3d at 1355).

B

In opposition, Fannie Mae did not raise an issue of fact whether the full mortgage debt was accelerated in 2009 (*see North Shore Invs. Realty Group, LLC v Traina*, 170 AD3d 737, 738 [2d Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Fannie Mae's central contention is that the mortgage debt could not have been accelerated in 2009; rather, it could only be accelerated once there was a final judgment of foreclosure inasmuch as the reinstatement provision of the mortgage precludes earlier acceleration of the full debt by granting the borrower the right to restore the loan to its pre-default status until the time of final judgment.

As Fannie Mae notes, however, the Second Department recently rejected that argument in *Bank of N.Y. Mellon v Dieudonne* (171 AD3d 34, 39-40 [2d Dept 2019], *lv denied* 34 NY3d 910 [2020] [hereafter, *Dieudonne*]), a case involving a mortgage identical to the one at issue here. Inasmuch as we agree with the Second Department's conclusion that the presence of a reinstatement provision does not, by itself, automatically preclude a lender from accelerating the full mortgage debt (*see id.* at 36), we reject Fannie Mae's contention that we should decline to follow that case.

Importantly, we conclude that the mortgage's reinstatement provision does not in any way affect or impede acceleration of the full mortgage debt. The reinstatement provision is not mentioned anywhere in the text of the mortgage's acceleration provision, which governs when Fannie Mae could exercise its option to accelerate the full debt (*see id.* at 36, 39-40). Further, the language of the reinstatement provision "indicates that [Fannie Mae's] right to accelerate the entire debt may be exercised *before* the [borrower's] rights under the reinstatement provision . . . are exercised or

extinguished" (*id.* at 40). Thus, in effect, the reinstatement provision merely "gives the borrower the contractual option to *de-accelerate* the mortgage when certain conditions are met" (*id.* at 39 [emphasis added])—which presupposes that an acceleration has already occurred.

Inasmuch as the reinstatement provision did not automatically prevent acceleration of the debt before entry of a final judgment, we by necessity also reject Fannie Mae's argument that acceleration of a debt secured by a mortgage containing a reinstatement provision could not occur until entry of a final judgment. Accepting Fannie Mae's argument would put the proverbial cart before the horse because, if followed to its logical end, the argument would permit a mortgagee to obtain judgment on a foreclosure claim before the claim even accrued—a proposition that cannot be true. In effect, there would be no statute of limitations for such claims. Consistent with our conclusion that the reinstatement provision does not affect acceleration of the full mortgage debt (*see id.* at 39-40), we reject Fannie Mae's contention that the delayed accrual of a foreclosure claim was a trade-off contemplated by the interplay of the mortgage's acceleration and reinstatement provisions.

Fannie Mae also contends that following the Second Department's approach in *Dieudonne* would violate public policy by disrupting the mortgage market, undermining the policy favoring uniform mortgages, and effectively conferring a windfall on Tortora by awarding him a "free" residence. We reject Fannie Mae's contention. Specifically, we note that it has been over a decade since the first foreclosure action was commenced. The court dismissed that action due to the mortgagee's failure to timely prosecute its claim. The court similarly dismissed the second foreclosure action, that time with prejudice, because of Fannie Mae's *repeated failure* to appear in court in support of its own motion for a judgment of foreclosure and sale. Given that history, Fannie Mae has only itself and its predecessor in interest to blame for failing to timely secure foreclosure of the mortgage, thereby creating the risk that Tortora would receive a "free" residence. Thus, the relatively unique circumstances of this case support the conclusion that adopting the rationale of *Dieudonne* will not violate public policy in the hyperbolic manner argued by Fannie Mae.

It is true enough that the presence of a reinstatement provision in a mortgage mitigates the harsh and unforgiving old rule that did not permit borrowers to pay arrears once a lender had elected to accelerate a loan (*cf. Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 477 [1932]). That does not, however, vitiate the duty of a lender to timely commence and prosecute a foreclosure action once it accelerates the debt. To that end, we are mindful that the policies undergirding statutes of limitations aim both to protect parties like Tortora against stale claims and to encourage parties like Fannie Mae not to sleep on their rights (*see generally* Siegel, NY Prac § 33 at 43 [5th ed 2011]). Tortora's ability to obtain a "free" home was simply the risk the mortgagee took by not diligently pursuing its prior

foreclosure actions; it is not a reason for us to conclude that the mortgage's reinstatement provision prevented acceleration of the full amount of the debt in 2009.

C

Having concluded that the full mortgage debt was effectively accelerated despite the presence of the reinstatement provision, we further conclude that there is nothing in the record establishing that Fannie Mae or its predecessor in interest ever affirmatively elected to revoke the 2009 acceleration of the mortgage in the six years following the commencement of the first foreclosure action (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935; *Lavin v Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003] *lv dismissed* 100 NY2d 577 [2003], *lv denied* 2 NY3d 703 [2004]).

Thus, we conclude that Fannie Mae did not raise an issue of fact with respect to the statute of limitations and that the court properly dismissed the complaint in action No. 1 against Tortora with respect to principal amount of the mortgage debt (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935).

III

Fannie Mae also contends on appeal that, even if the court properly granted the motion for summary judgment dismissing the complaint against Tortora in action No. 1 as time-barred to the extent it sought to recover the principal of the mortgage debt, the court erred in granting the motion to the extent that the complaint sought to recover interest that accrued on the principal in the six years preceding the commencement of action No. 1. Fannie Mae further contends that the court erred in denying its cross motion insofar as Fannie Mae sought summary judgment on its counterclaim in action No. 2 to recover the amount of authorized advances paid by its loan servicers on behalf of Squitieri. We disagree.

The court properly granted the motion with respect to the recovery of interest that accrued on the principal in the six years before the commencement of action No. 1 because the accrued interest, "being . . . [a] mere incident [of the mortgage debt], cannot exist without the debt, and the debt being extinguished[,] the interest necessarily [is also] extinguished" (*Ajdler v Province of Mendoza*, 33 NY3d 120, 126 [2019] [internal quotation marks omitted]; *see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). A similar rationale supports the denial of the cross motion with respect to the counterclaim seeking recovery of the amount of the authorized advances because the provisions purportedly entitling Fannie Mae to those amounts, as terms of the mortgage, were incident to the extinguished debt and therefore "stand[] or fall[] with" it (*Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923], *rearg denied* 236 NY 591 [1923]; *see generally Ajdler*, 33 NY3d at 126).

To the extent that Fannie Mae relies on a purported exception to the general rule that permits claims seeking recovery of incidents of

residential mortgages (*see e.g. Chapin v Posner*, 299 NY 31, 42 [1949]; *Ernst v Schaack*, 271 App Div 1012, 1013 [2d Dept 1947], *affd* 297 NY 566 [1947]; *Johnson v Meyer*, 268 NY 701, 702 [1935]), we note that those cases do not "apply outside the narrow context of the mortgage moratorium legislation in which they were decided" (*Ajdler*, 33 NY3d at 128 n 4), i.e., Great Depression-era mortgage moratorium statutes that are no longer in effect (*see Kirschner v Cohn*, 270 App Div 126, 129 [2d Dept 1945]; *Union Trust Co. of Rochester v Kaplan*, 249 App Div 280, 281 [4th Dept 1936]).

* * *

Accordingly, the amended order should be affirmed. Based on the foregoing, Fannie Mae's remaining contention is academic.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

1300/19

CA 19-00064

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE"), A CORPORATION ORGANIZED AND
EXISTING UNDER THE LAWS OF THE UNITED STATES
OF AMERICA, PLAINTIFF-APPELLANT,

V ORDER

CLAUDE TORTORA, ALSO KNOWN AS CLAUDE TOTORA,
ALSO KNOWN AS CLAUDE T. TORTORA,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

CLAUDE TORTORA, INDIVIDUALLY, AND AS EXECUTOR
OF THE ESTATE OF JACQUELINE SQUITIERI, DECEASED,
PLAINTIFF-RESPONDENT,

V

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE"), A CORPORATION ORGANIZED AND
EXISTING UNDER THE LAWS OF THE UNITED STATES
OF AMERICA, DEFENDANT-APPELLANT.
(ACTION NO. 2.)
(APPEAL NO. 2.)

HOGAN LOVELLS US LLP, NEW YORK CITY (CHAVA BRANDRISS OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

WEBSTER & DUBS, P.C., BUFFALO (DANIEL WEBSTER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 4, 2019. The amended order, inter alia, granted summary judgment in action No. 1 to defendant Claude Tortora, also known as Claude Totora, also known as Claude T. Tortora, and determined that the subject mortgage is unenforceable.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Faison v Luong*, 122 AD3d 1268, 1269 [4th Dept 2014]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

79

CA 19-00410

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

ELIZABETH VOTSIS AND CRAVE L&D, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ADP, LLC, DEFENDANT-RESPONDENT,
AND DAVID THOMAS POLIT, DEFENDANT.

THE COTTER LAW GROUP, MANHASSET (SCOTT B. MACLAGAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KELLEY DRYE & WARREN LLP, NEW YORK CITY (WILLIAM S. GYVES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 8, 2019. The order granted the motion of defendant ADP, LLC, to dismiss the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action against defendant ADP, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages arising from an allegedly defamatory statement authored by defendant David Thomas Polit and published by him to the Facebook page of plaintiff Crave L&D, LLC (Crave), a restaurant. Polit's statement advised potential customers to stay away from the restaurant, alleging, among other things, health code violations, mistreatment of staff, and criminal activity. In their amended complaint, plaintiffs asserted causes of action against Polit himself and against defendant ADP, LLC (ADP), Polit's employer. According to the amended complaint, Polit published the relevant Facebook post days after Polit had solicited plaintiffs, on behalf of ADP, to purchase ADP's payroll services. In connection with that solicitation, plaintiffs alleged that they provided Polit with various internal business and financial records so that ADP could provide plaintiffs with a price quote for ADP's services. Plaintiffs now appeal from an order that granted ADP's motion to dismiss the amended complaint against it.

Accepting as true the facts alleged in the amended complaint, as we must on a motion to dismiss pursuant to CPLR 3211 (a) (7), and according plaintiffs the benefit of every possible favorable inference

(*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Walden Bailey Chiropractic, P.C. v Geico Cas. Co.*, 173 AD3d 1806, 1806 [4th Dept 2019]), we agree with plaintiffs that Supreme Court erred in dismissing their first cause of action, for libel and defamation based on a theory of respondeat superior liability, against ADP. An employer may be held liable under a theory of respondeat superior for the intentional torts of its employees when done within the scope of employment (*see Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034 [2d Dept 2007]; *Buck v Zwelling*, 272 AD2d 895, 895 [4th Dept 2000]). " 'An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incident to such employment' " (*Holmes*, 40 AD3d at 1034; *see Baker v Lisconish*, 156 AD3d 1324, 1325 [4th Dept 2017], *appeal dismissed* 31 NY3d 1042 [2018]). "[T]he issue whether an employee is acting within the scope of his or her employment is ordinarily for jury resolution" (*Buck*, 272 AD2d at 895).

To that end, plaintiffs' amended complaint explicitly alleged that "Polit was acting within the scope of his employment as a district manager employed by . . . ADP when he published the defamatory statements against [p]laintiffs." Assuming, arguendo, that this assertion alone is too conclusory to state a cause of action against ADP premised on respondeat superior liability (*see generally Dominski v Frank Williams & Son, LLC*, 46 AD3d 1443, 1444 [4th Dept 2007]), we conclude that plaintiffs sufficiently pleaded the existence of respondeat superior liability through other allegations, including, among other things, that Polit visited Crave for the sole purpose of soliciting plaintiffs to enter into a payroll service agreement with ADP, that Polit represented himself as ADP's district manager and requested Crave's business and payroll records in order to provide Crave with a quote for ADP's services, that the post was based on Polit's review of those records, that ADP encouraged Polit to use social media in connection with his sales work, that Polit published the post during regular business hours, and that ADP was aware of Polit's use of Facebook and authorized his conduct. Furthermore, we conclude that, with respect to ADP, plaintiffs sufficiently alleged the other necessary elements of their first cause of action (*see generally Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *rearg denied* 42 NY2d 1015 [1977], *cert denied* 434 US 969 [1977]; *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]; *Zetes v Stephens*, 108 AD3d 1014, 1018-1019 [4th Dept 2013]). We therefore modify the order accordingly.

We reject plaintiffs' contention, however, that the court erred in dismissing their remaining causes of action against ADP. The court properly dismissed plaintiffs' second cause of action, alleging, inter alia, intentional infliction of emotional distress, against ADP inasmuch as that cause of action was based on the same facts as, and was duplicative of, plaintiffs' first cause of action (*see Napoli v New York Post*, 175 AD3d 433, 434 [1st Dept 2019], *lv denied* 35 NY3d 906 [2020]; *Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017]; *Dec v Auburn Enlarged School Dist.*, 249 AD2d 907, 908 [4th Dept 1998]).

The court also properly dismissed plaintiffs' third cause of action, alleging breach of fiduciary duty, against ADP. A fiduciary relationship " 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation,' " and requires "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). " 'If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them' " (*id.* at 20). Here, plaintiffs failed to sufficiently allege the existence of a fiduciary relationship and instead merely alleged a single incident of sales solicitation by ADP.

Lastly, the court properly dismissed plaintiffs' fourth cause of action, alleging negligent supervision, hiring, retention, and training, against ADP inasmuch as the amended complaint alleged that Polit had acted within the scope of his employment (*see Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 880 [4th Dept 2019]; *Walden Bailey Chiropractic, P.C.*, 173 AD3d at 1807; *Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1472 [4th Dept 2009]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

81

CA 19-01542

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF ANDREW BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WATERLOO, RESPONDENT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

LEVINE & BLIT, PLLC, NEW YORK CITY (JUSTIN S. CLARK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered February 15, 2019 in a CPLR article 78 proceeding. The judgment, insofar as appealed from, directed the reinstatement of petitioner to his position of employment with respondent with back pay and benefits.

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

Memorandum: In November 2017, petitioner was elected to the office of Highway Superintendent for the Town of Fayette. At the time of his election to that office, petitioner was employed by respondent, Town of Waterloo, as a laborer. Petitioner and respondent thereafter disputed whether petitioner orally resigned his position with respondent. Respondent informed petitioner by letter that it had accepted petitioner's resignation, effective December 31, 2017. Petitioner sought to retain his position with respondent, but respondent refused that request based on, inter alia, the purported oral resignation. Petitioner thereafter commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, reinstatement, back pay, and benefits and alleging, among other things, that his termination was arbitrary and capricious and made in violation of Civil Service Law § 75-b. Respondent filed an answer seeking dismissal of the petition. Supreme Court dismissed petitioner's claim with respect to the alleged violation of Civil Service Law § 75-b, but otherwise granted petitioner relief pursuant to CPLR article 78, thereby reinstating him to his position with respondent with back pay and benefits. Respondent appeals, and we affirm.

Initially, respondent's contention regarding petitioner's alleged failure to file a notice of claim under the Town Law is not properly

before us. Here, the record establishes that respondent abandoned its contention with respect to Town Law § 67, and its contention with respect to Town Law § 65 is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984-985 [4th Dept 1994]; *see also Laberge Eng'g & Consulting Group, Ltd. v Town of Beekman*, 128 AD3d 642, 642 [2d Dept 2015]; *see generally Matter of Schlosser v Board of Educ. of E. Ramapo Cent. School Dist.*, 47 NY2d 811, 813 [1979]).

Contrary to respondent's contention, it was not inconsistent for the court to dismiss petitioner's claim with respect to the alleged violation of Civil Service Law § 75-b, but otherwise grant him relief under CPLR article 78 (*see generally Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]). Contrary to respondent's further contention, petitioner's election to the position of Highway Superintendent in the Town of Fayette did not constitute an automatic resignation of his position as laborer in the neighboring Town of Waterloo. "[P]hysical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another" (*People ex rel. Ryan v Green*, 58 NY 304, 304 [1874]). Based upon the record before us, the two positions in question are not per se incompatible (*see generally Matter of Dupras v County of Clinton*, 213 AD2d 952, 953 [3d Dept 1995]). Respondent's further contention that granting the petition was erroneous in view of petitioner's alleged oral resignation is without merit inasmuch as the Town of Waterloo employee handbook requires that a resignation be in writing.

We reject respondent's contention that petitioner was not entitled to back pay and benefits. CPLR article 78 allows for damages incidental to the primary relief sought by the petitioner, i.e., reinstatement to employment (*see* CPLR 7806), and such damages may include full back pay and benefits retroactive to the date of termination (*see Matter of Jakubowicz v Village of Fredonia*, 159 AD3d 1540, 1541 [4th Dept 2018]; *Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1757 [4th Dept 2016]). To the extent that respondent contends that compensatory damages and attorney's fees are not recoverable, we note that the court did not grant such relief. The court only granted back pay and benefits from the time of the commencement of the proceeding.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

109

CA 19-00735

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR NORMANDY MORTGAGE LOAN TRUST, SERIES 2013-13, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHNNY L. RICE, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ZACHARY GOLD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 20, 2017. The order, insofar as appealed from, granted the cross motion of defendant Johnny L. Rice for leave to amend the answer.

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

Same memorandum as in *Christiana Trust v Rice* ([appeal No. 3] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

110

CA 19-01664

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR NORMANDY MORTGAGE LOAN TRUST, SERIES 2013-13, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHNNY L. RICE, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ZACHARY GOLD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 19, 2019. The amended order denied plaintiff's cross motion for leave to renew and reargue its opposition to the cross motion of defendant Johnny L. Rice for leave to amend the answer.

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

Same memorandum as in *Christiana Trust v Rice* ([appeal No. 3] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

111

CA 19-01665

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR NORMANDY MORTGAGE LOAN TRUST, SERIES 2013-13, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHNNY L. RICE, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 3.)

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ZACHARY GOLD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 19, 2019. The amended order, inter alia, granted the motion of defendant Johnny L. Rice for summary judgment and dismissed the complaint.

It is hereby ORDERED that the amended order so appealed from is unanimously vacated, the complaint is reinstated, and the order entered October 20, 2017 is modified on the law by denying the cross motion of defendant Johnny L. Rice for leave to amend the answer, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, plaintiff appeals from an order (October order) that, insofar as appealed from, granted the cross motion of Johnny L. Rice (defendant) for leave to amend the answer. In appeal No. 2, plaintiff appeals from an amended order that denied plaintiff's cross motion for leave to renew and reargue its opposition to defendant's cross motion. In appeal No. 3, plaintiff appeals from an amended order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint.

Initially, we conclude that appeal No. 2 must be dismissed because, although plaintiff denominated its cross motion as one for leave to renew and reargue, the cross motion was actually one for leave to reargue only (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 983 [4th Dept 1990]), and it is well settled that no appeal lies from an order denying such a motion or cross motion (*see Matter of Kleinbach v*

Cullerton, 151 AD3d 1686, 1687 [4th Dept 2017]; *Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252 [4th Dept 2014]). Furthermore, we note that the appeal from the final, amended order in appeal No. 3 brings up for review the propriety of the October order, and therefore the appeal from that order in appeal No. 1 must also be dismissed (*see Burke v Crosson*, 85 NY2d 10, 15 [1995]; *Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1413-1414 [4th Dept 2018]; *see generally* CPLR 5501 [a] [1]).

In appeal No. 3, we agree with plaintiff that Supreme Court erred in granting defendant's cross motion for leave to amend the answer. CPLR 3025 (b) provides, in relevant part, that "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (*see Fanelli v Upstate Cerebral Palsy, Inc.*, 171 AD3d 1478, 1479 [4th Dept 2019]). Where a complaint or answer has already been stricken or dismissed, however, a court cannot permit amendment of the pleading because there is no pleading before the court to be amended (*see Tanner v Stack*, 176 AD3d 429, 429 [1st Dept 2019]; *Deutsche Bank Natl. Trust Co. v James*, 164 AD3d 467, 469 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Fanto*, 146 AD3d 1012, 1012 [2d Dept 2017]). Here, there is no dispute that, at the time of defendant's cross motion, the answer had already been stricken pursuant to a prior order of the court (*see Tanner*, 176 AD3d at 429; *Deutsche Bank Natl. Trust Co.*, 164 AD3d at 469; *Wells Fargo Bank, N.A.*, 146 AD3d at 1012). We therefore modify the October order accordingly.

In light of our determination, plaintiff's remaining contentions are academic.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

178

CA 19-00457

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

JEANINE D. SCHWALLIE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY T. FARNAN AND KATHLEEN D. FARNAN,
DEFENDANTS-RESPONDENTS.

PAUL J. VACCA, JR., ROCHESTER, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 20, 2018. The order and judgment granted the motion of defendants insofar as it sought summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion insofar as it sought summary judgment dismissing the complaint is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action against defendants to recover damages for injuries that she sustained in a motor vehicle collision. Gregory T. Farnan (defendant) was operating a vehicle owned by defendant Kathleen D. Farnan on Greenleaf Road near the Lake Ontario State Parkway (Parkway). A white van that was exiting the Parkway proceeded to the stop sign where the off-ramp intersects with Greenleaf Road and then made a sudden left-hand turn in front of the vehicle that defendant was operating. Defendant tried to avoid the van by braking and swerving to the right. In doing so, he maneuvered his vehicle the wrong way onto the off-ramp, where it collided with the driver's side of the vehicle operated by plaintiff. We agree with plaintiff that Supreme Court erred in granting defendants' motion insofar as it sought summary judgment dismissing the complaint based on an application of the emergency doctrine.

"In general, the issues whether a qualifying emergency existed and whether the driver's response thereto was reasonable are for the trier of fact" (*White v Connors*, 177 AD3d 1250, 1252 [4th Dept 2019]; *see Chwojdak v Schunk*, 164 AD3d 1630, 1631 [4th Dept 2018]), and this case is no exception to the general rule. Even assuming, arguendo, that defendant was faced with a qualifying sudden and unexpected emergency, we conclude that defendants failed to meet their initial

burden on the motion of establishing that defendant's conduct was appropriate under the circumstances (*see White*, 177 AD3d at 1253; *Levy v Braman Motorcars*, 119 AD3d 530, 531 [2d Dept 2014]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

240

CA 19-00819

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, AND
NORMAN HABIB, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FARBER BROCKS & ZANE, LLP, GARDEN CITY (AUDRA ZANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 22, 2019. The order, among other things, granted in part plaintiffs' motion for partial summary judgment and denied defendant's cross motion for summary judgment.

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

Same memorandum as in *NHJB, Inc. v Utica First Ins. Co.* ([appeal No. 4] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

241

CA 19-01132

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, AND
NORMAN HABIB, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FARBER BROCKS & ZANE, LLP, GARDEN CITY (AUDRA ZANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered June 13, 2019. The order, among other things, granted plaintiffs' motion to compel defendant to comply with an order entered March 22, 2019, and directed defendant to reimburse plaintiffs for their attorneys' fees and disbursements in the underlying personal injury action.

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

Same memorandum as in *NHJB, Inc. v Utica First Ins. Co.* ([appeal No. 4] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

242.1

CA 19-01879

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, AND NORMAN HABIB, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY, DEFENDANT-APPELLANT. (APPEAL NO. 4.)

FARBER BROCKS & ZANE, LLP, GARDEN CITY (AUDRA ZANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended judgment of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 3, 2019. The amended judgment awarded plaintiffs the sum of $85,618.50 as against defendant.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by denying plaintiffs' motion for partial summary judgment in its entirety and denying plaintiffs' motion to compel, vacating the award of judgment to plaintiffs, granting those parts of defendant's cross motion for summary judgment dismissing the complaint and on the third counterclaim, and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to defend or indemnify plaintiffs in the underlying action,

and as modified the amended judgment is affirmed without costs.

Memorandum: This action involving a dispute over insurance coverage arises from an incident that occurred in May 2014 during which William Sager, Jr. (decedent) sustained fatal injuries when a bar manager at a nightclub shoved him, causing him to fall down an entire flight of stairs. The bar manager ultimately pleaded guilty to manslaughter in the first degree (Penal Law § 125.20 [1]) and was sentenced to 18 years in prison. We affirmed the judgment of conviction (*People v Basil*, 156 AD3d 1416 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018], *reconsideration denied* 31 NY3d 1114 [2018]). The nightclub at issue was operated by plaintiff NHJB, Inc., doing business as Molly's Pub, whose sole shareholder was plaintiff Norman Habib.

At all relevant times, plaintiffs were insured by a policy issued by defendant, which disclaimed coverage when initially notified about the incident within days of its occurrence. After a personal injury action was commenced against plaintiffs, among other parties (*see Sager v City of Buffalo*, 151 AD3d 1908 [4th Dept 2017]), plaintiffs again sought coverage from defendant, which again disclaimed coverage, relying in large part on an assault and battery exclusion contained within the policy.

Plaintiffs thereafter commenced this action, alleging that defendant had breached the insurance contract and seeking a declaration that defendant is obligated to defend and indemnify plaintiffs in the underlying personal injury action. Defendant answered and asserted several counterclaims. Plaintiffs thereafter moved for partial summary judgment seeking a declaration that defendant is obligated to defend plaintiffs in the underlying personal injury action. Defendant cross-moved for summary judgment on its counterclaims and sought, inter alia, dismissal of the complaint.

In the order in appeal No. 1, Supreme Court granted in part plaintiffs' motion for partial summary judgment, denied defendant's cross motion and ordered, inter alia, that defendant is obligated to defend plaintiffs in the underlying personal injury action "through the completion of discovery." When defendant failed to comply with the order in appeal No. 1, plaintiffs moved to compel defendant to comply with that order. In the order in appeal No. 2, the court, inter alia, granted plaintiffs' motion to compel and ordered defendant to reimburse plaintiffs in a set amount. A statement of judgment directing defendant to pay that amount plus costs and disbursements was entered, and is the subject of appeal No. 3. Defendant moved to amend the statement of judgment, contending that the court had not ordered it to pay costs and disbursements. The court thereafter entered the amended judgment in appeal No. 4, removing costs and disbursements from the calculation.

Inasmuch as the orders in appeal Nos. 1 and 2 are subsumed in the amended judgment, those appeals should be dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *see generally* CPLR 5501 [a] [1]). In addition, because the amended judgment made a substantive modification to the judgment, it supersedes the judgment and, therefore, appeal No. 3 should likewise be dismissed (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

With respect to the merits of appeal No. 4, we conclude that the court erred in granting in part plaintiffs' motion for partial summary judgment and granting plaintiffs' motion to compel, and erred in denying those parts of defendant's cross motion seeking summary judgment dismissing the complaint and on its third counterclaim, and we therefore modify the amended judgment accordingly. Although we conclude that the incident constitutes an occurrence under the terms of the policy (*see Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]; *see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137-138 [2006]; *Technicon Elecs. Corp. v American Home*

Assur. Co., 74 NY2d 66, 74 [1989], *rearg dismissed* 74 NY2d 843 [1989], *rearg denied* 74 NY2d 893 [1989]), we nevertheless agree with defendant that coverage for the incident is precluded by the policy's assault and battery exclusion.

Generally, an insurer is "required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" (*Automobile Ins. Co. of Hartford,* 7 NY3d at 137 [internal quotation marks omitted]; *see Technicon Elecs. Corp.*, 74 NY2d at 73-74).

In their motion for partial summary judgment, plaintiffs contended that, inasmuch as the 27th cause of action in the underlying personal injury action seeks damages under a theory of premises liability, there is at least one cause of action that is not precluded by the assault and battery exclusion, and that defendant must therefore defend plaintiffs on all causes of action. We agree with defendant on appeal, however, that all of the claims against plaintiffs in the underlying action are " 'based on' " or arise out of the bar manager's assault, "without which [the plaintiff in the underlying personal injury action] would have no cause of action" (*U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]). In other words, "no cause of action would exist but for the assault" and, therefore, the assault and battery exclusion is applicable and precludes coverage (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350 [1996]; *see U.S. Underwriters Ins. Co.*, 85 NY2d at 823; *Haines v New York Mut. Underwriters*, 30 AD3d 1030, 1030-1031 [4th Dept 2006]; *Essex Ins. Co. v Young*, 17 AD3d 1134, 1136 [4th Dept 2005]). Despite the conclusory allegations of premises liability, there is simply "no suggestion that [decedent] fell of his own accord" (*Fish v Dryden Mut. Ins. Co.*, 23 Misc 3d 1105[A], 2009 NY Slip Op 50596[U], *2 [Sup Ct, Cortland County 2009]).

We also agree with defendant that a determination on this issue need not await discovery in the personal injury action. The analysis of whether an exclusion applies "depends on the facts which are pleaded, not the conclusory assertions" contained in the underlying complaint (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 162 [1992]). "[T]he allegations of the complaint [in the underlying personal injury action] cast that pleading solely and entirely within the policy exclusions, and . . . the allegations, *in toto*, are subject to no other interpretation" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137; *see U.S. Underwriters Ins. Co.*, 85 NY2d at 822-823*; Essex Ins. Co.*, 17 AD3d at 1135-1136). Even if it were learned during discovery that there was a defect with respect to the stairs, the fact remains that, but for the bar manager's assault, decedent would not have fallen down the stairs.

We do not agree with plaintiffs that our determination in an earlier appeal constrains us to conclude that defendant is obligated to provide a defense in the underlying personal injury action. Although we determined that the personal injury plaintiff had stated a

cause of action for premises liability sufficient to survive a CPLR 3211 (a) (7) motion to dismiss (*Sager*, 151 AD3d at 1910), that determination does not dictate the result in this case, where the dispositive issue is whether any cause of action alleged in the underlying complaint would exist if it were not for the assault. There is a distinction between the ultimate liability of the insured and the insured's right to coverage based on the language of the insurance policy, and thus "[m]erely because the insured might be found liable under some theory of negligence does not overcome the policy's exclusion for injury resulting from assault" (*Mount Vernon Fire Ins. Co.*, 88 NY2d at 352).

Based on our determination, we do not reach defendant's remaining contentions.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

242

CA 19-01237

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, AND
NORMAN HABIB, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

FARBER BROCKS & ZANE, LLP, GARDEN CITY (AUDRA ZANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Mark A. Montour, J.), entered June 19, 2019. The judgment awarded plaintiffs the sum of $86,093.50 as against defendant.

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

Same memorandum as in *NHJB, Inc. v Utica First Ins. Co.* ([appeal No. 4] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

258

KA 17-02139

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE HERNANDEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 15, 2017. The judgment convicted defendant upon a nonjury verdict of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress the statements made by defendant at the scene of his detention and the cocaine seized as a result of those statements is granted and a new trial is granted on counts one, two and five of the indictment.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]) related to his possession and sale of cocaine at a parking lot on South Geddes Street in the City of Syracuse. Contrary to defendant's contention, the People's pronouncement of readiness was not illusory even though the announcement was made before the People had received a formal laboratory analysis confirming that the substance at issue was cocaine (*see People v Van Hoesen*, 12 AD3d 5, 7-9 [3d Dept 2004], *lv denied* 4 NY3d 804 [2005]; *cf. People v Swamp*, 84 NY2d 725, 732 [1995]). Indeed, as we have held, such a report is not necessary to sustain a conviction for selling drugs (*see People v Cruz*, 298 AD2d 905, 905 [4th Dept 2002], *lv denied* 99 NY2d 557 [2002]; *People v Lynch*, 85 AD2d 126, 128-130 [4th Dept 1982]). Upon viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that County Court (Bauer, A.J.) erred in refusing to suppress all of defendant's statements to the police and the evidence that was "obtained through knowledge gained by reason of said statements." Although the court suppressed the statements defendant made to police officers at the police station, the court refused to suppress the statements defendant made at the scene of his initial detention and the physical evidence that was retrieved from his person.

Defendant contends initially that police officers lacked sufficient cause to effectuate the vehicle stop and to seize defendant. We agree with the People that defendant did not preserve for our review his challenge to the initial stop of the vehicle inasmuch as he did not raise that challenge in his motion papers or before the suppression court (*see People v Facen*, 117 AD3d 1463, 1464 [4th Dept 2014], *lv denied* 23 NY3d 1020 [2014]). Contrary to defendant's contention, the court, in expressing an advisory opinion on what it would have concluded had such a challenge been made, did not "expressly decide[]" the issue in response to a protest by defendant (CPL 470.05 [2]; *see People v Turriago*, 90 NY2d 77, 84 [1997], *rearg denied* 90 NY2d 936 [1997]; *cf. People v Gambale*, 150 AD3d 1667, 1668 [4th Dept 2017]; *see generally People v Smith*, 22 NY3d 462, 465 [2013]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that he was subjected to a de facto arrest without probable cause and, in the alternative, that he was detained without reasonable suspicion. We agree with defendant that he preserved the former contention for our review inasmuch as he contended, in his motion papers, that he was "detained without probable cause to arrest." Although the latter contention was not specifically raised in the motion papers, we nevertheless exercise our power to address it as a matter of discretion in the interest of justice (*see id.*).

As defendant contends, the police officers lacked reasonable suspicion to detain him. It is undisputed that a police officer conducting surveillance of a shopping plaza parking lot known for narcotics transactions observed defendant approach a vehicle that was parked in a remote location of that parking lot in the middle of the afternoon. Defendant had his back toward the officer, who testified at the suppression hearing that he could not see "what, if anything, was passed back and forth." Although the officer surmised that a drug transaction occurred, a "mere 'hunch' or 'gut reaction' " is insufficient to create the requisite reasonable suspicion that criminal activity was afoot (*People v Sobotker*, 43 NY2d 559, 564 [1978]; *see People v Stock*, 57 AD3d 1424, 1425 [4th Dept 2008]). Nevertheless, that officer directed two teams of officers to stop the purported buyer's vehicle as well as the vehicle in which defendant left the scene of the purported transaction as a passenger. One team of officers approached the vehicle in which defendant was a passenger while it was located at a fast-food restaurant one-half mile away from

the scene of the purported transaction. After defendant exited the vehicle, he was immediately handcuffed and escorted by those officers to a different area of the restaurant parking lot, where he was questioned "for a while." It is undisputed that defendant was not free to leave at that point in time. Defendant thereafter admitted that he was in possession of cocaine, at which time he was placed under arrest.

A second team of officers stopped and questioned the purported buyer. She admitted purchasing $50 of cocaine and, after officers drove her to defendant's location, she identified him as the person who sold her the cocaine. Defendant was thereafter taken to the police station, where officers recovered cocaine and $50 from his person.

It is well settled that reasonable suspicion "may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation" (*People v Brannon*, 16 NY3d 596, 602 [2011]; *see People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]) and, here, it is undisputed that there was no actual observation of any hand-to-hand exchange (*cf. People v Lee*, 110 AD3d 1482, 1483 [4th Dept 2013]). The People ask that we infer that there was some communication between the officers who stopped the buyer and the officers who stopped defendant that would provide the officers detaining defendant with reasonable suspicion to support the detention (*see People v Ramirez-Portoreal*, 88 NY2d 99, 114 [1996]). We decline to do so inasmuch as the stops of the buyer and defendant occurred simultaneously and defendant was forcibly detained almost immediately upon his exit from the vehicle. There is no basis to draw any inference that there was additional communication between the two teams of officers before defendant's detention (*cf. id.*).

Inasmuch as the officer conducting the surveillance and directing the stop of defendant "did not see what the defendant and [the alleged buyer] exchanged, could not see if one of the [participants] gave the other something in return for something else, and did not see money pass between the two [individuals]," we conclude that the officers detaining defendant lacked reasonable suspicion to do so (*People v Loper*, 115 AD3d 875, 879 [2d Dept 2014]; *see People v Forrest*, 77 AD3d 511, 512 [1st Dept 2010]; *People v Peterson*, 266 AD2d 738, 739 [3d Dept 1999]).

Based on the foregoing, we further conclude that defendant's detention constituted a de facto arrest (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Although the use of handcuffs does not automatically transform a defendant's detention into a de facto arrest (*see People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]), such use must be justified by some additional circumstances, such as a threat of evasive conduct (*see People v McDonald*, 173 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]); a need to transport the defendant for a showup procedure (*see People v Owens*, 39 AD3d 1260, 1261 [4th Dept 2007], *lv denied* 9 NY3d 849 [2007]); a fear that the

suspect may interfere with the execution of a search warrant (*see People v Binion*, 100 AD3d 1514, 1516 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]); or a concern for officer safety (*see People v Allen*, 73 NY2d 378, 379-380 [1989]).

Here, there was no testimony to establish any of those circumstances. Specifically, there was no testimony that the officer who handcuffed defendant "reasonably suspect[ed] that he [was] in danger of physical injury by virtue of [defendant] being armed" (*People v De Bour*, 40 NY2d 210, 223 [1976]). "[T]he test for determining whether a defendant is in custody or has been subjected to a de facto arrest is 'what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Brewer*, 118 AD3d 1407, 1408 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], quoting *Yukl*, 25 NY2d at 589; *see People v Hicks*, 68 NY2d 234, 240 [1986]). In our view, a reasonable person innocent of any crime would have believed that he or she was under arrest under the circumstances of this case (*see Lee*, 110 AD3d at 1484; *see also People v Finch*, 137 AD3d 1653, 1654 [4th Dept 2016]).

We further conclude that the de facto arrest was not supported by probable cause inasmuch as the officer directing the team to stop defendant did not observe any of the telltale signs of a narcotics transaction, such as a hand-to-hand exchange, an exchange of currency or glassine bags, or evasive or furtive behavior. Despite the officer's experience in drug investigations, the evidence is simply insufficient to establish probable cause to believe that a crime occurred (*see Lee*, 110 AD3d at 1484; *see also People v Ayarde*, 161 AD3d 630, 631 [1st Dept 2018]).

Based on our determination, we conclude that defendant's statements at the scene must be suppressed. Inasmuch as defendant admitted to the possession of the cocaine on his person in those statements, the cocaine seized from his person must also be suppressed (*see Lee*, 110 AD3d at 1484). We do not reach the same conclusion with respect to the money that was taken from defendant. In his omnibus motion, defendant sought suppression of only that physical evidence that was "obtained through knowledge gained by reason of [the] statements." There is no evidence that the money was obtained as a direct result of defendant's statements, and we do not address any other basis for suppression of that evidence.

Inasmuch as the counts of which defendant was convicted relate to the sale of cocaine to the alleged buyer and defendant's possession of cocaine with intent to sell at the location of the shopping plaza, i.e., possession of the cocaine that was ultimately sold, our determination does not "result[] in the suppression of all evidence in support of the crimes" of conviction and thus does not require dismissal of the indictment (*People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]).

We therefore reverse the judgment, grant that part of the omnibus motion seeking to suppress the statements made by defendant at the scene of his detention as well as the cocaine seized as a result of

those statements and grant a new trial on counts one, two and five of the indictment.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

263

CA 19-01548

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

BURKE, ALBRIGHT, HARTER & RZEPKA LLP, AND BURKE, ALBRIGHT, HARTER & REDDY, LLP, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

AUDREY ELAINE SILLS, AS EXECUTOR OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, DEFENDANT-APPELLANT.

PAUL A. ARGENTIERI, HORNELL, FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTOPHER MILITELLO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), entered January 31, 2019. The order granted plaintiffs' motion to dismiss all counterclaims and denied defendant's cross motion for, inter alia, leave to serve a third amended answer with counterclaims.

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

Memorandum: Plaintiffs commenced this action in 2004 to recover fees for legal services rendered to Angeline V. Sills (decedent). Decedent, through a guardian, asserted various counterclaims in an amended answer. Decedent passed away in 2005 and, in 2008, defendant and one of her siblings, Robert Sills, were appointed coexecutors of decedent's estate. In 2010, Supreme Court granted plaintiffs' motion for partial summary judgment dismissing two of the counterclaims and granted the coexecutors' cross motion for leave to serve a second amended answer to assert additional counterclaims for fraud and breach of fiduciary duty. We affirmed that order, rejecting, inter alia, plaintiffs' contention that the court erred in failing to award them summary judgment dismissing the legal malpractice counterclaim (*Burke, Albright, Harter & Rzepka, LLP v Sills*, 83 AD3d 1413 [4th Dept 2011]). As a result of the motion and cross motion, the second amended answer was filed, asserting counterclaims for fraud, breach of fiduciary duty and legal malpractice.

In 2016, the third attorney to represent the coexecutors was granted permission to withdraw. In 2017, Robert passed away, and no further action occurred on the case until March 2018, when an attorney purporting to represent either defendant or decedent's estate

submitted a letter to plaintiffs' counsel. That attorney ultimately filed a notice of appearance on behalf of, inter alia, defendant in May 2018. On June 11, 2018, plaintiffs served upon defendant a demand to resume prosecution (*see* CPLR 3216). After defendant failed to respond to the demand within the requisite 90-day period, plaintiffs moved to dismiss the counterclaims pursuant to CPLR 3216.

Rather than oppose the motion, defendant cross-moved for, inter alia, leave to serve a third amended answer with counterclaims on plaintiffs, "collectively and individually," and for leave to serve a third-party complaint against an insurance company and plaintiffs' defense lawyers, "individually and collectively." Defendant sought to assert a counterclaim and cause of action under Judiciary Law § 487. The court granted the motion and denied the cross motion, and we now affirm.

Contrary to defendant's contention, the court properly granted the motion and dismissed all of defendant's existing counterclaims. Defendant provided no explanation for her failure to respond to the 90-day demand and, in our view, that failure established a valid basis for dismissal. Although the court retains some discretion in determining whether to dismiss a cause of action or counterclaim under CPLR 3216, that section "presupposes that [the party opposing dismissal will] tender[ ] *some* excuse in response to the motion in an attempt to satisfy the statutory threshold" (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 504 [1997] [emphasis added]; *see Burridge v Gaines*, 281 AD2d 967, 967 [4th Dept 2001]; *see also Walker v City of New York*, 87 AD3d 734, 735 [2d Dept 2011]; *Grullon v Henry*, 7 AD3d 342, 343 [1st Dept 2004]). "If [a party] unjustifiably fails to comply with the 90-day requirement, knowing full well that the action can be saved simply by filing a note of issue but is subject to dismissal otherwise, the culpability for the resulting dismissal is squarely placed at the door of [that party] or [its] counsel" (*Baczkowski*, 89 NY2d at 504-505).

Although defendant further contends that the court erred in denying the cross motion, defendant's contentions are limited to the court's denial of that part of the cross motion that sought leave to serve a third amended answer with further counterclaims against plaintiffs only. Defendant does not address the court's denial of that part of the cross motion that sought leave to add the individual attorneys in plaintiffs' firm to the instant action or that part of the cross motion that sought leave to serve a third-party complaint against an insurance company and the attorneys representing plaintiffs in this action. We thus deem those issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

It is well settled that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983], quoting CPLR 3025 [b]). Here, there was a 14-year delay between the time the complaint was filed and the time defendant sought leave to amend the answer to add the new counterclaim. Nevertheless, " '[m]ere lateness is not a barrier to

the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). "Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]).

We conclude that plaintiffs established significant prejudice resulting from the delay inasmuch as their primary witness died in 2017 and another significant witness suffers from dementia and is unable to recall the events underlying the proposed amendment (*see e.g. Slavet v Horton Mem. Hosp.*, 227 AD2d 465, 466 [2d Dept 1996]; *Chemicraft Corp. v Honeywell Protection Servs.*, 161 AD2d 250, 250 [1st Dept 1990]). Moreover, defendant has failed to offer *any* excuse for the delay in attempting to assert the new counterclaim. "Where[, as here,] there has been an extended delay in moving to amend, the party seeking leave to amend *must* establish a reasonable excuse for the delay" (*Jablonski v County of Erie*, 286 AD2d 927, 928 [4th Dept 2001] [emphasis added]; *see Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]; *J.B. Stauffer Constr. Co., Inc. v Mailloux*, 35 AD3d 1207, 1207 [4th Dept 2006]). "Given [defendant's] extensive and unexplained delay in seeking to amend [the second amended answer] based on facts that were known to [defendant] since the onset of the litigation" and the substantial prejudice to plaintiffs resulting from the delay, we see no basis to disturb the court's discretionary determination to deny the cross motion (*Schelchere v Halls*, 120 AD3d 788, 788 [2d Dept 2014]; *see Raymond*, 98 AD3d at 1266; *Gross, Shuman, Brizdle & Gilfillan v Bayger*, 256 AD2d 1187, 1187 [4th Dept 1998]).

Based on our determination, we do not address defendant's remaining contentions.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

265

CA 19-00135

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

TOWN OF WEST SENECA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIDENEY ARCHITECTS, P.C., FORMERLY KNOWN AS KIDENEY ARCHITECTS, LAPING JAEGER ASSOCIATES, P.C., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MATTHEW D. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J., by Frederick J. Marshall, J.), entered January 17, 2019. The order granted defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this malpractice action against defendant, an architectural firm, in relation to a construction project. Before breaking ground on the project, plaintiff entered into an agreement with an engineering firm, pursuant to which the engineering firm agreed to provide professional engineering services on the project. The engineering firm, in turn, entered into a contract with defendant, pursuant to which defendant agreed to provide professional architectural services on the project. Plaintiff certified the building as complete in 2002, found damage in 2017, and commenced this action in 2018.

In appeal No. 1, plaintiff appeals from an order granting defendant's motion to dismiss the complaint. In appeal No. 2, plaintiff appeals from an order that revised the order in appeal No. 1 by setting forth the reasons for dismissal of the complaint, and that denied plaintiff's motion to settle the record on appeal in appeal No. 1.

We first address plaintiff's contentions in appeal No. 2. Insofar as the order in that appeal concerns dismissal of the complaint, we dismiss the appeal because the order "merely clarified" the original order (*Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d

Dept 1978]). With respect to the motion to settle the record on appeal, however, we agree with plaintiff that Supreme Court erred in denying that motion. More particularly, the court erred in excluding from the record the transcript of oral argument on the motion to dismiss the complaint (*see Mosey v County of Erie*, 148 AD3d 1572, 1573 [4th Dept 2017]; *OneWest Bank, FSB v Spencer*, 145 AD3d 1488, 1488 [4th Dept 2016]), and the memoranda of law, which may be included only for the limited purpose of determining whether the contentions on appeal are preserved for our review (*see Byrd v Roneker*, 90 AD3d 1648, 1649 [4th Dept 2011]). We thus modify the order in appeal No. 2 by granting the motion to settle the record on appeal.

With respect to appeal No. 1, we conclude that the court properly granted defendant's motion to dismiss the complaint on the ground that plaintiff's cause of action is barred by the three-year statute of limitations (*see* CPLR 214 [6]; *Gelwicks v Campbell, Surveyors*, 257 AD2d 601, 602 [2d Dept 1999]). Plaintiff contends that its cause of action did not accrue upon completion of the construction in 2002, but rather upon discovery of the damage in 2017, because it was not a party to the contract pursuant to which defendant agreed to provide architectural services. We reject that contention. A claim against an architect accrues upon the completion of performance (*see Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1030 [2013], *rearg denied* 23 NY3d 934 [2014]; *City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538 [1995]). "This rule applies 'no matter how a claim is characterized in the complaint' because 'all liability' for defective construction 'has its genesis in the contractual relationship of the parties' " (*Lizza Indus., Inc.*, 22 NY3d at 1030, quoting *City School Dist. of City of Newburgh*, 85 NY2d at 538). "Even if the plaintiff is not a party to the underlying construction contract, the claim may accrue upon completion of the construction where the plaintiff is not a 'stranger to the contract,' and the relationship between the plaintiff and the defendant is the 'functional equivalent of privity' " (*id.*, quoting *City School Dist. of City of Newburgh*, 85 NY2d at 538-539).

Despite the lack of privity between plaintiff and defendant, plaintiff was "not a stranger to the contract" (*City School Dist. of City of Newburgh*, 85 NY2d at 538). Indeed, we conclude that plaintiff was an intended third-party beneficiary of the contract (*see id.*). A nonparty to a contract is an intended third-party beneficiary where (1) there is a "valid and binding contract between other parties," (2) the contract was intended for the nonparty's benefit, and (3) "the benefit to [the nonparty] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the nonparty] if the benefit is lost" (*Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1468 [4th Dept 2012]; *see DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311 [4th Dept 2005]). A nonparty is " 'an intended beneficiary, rather than merely an incidental beneficiary, when the circumstances indicate that the promisee[, i.e., the engineering firm here,] intends to give the beneficiary the benefit of the promised performance' " (*Logan-Baldwin*, 94 AD3d at 1468; *see Fourth Ocean Putnam Corp. v*

Interstate Wrecking Co., 66 NY2d 38, 44 [1985]). The circumstances present here satisfy that test. It is undisputed that there was a valid contract between defendant and the engineering firm. That contract specifically listed plaintiff in the recitals, and expressly incorporated the agreement between the engineering firm and plaintiff. Pursuant to that contract, defendant designed the building that plaintiff has owned for nearly two decades. Indeed, plaintiff alleged in the complaint that defendant knew that its services were for plaintiff's benefit, and that plaintiff would rely upon those services.

Because plaintiff "is not a 'stranger to the contract,' " its professional malpractice cause of action accrued upon completion of performance by defendant (*Lizza Indus., Inc.*, 22 NY3d at 1030; *see City School Dist. of City of Newburgh*, 85 NY2d at 538). Therefore, the complaint is time-barred (*see* CPLR 214 [6]).

In light of our determination, plaintiff's remaining contentions in appeal No. 1 are academic.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

266

CA 19-01139

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

TOWN OF WEST SENECA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIDENEY ARCHITECTS, P.C., FORMERLY KNOWN AS
KIDENEY ARCHITECTS, LAPING JAEGER ASSOCIATES, P.C.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MATTHEW D. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 11, 2019. The order, among other things, denied plaintiff's motion to settle the record on appeal and ordered that memoranda of law and a transcript of oral argument will not be included in the record on appeal.

It is hereby ORDERED that said appeal from the order insofar as it relates to the second ordering paragraph is unanimously dismissed and the order is modified on the law by granting the motion to settle the record on appeal and as modified the order is affirmed without costs.

Same memorandum as in *Town of W. Seneca v Kideney Architects, P.C.* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

267

CA 19-01034

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

CASSANDRA MONNIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLOVER GROUP, INC., BRIARCLIFF ASSOCIATES, LP, BRIARCLIFF APARTMENTS AND CLOVER MANAGEMENT, INC., DEFENDANTS-RESPONDENTS.

LOTEMPIO P.C. LAW GROUP, BUFFALO (BRIAN KNAUTH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 24, 2019. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the amended complaint insofar as the amended complaint, as amplified by the bill of particulars, alleges that defendants had constructive notice of a recurring dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on ice on a sidewalk at property owned or managed by defendants. Prior to the incident, plaintiff had been providing home health care for a tenant at the property. Plaintiff fell after she left that tenant's apartment. Defendants moved for summary judgment dismissing the amended complaint, and Supreme Court granted the motion. Plaintiff appeals.

At the outset, we note that plaintiff contends on appeal only that the court erred in granting the motion insofar as the amended complaint, as amplified by the bill of particulars, alleges that defendants had constructive notice of a recurring dangerous condition, and plaintiff has therefore abandoned any other theories of liability (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). It is well settled that " '[a] defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition' " (*Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1378 [4th Dept

2008]).

Even assuming, arguendo, that defendants met their initial burden on the motion (*see generally Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1468-1469 [4th Dept 2013]), we conclude that plaintiff raised a triable issue of fact whether defendants had actual knowledge of an ongoing and recurring dangerous condition on the premises (*see Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958, 960-961 [3d Dept 2011]). In opposition to the motion, plaintiff submitted, inter alia, the deposition testimony of the tenant that she had treated on the day of the incident. The tenant testified that, "basically[,] what happens is there's a lot of runoff from the ground over here. When the snow melts the whole area gets flooded and then it freezes, and then you have a solid sheet of ice pretty much over these last few blocks of the sidewalk and then down in the end, right at the end where the parking lot meets the sidewalk. I've actually contacted management many times in regards to that issue." The tenant further testified that, when he contacted the property manager on such occasions prior to the incident, he was told that there was nothing that could be done because "the snow melts, thaws and freezes, and there's nothing they can do about water." He also noted that he had been living at the property for 11 years, and no steps had been taken during that time to eliminate water from pooling on the sidewalk. We agree with plaintiff that the recurring dangerous condition theory was "readily discernable" from the allegations set forth in her bill of particulars (*Shanoff v Golyan*, 139 AD3d 932, 934 [2d Dept 2016]; *see generally Byrnes v Satterly*, 85 AD3d 1711, 1712 [4th Dept 2011]; *DaBiere v Craig*, 268 AD2d 875, 876 [3d Dept 2000]). We further agree with plaintiff that "[t]his evidence, when considered in a light most favorable to plaintiff, was sufficient to meet her burden of raising a factual question concerning whether the recurring nature of the situation put defendant[s] on constructive notice that a dangerous condition existed [on the premises]" (*Black*, 80 AD3d at 961; *see Knight v Sawyer*, 306 AD2d 849, 849 [4th Dept 2003]; *Loguidice v Fiorito*, 254 AD2d 714, 714 [4th Dept 1998]; *Columbo v James River, II, Inc.*, 197 AD2d 760, 761 [3d Dept 1993]). Finally, we cannot conclude, as matter of law, that plaintiff did not fall in the same location as, or in close proximity to, the area affected by the allegedly recurring condition (*cf. Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1402 [4th Dept 2018]; *Carpenter v J. Giardino, LLC*, 81 AD3d 1231, 1232-1233 [3d Dept 2011], *lv denied* 17 NY3d 710 [2011]). We therefore modify the order accordingly.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

271

CA 18-02366

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

TOWN OF WEST SENECA, PLAINTIFF-APPELLANT,

V ORDER

LOUIS DESIGN SOLUTIONS ARCHITECTURE, LLC,
FORMERLY KNOWN AS LOUIS DESIGN GROUP,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MATTHEW D. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 3, 2018. The order and judgment granted defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs (*see Town of W. Seneca v Kideney Architects, P.C.* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

272

CA 19-00833

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

TOWN OF WEST SENECA, PLAINTIFF-APPELLANT,

V ORDER

LOUIS DESIGN SOLUTIONS ARCHITECTURE, LLC,
FORMERLY KNOWN AS LOUIS DESIGN GROUP,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MATTHEW D. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 22, 2019. The order and judgment revised a prior order and judgment granting defendant's motion to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Town of W. Seneca v Kideney Architects, P.C.* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

273

CA 19-00850

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

TOWN OF WEST SENECA, PLAINTIFF-APPELLANT,

V ORDER

LOUIS DESIGN SOLUTIONS ARCHITECTURE, LLC,
FORMERLY KNOWN AS LOUIS DESIGN GROUP,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MATTHEW D. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 22, 2019. The order, insofar as appealed from, denied plaintiff's motion to settle the record on appeal and ordered that memoranda of law and a transcript of oral argument will not be included in the record on appeal.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion to settle the record is granted (*see Town of W. Seneca v Kideney Architects, P.C.* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

279

KA 17-02211

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD ALLS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered December 7, 2017. The judgment convicted defendant upon his plea of guilty of leaving the scene of an incident without reporting personal injury.

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 leaving the scene of an incident without reporting personal injury, which resulted in serious physical injury (Vehicle and Traffic Law § 600 [2] [a], [c] [i]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. "Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of [his] challenge to the severity of [his] sentence" (*People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that this was defendant's fourth felony conviction and that he has already been released to parole supervision.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

312

CA 19-01092

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ROBERT M. WEICHERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF EVANS MILLS, ET AL., RESPONDENTS,
AND COUNTY OF JEFFERSON, RESPONDENT-APPELLANT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN, FOR RESPONDENT-APPELLANT.

ROBERT M. WEICHERT, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered February 28, 2019. The judgment, among other things, directed respondent County of Jefferson to comply with a directive in a 2005 judgment of foreclosure.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first ordering paragraph, vacating that part of the judgment converting the CPLR article 78 proceeding to a "Contempt of Court" proceeding, converting the converted declaratory judgment action to a joint declaratory judgment action and application for an enforcement of judgment pursuant to CPLR 5102, and granting respondent County of Jefferson 30 days from the date of entry of the order of this Court to serve and file an answer in this converted declaratory judgment action, and as modified the judgment is affirmed without costs.

Memorandum: Respondent County of Jefferson (County) previously commenced a tax foreclosure proceeding with respect to property belonging to petitioner and, in September 2005, obtained a judgment of foreclosure (2005 judgment of foreclosure) awarding it possession of the property and directing the County's tax enforcement officer to prepare, execute, and record a deed conveying title to the County. We affirmed that judgment on appeal (*Matter of County of Jefferson [Weichert]*, 38 AD3d 1364 [4th Dept 2007], *lv dismissed* 9 NY3d 940 [2007]). The County's tax enforcement officer, however, did not prepare, execute, or record the deed as directed in the 2005 judgment of foreclosure.

In 2017, respondent Village of Evans Mills (Village) issued petitioner an appearance ticket alleging that structures on the

property were unsafe; the Village also undertook certain repairs to those structures for which it billed petitioner. Petitioner, acting pro se, thereafter commenced a CPLR article 78 proceeding seeking, inter alia, a declaration that he is not the owner of the property. The County now appeals from a judgment that, in effect, denied its pre-answer motion to dismiss the amended petition pursuant to CPLR 3211 (a) (2), (5), and (7) and, inter alia, determined that it was "appropriate to convert this matter to a Declaratory Judgment or Contempt of Court petition" and ordered the County to comply with the directive in the 2005 judgment of foreclosure.

We agree with the County that petitioner's proper remedy for the enforcement of the 2005 judgment of foreclosure is an application pursuant to CPLR 5102 (*see Clifton Country Rd. Assoc. v Vinciguerra*, 225 AD2d 932, 933 [3d Dept 1996]; *see generally* CPLR 103 [c]) rather than enforcement of the judgment by contempt (*see generally* CPLR 5104). We therefore modify the judgment by vacating that part of the judgment converting the CPLR article 78 proceeding to a "Contempt of Court" proceeding and converting the converted declaratory judgment action to a joint declaratory judgment action and application for an enforcement of judgment pursuant to CPLR 5102.

The County does not challenge Supreme Court's conversion of the matter into an action seeking a declaration pursuant to CPLR 3001, but it contends that the court erred in granting relief to petitioner without affording the County an opportunity to file an answer. We agree (*see Matter of Liederman v Mills*, 238 AD2d 593, 594 [2d Dept 1997]; *see also Jones v Town of Carroll*, 32 AD3d 1216, 1218 [4th Dept 2006], *appeal dismissed* 12 NY3d 880 [2009]; *see generally* CPLR 103 [c]). We therefore further modify the judgment by vacating the first ordering paragraph and granting the County 30 days from the date of entry of the order of this Court to serve and file an answer with respect to the converted declaratory judgment action.

We have examined the County's remaining contentions and conclude that none warrants further relief.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

314

CA 19-01672

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION AND BATAVIA INVESTORS, LTD., PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC., DEFENDANT-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (WILLIAM E. BRUECKNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLAND & KNIGHT LLP, WASHINGTON, D.C. (STEVEN D. GORDON, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Timothy J. Walker, A.J.), entered August 19, 2019. The order, inter alia, denied the motion of defendant for summary judgment and granted the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Supreme Court, Genesee County, for further proceedings in accordance with the following opinion and as modified the order is affirmed without costs.

Opinion by PERADOTTO, J.:

In this action seeking, inter alia, a declaration that a mortgage is unenforceable on the ground that the limitations period for enforcement thereof had expired, we must determine, among other things, the applicable provision of the General Obligations Law under which the otherwise expired statute of limitations might be revived. We conclude that General Obligations Law § 17-105 (1), and not § 17-101, applies in this case.

I.

The undisputed facts establish that plaintiff Batavia Townhouses, Ltd. (Partnership)—which at all relevant times was comprised of defendant, as general partner, and plaintiffs Arlington Housing Corporation and Batavia Investors, Ltd. (collectively, Limited Partner plaintiffs), as limited partners—was formed to acquire and operate an apartment complex that had been owned and managed by defendant.

Partnership purchased the apartment complex and executed a wraparound note and mortgage (collectively, mortgage) in favor of defendant that was subordinate to a separate, previously issued loan on which defendant remained the obligor. Income generated by the apartment complex was used by Partnership to pay down the debt under the mortgage and, in turn, those funds were used by defendant to pay down the debt on the loan. Both the loan and the mortgage matured at the beginning of March 2012, and the loan was paid off on schedule, thereby leaving the mortgage as the sole encumbrance on the apartment complex property. After the maturity date, however, payments on the mortgage ceased, and defendant never instituted an action to foreclose on it.

More than six years after the maturity date, the Limited Partner plaintiffs accused defendant of violating its duties as the general partner by keeping rents at the apartment complex artificially low and preventing Partnership from paying off the mortgage, thereby siphoning the equity interest of the Limited Partner plaintiffs to defendant's own account. The Limited Partner plaintiffs sought to remove defendant as general partner pursuant to the partnership agreement, and litigation then began in federal court concerning the attempted removal. A few months later, defendant's Board of Directors adopted a resolution stating that defendant, as holder of the mortgage, demanded that Partnership resume "monthly debt service payments of interest" on the mortgage. The resolution stated that the purpose for demanding resumption of those payments was because defendant "ha[d] an immediate need for cash resources in order to defend itself and assert its interests in the litigation with the [Limited Partner plaintiffs]." Thereafter, defendant, as general partner of Partnership, made such payments to itself, as holder of the mortgage, which eventually totaled $330,000.

The Limited Partner plaintiffs commenced this derivative action (*see* Partnership Law § 121-1002) seeking, inter alia, a judgment declaring pursuant to RPAPL 1501 (4) that the mortgage is unenforceable on the ground that the limitations period for enforcement thereof had expired. Defendant appeals from an order that, among other things, denied its motion for summary judgment seeking a declaration that the mortgage is valid and enforceable and granted plaintiffs' cross motion for summary judgment seeking, inter alia, to cancel and discharge the mortgage.

II.

Defendant contends that, under either General Obligations Law § 17-101 or § 17-105 (1), its submissions—i.e., Partnership's financial statements that were sent to defendant and the Limited Partner plaintiffs during the relevant period and Partnership's tax returns—establish that the limitations period on a foreclosure action was revived and therefore that the mortgage remains enforceable. We agree with plaintiffs, however, that: (A) only General Obligations Law § 17-105 (1) applies, and (B) the documents submitted by defendant are not sufficient under that subdivision to revive the statute of

limitations.

Initially, RPAPL 1501 (4) provides in pertinent part that,

> "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance."

Thus, a party with an interest in real property that is subject to a mortgage may commence an action seeking to cancel and discharge the mortgage based on the expiration of the six-year statute of limitations applicable to mortgage foreclosure actions (*see* CPLR 213 [4]; *LePore v Shaheen*, 32 AD3d 1330, 1330-1331 [4th Dept 2006]). With an exception not relevant to this case, "it is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt" (*CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st Dept 2007]).

Here, it is undisputed that plaintiffs established in support of their cross motion that the six-year limitations period began to run at the beginning of March 2012 and expired at the beginning of March 2018. It is further undisputed that no payments on the mortgage were made by Partnership, the property owner, during that period. Plaintiffs thus met their initial burden of "establishing that more than six years had elapsed since [Partnership] defaulted on the mortgage . . . thereby establish[ing] that a mortgage foreclosure action commenced by defendant would be time-barred" (*LePore*, 32 AD3d at 1331; *see Defelice v Frew*, 166 AD3d 725, 726 [2d Dept 2018]). The burden therefore shifted to defendant to raise a triable issue of fact whether the statute of limitations was tolled or revived (*see JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 [2d Dept 2010]; *LePore*, 32 AD3d at 1331; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A.

There are two statutory provisions that potentially apply in this case to revive the otherwise expired statute of limitations. General Obligations Law § 17-101 provides, in relevant part:

> "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for

> the recovery of real property."

Further, General Obligations Law § 17-105 (1) provides, in relevant part:

> "A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise."

We agree with plaintiffs for the reasons that follow that General Obligations Law § 17-105 (1), and not § 17-101, applies in this case.

First, the plain language of subdivision (1) of section 17-105 is specifically applicable to waivers of the limitations period for commencement of an action to foreclose a mortgage and promises to pay mortgage debt. As plaintiffs correctly contend, and contrary to defendant's assertion, that subdivision, by its terms, applies to the type of action brought here under RPAPL 1501 (4), which requires the party bringing such an action to establish that the limitations period for the commencement of a mortgage foreclosure action has expired (*see generally Albin v Dallacqua*, 254 AD2d 444, 444 [2d Dept 1998]).

Second, legislative history supports the conclusion that subdivision (1) of section 17-105 governs here. The Law Revision Commission recognized that the rationale for permitting a mere "acknowledgment" to revive a general or contractual debt—i.e., that such acknowledgment implied a new promise to pay the debt supported by moral consideration of the previous obligation—is inapplicable to the acknowledgment of a mortgage lien on real property because a mortgage is not a promise but rather an executed transaction creating an interest in real property (*see* 1961 Rep of NY Law Rev Commn, reprinted in 1961 McKinney's Session Laws of NY, at 1873-1874). The Commission thus proposed a separate provision—eventually codified as General Obligations Law § 17-105—that would clarify whether a transaction should be given the effect of either tolling the limitations period applicable to a mortgage foreclosure or reviving that limitations period after it had run (*see id.* at 1875-1876). The determination whether a transaction should be given those effects was to be controlled by two factors: (1) whether the transaction manifested an intention to waive the limitations period or not plead it, and (2) whether the transaction expressing such intent was sufficiently evidenced (*see id.*). With respect to the first factor, the Commission

listed several ways in which the requisite intention might manifest itself, including an express waiver of the limitations period and a promise not to plead it (*see id.*). Critically, an intention to waive the limitations period would also "reasonably . . . be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage" (*id.*; *accord* § 17-105 [1]). In sum, subdivision (1) of section 17-105 was enacted specifically to address the waiver of the statute of limitations applicable to mortgage debt and, in doing so, provided that an express promise to pay such debt made after the accrual of the right to foreclose would be sufficient to revive the otherwise expired statute of limitations.

Third, a leading treatise on mortgage foreclosure law in New York likewise reinforces the conclusion that subdivision (1) of section 17-105, and not section 17-101, applies. The treatise states, in relevant part, that "the statutes must be read carefully as a cursory look at General Obligations Law section[] 17-101 . . . might lead one to the erroneous conclusion that [it is] applicable to mortgage foreclosures; in fact, it is the provisions of [General Obligations Law §] 17-105 that are controlling" (1 Bergman on New York Mortgage Foreclosures § 5.11 [7] [2020]).

Fourth, principles of statutory construction support the same conclusion. Even assuming, arguendo, that the inapplicability of section 17-101 to "an action for the recovery of real property" does not remove from its scope actions under RPAPL article 15, we conclude that those principles still dictate that subdivision (1) of section 17-105 applies here. It is well established that, "whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable" (*Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 NY3d 1, 9 [2016]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 238). Section 17-101 is a general provision applicable to all types of contractual debts, whereas subdivision (1) of section 17-105 is a specific provision applicable to mortgage debts and, therefore, that subdivision is the applicable provision here. Defendant nonetheless asserts that the statutory structure supports the conclusion that a mere acknowledgment—as opposed to a promise—is effective to fulfill subdivision (1) of section 17-105. We reject that assertion. While an acknowledgment of mortgage debt is certainly inherent in a promise to pay that debt, it does not follow that mere acknowledgment is sufficient to fulfill the requirements of subdivision (1) of section 17-105 because that subdivision requires something more in the form of an express promise to pay (*see Petito v Piffath*, 85 NY2d 1, 8-9 [1994], *rearg denied* 85 NY2d 858 [1995], *cert denied* 516 US 864 [1995]; *see generally* 1 Bergman on New York Mortgage Foreclosures § 5.11 [6] [a]).

Fifth, case law to which we are bound does not compel a different conclusion. Defendant correctly notes that the Court of Appeals has analyzed the sufficiency of evidence under *both* section 17-101 and subdivision (1) of section 17-105 in a mortgage debt case (*see Petito*, 85 NY2d at 4-9). However, upon our review of the underlying appellate

decision in *Petito* (199 AD2d 252, 253 [2d Dept 1993], *revd* 85 NY2d 1 [1994]), which applied subdivision (1) of section 17-105 only, as well as the parties' briefs at the Court of Appeals, which did not squarely raise the threshold issue concerning the applicability of section 17-101 in mortgage debt cases (*see* brief for defendant-appellant, available at 1994 WL 16044901; brief for plaintiff-respondent, available at 1994 WL 16044902; reply brief for defendant-appellant, available at 1994 WL 16044903), we conclude that the Court of Appeals in *Petito* had no occasion to pass on that threshold issue (*see generally Naso v Lafata*, 4 NY2d 585, 591 [1958], *rearg denied* 5 NY2d 861 [1958]). Rather, in our view, the more accurate reading of *Petito* is that the Court of Appeals *assumed* the applicability of section 17-101 and decided only that, if that section also applied, the subject stipulation in that case did not constitute a sufficient acknowledgment thereunder (85 NY2d at 8).

B.

In light of our determination with respect to the applicable statutory provision, whether the documents submitted by defendant were sufficient to revive the statute of limitations depends on whether those documents constitute "a promise to pay the mortgage debt . . . made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged" (General Obligations Law § 17-105 [1]).

As Supreme Court properly concluded, the financial statements submitted by defendant do not meet the requirements of subdivision (1) of section 17-105 because those documents merely list the mortgage as a liability and do not constitute an express promise to pay the mortgage debt (*see Petito*, 85 NY2d at 8-9; *Filigree Films, Inc., Pension Plan v CBC Realty Corp.*, 229 AD2d 862, 863 [3d Dept 1996]; *cf. National Loan Invs., L.P. v Piscitello*, 21 AD3d 537, 538 [2d Dept 2005]; *Albin*, 254 AD2d at 445).

We agree with defendant that the court erred in failing to consider the tax returns it submitted. "Although defendant 'could not rely in support of [its] motion on evidence submitted for the first time in [its] reply papers[,]' . . . the [tax returns] were submitted by defendant in opposition to plaintiff[s'] cross motion, and were not merely reply papers in support of its own motion" (*Pittsford Plaza Co. LP v TLC W. LLC*, 45 AD3d 1272, 1274 [4th Dept 2007]). Nonetheless, even when properly considered, the tax returns merely reflect that Partnership had unspecified nonrecourse loans on its balance sheets and do not constitute an express promise to pay the mortgage debt (*see Petito*, 85 NY2d at 8-9).

Based on the foregoing, we conclude that defendant failed to raise a triable issue of fact whether the statute of limitations was revived pursuant to the applicable General Obligations Law § 17-105 (1) (*see generally LePore*, 32 AD3d at 1331).

III.

Defendant further contends that the court erred in concluding that the recommencement of mortgage payments did not revive the limitations period under General Obligations Law § 17-107. Although a partial payment can be effective in reviving the statute of limitations period (*see id.*), the court concluded that the payments were void ab initio because defendant's actions to recommence payment on the mortgage in the midst of litigation over whether defendant should be removed as general partner constituted a breach of fiduciary duty. We see no basis to disturb the court's determination.

The partnership agreement specified that the agreement would be governed by the law of the District of Columbia. The governing law permits partnerships to modify the duties among the partners by identifying "specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable" (DC Code Ann § 29-701.07 [b] [5] [A]). Here, the partnership agreement provided that the general partner would not be liable to Partnership or the Limited Partner plaintiffs for any loss arising from the action of the general partner if the general partner, in good faith, determined that such action was in the best interests of Partnership and such action did not constitute negligence. With respect to good faith, as the court properly noted, "partners owe each other the duty of 'the utmost good faith in all that pertains to their relationship' " especially "in the case of managing general partners in a limited partnership, on whose good faith the other partners depend entirely" (*Washington Med. Ctr., Inc. v Holle*, 573 A2d 1269, 1285 and n 26 [DC Ct App 1990]).

Contrary to defendant's contention, we agree with the Limited Partner plaintiffs that defendant's conduct in compelling Partnership to recommence payments on the mortgage after the statute of limitations expired and thus became unenforceable was to the detriment of Partnership. The record establishes that, in the midst of litigation with the Limited Partner plaintiffs regarding whether it should be removed as general partner, defendant diverted $330,000 from Partnership to pay a time-barred mortgage for the purpose, as stated by defendant's Board of Directors, of generating funds for defendant to defend its own position in that litigation. In doing so, defendant either negligently failed to ascertain the enforceability of the mortgage debt against Partnership, or it acted with a lack of good faith to Partnership by making payments that it knew to be unenforceable. " 'Good faith [does] not permit any one partner to advantage [itself] singly and alone, at the expense of the [partnership]' " (*Marmac Inv. Co. Inc. v Wolpe*, 759 A2d 620, 626 [DC Ct App 2000]).

IV.

Finally, although the court reached the correct result with respect to the motion and cross motion, it should have issued a

judgment declaring the rights of the parties in compliance with RPAPL article 15 because this is an action seeking a declaratory judgment pursuant to that statute (*see* RPAPL 1501 [4]; 1521). Accordingly, the order should be modified by remitting the matter to Supreme Court to grant an appropriate judgment (*see Corrado v Petrone*, 139 AD2d 483, 485 [2d Dept 1988]; *see generally JBR Constr. Corp.*, 71 AD3d at 953; *LePore*, 32 AD3d at 1331).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

332

CA 19-00581

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

JOHN T. DILLON AND D. TIMOTHY DILLON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PEAK ENVIRONMENTAL, LLC, MARCUS E. O'ROURKE, JR.
AND TIMOTHY M. O'ROURKE, DEFENDANTS-RESPONDENTS.

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered March 8, 2019. The order granted in part defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment dismissing the first cause of action and reinstating that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs and defendants Marcus E. O'Rourke, Jr. and Timothy M. O'Rourke, who had been equal-interest members of defendant Peak Environmental, LLC (Peak), entered into a liquidation agreement setting conditions and buyout terms to effectuate plaintiffs' withdrawal and disassociation from Peak. Plaintiffs commenced this action alleging in the first cause of action that defendants fraudulently induced them to enter into the liquidation agreement—which included buyout terms allowing for the adjustment of the purchase price for work then in progress—by misrepresenting, among other things, the financial status of certain ongoing projects. Plaintiffs alleged in the fourth cause of action that Peak breached its contractual obligation under the liquidation agreement to indemnify them for payments they were required to make as guarantors of a line of credit obligation on which Peak purportedly defaulted. Plaintiffs appeal from an order that, inter alia, granted those parts of defendants' motion for summary judgment dismissing the first and fourth causes of action.

We reject plaintiffs' contention that Supreme Court erred in granting that part of the motion for summary judgment dismissing the

fourth cause of action, seeking contractual indemnification against Peak. Peak established as a matter of law that the indemnification provisions of the liquidation agreement did not apply to plaintiffs' preexisting obligation as guarantors of the line of credit, and plaintiffs failed to raise a triable issue of fact in opposition (*see Wisniewski v Kings Plaza Shopping Ctr. of Flatbush Ave.*, 279 AD2d 570, 571 [2d Dept 2001]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiffs further contend that the court erred in granting that part of the motion for summary judgment dismissing the first cause of action. Initially, we reject plaintiffs' assertion that alleged misrepresentations made by defendants in a separate letter may serve as a basis for establishing fraudulent inducement in execution of the liquidation agreement. "While a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a specific disclaimer defeats any allegation that the contract was executed in reliance upon contrary . . . representations" (*Barnaba Realty Group, LLC v Solomon*, 121 AD3d 730, 731 [2d Dept 2014]; *see Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). Here, the liquidation agreement specifically provided that the parties made no agreements, warranties, or representations other than those expressly set forth in the liquidation agreement (*see Barnaba Realty Group, LLC*, 121 AD3d at 731; *Sperry v Papastamos*, 195 AD2d 1031, 1033 [4th Dept 1993]).

We agree with plaintiffs, however, that defendants failed to establish as a matter of law that the release in the liquidation agreement barred plaintiffs' claims that defendants made misrepresentations in violation of certain warranties therein. "In construing a general release it is appropriate to look to the controversy being settled and the purpose for which the release was executed[,] . . . [and] a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Bugel v WPS Niagara Props., Inc.*, 19 AD3d 1081, 1082 [4th Dept 2005] [internal quotation marks omitted]; *see Cahill v Regan*, 5 NY2d 292, 299 [1959]). Here, although the liquidation agreement contained a general release in which plaintiffs broadly discharged defendants from, inter alia, any claims, liabilities, or obligations, including those known or unknown, and those concealed or hidden, the release provided an exception for "any obligation of [Peak] or the [m]embers established by this [liquidation a]greement." In that regard, the liquidation agreement established an obligation for defendants to make certain true and correct representations and warranties. As relevant here, defendants represented that Peak had no material obligations or liabilities beyond those disclosed in financial statements for the year preceding the liquidation agreement and also represented that there existed no circumstances resulting from transactions effected or events occurring prior to the liquidation agreement that could reasonably be expected to result in any such material obligation or liability beyond those disclosed in the subject financial statements. Plaintiffs' fraudulent inducement cause of action involves allegations that defendants violated those obligations by, among other things, misrepresenting in the subject financial statements the estimated completion levels and projected losses for certain ongoing projects.

We therefore conclude that defendants failed to meet their initial burden of establishing, as a matter of law, that the release barred plaintiffs' claims that they were fraudulently induced to enter the liquidation agreement by misrepresentations that defendants made in violation of their obligations thereunder (*see Silver v Newman*, 121 AD3d 667, 668 [2d Dept 2014]).

Defendants nonetheless contend, as properly raised alternative grounds for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that summary judgment dismissing the first cause of action is warranted because the alleged misrepresentations are premised on nonactionable estimates and the record establishes as a matter of law that plaintiffs could not justifiably rely on the alleged misrepresentations. We reject that contention. A claim of fraudulent inducement is viable where, as here, the plaintiffs "allege that [the defendants] knew at the time of the estimate that the [financial cost of a] project would substantially exceed the amount of the estimate, that [the defendants] intentionally misstated the estimate in order to induce [the plaintiffs] to enter into the contract, that [the plaintiffs] relied on the misrepresentation, and that [the plaintiffs] were damaged as a result" (*Wright v Selle*, 27 AD3d 1065, 1067-1068 [4th Dept 2006]). With respect to justifiable reliance, "[t]he determination of whether a party's reliance is reasonable is always nettlesome because it is so fact-intensive" (*Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 665 [2d Dept 2011] [internal quotation marks omitted]; *see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010]). Here, defendants' own submissions establish that plaintiffs "made a significant effort to protect themselves against the possibility of false financial statements: they obtained representations and warranties to the effect that nothing in the financials was materially misleading" (*DDJ Mgt., LLC*, 15 NY3d at 156; *cf. Pappas v Tzolis*, 20 NY3d 228, 233 [2012], *rearg denied* 20 NY3d 1075 [2013]), i.e., that Peak had no material liabilities beyond those disclosed in the financial statements and no circumstances existed that could reasonably be expected to result in such a material obligation. Thus, "[i]f plaintiffs can prove the allegations in the complaint, whether they were justified in relying on the warranties they received is a question to be resolved by the trier of fact" (*DDJ Mgt., LLC*, 15 NY3d at 156; *see Lunal Realty, LLC*, 88 AD3d at 665). We therefore modify the order by denying that part of defendants' motion seeking summary judgment dismissing the first cause of action and reinstating that cause of action.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

355

CA 19-01778

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

JEFFREY D. CONRAD AND KATHERINE M. CONRAD,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOLIDAY VALLEY, INC., AND WIN-SUM SKI CORP.,
DOING BUSINESS AS HOLIDAY VALLEY RESORT,
DEFENDANTS-APPELLANTS.

ZWEIG LAW, P.C., HAMBURG (STEVEN M. ZWEIG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 28, 2019. The order denied the motion of defendants 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: Plaintiffs commenced this action seeking to recover damages for injuries that Jeffrey D. Conrad (plaintiff) sustained when he slipped and fell on a stairway landing while playing golf at defendants' golf course. According to plaintiff, he ascended a stairway used to access the tee box on the twelfth hole and then took a measurement from the tee box using his range finder. When he went to return to his golf cart to select a club, he stepped onto the landing at the top of the stairway, slipped on a wooden board, and fell, suffering severe injuries to both of his knees. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with playing golf. Supreme Court denied the motion, and we reverse.

The doctrine of assumption of the risk acts as a complete bar to recovery where a plaintiff is injured in the course of a sporting or recreational activity through a risk inherent in that activity (*see Turcotte v Fell*, 68 NY2d 432, 438-439 [1986]). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*id*. at 439, citing *Maddox v City of New York*, 66 NY2d 270, 277-278 [1985]). " 'It is not necessary to the application of assumption of

[the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' " (*Yargeau v Lasertron*, 128 AD3d 1369, 1371 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015], quoting *Maddox*, 66 NY2d at 278). "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" (*Ribaudo v La Salle Inst.*, 45 AD3d 556, 557 [2d Dept 2007], *lv denied* 10 NY3d 717 [2008]).

Here, defendants established on their motion that plaintiff was an experienced golfer who had played defendants' golf course several times in the past (*see Kirby v Drumlins, Inc.*, 145 AD3d 1561, 1562 [4th Dept 2016]). Moreover, defendants demonstrated that, at the time of the incident, plaintiff knew that the course was still wet from rain that had just fallen, and that he was familiar with the stairway in question, having just used it moments before his accident. For those reasons, we conclude that defendants met their initial burden by establishing that plaintiff was aware of the risk posed by the stairway and assumed it (*see id.* at 1562-1563; *Bryant v Town of Brookhaven*, 135 AD3d 801, 802-803 [2d Dept 2016]; *Mangan v Engineer's Country Club, Inc.*, 79 AD3d 706, 706 [2d Dept 2010]).

In opposition, plaintiffs failed to raise a triable issue of fact whether plaintiff was subjected to "unassumed, concealed or unreasonably increased risks" (*Benitz v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]; *see Morgan v State of New York*, 90 NY2d 471, 485 [1997]). Even assuming, arguendo, that the condition of the stairs was "less than optimal" because anti-slip guards were not extended onto the portion of the landing where plaintiff fell, that does not create an issue of fact under the assumption of the risk doctrine (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356 [2012]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

364

CA 19-00729

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

CALVIN WILLIAMS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 122732.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Walter Rivera, J.), entered October 17, 2018. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries that he allegedly sustained when, while squat lifting a barbell weighing approximately 500 pounds in the weight room at Mid-State Correctional Facility, the squat rack onto which he dropped the weights tipped over, causing claimant to fall backwards and hit his neck on the barbell. After a nonjury trial, the Court of Claims rendered a verdict in favor of defendant and dismissed the claim. We affirm.

Claimant contends that the verdict is against the weight of the evidence because, inter alia, the court erred in concluding that the doctrine of primary assumption of the risk precluded the claim. We reject that contention. "While it is well settled that this Court has the authority to independently consider the weight of the evidence on an appeal in a nonjury case, deference is still afforded to the findings of the [court] where, as here, they are based largely on credibility determinations" (*Payne v State of New York*, 144 AD3d 1490, 1491 [4th Dept 2016] [internal quotation marks omitted]; *see Janczylik v State of New York*, 126 AD3d 1485, 1485 [4th Dept 2015]). "Moreover, '[o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1525 [4th Dept 2015]; *see City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [4th Dept 2005]).

The doctrine of assumption of the risk provides that "voluntary participants in sports activities may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of their participation" in such events (*Lee v Maloney*, 270 AD2d 689, 690 [3d Dept 2000] [internal quotation marks omitted]; *see generally Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]). Where, as here, a participant in a sports activity alleges that his or her injury was caused by a dangerous condition in equipment provided by a defendant, "the application of the assumption of risk doctrine . . . requires that the participant have not only knowledge of the injury-causing defect but also appreciation of the resultant risk" (*Morgan v State of New York*, 90 NY2d 471, 485-486 [1997] [internal quotation marks omitted]). Ascertaining a participant's awareness of the risk "is not to be determined in a vacuum[, but] rather, [is] to be assessed against the background of the skill and experience of the particular [participant]" (*id.* at 486 [internal quotation marks omitted]; *see Bukowski v Clarkson Univ.*, 19 NY3d 353, 356-357 [2012]; *Kingston v Cardinal O'Hara High Sch.*, 144 AD3d 1672, 1674 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]).

Here, we conclude that a fair interpretation of the evidence supports the court's conclusion that claimant assumed the risk of being injured when he did not use a spotter while lifting a barbell weighing approximately 500 pounds. The evidence at trial established the importance of using a spotter when lifting approximately 500 pounds, and that claimant was an experienced weight lifter who knew about the potential risk of being injured by not using a spotter while lifting such a weight. Moreover, claimant testified that the squat rack in the weight room was not bolted to the floor and that he had previously seen it shake and move while in use, which put claimant on notice that simply dropping a significant amount of weight on the rack could be unsafe, necessitating the use of a spotter.

Claimant contends that the doctrine does not apply because the dangerous nature of the squat rack was a latent defect that was "not . . . typically known, apparent, or reasonably foreseeable" (*Repka v Arctic Cat, Inc.*, 20 AD3d 916, 919 [4th Dept 2005]; *see Alqurashi v Party of Four, Inc.*, 89 AD3d 1047, 1047-1048 [2d Dept 2011]). We reject that contention. Here, as noted above, claimant was aware of the squat rack's purported defect—i.e., that it shook and moved while in use. This is not a case where the defect was not readily apparent or not the sort of risk that a participant appreciates when engaged in that activity. Rather, the mechanism of the injury in this case was squarely related to the manner in which claimant lifted weights, and the evidence supports the conclusion that it was reasonably foreseeable that a person lifting weights has a risk of injury if he or she is unable to perform the act of lifting the weights.

In light of the foregoing, claimant's remaining contentions are

academic.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

369

CA 19-01883

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MICHAEL MAZZEO, AS PRESIDENT
OF ROCHESTER POLICE LOCUST CLUB, INC., AND
ROCHESTER POLICE LOCUST CLUB, INC.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL CIMINELLI, AS CHIEF OF POLICE OF
ROCHESTER CITY POLICE DEPARTMENT, ROCHESTER
CITY POLICE DEPARTMENT AND CITY OF ROCHESTER,
RESPONDENTS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

TREVETT CRISTO, ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 9, 2019 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 modified on the law by vacating the second ordering paragraph and enjoining respondents from temporarily appointing lower ranking officers to serve in out-of-title positions for higher ranking officers during nonurgent and routine absences that are scheduled well in advance, such as vacations, for which coverage by higher ranking officers may be obtained, or in any other instance that would contravene *Matter of Miller v Griffith* (251 AD2d 1058, 1059 [4th Dept 1998]), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner Rochester Police Locust Club, Inc. (Locust Club), the exclusive bargaining representative for police officers employed by respondent Rochester City Police Department (RPD), and Michael Mazzeo, the president of the Locust Club, commenced this CPLR article 78 proceeding seeking injunctive relief based on allegations that respondents were temporarily appointing lower ranked officers to perform out-of-title work, filling in for the regular, routine, and scheduled absences of higher ranking officers in violation of the Civil Service Law. Respondents appeal from a judgment that granted the petition and enjoined them from temporarily appointing lower ranking officers to serve in out-of-title positions

for higher ranking officers unless such assignments or appointments complied with *Evangelista v Irving* (177 AD2d 1005, 1005 [4th Dept 1991]), and were explicitly permitted by Civil Service Law §§ 61 and 64. Although we conclude that Supreme Court properly granted the petition and determined that petitioners are entitled to injunctive relief, we nonetheless also conclude that the injunction granted by the court is overly broad. We therefore modify the judgment by vacating the second ordering paragraph and enjoining respondents from temporarily appointing lower ranking officers to serve in out-of-title positions for higher ranking officers during nonurgent and routine absences that are scheduled well in advance, such as vacations, for which coverage by higher ranking officers may timely be obtained, and in any other instance that would contravene our prior decision in *Matter of Miller v Griffith* (251 AD2d 1058, 1059 [4th Dept 1998]).

The parties correctly observe that the propriety of the challenged appointments must be evaluated under Civil Service Law § 64, which provides that there are limited circumstances under which temporary appointments may be made without examination, including, "for a period not exceeding three months when the need for such service is *important and urgent*" (§ 64 [1] [emphasis added]). To the extent that, in issuing the injunction, the court relied on *Evangelista*, which involved many of the same parties as here, that case is not applicable here inasmuch as it did not address Civil Service Law § 64, and instead was based largely on section 61 (*see Evangelista*, 177 AD2d at 1005).

When analyzing whether temporary appointments are appropriate under Civil Service Law § 64, this Court has held that, where "scheduling is routine and nonurgent, the use of temporary appointments to fill those vacancies is not authorized" (*Miller*, 251 AD2d at 1058). In *Miller* we concluded that, under section 64, temporary appointments cannot be used to fill vacancies caused by "furlough and cycle time" because such absences are scheduled well in advance and are therefore "routine and nonurgent" (*id.*). We further concluded, however, that temporary appointments are permissible to fill vacancies caused by "unscheduled absences" (*id.*).

Here, as in *Miller*, respondents made temporary appointments for absences due to vacations, despite the fact that those absences were scheduled well in advance. Thus, contrary to respondents' contention, we conclude that those temporary appointments were improper because absences that are scheduled well in advance do not result in an "important and urgent" need within the meaning of Civil Service Law § 64 to justify a temporary appointment (*see Miller*, 251 AD2d at 1058). We therefore conclude that the court did not err to the extent it granted the petition and enjoined respondents from making temporary appointments under such circumstances.

We further conclude, however, that respondents did not abuse their discretion in making the other temporary appointments at issue here and that the injunction is overly broad to the extent it precludes such appointments. Specifically, we note that respondents

established that the other temporary appointees were paid the salary of the higher ranking positions to which they were appointed, the practice of making temporary appointments was not done to avoid making permanent appointments or to prevent officers from utilizing overtime, and those appointments were not for the type of regular and routine practice that is inconsistent with the Civil Service Law and the New York State Constitution (*see Matter of O'Reilly v Grumet*, 308 NY 351, 357 [1955]; *Matter of Gates Keystone Club v Roche*, 106 AD2d 877, 877 [4th Dept 1984]).

To the extent that specific reasoning for *each and every* temporary appointment was not provided by respondents, "[i]n the absence of a clear showing of an abuse of discretion [on the part of the employer] the court will assume that the need was 'important and urgent' sufficient to permit the use of a temporary appointment" (*Halpin v Reile*, 64 Misc 2d 1023, 1025 [Sup Ct, Herkimer County 1970]). Here, petitioners did not show, except with respect to the temporary appointments made for scheduled absences for vacations, that respondents' use of temporary appointments was not done to meet important and urgent needs. Thus, we conclude that the court erred to the extent the judgment broadly enjoined respondents from making all temporary appointments—not just those done in routine and nonurgent circumstances (*see generally Miller*, 251 AD2d at 1058-1059).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

374

CA 19-01746

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,
AS SUBROGEE OF FRANJO FARMS, LUCIAN SACHELI,
ET AL., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KYLE A. HEATH, EMMA J. GARRETT,
DEFENDANTS-RESPONDENTS,
JACK D. HENDERSON, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF STEVEN L. SMITH, P.C., SWARTHMORE, PENNSYLVANIA (STEVEN L. SMITH, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered March 12, 2019. The amended order denied the motion of defendant Jack D. Henderson for summary judgment dismissing the complaint and all cross claims against him.

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

Memorandum: After a home that defendant Kyle A. Heath was renting was damaged by fire, plaintiff insurer paid the homeowner on an insurance policy and then commenced this action against the four individuals who were at the residence on the night of the fire, alleging that the fire was started "as a direct result of the careless and improper use and disposal of smoking materials and/or candles." Jack D. Henderson (defendant) moved for summary judgment dismissing the complaint and all cross claims against him. We conclude that Supreme Court properly denied that motion.

Contrary to defendant's contention, he failed to meet his initial burden of establishing that he did not cause the fire. " 'On a motion for summary judgment, . . . self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts' . . . Indeed, '[i]f everything or anything had to be believed in court simply because

there is no witness to contradict it, the administration of justice would be a pitiable affair' " (*Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; *see Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]).

Here, although defendant testified at his deposition that he properly disposed of his ashes and cigarettes by placing them in a metal bucket and thus could not be the cause of a fire that seemingly started in the hollow area of the table on which the bucket was kept, the deposition testimony of other witnesses establishes that no one else who was present that night could recall how defendant disposed of his cigarettes. Moreover, at least one of the witnesses testified that defendant was alone on the deck after everyone else went to bed, and it appears that the fire started on the deck. As in *Mills*, "plaintiff is not in a position to refute [defendant's] claims [that he did not unsafely dispose of his cigarettes on the porch], and a jury could disbelieve those claims even though they are uncontroverted" (*Mills*, 163 AD3d at 1438). Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law, the court properly denied his motion regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Based on our determination, we do not address defendant's remaining contentions.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

382

KA 16-02302

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. WALLS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 26, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Supreme Court erred in refusing to suppress evidence arising from an allegedly unlawful seizure, detention, and arrest. We reject that contention.

Defendant asserts that the police lacked reasonable suspicion to stop the vehicle in which he was an occupant because the 911 call to which the police were responding lacked sufficient information of criminal activity. As relevant here, "[p]olice stops of automobiles in New York State are legal 'when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " (*People v Bushey*, 29 NY3d 158, 164 [2017], quoting *People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]). The evidence at the suppression hearing established that police officers were dispatched based on a 911 call reporting a group of people at a specific location, one of whom had been observed getting into a van while possessing "a long gun." The dispatch provided the license plate number of a van in which the group had driven away from the location where they had been seen by the 911 caller. One or two minutes after the dispatch, one of the responding officers located the van in the area. The officer confirmed that the van's license plate number matched the one provided in the dispatch, and he initiated a traffic

stop. Contrary to defendant's assertion, "the totality of the information known to the police at the time of the stop of [the van] 'supported a reasonable suspicion of criminal activity . . . [, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " (*People v Andrews*, 57 AD3d 1428, 1429 [4th Dept 2008], *lv denied* 12 NY3d 850 [2009]). In particular, we conclude that the 911 call as relayed in the dispatch "contained sufficient information about defendant['s] unlawful possession of a weapon to create reasonable suspicion" justifying the stop of the van (*People v Argyris*, 24 NY3d 1138, 1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* — US —, 136 S Ct 793 [2016]).

Contrary to defendant's further contention, the police officers were " 'entitled to handcuff defendant to effect his nonarrest detention in order to ensure [their] own safety while [they] removed [defendant] to a more suitable location' " (*People v Harmon*, 170 AD3d 1674, 1675 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019], quoting *People v Allen*, 73 NY2d 378, 379 [1989]; *see People v Martinez*, 147 AD3d 642, 643 [1st Dept 2017], *lv denied* 29 NY3d 1034 [2017]).

We further reject defendant's contention that he was arrested without probable cause inasmuch as, after defendant exited the van, a police officer's observation of the gun in plain view on the floor of the van "provided probable cause for defendant's arrest" (*People v Johnson*, 114 AD3d 1132, 1132 [4th Dept 2014], *lv denied* 24 NY3d 961 [2014]; *see People v Fleming*, 65 AD3d 702, 704 [2d Dept 2009], *lv denied* 13 NY3d 907 [2009]).

Finally, even assuming, arguendo, that the court erred in admitting in evidence at trial a recording of the 911 call without making a ruling on whether it was hearsay, we conclude nonetheless that any error is harmless inasmuch as the evidence at trial of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the recording of the 911 call not been admitted in evidence (*see People v Kello*, 96 NY2d 740, 743-744 [2001]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and would reverse the judgment, grant that part of the omnibus motion seeking to suppress evidence arising from the seizure, detention and arrest of defendant, and dismiss the indictment inasmuch as I agree with defendant that the police lacked the requisite reasonable suspicion of criminal activity to stop the vehicle in which he was an occupant. "An anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains [sufficient] information . . . [such] that the police can test the reliability of the tip" (*People v Moore*, 6 NY3d 496, 499 [2006]; *see People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* — US —, 136 S Ct 793 [2016]; *see generally Navarette v California*, 572 US 393, 397 [2014]). Here, the officer

who stopped the vehicle testified at the suppression hearing that he received a dispatch "call for someone [dressed in dark clothing] getting into a van" with a specified license plate and "one of the individuals had a long gun." The contents of the 911 call that prompted the dispatch, however, were never entered into evidence (*cf. Argyris*, 24 NY3d at 1140; *People v Wisniewski*, 147 AD3d 1388, 1388 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017]), and the People offered no other evidence that would tend to establish, for example, the basis of the 911 caller's knowledge (*cf. People v Williams*, 126 AD3d 1304, 1305 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]). Thus, "whether evaluated in light of the totality of the circumstances or under the *Aguilar–Spinelli* framework" (*Argyris*, 24 NY3d at 1141), the anonymous tip lacked sufficient indicia of reliability to provide the reasonable suspicion of criminality necessary for a lawful stop of the vehicle. I therefore agree with defendant that Supreme Court erred in denying that part of his omnibus motion seeking suppression of the weapon subsequently observed by the officer in the vehicle (*see generally People v Arnau*, 58 NY2d 27, 32 [1982], *cert denied* 468 US 1217 [1984]). Further, because my determination would result in the suppression of all evidence in support of the crime charged, I would also dismiss the indictment (*see People v Williams*, 177 AD3d 1312, 1313 [4th Dept 2019]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

389

CA 18-01429

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

MILLER MAYER, LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), dated November 29, 2017. The order, among other things, equitably distributed the marital property.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the second ordering paragraph the sum of $238,670 and substituting therefor the sum of $104,350, and vacating the third and fourth ordering paragraphs and substituting therefor the provision that plaintiff is entitled to recover from defendant one-half the value of the Lindley property and the Country Walk Estates property, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the following memorandum: Plaintiff husband commenced this action seeking equitable distribution of marital assets after obtaining a divorce decree from Pennsylvania. In appeal No. 1, defendant wife appeals from an order that equitably distributed the marital property. In appeal No. 2, defendant appeals from an order that, inter alia, directed her to execute deeds to certain properties and to provide an accounting. In appeal No. 3, defendant appeals from an order directing her to execute those same deeds.

With respect to appeal No. 1, defendant contends that plaintiff's claim to equitable distribution is barred by the Pennsylvania divorce decree. We agree with plaintiff that defendant's contention is based on the defense of res judicata (*see O'Connell v Corcoran*, 1 NY3d 179, 182-184 [2003]; *Erhart v Erhart*, 226 AD2d 26, 27-29 [4th Dept 1996]) and that she waived that defense by failing to raise it in either a pre-answer motion to dismiss or her answer (*see* CPLR 3211 [e]; *U.S. Bank N.A. v Gilchrist*, 172 AD3d 1425, 1426-1427 [2d Dept 2019]; *Country-Wide Ins. Co. v Gotham Med., P.C.*, 154 AD3d 608, 610 [1st Dept 2017]; *Matter of Hall*, 275 AD2d 979, 979 [4th Dept 2000]). Similarly,

defendant's contention that plaintiff's claims with respect to the Lindley and Markle Hollow properties are barred by res judicata based on a prior proceeding to set aside the transfer of those properties to defendant has also been waived.

We reject defendant's further contention with respect to appeal No. 1 that Supreme Court's award of equitable distribution was barred by the antenuptial agreement signed by the parties. That agreement aimed to preserve property rights held individually by the parties and did not contemplate property that was or became jointly owned notwithstanding the terms of the agreement. Inasmuch as the agreement did not specify how marital property would be divided, the court properly equitably distributed the marital property. To the extent that defendant contends that the properties at issue were not marital property because she alone held title to those properties, we reject that contention inasmuch as a determination of whether property is marital does not depend on the form in which title is held (*see* Domestic Relations Law § 236 [B] [1] [c]; *Fields v Fields*, 15 NY3d 158, 161-162 [2010], *rearg denied* 15 NY3d 819 [2010]; *Mattioli v Mattioli*, 48 AD3d 1143, 1144 [4th Dept 2008]). Defendant correctly notes that the antenuptial agreement permitted gifts from one party to the other and required that, once gifted, the property was the separate property of the recipient. Defendant, however, transferred title to the Lindley and Markle Hollow properties to herself using a power of attorney that plaintiff had granted to her prior to the marriage. The fact that those transfers were made without plaintiff's knowledge belies any claim that they were gifts to defendant, and thus they were not defendant's separate property. With respect to the Country Walk Estates (CWE) property, the record supports the court's determination that, although plaintiff transferred title of that property to defendant, it was for convenience purposes and remained marital property (*see generally Fields*, 15 NY3d at 162-163).

We agree with defendant, and plaintiff correctly concedes, that with respect to appeal No. 1 the court made errors in its calculations regarding lease and condemnation revenues for the Lindley property that are subject to equitable distribution. Plaintiff is entitled to one-half the amount of $39,600 from an oil and gas lease, $110,000 for a portion of the property acquired by New York State, and $59,100 for rental income. We therefore modify the order in appeal No. 1 by striking the sum of $238,670 from the second ordering paragraph and substituting therefor the sum of $104,350.

We agree with defendant in all three appeals that the court lacked jurisdiction to order her to sign deeds transferring to plaintiff a one-half interest in the Lindley and CWE properties. Defendant transferred title to the Lindley property to her children while reserving a life interest for herself. She transferred title to the CWE property to an LLC of which she was the sole owner, but later gifted that LLC to her children. The court equitably distributed those marital properties by directing defendant to prepare and execute deeds listing plaintiff as a one-half owner of those properties. The court, however, lacked jurisdiction to do so inasmuch as the children and the LLC were not named as parties to this action (*see Petrie v*

Petrie, 126 AD2d 951, 952 [4th Dept 1987]; *Friedman v Friedman*, 125 AD2d 539, 541 [2d Dept 1986]; *see generally Hirsch v Hirsch*, 148 AD3d 997, 997-998 [2d Dept 2017]; *Solomon v Solomon*, 136 AD2d 697, 698 [2d Dept 1988]). We further agree with defendant that ordering the parties to be joint owners of the properties is inappropriate under the circumstances because it would force the combatant parties to work together in a joint real estate venture. We therefore further modify the order in appeal No. 1 by vacating the third and fourth ordering paragraphs and substituting therefore the provision that plaintiff is entitled to recover from defendant one-half the value of the Lindley and CWE properties, and we remit the matter to Supreme Court for further proceedings to determine the value of those properties. We thus also modify the order in appeal No. 2 by vacating the provision requiring defendant to execute the deeds to those properties and denying that part of plaintiff's motion seeking that relief. Finally, we reverse the order in appeal No. 3 and vacate the provision requiring defendant to execute those deeds.

Defendant's remaining contention in appeal No. 1 is without merit, and her remaining contentions in appeal Nos. 2 and 3 are rendered academic by our decision herein.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

391

CA 19-01333

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

LOUIS MICHAEL MAGNANO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLEGANY CO-OP INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

STUART B. SHAPIRO, KENMORE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 2, 2019. The order granted the motion of defendant Allegany Co-Op Insurance Company for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant Allegany Co-op Insurance Company.

Memorandum: Plaintiff commenced this action seeking damages for breach of a homeowner's insurance policy. In his complaint, plaintiff alleged that his home suffered extensive damage as a result of a water leak in the second floor master bathroom. Plaintiff had a homeowner's insurance policy through defendant Allegany Co-Op Insurance Company (Allegany), which included coverage for water damage. Plaintiff notified Allegany of the loss and submitted a sworn statement in proof of loss, which contained a description of the damage to the home and a contractor's estimate of the cost to repair the damage, and a claim of loss in the amount of $72,748. Allegany disclaimed coverage of plaintiff's claim on, inter alia, the grounds that the claim was inflated and that there was prior damage to the home that was not disclosed to Allegany. Supreme Court granted the motion of Allegany for summary judgment dismissing the complaint against it. Plaintiff appeals, and we reverse.

We agree with plaintiff that Allegany failed to meet its initial burden on its motion of establishing as a matter of law that the claim was inflated (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A policy may be voided if the insured " 'willfully and fraudulently placed in the proofs of loss a statement of property lost

which [the insured] did not possess, or has placed a false and fraudulent value upon the articles which [the insured] did own' " (*Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]; *see Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 App Div 187, 190 [4th Dept 1926]). "Incorrect information is not necessarily tantamount to fraud or material misrepresentation as the insurer must tender 'proof of intent to defraud—a necessary element to the defense' " (*Magie v Preferred Mut. Ins. Co.*, 91 AD3d 1232, 1233-1234 [3d Dept 2012], quoting *Deitsch Textiles v New York Prop. Ins. Underwriting Assn.*, 62 NY2d 999, 1001 [1984]; *see Azzato v Allstate Ins. Co.*, 99 AD3d 643, 646 [2d Dept 2012]; *Kittner v Eastern Mut. Ins. Co.*, 80 AD3d 843, 847 [3d Dept 2011], *lv dismissed* 16 NY3d 890 [2011], 18 NY3d 911 [2012]). " '[U]nintentional fraud or false swearing or the statement of any opinion mistakenly held[, however,] are not grounds for vitiating a policy' " (*Christophersen v Allstate Ins. Co.*, 34 AD3d 515, 516 [2d Dept 2006]).

Here, although Allegany's submissions in support of its motion demonstrate a disparity between the estimates of plaintiff's contractor and Allegany's assessor of the amount of damage and loss (*see generally Magie*, 91 AD3d at 1233-1234), the submissions fail to establish fraudulent intent on the part of plaintiff (*cf. Azzato*, 99 AD3d at 646). Plaintiff's proof of loss statement did not include duplicative items, unincurred expenses, or substantial sums of money that were unaccounted for (*cf. Latha Rest. Corp. v Tower Ins. Corp.*, 38 AD3d 321, 321 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007], *cert denied* 552 US 1010 [2007]), and the disparity between the damage estimate of plaintiff's contractor and the estimate of Allegany's assessor is not "so grossly excessive as to constitute false swearing and misrepresentation" (*Pogo Holding Corp. v New York Prop. Ins. Underwriting Assn.*, 97 AD2d 503, 505 [2d Dept 1983], *affd* 62 NY2d 969 [1984]; *cf. Azzato*, 99 AD3d at 646).

To the extent that the court based its determination on its finding that plaintiff's inclusion "in his claim [of] cabinets to replace those not damaged by water in this event" vitiated the insurance policy and prohibited plaintiff's recovery under the policy, we note that neither the estimate of plaintiff's contractor nor plaintiff's proof of loss statement specified an amount for the replacement of the cabinets. Thus, that part of the court's determination appears to be based on a credibility determination and, inasmuch as there is no evidence of any self-serving, incredible, or demonstrably false statements made by plaintiff (*cf. Carthen v Sherman*, 169 AD3d 416, 417 [1st Dept 2019]; *Finley v Erie & Niagara Ins. Assn.*, 162 AD3d 1644, 1645-1646 [4th Dept 2018]), we conclude that this is not one of the "rare instances where credibility is properly determined as a matter of law" (*Carthen*, 169 AD3d at 417; *see Ingarra v General Acc./PG Ins. Co. of N.Y.*, 273 AD2d 766, 768 [3d Dept 2000]).

Finally, Allegany failed to meet its burden of establishing as a matter of law that plaintiff breached the terms of the insurance policy by failing to disclose a previous insurance claim that he

submitted for prior damage to the home (*see generally Zuckerman*, 49 NY2d at 562), and thus the burden never shifted to plaintiff with respect to that issue (*see Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

394

CA 19-01517

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

MILLER MAYER LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), dated January 31, 2019. The order, among other things, granted that part of plaintiff's motion seeking to enforce that part of an equitable distribution order requiring defendant to execute deeds transferring a one-half interest in certain properties to plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision requiring defendant to execute deeds to certain properties and denying that part of plaintiff's motion seeking that relief, and as modified the order is affirmed without costs.

Same memorandum as in *Jolley v Lando* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

395

CA 19-01520

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

MILLER MAYER LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), dated March 14, 2019. The order, among other things, directed defendant to execute deeds to certain properties.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the provision requiring defendant to execute deeds to certain properties is vacated.

Same memorandum as in *Jolley v Lando* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

397

CA 19-01774

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

RICK NASH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GARY R. SCHOPFER, DDS, DEFENDANT-RESPONDENT.

COTE & VANDYKE, LLP, SYRACUSE (ROBIN ZIMPEL-FONTAINE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (CHRISTINA M. VERRONE JULIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered March 28, 2019. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this dental malpractice action seeking damages for injuries allegedly arising from an extraction of plaintiff's tooth performed by defendant. Plaintiff filed a summons and complaint in May 2016. During the next two years, plaintiff failed to respond to defendant's discovery requests and failed to comply with a scheduling order. On September 27, 2018, pursuant to CPLR 3216 (b) (3), defendant served a demand upon plaintiff to file a note of issue within 90 days. Plaintiff, however, did not file the note of issue until January 24, 2019, which was after the 90-day period expired. Plaintiff now appeals from an order granting defendant's motion to dismiss the complaint pursuant to CPLR 3216 for failure to prosecute. We affirm.

We reject plaintiff's contention that Supreme Court erred in granting defendant's motion. "In order to avoid dismissal for failure to comply with a 90-day demand[, a] plaintiff must show both a justifiable excuse for [the] delay and that he [or she] has a meritorious cause of action" (*Nichols v Agents Serv. Corp.*, 133 AD2d 912, 913 [3d Dept 1987]; *see* CPLR 3216 [e]). We conclude that, under the circumstances presented, plaintiff's proffered excuse that the delay was caused by a mistake committed by the secretary of plaintiff's attorney is insufficient to establish excusable law office failure (*cf. Hawe v Delmar*, 148 AD3d 1788, 1788 [4th Dept 2017]).

Moreover, plaintiff exhibited "a pattern of persistent neglect

and delay in prosecuting the action" (*Malcolm v Rite Aid of N.Y., Inc.*, 100 AD3d 837, 838-839 [2d Dept 2012]) and failed to "negate[] any inference that [he] intended to abandon [the] action" (*Restaino v Capicotto*, 26 AD3d 771, 772 [4th Dept 2006]). Viewing "the totality of the relevant circumstances," we conclude that plaintiff "failed to pursue [his] lawsuit with any diligence" and displayed "dilatory tactics and [an] apparent lack of interest" (*Nichols*, 133 AD2d at 914).

Inasmuch as the court did not abuse its discretion in granting defendant's motion and dismissing the complaint, plaintiff's contention that defendant's service of a 90-day demand waived further discovery (*see Witmer v Biehls*, 219 AD2d 870, 870 [4th Dept 1995]; *Siragusa v Teal's Express*, 96 AD2d 749, 749-750 [4th Dept 1983]) is academic.

Finally, we have considered plaintiff's remaining contentions and conclude that they lack merit.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

402

KA 18-01048

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL ADAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered September 5, 2017. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

417

CA 19-01852

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

BRENDA C. MORRIS-WILTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EUPHORIA SALON & SPA, DEFENDANT,
AND BECKER ENTERPRISES, INC., DEFENDANT-APPELLANT.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, ROCHESTER (THEODORE M. BAUM OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 26, 2019. The order, inter alia, granted plaintiff's cross motion for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she allegedly sustained as a result of exposure to chemicals used on her hair in the course of a coloring treatment at defendant Euphoria Salon & Spa, which is a trade name of Becker Enterprises, Inc. (defendant). Defendant appeals from an order that, inter alia, granted plaintiff's cross motion for partial summary judgment on the issue of liability. We agree with defendant that Supreme Court erred in granting plaintiff's cross motion, and we therefore modify the order accordingly.

It is well settled that, "[o]n a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In order to prevail on her negligence claim, plaintiff was required to " 'demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom' " (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]). On the record before us,

plaintiff's moving papers failed to eliminate all questions of fact whether defendant breached its duty of care to her, and whether that breach was a proximate cause of the injury alleged in her complaint, and thus denial of the cross motion is required regardless of the sufficiency of defendant's opposing papers (*see generally Winegrad*, 64 NY2d at 853).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

436

CA 19-00261

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THOMAS POLKA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MOUNT ST. MARY'S HOSPITAL OF NIAGARA FALLS, MARC KLEMENTOWSKI, M.D., AND KYLE R. ANDREWS, AS ADMINISTRATOR OF THE ESTATE OF RENEE BUCKLEY-BLEILER, P.A., DECEASED, DEFENDANTS-RESPONDENTS.

DEMPSEY & DEMPSEY, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

STILLWELL MIDGLEY, BUFFALO (JOHN M. VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT MOUNT ST. MARY'S HOSPITAL OF NIAGARA FALLS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-RESPONDENT MARC KLEMENTOWSKI, M.D.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-RESPONDENT KYLE R. ANDREWS, AS ADMINISTRATOR OF THE ESTATE OF RENEE BUCKLEY-BLEILER, P.A., DECEASED.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Daniel Furlong, J.), entered February 6, 2019. The order and judgment granted the motions of defendants for a directed verdict and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, defendants' motions for a directed verdict are denied, the complaint is reinstated and a new trial is granted in accordance with the following memorandum: Plaintiff commenced this medical malpractice action against defendants, Mount St. Mary's Hospital of Niagara Falls (hospital), Marc Klementowski, M.D., and Kyle R. Andrews, as administrator of the estate of Renee Buckley-Bleiler, P.A., deceased, seeking damages for alleged negligence in the treatment of plaintiff's right ear. We agree with plaintiff that Supreme Court erred in granting defendants' motions for a directed verdict. Plaintiff presented expert testimony establishing that Buckley-Bleiler, who examined plaintiff in the hospital's emergency room on the night in question, should have recognized and diagnosed plaintiff with a middle ear infection based upon, inter alia, plaintiff's complaints at that time. Also according to plaintiff's experts, Buckley-Bleiler's negligence caused or

contributed to plaintiff's profound hearing loss. Furthermore, plaintiff established through the testimony of one expert that Klementowski, the supervising physician in the emergency room at the time, should have realized upon reviewing plaintiff's chart that plaintiff had a serious infection. Based on the expert testimony presented by plaintiff, it cannot be said that "it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiff]" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). We therefore reverse the order and judgment, deny defendants' motions for a directed verdict and grant a new trial before a different justice.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

439

CA 19-02079

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

ANDREW KOWALYK AND HOLLY KOWALYK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., ET AL., DEFENDANTS,
JOHN J. JONES, III, ADESA BUFFALO, ADESA
NEW YORK, LLC, AND KAR AUCTION SERVICES, INC.,
DEFENDANTS-RESPONDENTS.

CAMBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 6, 2019. The order, insofar as appealed from, denied plaintiffs' motion for partial summary judgment on the issue of negligence against defendants John J. Jones, III, Adesa Buffalo, Adesa New York, LLC and KAR Auction Services, Inc.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is granted in part with respect to the issue of negligence.

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly sustained by Andrew Kowalyk (plaintiff) when his vehicle collided with a vehicle operated by defendant-respondent John J. Jones, III (defendant) and owned by one or more of the other defendants-respondents. Plaintiff thereafter moved for, inter alia, partial summary judgment against all defendants-respondents (collectively, defendants) on the issue of negligence. Supreme Court denied the motion, and we now reverse the order insofar as appealed from.

"It is well settled that a driver who has the right-of-way is entitled to anticipate that the drivers of other vehicles will obey the traffic laws that require them to yield. Because [defendant] was entering the roadway from a parking lot, []he was required to yield the right-of-way to [plaintiff's] vehicle" (*Rose v Leberth*, 128 AD3d 1492, 1493 [4th Dept 2015] [internal quotation marks, brackets, and citation omitted]; *see* Vehicle and Traffic Law § 1143). Here, plaintiffs met their initial burden of proof with respect to

defendant's negligence by submitting, inter alia, plaintiff's deposition testimony recounting the circumstances of the accident and the corroborating police report, which established as a matter of law that defendant violated Vehicle and Traffic Law § 1143, breached his duty to operate his vehicle with due care, and thereby caused the accident (*see Garza v Taravella*, 74 AD3d 1802, 1804 [4th Dept 2010]; *Whitcombe v Phillips*, 61 AD3d 1431, 1431 [4th Dept 2009]; *see also Kerolle v Nicholson*, 172 AD3d 1187, 1188 [2d Dept 2019]).

In opposition, defendants failed to raise a triable issue of fact (*see Kerolle*, 172 AD3d at 1188; *Garza*, 74 AD3d at 1804). Defendant's claimed inability to recall the circumstances of the accident "is not affirmative proof that the event did not happen[and is] . . . thus insufficient to create an issue of fact" (*Bavisotto v Doldan*, 175 AD3d 891, 893 [4th Dept 2019]). Moreover, while defendant made inconsistent statements about his actions before pulling into the street from the parking lot, those statements offered no basis for a rational factfinder to excuse his violation of Vehicle and Traffic Law § 1143 or negate his responsibility for the accident (*see generally Amerman v Reeves*, 148 AD3d 1632, 1633 [4th Dept 2017]). The remaining factual disputes upon which defendants rely are not material to the issue of negligence (*see generally Rose*, 128 AD3d at 1493).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

462

CA 19-01355

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF MELANIE TURCSIK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PHILLIP GRIFFIN, AS EXECUTIVE DIRECTOR OF THE
ROCHESTER PSYCHIATRIC CENTER, NEW YORK STATE
OFFICE OF MENTAL HEALTH, RESPONDENT-RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JENNIFER L. CLARK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 19, 2019 in a CPLR article 78 proceeding. The judgment granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and respondent is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: On July 19, 2018, petitioner was hired as a probationary employee at the Rochester Psychiatric Center (RPC). On January 22, 2019, petitioner received a notice that her probationary employment was being terminated "Wednesday, January 29, 2018 [sic], **effective at the close of business**." There is no dispute that the correct effective date of the termination was supposed to be January 29, 2019. Petitioner commenced this proceeding challenging her termination on May 23, 2019, which is four months and one day after the notice of termination but within four months of the effective date of the termination. Respondent, who is represented by the Attorney General, moved to dismiss the petition, contending that petitioner failed to serve the Attorney General as required by CPLR 7804 (c) and that the proceeding was time-barred under CPLR 217 (1). It is undisputed that petitioner timely served the RPC on June 3, 2019, but did not serve the Attorney General until June 19, 2019, i.e., within two days of the motion to dismiss. Supreme Court granted respondent's motion on both grounds. We now reverse.

As respondent correctly concedes, the time for service upon the Attorney General was tolled following service upon the RPC and, as a result, the late service upon the Attorney General does not impede this proceeding if we ultimately determine that the proceeding is not time-barred under CPLR 217 (*see Matter of Chem-Trol Pollution Servs. v Ingraham*, 42 AD2d 192, 193-194 [4th Dept 1973], *lv denied* 33 NY2d 516 [1973]; *see also Matter of Troy v Sobol*, 216 AD2d 661, 662 [3d Dept 1995]).

We agree with petitioner that the statute of limitations began to run on the effective date of the termination (*see Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *Matter of Bruno v Greenville Fire Dist.*, 125 AD3d 961, 962 [2d Dept 2015]; *Matter of Rakiecki v State Univ. of N.Y.*, 31 AD3d 1015, 1016 [3d Dept 2006]; *see also Matter of Armstrong v Centerville Fire Co.*, 83 NY2d 937, 939 [1994]) and, as a result, the proceeding is not time-barred. *Matter of Edmead v McGuire* (67 NY2d 714, 716 [1986]), upon which respondent relies, does not require a different result. In *Edmead*, the Court of Appeals stated that, "where the [administrative] determination is unambiguous and its effect certain, the statutory period commences as soon as the aggrieved party is notified" (*id.*). That case, however, involved a proceeding to challenge an involuntary retirement (*see id.*), which is "in the nature of certiorari to review" (*Matter of Lynch v New York City Employees' Retirement Sys.*, 103 AD2d 695, 697 [1st Dept 1984, Silverman and Milonas, JJ., dissenting], *revd for the reasons stated in the dissenting op* 64 NY2d 1103 [1985]; *see generally Matter of Balash v New York City Employees' Retirement Sys.*, 34 NY2d 654, 655-656 [1974]). This proceeding, involving the termination of a probationary employee, is in the nature of mandamus to review (*see Di Milio*, 55 NY2d at 220) and, as a result, *Di Milio* is still good and controlling law (*see Rakiecki*, 31 AD3d at 1016; *see also Bruno*, 125 AD3d at 962).

Relying on *Di Milio*, we conclude that the statute of limitations must be measured from the effective date of petitioner's termination, which was January 29, 2019. As a result, this proceeding, which was commenced on May 23, 2019, was timely commenced within the four-month statute of limitations (*see* CPLR 217 [1]). We therefore reverse the judgment, deny respondent's motion, reinstate the petition and grant respondent 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

464

CA 19-01106

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF CIRCLE T STERLING, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF STERLING ZONING BOARD OF APPEALS,
RESPONDENT-RESPONDENT.

DR. VIRGINIA M. FICHERA, LORRAINE L. RITCHIE,
WILLIAM B. WELSH AND DELORES WELSH,
INTERVENORS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NADINE C. BELL OF COUNSEL), FOR PETITIONER-APPELLANT.

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR RESPONDENT-RESPONDENT.

NEIL M. GINGOLD, FAYETTEVILLE, FOR INTERVENORS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 31, 2019 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the petition.

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

Memorandum: Petitioner appeals from a judgment that, inter alia, denied its CPLR article 78 petition seeking, among other things, to annul respondent's determination denying petitioner's application for an area variance. We affirm.

Petitioner owns a gravel mine. The prior owners of the mine previously sought and obtained the permits necessary to operate the mine. Their plan was to use two access roads to allow for trucks to travel to and from the mine. The access roads, however, did not comply with a local zoning regulation that requires a 1,000-foot setback from existing residences. The proposed area variance would provide relief from that regulation. A public hearing was held on April 27, 2015, at which time respondent's members unanimously approved the application for the area variance. One of the reasons for approval expressed by respondent's members was that noise emanating from the mine would be equivalent to that of farming activities prevalent throughout the

community. An amended area variance, which eliminated one of the two access roads, was approved on September 24, 2015. In a prior related appeal, we vacated the determinations approving the area variances based on a jurisdictional defect, and we remitted the matter to respondent for a new determination (*Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1496 [4th Dept 2018]). In our decision in that appeal, we concluded that the appellants impermissibly relied on documents and reports, such as a Traffic and Noise Review, which were generated after respondent's determinations (*id.* at 1497).

A new public hearing was held on remittal. The record of the hearing included the Traffic and Noise Review, in which intervenors' engineer considered, inter alia, the frequency with which trucks would pass nearby residences under petitioner's proposed project. Furthermore, the engineer opined that the information provided to the Department of Environmental Conservation concerning the noise generated by the project was not developed by persons qualified to conduct sound testing or modeling, was not performed according to internationally accepted standards, and omitted critical sources of potential noise. In addition, several residents expressed concerns that the mine would destroy the "peace and quiet" in the neighborhood, with houses located only a few hundred feet from the access road experiencing noise, odor, and dust from passing trucks. Three of respondent's members expressed concern over potential noise. In the lengthy written determination denying petitioner's application, respondent stated, inter alia, that the "quiet and serene neighborhood would experience the noise of a truck entering or exiting the access road with acceleration and braking every 6 minutes" during the 58-hour work week for a projected 20-year period.

Petitioner contends that the determination denying the area variance is arbitrary and capricious because respondent was required either to reach the same result as in its prior two determinations or to explain its reasons for reaching a different result. We reject that contention. "[A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93 [2001] [internal quotation marks omitted]; *see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]). However, because respondent's prior determinations were vacated and thus are "null and void" (*Fichera*, 159 AD3d at 1496), those determinations have no precedential value.

Contrary to petitioner's further contention, respondent's determination denying the area variance and its reasoning in support thereof are supported by substantial evidence. " 'A record contains substantial evidence to support an administrative determination when reasonable minds could adequately accept the conclusion or ultimate fact based on the relevant proof' " (*Matter of Bounds v Village of Clifton Springs Zoning Bd. of Appeals*, 137 AD3d 1759, 1760 [4th Dept 2016]; *see Matter of B.P. Global Funds, Inc. v New York State Liq.*

Auth., 169 AD3d 1506, 1506 [4th Dept 2019]). Although the administrative record on the prior determinations contained largely unrefuted assertions that the proposed mining project would create only de minimis levels of increased noise, the administrative record on the present determination, which denied the area variance, casts serious doubt on those representations. Further, the minutes of respondent's proceedings reflect that the issue of increased noise was a factor that respondent's members weighed heavily in reaching their determination. The duty of weighing the conflicting evidence rested solely with respondent (*see Bounds*, 137 AD3d at 1760; *see also Matter of Thomas v Town of Southeast, N.Y.*, 168 AD3d 955, 957 [2d Dept 2019]), and we perceive no basis for disturbing its determination.

We have considered petitioner's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

509

CA 19-01238

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

ERIC BARKER, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

UNION CORRUGATING COMPANY, DEFENDANT-RESPONDENT,
AND LOWE'S HOME CENTERS, L.L.C., DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANT-APPELLANT AND DEFENDANT-RESPONDENT.

ALEXANDER LAW OFFICE, PLLC, ELBRIDGE (RALPH S. ALEXANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 19, 2019. The order, among other things, granted in part and denied in part the motion of defendants for summary judgment, dismissed the complaint against defendant Union Corrugating Company, and granted that part of plaintiff's cross motion seeking summary judgment against defendant Lowe's Home Centers, L.L.C. on the Labor Law § 240 (1) cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendants' motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action against defendant Union Corrugating Company, reinstating that cause of action against that defendant, and granting that part of plaintiff's cross motion seeking summary judgment on the Labor Law § 240 (1) cause of action against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell from a roof while working on a roofing project at a private residence (residence). Defendant Union Corrugating Company (Union) manufactures metal roofing materials, and defendant Lowe's Home Centers, L.L.C. (Lowe's), among other things, sells such materials. Defendants entered into an agreement whereby Lowe's agreed to sell Union's roofing materials to consumers, and both defendants entered into contracts with plaintiff's employer pursuant to which plaintiff's employer agreed to install Union's roofing materials that were sold by Lowe's. Lowe's also entered into an agreement whereby it agreed to sell to the owners of the residence Union's roofing materials, which were to be installed by plaintiff's employer.

After commencement of this action, defendants jointly moved for summary judgment dismissing the complaint, and plaintiff cross-moved for, inter alia, summary judgment on the Labor Law § 240 (1) cause of action and dismissing Lowe's eighth affirmative defense, wherein Lowe's alleged that it was not a contractor within the meaning of the Labor Law. As relevant on appeal, Supreme Court granted defendants' motion and denied plaintiff's cross motion with respect to the Labor Law § 240 (1) cause of action against Union, denied defendants' motion and granted plaintiff's cross motion with respect to the Labor Law § 240 (1) cause of action against Lowe's, and granted the cross motion with respect to Lowe's eighth affirmative defense. Lowe's and plaintiff appeal.

Regarding Lowe's appeal and for reasons stated in the decision at Supreme Court, we affirm the order insofar as it denied defendants' motion and granted plaintiff's cross motion with respect to the Labor Law § 240 (1) cause of action against Lowe's and further granted the cross motion with respect to Lowe's eighth affirmative defense.

We agree with plaintiff on his appeal, however, that the court erred in granting defendants' motion and denying plaintiff's cross motion with respect to the Labor Law § 240 (1) cause of action against Union. We therefore modify the order accordingly. Initially, we note that, "[i]n order to prevail on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his or her injuries" (*Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 985 [2d Dept 2012]; *see Bellreng v Sicoli & Massaro, Inc.* [appeal No. 2], 108 AD3d 1027, 1029-1030 [4th Dept 2013]). Here, we agree with plaintiff that he met his initial burden on the cross motion with respect to the section 240 (1) cause of action against Union by establishing that defendants failed to provide appropriate safety devices, that he was working at an elevated work site, and that the statutory violation was a proximate cause of his injuries, and defendants failed to raise a triable issue of fact in opposition thereto. Indeed, defendants do not contest those issues on appeal. Thus, the sole issue on plaintiff's appeal concerns whether Union is a contractor within the meaning of the statute.

Plaintiff contends that he met his initial burden on the cross motion with respect to that issue. We agree. It is well settled that the Labor Law "holds . . . general contractors absolutely liable for any breach of the statute even if the job was performed by an independent contractor over which [they] exercised no supervision or control" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011] [internal quotation marks omitted]), inasmuch as "[t]heir status as contractors is dependent on their right to exercise control, not whether they in fact did so" (*Mergenhagen v Dish Network Serv. L.L.C.*, 64 AD3d 1170, 1171-1172 [4th Dept 2009]). In determining whether a defendant may be found liable pursuant to section 240 (1), it is well settled that, where, as here, a defendant "ha[s] the authority to choose the part[y] who did the work, and directly enter[s] into [a] contract[] with th[at party], it ha[s] the authority to exercise

control over the work, even if it [does] not actually do so" (*Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]; *see Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098-1099 [4th Dept 2014]; *see generally Stiegman v Barden & Robeson Corp.* [appeal No. 2], 162 AD3d 1694, 1697 [4th Dept 2018]). In addition, the "fact that [Lowe's] possessed concomitant or overlapping authority to supervise the entire renovation, including the installation of the [roofing materials], does not negate [Union's] authority to supervise and control the installation of" those materials (*Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

Here, plaintiff submitted evidence establishing that Union entered into a contract with plaintiff's employer to install the roofing materials at issue and that the contract provided Union with the power to, inter alia, perform inspections, stop work, and remove plaintiff's employer from the job. We therefore conclude that plaintiff demonstrated as a matter of law that Union is a "contractor" within the meaning of Labor Law § 240 (1) (*see generally Rauls*, 113 AD3d at 1098-1099). We further conclude that defendants failed to raise a triable issue of fact in opposition thereto, and thus the court erred in denying that part of the cross motion seeking summary judgment on the Labor Law § 240 (1) cause of action against Union (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Furthermore, inasmuch as defendants submitted the same evidence in support of their motion, the court erred in granting that part of their motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action against Union.

Plaintiff's further contention is academic in light of our determination.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

510

CA 19-02022

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

DEBRA GINSBERG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BJ'S WHOLESALE CLUB, INC., DEFENDANT-APPELLANT.

BJ'S WHOLESALE CLUB, INC., THIRD-PARTY PLAINTIFF,

V

INTERNATIONAL BUSINESS MACHINES CORPORATION, THIRD-PARTY DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (STEPHEN S. DAVIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (ROBERT P. YAWMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered April 25, 2019. The order denied the motions of defendant and third-party defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a metal panel detached from a self-check-out machine at one of defendant-third-party plaintiff's stores and fell onto her foot. The machine was manufactured by third-party defendant. Defendant-third-party plaintiff (BJ's) and third-party defendant (collectively, defendants) separately moved for summary judgment dismissing the complaint. Supreme Court denied the motions on the ground that questions of fact existed whether BJ's lacked constructive notice of any defective or dangerous condition of the machine.

We agree with defendants that the court erred in denying their motions, and we therefore reverse. Defendants met their initial

burden of establishing that BJ's lacked constructive notice of the allegedly dangerous or defective condition of the machine, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Anderson v Justice*, 96 AD3d 1446, 1447 [4th Dept 2012]).

It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1401 [4th Dept 2018]; *Clarke v Wegmans Food Mkts., Inc.*, 147 AD3d 1401, 1402 [4th Dept 2017]). Here, defendants' submissions on the motions established that no one, including plaintiff, observed any defect in the machine or the metal panel that injured plaintiff (*see Anderson*, 96 AD3d at 1447). Indeed, defendants' evidence demonstrated that the self-check-out machine was inspected and tested on the morning of the incident, that an employee was stationed directly in front of the machine prior to the incident and observed nothing abnormal about the machine, and that plaintiff herself had observed nothing abnormal about the machine while standing in line and waiting to use it. Although the deposition testimony of one of BJ's employees referenced that the employee had previously "adjust[ed]" a panel on an unidentified self-check-out machine at some time, nothing in that testimony indicated that BJ's had notice of a defective or dangerous condition of the machine that injured plaintiff.

In opposition to the motions, plaintiff submitted an affidavit from her expert opining that a physical inspection of the metal panel would have revealed that it posed a danger of falling. That conclusion was both "speculative and unsupported by the record" (*Calcagno v Big V Supermarkets*, 245 AD2d 698, 699 [3d Dept 1997]) in light of the evidence regarding the inspections performed and observations of the machine prior to the incident (*see generally Anderson*, 96 AD3d at 1447-1448).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

513

CA 19-01470

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

BRENDA J. BARNETT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN J. DISALVO AND JOHN DISALVO, DOING BUSINESS AS DISALVO PIZZERIA & SUB SHOP, DEFENDANTS-RESPONDENTS.

THE DIETRICH LAW FIRM, PC, WILLIAMSVILLE (BRIAN R. WOOD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS HERDZIK SPEYER & MONTE P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 11, 2019. The amended judgment awarded defendants costs and disbursements upon a verdict of no cause of action.

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

Memorandum: Plaintiff appeals from an amended judgment that awarded defendants costs and disbursements upon a verdict of no cause of action in this negligence action commenced by plaintiff after she allegedly fell on the stairs leading into defendants' pizzeria. Two weeks prior to trial, plaintiff moved, as relevant to this appeal, for summary judgment on the issue of liability based solely on the theory that the uneven rise and tread of the stairs caused her fall. She supported her motion with, among other things, the affidavit of an expert, who opined that the stairs were noncompliant with the governing building code at the time of the accident and their construction due to the uneven rise and tread, as well as an affidavit from plaintiff herself asserting that the uneven stairs were a proximate cause of her fall. In response, defendants filed a cross motion in limine seeking, inter alia, to preclude at trial any expert testimony regarding those alleged building code violations and any reference to plaintiff's affidavit. Supreme Court denied plaintiff's motion and granted defendants' cross motion.

On appeal, plaintiff contends that the court abused its discretion in precluding her expert from testifying at trial regarding the uneven rise and tread of the stairs as a sanction for plaintiff's alleged failure to comply with the notice requirements of CPLR 3101

(d) (1). The court, however, did not grant that part of the cross motion seeking to preclude the expert testimony on that basis. Instead, the court precluded it because the expert opinion raised a new theory of negligence on the eve of trial that was inconsistent with plaintiff's deposition testimony that she stepped down onto the stairs and slipped on ice. The court similarly granted that part of the cross motion seeking to preclude any reference at trial to a "self-serving affidavit" of plaintiff asserting that her fall at defendants' pizzeria was caused in part by the uneven stairs and directed that the trial would proceed on the theory of "snow and ice only." Plaintiff failed to address those determinations in her main brief on appeal. Although plaintiff did argue in her reply brief that her deposition testimony did not preclude the additional theory that the uneven stairs contributed to her fall, "by failing to address the basis for the court's decision in [her] main brief, [plaintiff] cannot be heard on [her] other contentions that were not the dispositive basis for the court's decision, and [she] therefore ha[s] effectively abandoned any issue concerning [the court's preclusion of plaintiff's new theory of her fall] on appeal" (*Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

515

CA 19-01705

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

ROBERT BARRON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TYLER BLASETTI, DEFENDANT-RESPONDENT.

THE WRIGHT FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 19, 2019. The order and judgment, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) insofar as they relate to plaintiff's thoracic spine and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he allegedly sustained after his vehicle was struck by a vehicle driven by defendant. Plaintiff appeals from an order and judgment that, inter alia, granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) and denied that part of plaintiff's cross motion for summary judgment on the issue of serious injury. As an initial matter, we note that plaintiff contends on appeal only that he sustained a significant limitation of use and a permanent consequential limitation of use of his thoracic spine and thus has abandoned any other particularized claims of serious injury (*see Houston v Geerlings*, 83 AD3d 1448, 1449 [4th Dept 2011]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with plaintiff that defendant failed to meet his initial burden on his motion with respect to plaintiff's thoracic spine injury under the significant limitation of use and permanent consequential

limitation of use categories and thus that Supreme Court erred in granting defendant's motion to that extent. We therefore modify the order and judgment accordingly. The medical records submitted by defendant reference plaintiff's thoracic pain, tenderness, and muscle spasms; discuss imaging that revealed disc protrusions in plaintiff's thoracic spine; and at times note decreased range of motion in his mid and lower back (*see generally Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1544 [4th Dept 2011]). Defendant also submitted the report of a physician who performed a medical examination of plaintiff wherein the physician acknowledged that the accident activated symptoms of preexisting degenerative changes in plaintiff's thoracic spine, but opined that plaintiff had only a "mild disability." Although the report described plaintiff's thoracic range of motion as "full," it did not provide related numerical measurements as it had with respect to the cervical and lumbar spine. Based on the above, we conclude that defendant's own submissions raised issues of fact with respect to plaintiff's thoracic spine injury under the significant limitation of use and permanent consequential limitation of use categories (*see generally Strangio v Vasquez*, 144 AD3d 1579, 1580 [4th Dept 2016]; *Aleksiejuk v Pell*, 300 AD2d 1066, 1066-1067 [4th Dept 2002]).

Contrary to plaintiff's further contention, however, he failed to meet his initial burden on his cross motion with respect to his thoracic spine injury under the significant limitation of use and permanent consequential limitation of use categories. Although plaintiff submitted the report of a physician who measured a loss of range of motion in plaintiff's thoracic spine during an examination over four years after the collision, records more contemporaneous to the accident raise an issue of fact whether or to what degree plaintiff lost range of motion (*see generally Doran v Sequino*, 17 AD3d 626, 626-627 [2d Dept 2005]; *Sarkis v Gandy*, 15 AD3d 942, 943 [4th Dept 2005]; *Check v Gacevk*, 14 AD3d 586, 586 [2d Dept 2005]). Further, although plaintiff's imaging revealed that he had disc protrusions in his thoracic spine, such protrusions alone were insufficient to establish a qualifying serious injury as a matter of law (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Borzillieri v Jones*, 68 AD3d 1668, 1669 [4th Dept 2009]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

516

CA 19-01583

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

ERIK D. SWANSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID DOMINESEY, DEFENDANT-RESPONDENT.

JOSEPH (JED) E. DIETRICH, III, ESQ., WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 22, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and with respect to the claim for economic loss in excess of basic economic loss, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident. Plaintiff asserted that, as a result of the collision, he suffered a serious injury under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories within the meaning of Insurance Law § 5102 (d). Defendant thereafter moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury that was causally related to the accident and did not sustain economic loss in excess of basic economic loss (*see* § 5102 [a]). Plaintiff appeals from an order granting the motion.

Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion with respect to the 90/180-day category. Defendant submitted "competent evidence establishing that plaintiff's activities were not curtailed to a great extent and that [he] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury," and plaintiff failed to raise a triable

issue of fact with respect to that category (*Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012] [internal quotation marks omitted]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore modify the order accordingly. Defendant failed to meet his initial burden of establishing that plaintiff did not sustain a serious injury under those categories that was causally related to the accident inasmuch as his own submissions raised triable issues of fact (*see Barnes v Occhino*, 171 AD3d 1455, 1456 [4th Dept 2019]; *Mancuso v Collins*, 32 AD3d 1325, 1326 [4th Dept 2006]). Even assuming, arguendo, that defendant met his initial burden to that extent, we conclude that plaintiff raised a triable issue of fact in opposition by submitting the expert affirmation of his surgeon (*see Grier v Mosey*, 148 AD3d 1818, 1819-1820 [4th Dept 2017]; *see also Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]).

We likewise agree with plaintiff that the court erred in granting the motion insofar as it sought summary judgment dismissing the claim for economic loss in excess of basic economic loss inasmuch as there are triable issues of fact with respect thereto (*cf. Cicco*, 147 AD3d at 1488). We therefore further modify the order accordingly.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

523

KA 19-01423

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DAMION R. RUVALCABA, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Monroe County Court (Sam L. Valleriani, J.), dated April 5, 2019. The order, insofar as appealed from, granted in part defendant's omnibus motion and reduced count one of the indictment to criminal obstruction of breathing or blood circulation.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss or reduce count one of the indictment is denied, count one of the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss or reduce count one of the indictment, charging the crime of strangulation in the second degree (Penal Law § 121.12), by reducing that count to criminal obstruction of breathing or blood circulation (§ 121.11). The charges arose from an incident in which defendant allegedly choked and assaulted his girlfriend in the presence of their infant daughter. County Court determined, based on its review of the grand jury minutes, that "[t]he People's theory of prosecution as presented to the grand jury was that defendant committed strangulation in the second degree by choking the alleged victim thereby causing her 'stupor.' " The court further concluded that the grand jury proceeding was defective with respect to the strangulation charge because "[t]he prosecutor did not offer a definition of the necessary element of stupor to the grand jury." Based on its determination that the evidence was legally sufficient "to establish defendant's commission of the lesser included offense of criminal obstruction of breathing or blood circulation," however, the court reduced the charge of strangulation in the second degree to criminal obstruction of

breathing or blood circulation. We reverse the order insofar as appealed from.

We agree with the People that the court erred in determining that the failure of the prosecutor to offer a definition of the term "stupor" rendered the grand jury proceedings defective with respect to the charge of strangulation in the second degree. A grand jury proceeding is defective if it "fails to conform to the requirements of [CPL] article [190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]). "[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Sheltray*, 244 AD2d 854, 855 [4th Dept 1997], *lv denied* 91 NY2d 897 [1998] [internal quotation marks omitted]; *see People v Huston*, 88 NY2d 400, 409 [1996]). A grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law," and it is "sufficient if the [prosecutor] provides the [g]rand [j]ury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*People v Calbud, Inc.*, 49 NY2d 389, 394-395 [1980]).

In order to sustain the charge of strangulation in the second degree against defendant, the People were required to present to the grand jury legally sufficient evidence of the following three elements: (1) that defendant applied pressure on the throat or neck of the alleged victim; (2) that defendant did so with the intent to impede the normal breathing or circulation of the blood of the alleged victim; and (3) that defendant thereby caused stupor, loss of consciousness for any period of time, or any other physical injury or impairment to the alleged victim (*see* Penal Law § 121.12; CJI2d [NY] Penal Law § 121.12).

Here, the prosecutor's instructions to the grand jury comported with the statute and mirrored the pattern criminal jury instructions (*see* Penal Law § 121.12; CJI2d [NY] Penal Law § 121.12), and we conclude that the failure of the prosecutor to offer a definition of the term "stupor" did not impair the integrity of the grand jury proceedings or potentially prejudice defendant (*see generally People v Talley*, 273 AD2d 883, 883 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]). The term "stupor" is not defined in the Penal Law (*see generally* §§ 10.00, 121.12), but we "presum[e] that lawmakers have used words as they are commonly or ordinarily employed, unless there is something in the context or purpose of the [statute] which shows a contrary intention" (*People v Finley*, 10 NY3d 647, 654 [2008] [internal quotation marks omitted]). Like other statutory provisions, "those contained in the Penal Law are generally to be construed so as to give effect to their most natural and obvious meaning" (*People v Burman*, 173 AD3d 1727, 1727 [4th Dept 2019] [internal quotation marks omitted]; *see also* § 5.00), and we conclude that the grand jury did not require additional instruction to apply the "most natural and

obvious meaning" of the term "stupor" in reaching its conclusion (*Burman*, 173 AD3d at 1727 [internal quotation marks omitted]). Notably, the grand jury made no request for a definition or explanation of the meaning of that term.

We also agree with the People that the evidence before the grand jury was legally sufficient to sustain the charge of strangulation in the second degree. In reviewing the evidence before a grand jury, "a reviewing court must consider 'whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury' " (*People v Bello*, 92 NY2d 523, 525 [1998], quoting *People v Jennings*, 69 NY2d 103, 114 [1986]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged" (CPL 70.10 [1]). "In the context of a [g]rand [j]ury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt . . . The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes" (*Bello*, 92 NY2d at 526 [internal quotation marks omitted]).

Here, the alleged victim testified before the grand jury that defendant "put both of his hands around [her] neck and choked [her] until [she] could barely breathe anymore" and "was starting to lose consciousness." She was "pushed up against the wall and the door" and felt "[v]ery light-headed and kind of like—like there was a buzzing in [her] head and everything was starting to turn purple in [her] vision before—by the time [the alleged victim] got him to let go." She fell to the ground and "started to gasp for air," and defendant kicked her in the head while she was on the ground. The alleged victim told defendant that she would call the police, to which defendant responded: "No you're not because you're going to go to sleep." The alleged victim testified that she suffered pain as a result of defendant hitting and choking her, which lasted for a few days and that she took ibuprofen to manage her pain. During her testimony, which occurred five days after the incident, the alleged victim displayed to the grand jury the bruising that remained on her forehead, cheek, and left arm.

Even assuming, arguendo, that the People's theory of the case as presented to the grand jury was, as the court determined, that defendant caused only stupor and no other physical injury or impairment to the alleged victim, we conclude that her testimony that defendant applied pressure to her neck with the intent to impede her normal breathing or circulation of blood and that he caused her to be able to barely breathe and to feel light-headed, to gasp for air, and to have purple vision provided legally sufficient evidence of stupor (*see People v Manigault*, 150 AD3d 1331, 1332-1333 [3d Dept 2017], *lv denied* 29 NY3d 1130 [2017]).

Furthermore, we agree with the People that the prosecutor did not limit the People's case to the theory that defendant caused "stupor"

but not "any other physical injury or impairment" to the alleged victim (Penal Law § 121.12) and that the People were not required to so limit their theory. The harms resulting from the strangulation are stated disjunctively in the statute and, based on our review of the grand jury minutes, we conclude that the People's theory also could have been that defendant caused "any other physical injury or impairment" to the alleged victim (*id.*), as set forth in the bill of particulars. Inasmuch as the alleged victim testified that, as a result of defendant choking and striking her, she felt pain for several days and took ibuprofen to manage the pain, we conclude that the evidence before the grand jury was also legally sufficient to establish that defendant caused "impairment of physical condition or substantial pain" (§ 10.00 [9]; *see* CJI2d [NY] Penal Law § 121.12; *People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *see also People v Funk*, 166 AD3d 1487, 1487-1488 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *People v Pettine*, 50 AD3d 1517, 1517-1518 [4th Dept 2008]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

525

KA 18-00492

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. CARPENTER, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 26, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [1]), arising from an altercation in which defendant punched the victim in the face. We affirm.

Defendant contends that he was deprived of a fair trial because, even in the absence of a for-cause challenge from either side, County Court should have excluded two prospective jurors who purportedly exhibited actual bias (CPL 270.20 [1] [b]) and another prospective juror who had an implied bias (CPL 270.20 [1] [c]). We reject that contention. Even assuming, arguendo, that the court erred in failing, sua sponte, to exclude the prospective jurors for cause, we conclude that "the error does not require reversal because defendant had not exhausted his peremptory challenges and did not peremptorily challenge th[e] prospective juror[s]" (*People v Arguinzoni*, 48 AD3d 1239, 1241 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]; *see* CPL 270.20 [2]; *People v Green*, 179 AD3d 1516, 1516 [4th Dept 2020], *lv denied* 35 NY3d 93 [2020], *reconsideration denied* 35 NY3d 1045 [2020]). Contrary to defendant's related contention, we conclude on this record that defendant has "failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge th[e] prospective jurors" (*People v Mahoney*, 175 AD3d 1034, 1035 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]; *see People v Maffei*, 35 NY3d 264, 265-274 [2020]; *People v Barboni*, 21 NY3d 393, 406-407 [2013]). To the extent that defendant's contention is dependent on matters outside the record

on direct appeal, "the appropriate procedure for the litigation of defendant's challenge to his counsel's performance is a CPL 440.10 motion" (*Maffei*, 35 NY3d at 266).

Defendant's contention that the evidence is legally insufficient because the testimony of the People's witnesses was inconsistent is not preserved for our review inasmuch as defendant did not raise that ground in support of his motion for a trial order of dismissal (*see People v Graham*, 174 AD3d 1486, 1490 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Whitfield*, 255 AD2d 924, 924-925 [4th Dept 1998], *lv denied* 93 NY2d 981 [1999]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). We reject defendant's related contention that he was denied effective assistance of counsel because defense counsel failed to preserve that challenge for our review. "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 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Bell*, 176 AD3d 1634, 1635 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]).

Contrary to defendant's further contention, we conclude that the evidence is legally sufficient to establish that the victim sustained a serious physical injury in the form of protracted impairment of health (Penal Law § 10.00 [10]). The People presented testimony and medical records establishing that the victim sustained multiple, extensive facial fractures, which required surgery and the permanent placement of a plate in her face. The victim experienced pain and difficulty eating for months after the incident, and she continued to experience shooting pains and numbness at the time of trial as a result of nerve damage that, according to the medical evidence, may never resolve (*see People v Payne*, 115 AD3d 439, 440 [1st Dept 2014], *lv denied* 23 NY3d 1041 [2014]; *People v Ford*, 114 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]; *People v Nicholson*, 97 AD3d 968, 969 [3d Dept 2012], *lv denied* 19 NY3d 1104 [2012]; *cf. People v Stewart*, 18 NY3d 831, 832-833 [2011]).

We also reject defendant's alternative contention that the verdict is against the weight of the evidence due to inconsistencies in the testimony of the People's witnesses. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the "inconsistencies are not so substantial as to render the verdict against the weight of the evidence" (*People v Bailey*, 90 AD3d 1664, 1666 [4th Dept 2011], *lv denied* 19 NY3d 861 [2012]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, the " '[i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations' " (*People v Odums*, 121 AD3d 1503, 1504 [4th Dept 2014], *lv denied* 26 NY3d 1042 [2015]; *see People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

With respect to the remaining instances of purported ineffective

assistance raised by defendant on appeal, we conclude that defendant has failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 713 [1998]). Finally, contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

532

CA 19-01995

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL CHURCHILL AND
DIANA STIRLING, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG, TOWN OF HAMBURG ZONING BOARD
OF APPEALS AND TOWN OF HAMBURG SUPERVISING CODE
ENFORCEMENT OFFICIAL, RESPONDENTS-RESPONDENTS.

THE GARAS LAW FIRM, LLP, WILLIAMSVILLE (JOHN C. GARAS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Dennis Ward, J.), entered May 22, 2019 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 modified on the law by granting the petition insofar as it sought to annul the determination of respondent Town of Hamburg Zoning Board of Appeals affirming the determination of respondent Town of Hamburg Supervising Code Enforcement Official and as modified the judgment is affirmed without costs.

Memorandum: Petitioners, who sought to operate their residence as an Airbnb rental, commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Town of Hamburg Zoning Board of Appeals (ZBA) affirming respondent Town of Hamburg Supervising Code Enforcement Official's (CEO) interpretation that, under the Code of the Town of Hamburg (Town Code), such a "tourist home" is not a permitted principal use in an R-1 zoning district and that petitioners would therefore have to obtain a use variance before applying for a special use permit to operate an Airbnb rental. Petitioners now appeal, as limited by their brief, from a judgment insofar as it denied that relief.

We agree with petitioners that the ZBA's interpretation of the Town Code lacks a rational basis and that Supreme Court therefore erred in sustaining the ZBA's determination (*see Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1577-1578 [4th Dept 2019]; *see generally Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-419 [1998]). We

therefore modify the judgment by granting that part of the petition seeking to annul the ZBA's determination upholding the CEO's interpretation of the Town Code.

Specifically, we conclude that the court failed to apply the clear language of the Town Code's relevant provisions. It is well settled that "[c]ourts should not . . . interpret what has no need of interpretation" (*Marcus Assoc. v Town of Huntington*, 45 NY2d 501, 505 [1978] [internal quotation marks omitted]). Town Code § 280-31 provides that the uses and structures permitted in the R-1 District, where petitioners' residence is located, include the principal uses and structures permitted under section 280-24, which governs R-E Districts, except those specified in subdivisions four and five of the six enumerated subdivisions in that section. The sixth subdivision allows "[t]he following uses by special use permit authorized by the Planning Board: . . . (b) Bed-and-breakfast establishments and tourist homes" (§ 280-24 [A] [6] [b]). A plain reading of sections 280-24 and 280-31 therefore unambiguously demonstrates that special uses are permitted principal uses, subject to authorization by the Planning Board (*see generally Matter of Sunrise Plaza Assoc. v Town Bd. of Town of Babylon*, 250 AD2d 690, 693 [2d Dept 1998], *lv denied* 92 NY2d 810 [1998]; *Matter of Shepard v Zoning Bd. of Appeals of City of Johnstown*, 92 AD2d 993, 995 [3d Dept 1983]).

Contrary to the ZBA's determination and the interpretation advocated by respondents—i.e., that when sections 280-24 and 280-31 of the Town Code are read in the context of the Town Code as a whole, it is clear that special uses are not permitted principal uses and that the Town Board did not intend for special uses to carry over into other provisions—we conclude that the Town Code establishes that special uses are permitted uses in specific districts, but the burden is on an applicant for a special use permit to show that the proposed use is allowable within that district by establishing that the use has the requisite individual characteristics (*see* §§ 280-312, 280-313 [B]). Our interpretation of the Town Code is supported by Town Law § 274-b (1), which defines a special use permit as "an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Further, if the Town Board had intended for special uses to be separate from principal uses, it would have separated them into their own category as it did with accessory uses.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

537

CA 19-01801

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF DELAWARE OPERATIONS ASSOCIATES LLC, DOING BUSINESS AS BUFFALO CENTER FOR NURSING AND REHABILITATION, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT-RESPONDENT.

COWART DIZZIA LLP, NEW YORK CITY (JENNIFER J. NEARY OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered March 15, 2019 in a CPLR article 78 proceeding. The order and judgment granted the motion of respondent to dismiss the petition, denied the cross motion of petitioner for an extension of time to effectuate service and dismissed the petition.

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

Memorandum: In this CPLR article 78 proceeding seeking to annul a determination by respondent New York State Department of Health (DOH) that petitioner was ineligible for Medicaid reimbursement for the costs of medical assistance provided to one of its residents, petitioner appeals from an order and judgment that, inter alia, granted DOH's motion to dismiss the petition on the ground that petitioner failed to timely serve the notice of petition and petition and denied petitioner's cross motion for an extension of time to effectuate service. We affirm.

Petitioner contends that Supreme Court should have granted its cross motion for an extension of time to effectuate service pursuant to CPLR 306-b "in the interest of justice." It is well settled that the determination to grant such "[a]n extension of time for service is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]; *see Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]). Factors the court may consider in making that determination include petitioner's "diligen[t efforts at service] or

lack thereof, along with . . . [the] expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a [petitioner's] request for the extension of time, and prejudice to the [respondent]" (*Leader*, 97 NY2d at 105-106).

After weighing the relevant factors, we conclude that the court did not abuse its discretion in denying the cross motion (*see generally Swaggard v Dagonese*, 132 AD3d 1395, 1396 [4th Dept 2015]; *Matter of Ontario Sq. Realty Corp. v LaPlant*, 100 AD3d 1469, 1469 [4th Dept 2012]; *Moss*, 87 AD3d at 1374). Here, petitioner's lack of diligence in attempting to effectuate service—i.e., the absence of any evidence that petitioner attempted to serve DOH, among others, during the relevant time frame—weighs heavily in favor of denying its cross motion (*cf. Moundrakis v Dellis*, 96 AD3d 1026, 1027 [2d Dept 2012]; *Stryker v Stelmak*, 69 AD3d 454, 455 [1st Dept 2010]). We note that petitioner did not promptly request an extension of time; indeed, it did not even discover its error until *after* DOH moved to dismiss the petition on the ground of untimely service.

Also heavily weighing against granting an extension of time is the lack of merit to the underlying proceeding (*see generally Pierce v Village of Horseheads Police Dept.*, 107 AD3d 1354, 1357-1358 [3d Dept 2013]). Given the deference accorded to an agency's interpretation of its own regulations (*see Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 280 [2003]), it is highly unlikely that the court would have annulled DOH's determination that petitioner was not entitled to reimbursement through Medicaid of the cost of providing medical care to its resident because she did not qualify for the undue hardship exception (*see Matter of Conners v Berlin*, 105 AD3d 1208, 1210-1211 [3d Dept 2013]; *see also* 18 NYCRR 360-4.10 [a] [12] [iii]). To the extent that the remaining factor favors granting petitioner an extension of time, we conclude that it does not outweigh the factors supporting denial.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

547

CA 19-01382

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

AL DIRSCHBERGER, PH.D., AS COMMISSIONER OF
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN LAWSON, DEFENDANT-APPELLANT.

LEROI C. JOHNSON, BUFFALO, FOR DEFENDANT-APPELLANT.

BONNIE A. MCLAUGHLIN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 4, 2019. The judgment awarded plaintiff $22,354.59, plus interest.

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

Memorandum: Plaintiff commenced this action pursuant to Social Services Law § 104 seeking to recover the overpayment of Medicaid benefits to defendant. Following a nonjury trial, Supreme Court granted judgment to plaintiff in the amount of $22,354.59, plus interest. We affirm.

Defendant's contention that the court erred in admitting in evidence plaintiff's exhibit 5, a summary of the amounts of Medicaid benefits that were overpaid to defendant, on the ground that it was a document prepared in anticipation of litigation, is not preserved for our review (*see Cooper v Nestoros*, 159 AD3d 1365, 1367 [4th Dept 2018]; *Davis v Vallie*, 93 AD3d 1232, 1232 [4th Dept 2012]; *see also Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d 769, 771 [1984]). In any event, we agree with plaintiff that the court properly admitted that exhibit in evidence as a business record (*see* CPLR 4518 [a]; *Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569, 570 [1st Dept 2019]).

Defendant contends that, pursuant to CPLR 2305 (d), plaintiff should have provided him with copies of bank statements that plaintiff obtained by subpoena. Defendant has failed to include any subpoenas in the record on appeal, however, and we are thus unable to determine whether plaintiff failed to comply with CPLR 2305 (d) (*see Allington v Templeton Found.*, 167 AD3d 1437, 1440 [4th Dept 2018]; *Montanaro v Weichert*, 164 AD3d 1611, 1612 [4th Dept 2018]). Defendant contends

that the court erred in admitting in evidence plaintiff's exhibit 9, a review summary of the aforementioned bank statements. That contention is not preserved for our review because, although defendant's attorney initially objected to the use of plaintiff's exhibit 9 during direct examination of one of plaintiff's witnesses, defendant's attorney subsequently stated that he had no objection to the exhibit being admitted in evidence (*see Matter of Clark v Hawkins*, 140 AD3d 1753, 1754 [4th Dept 2016]). In any event, the information in plaintiff's exhibit 9 was also contained in plaintiff's exhibit 6, and defendant's attorney had no objection to plaintiff's exhibit 6 being admitted in evidence. We therefore conclude that any error in admitting plaintiff's exhibit 9 in evidence is harmless (*see Palmer v Wright & Kremers*, 62 AD2d 1170, 1171 [4th Dept 1978]; *see generally Rizzuto v Getty Petroleum Corp.*, 289 AD2d 217, 217-218 [4th Dept 2001]).

We have considered defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

556

CA 19-01531

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

HELENE F. VANEPPS AND JAMES J. VANEPPS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID D. MANCUSO, DOING BUSINESS AS MANCUSO COUNTRY AUTO AND DOING BUSINESS AS MANCUSO LIMOUSINES & BUSES OF WNY, AND JOSHUA D. WAHL,
DEFENDANTS-RESPONDENTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 20, 2019. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint except insofar as the complaint, as amplified by the bill of particulars, alleges that defendants were negligent in failing to provide seatbelts, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by plaintiff Helene F. VanEpps in a single-vehicle accident involving a limousine bus owned by defendant David D. Mancuso, doing business as Mancuso Country Auto and doing business as Mancuso Limousines & Buses of WNY, and operated by defendant Joshua D. Wahl. We agree with plaintiffs that Supreme Court erred in granting that part of defendants' motion seeking summary judgment dismissing the complaint based on application of the emergency doctrine. " 'The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact' " (*Baldauf v Gambino*, 177 AD3d 1307, 1309 [4th Dept 2019]; *see White v Connors*, 177 AD3d 1250, 1252 [4th Dept 2019]). Upon our review of the record, we conclude that "whether the emergency doctrine precludes liability presents a question of fact and, therefore, summary judgment for defendants . . . was inappropriate" (*Green v Metropolitan Transp. Auth. Bus Co.*, 26 NY3d 1061, 1062

[2015]).

We note, however, that the court also granted that part of defendants' motion seeking to dismiss plaintiffs' claim that defendants were negligent in failing to provide seatbelts on the ground that defendants were under no duty to do so. Plaintiffs failed to brief any argument with respect to the dismissal of that claim, thereby abandoning any challenge to that part of the order (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We therefore modify the order by denying the motion in part and reinstating the complaint except insofar as the complaint, as amplified by the bill of particulars, alleges that defendants were negligent in failing to provide seatbelts.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

562

KA 18-01026

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN WILLIAMS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 1, 2018. The judgment convicted defendant upon his plea of guilty of aggravated driving while intoxicated, a class E felony, and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i]). As the People correctly concede, the uniform sentence and commitment dated July 2, 2018, and the certificate of conviction erroneously recite that, with respect to the above crime, Supreme Court adjudicated defendant a second felony offender and imposed an indeterminate term of imprisonment of 1½ to 3 years. Those documents must therefore be amended to reflect that defendant was not adjudicated a second felony offender and that the court imposed an indeterminate term of imprisonment of 1 to 3 years (*see People v Morrow*, 167 AD3d 1516, 1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Wesley B.*, 167 AD3d 1562, 1562 [4th Dept 2018]; *People v Kowal*, 159 AD3d 1346, 1347 [4th Dept 2018]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

589

KA 15-01596

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 21, 2015. The appeal was held by this Court by order entered February 1, 2019, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (169 AD3d 1443 [4th Dept 2019]). The proceedings were held and completed.

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 sexual abuse in the first degree (Penal Law § 130.65 [2]). We previously held the case, reserved decision, and remitted the matter to County Court for clarification of the sentence imposed (*People v Boyde*, 169 AD3d 1443, 1445 [4th Dept 2019]). Upon remittal, the court stated that, at the time of sentencing, it had concluded that "it would have been unduly harsh to impose a determinate term of imprisonment" and the requisite term of postrelease supervision under the circumstances of the case, and thus it had "imposed a definite, I'll repeat that, definite term of imprisonment." Inasmuch as the court properly imposed a sentence of local incarceration (*see* § 70.80 [4] [c]) and "there is no requirement that postrelease supervision be imposed where a defendant is sentenced to a definite term of incarceration" (*Boyde*, 169 AD3d at 1444), we reject defendant's contention that the sentence is illegal.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

591

KA 19-01781

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered June 12, 2019. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that Supreme Court erred in refusing to grant him a downward departure from the presumptive risk level. Even assuming, arguendo, that defendant's contention is preserved despite the fact that he never expressly asked for a downward departure (*cf. People v Wright*, 158 AD3d 1062, 1063 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]; *People v Williams*, 122 AD3d 1378, 1379 [4th Dept 2014]), we conclude that defendant failed to establish the existence of a mitigating factor by the requisite "preponderance of the evidence" (*People v Gillotti*, 23 NY3d 841, 861 [2014]).

"Although 'advanced age' may constitute a basis for a downward departure[,] . . . defendant failed to demonstrate that his age at the time of the SORA hearing, [55] years old, would, in and of itself, reduce his risk of reoffense" (*People v Munoz*, 155 AD3d 1068, 1069 [2d Dept 2017], *lv denied* 30 NY3d 912 [2018]; *see People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4-5 [2006]). Defendant "failed to present any expert testimony or other evidence that would have permitted the SORA court to find that his [age alone or combined with the length of his supervision] decrease[d] the likelihood that he will reoffend" (*People v Rodriguez*,

145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]; *see People v Santiago*, 137 AD3d 762, 764-765 [2d Dept 2016], *lv denied* 27 NY3d 907 [2016]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

599

CA 20-00002

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

MARLENE CORNELL, AS ADMINISTRATOR OF THE ESTATE
OF SAMUEL CONDELLO, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-RESPONDENT.

DAVID L. MURPHY, P.C., ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MICHELE ROMANCE CRAIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered December 6, 2019. The order granted the motion of defendant for partial summary judgment dismissing plaintiff's claim for punitive damages.

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

Memorandum: Plaintiff's decedent, Samuel Condello, was a wheelchair-bound resident at Monroe Community Hospital (MCH). On December 6, 2012, Condello was deprived of his manual wheelchair by MCH's executive director. Condello's health thereafter deteriorated, and he died on January 9, 2013. Plaintiff filed the instant amended complaint asserting causes of action for, inter alia, violations of Public Health Law § 2801-d. Plaintiff's cause of action under the Public Health Law also sought the imposition of punitive damages. Defendant moved for partial summary judgment dismissing the claim for punitive damages, asserting that such damages could not be awarded against a municipality pursuant to Public Health Law § 2801-d. Supreme Court granted the motion, and we affirm.

Contrary to plaintiff's contention, although the plain language of the statute clearly "permits punitive damages against a medical facility where a deprivation of a patient's rights is found to be willful or in reckless disregard to the patient's rights" (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d 960, 962 [2d Dept 2019]), as a general rule "the State and its political subdivisions are not subject to punitive damages" (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 386 [1987]). Further, "the twin justifications for punitive damages—punishment and deterrence—are hardly advanced when applied to a governmental unit" (*Sharapata v Town of Islip*, 56 NY2d

332, 338 [1982]), and "a statute in derogation of the sovereignty of a State must be strictly construed, waiver of immunity by inference being disfavored" (*id*. at 336). Here, Public Health Law § 2801-d (2) does not "clearly, expressly and specifically waive [the municipalities'] sovereign immunity" (*Krohn v New York City Police Dept*., 2 NY3d 329, 338 [2004]), and there is no indication that the legislature "discussed, debated, or even contemplated exposing" municipalities to punitive damages (*id.* at 336). Plaintiff's reliance on other sections of article 28 of the Public Health Law, at best, makes the subject provision (§ 2801-d [2]) "ambiguous as to imposition of punitive damages liability upon [defendant] and thus cannot be considered express legislative authorization or [an] abrogation of th[e] well-settled principle" regarding municipal immunity from punitive damages (*Krohn*, 2 NY3d at 336).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

603

CA 19-01814

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

MARGARET WEED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER AND ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 20, 2019. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she allegedly slipped on ice in a parking lot at defendants' premises. Defendants moved for summary judgment dismissing the complaint, contending that plaintiff was unable to establish the cause of her fall without engaging in speculation. Defendants appeal from an order denying that motion, and we now affirm.

" 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]; *see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]). Here, defendants submitted on their motion, inter alia, excerpts of plaintiff's deposition testimony, wherein she testified that she knew she slipped on ice. We conclude that her testimony regarding the condition that caused her fall "render[ed] any other potential cause of [her] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Doner v Camp*, 163 AD3d 1457, 1457 [4th Dept 2018] [internal quotation marks omitted]). We thus conclude that defendants failed to meet their initial burden on

the motion.

Even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiff raised a triable issue of fact sufficient to defeat summary judgment (*see generally Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). In opposition to the motion, plaintiff submitted her complete deposition testimony, in which she testified to her observation that the entire parking lot was icy at the time of her fall and that, as she walked across the parking lot, she observed a dusting of snow over solid ice. Plaintiff further testified that, after her fall, she could see and feel the ice as she was lying on the ground. Plaintiff also submitted the deposition testimony of two of her coworkers, who each testified that they had traversed the parking lot around the time of plaintiff's fall and slipped as they walked. In addition, plaintiff submitted the deposition testimony of the assistant supervisor of buildings and grounds that the grounds and sidewalks were icy when he arrived at work on the morning of plaintiff's fall and that, after responding to the location of plaintiff's fall, he observed that the area was icy.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

632

KA 19-01118

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM KIBLER, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 22, 2018. 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 as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of five years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]) and sentencing him to a determinate term of imprisonment of seven years, followed by a period of three years of postrelease supervision.

Preliminarily, we note that even if defendant executed a valid waiver of the right to appeal at the underlying plea proceeding, it would not encompass his challenge to the severity of the sentence imposed following his violation of probation (*see People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Tedesco*, 143 AD3d 1279, 1279 [4th Dept 2016], *lv denied* 28 NY3d 1075 [2016]). Contrary to the People's contention, defendant's challenge to the severity of the sentence is not subject to a preservation requirement (*see* CPL 470.15 [3] [c]; [6] [b]; *People v Williams*, 120 AD3d 721, 724 [2d Dept 2014], *lv denied* 25 NY3d 1078 [2015]). "A claim that a sentence is excessive is, by definition (*see* CPL 470.15 [6] [b]), addressed to this Court's interest of justice jurisdiction, and does not need to be preserved as a question of law (*cf.* CPL 470.05 [2]; CPL 470.15 [4])" (*Williams*, 120 AD3d at 724). Contrary to the People's further contention, in reviewing that challenge, "it is inappropriate for this Court to address whether the

sentencing court abused its discretion" (*People v Garcia-Gual*, 67 AD3d 1356, 1356 [4th Dept 2009], *lv denied* 14 NY3d 771 [2010]; *see People v Parker*, 137 AD3d 1625, 1626 [4th Dept 2016]; *see generally People v Delgado*, 80 NY2d 780, 783 [1992]). Rather, this Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and such "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*Delgado*, 80 NY2d at 783). We agree with defendant that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of five years (*see generally* CPL 470.15 [6] [b]), to be followed by the three years of postrelease supervision imposed by County Court.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

645

CAF 19-00060

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF MARIANYS I.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GABRIELLE I., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 6, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate a default order.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, Family Court entered default orders terminating respondent mother's parental rights with respect to each of the subject children on the ground of abandonment after the mother failed to answer the abandonment petitions and failed to appear in court on the return date. The mother thereafter moved to vacate the default orders, contending, inter alia, that she was never served with the petitions. The court denied the motions in two separate orders, and we now affirm.

"Pursuant to CPLR 5015 (a) (1), a court may vacate a judgment or order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense" (*Matter of Shehatou v Louka*, 145 AD3d 1533, 1534 [4th Dept 2016] [internal quotation marks omitted]). To establish a meritorious defense, the moving party is required "to set forth sufficient facts [or legal arguments] to demonstrate, on a prima facie basis, that a defense existed" (*Matter of Strumpf v Avery*, 134 AD3d 1465, 1466 [4th Dept 2015] [internal quotation marks omitted]). "[B]are assertion[s] . . . [of] a meritorious defense without stating the facts or legal arguments to establish that defense [are] insufficient" (*id.*).

Here, even assuming, arguendo, that the mother established a reasonable excuse for her default, we conclude that she failed to demonstrate a meritorious defense to the abandonment petitions, which alleged that she had no meaningful contact with the subject children during the six-month period immediately preceding the filing of the petitions (*see* Social Services Law § 384-b [4] [b]). In the affidavit submitted by the mother in support of her motions, she did not dispute that she failed to visit or contact the children during the relevant time period. We therefore conclude that the court did not abuse its discretion in denying the motions (*see Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1576 [4th Dept 2010], *lv denied in part and dismissed in part* 16 NY3d 760 [2011]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

646

CAF 19-00174

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF YANUEL D.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GABRIELLE I., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 6, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate a default order.

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

Same memorandum as in *Matter of Marianys I. (Gabrielle I.)* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

663

KA 19-01119

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FAHRUDIN OMEROVIC, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 28, 2019. The judgment convicted defendant upon a jury verdict of making a terroristic threat (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of making a terroristic threat (Penal Law § 490.20 [1]). Although defendant was not required to preserve his contention that County Court imposed illegal consecutive sentences (*see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]), he was required, and failed, to preserve his related contention that the indictment is multiplicitous (*see People v Kobza*, 66 AD3d 1387, 1388 [4th Dept 2009], *lv denied* 13 NY3d 939 [2010]). In any event, both contentions lack merit. An indictment is considered multiplicitous when a single offense is charged in more than one count (*see People v Alonzo*, 16 NY3d 267, 269 [2011]; *People v Sprague*, 151 AD3d 1921, 1922-1923 [4th Dept 2017], *lv denied* 30 NY3d 1023 [2017]). Here, inasmuch as the events underlying the two counts occurred at distinct times on different days and as separate transactions, they did not constitute a " 'single, uninterrupted occurrence' " (*Alonzo*, 16 NY3d at 270; *see generally People v Moffitt*, 20 AD3d 687, 690-691 [3d Dept 2005], *lv denied* 5 NY3d 854 [2005]), and thus the indictment was not multiplicitous. Further, because the acts underlying the crimes were separate and distinct, the imposition of consecutive sentences was permissible (*see People v Fuentes*, 52 AD3d 1297, 1301 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

664

KA 17-00155

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JODI DOLAN, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered October 11, 2016. The judgment convicted defendant upon her plea of guilty of attempted perjury in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted perjury in the first degree (Penal Law §§ 110.00, 210.15). By failing to move to withdraw her guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review her contention that the plea was not knowingly, intelligently, and voluntarily entered (*see People v McCullen*, 162 AD3d 1661, 1661 [4th Dept 2018]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement because nothing in the plea colloquy calls into question the voluntariness of the plea or casts "significant doubt" on her guilt (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). In any event, even assuming, arguendo, that defendant's initial hesitation to enter the plea called into question the voluntariness of the plea, we conclude on the record before us that County Court fulfilled its "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*Lopez*, 71 NY2d at 666; *see Pitcher*, 126 AD3d at 1472; *People v Mitchell*, 48 AD3d 1081, 1082 [4th Dept 2008], *lv denied* 10 NY3d 867 [2008]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

670

CAF 18-01663

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF THOMAS J. FOSTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MELISSA M. OUDERKIRK, RESPONDENT-RESPONDENT.

IN THE MATTER OF MELISSA M. OUDERKIRK,
PETITIONER-RESPONDENT,

V

THOMAS J. FOSTER, RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

ROY G. FRANKS, MARION, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (L. Paul Kehoe, J.H.O.), entered August 8, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, ordered that the parties shall continue to have joint legal custody of the subject child and respondent-petitioner shall continue to have primary physical custody of the subject child.

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

Memorandum: In this custody proceeding pursuant to article 6 of the Family Court Act, petitioner-respondent father appeals from an order of Family Court that, inter alia, continued primary physical custody of the parties' child with respondent-petitioner mother. We affirm.

"The court's determination in a custody matter is entitled to great deference and will not be disturbed where, as here, it is based on a careful weighing of appropriate factors" (*Matter of Stevenson v Smith*, 145 AD3d 1598, 1598 [4th Dept 2016] [internal quotation marks omitted]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). As the court noted in its decision, "both parties are fit parents who love the subject child and are determined to act in his best interests." Although an award of primary physical custody to the

father would not have been unreasonable based on the evidence adduced at the hearing, we nevertheless conclude that there is a sound and substantial basis in the record for the court's determination that it is in the child's best interests to continue his primary physical residence with the mother (*see Stevenson*, 145 AD3d at 1599).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

680.3

KA 18-01835

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS L. THOMPSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered July 11, 2016. The judgment convicted defendant, upon a plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [1]). Inasmuch as defendant did not execute a new waiver of the right to appeal after the terms of his plea bargain were altered, his original waiver does not foreclose his current challenge to the severity of his sentence (*see People v Alsaaidi*, 173 AD3d 1836, 1837-1838 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]). Nevertheless, the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

697

TP 19-02277

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

ALFONSO RIZZUTO, PETITIONER,

V ORDER

D. VENETTOZZI, DIRECTOR SPECIAL HOUSING,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT.

ALFONSO RIZZUTO, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE 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, Oneida County [David A. Murad, J.], entered June 3, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner should be placed in administrative segregation.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

703

KA 17-00969

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO NELLONS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 8, 2017. 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 Supreme Court erred in failing to conduct a *Darden* hearing with respect to a confidential informant who allegedly purchased heroin from defendant while working with the police (*see generally People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]). Because defendant did not request a *Darden* hearing or object to the court's failure to conduct one, however, he failed to preserve his contention for our review (*see People v Brown*, 181 AD3d 1301, 1303 [4th Dept 2020]; *People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). We reject defendant's assertion that his contention is preserved for appellate review under CPL 470.05 (2) because the court "expressly decided" that a *Darden* hearing was not warranted. Even assuming, arguendo, that the court's statement that there is "no *Darden* here" constitutes an express ruling that defendant was not entitled to a *Darden* hearing, we conclude that such ruling was not "in re[s]ponse to a protest by a party" (*id*.).

We also reject defendant's related contention that his attorney was ineffective in failing to request a *Darden* hearing. A single error rises to the level of ineffective assistance of counsel only in the rare instance when the error " 'involve[s] an issue that is so clear-cut and dispositive that no reasonable defense counsel would

have failed to assert it, and it [is] evident that the decision to forego the contention could not have been grounded in a legitimate trial strategy' " (*People v Keschner*, 25 NY3d 704, 723 [2015], quoting *People v McGee*, 20 NY3d 513, 518 [2013]; *see People v Flowers*, 28 NY3d 536, 541 [2016]). Additionally, counsel is not ineffective for failing to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, the issue whether defendant was entitled to a *Darden* hearing is not "clear-cut." Moreover, because there is no indication in the record that the confidential informant was "wholly imaginary" or that his communications to the police were "entirely fabricated" (*Darden*, 34 NY2d at 182; *see People v Crooks*, 27 NY3d 609, 613 [2016]), defendant has failed to establish that he would have been entitled to any relief had a *Darden* hearing been conducted.

Finally, we have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

709

CA 19-00892

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

FREDERICK P. BRADLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT REXCOAT AND JENNIFER REXCOAT,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered March 12, 2019. The order denied defendants' motion to vacate a prior order entered May 12, 2017 that granted plaintiff's motion seeking an extension of time to serve defendants with plaintiff's summons and notice.

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

Memorandum: Defendants appeal from an order that denied their motion seeking to vacate a prior order granting plaintiff's ex parte motion pursuant to CPLR 306-b to extend the time in which to serve them with a summons and notice. After weighing the relevant factors, including the "expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of . . . plaintiff's request for the extension of time, and prejudice to defendant" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]), we reject defendants' contention that Supreme Court (Dillon, J.) abused its discretion in granting the ex parte motion in the interest of justice (*see generally Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]). We note, in particular, that defendants' insurer received prompt notice of the accident at issue and had the opportunity to investigate. Thus, defendants failed to demonstrate that they were prejudiced by the delay in service (*see Przespolewski v Elderwood Health Care at Linwood*, 55 AD3d 1327, 1328 [4th Dept 2008]; *see also Gabbar v Flatlands Commons, LLC*, 150 AD3d 1084, 1085 [2d Dept 2017]; *see generally Terrigino v Village of Brockport*, 88 AD3d 1288, 1288 [4th

Dept 2011]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

721

KAH 18-01512

PRESENT: SMITH, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GEORGE WARD, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AKINYEMI AWOPETU, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ROCHESTER (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 May 3, 2018 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: In the 1960's, "petitioner was convicted of murder in the second degree after he fatally strangled a 76-year-old woman, then stole money from her apartment and engaged in sex with her corpse" (*Matter of Ward v New York State Div. of Parole*, 144 AD3d 1375, 1376 [3d Dept 2016]). He was sentenced to an indeterminate period of incarceration with a maximum of life in prison. After he was released to parole on that charge, he was rearrested in 1991 and eventually pleaded guilty to two counts of sodomy in the first degree (former Penal Law § 130.50 [1]), "arising from his forced oral sodomization of two young girls" (*Ward*, 144 AD3d at 1376), and was sentenced to two indeterminate terms of 6 to 18 years' incarceration, to be served concurrently with the remainder of his indeterminate life sentence on the murder conviction. Petitioner commenced this habeas corpus proceeding, contending that the New York State Department of Corrections and Community Supervision (DOCCS) miscalculated his sentence, and that he was improperly committed on the expired 1993 sentence from the sodomy conviction. He appeals from a judgment dismissing the petition. We affirm.

Where, as here, a person is sentenced to concurrent indeterminate terms of incarceration, "[t]he maximum term or terms of the indeterminate sentences . . . shall merge in and be satisfied by

discharge of the term which has the longest unexpired time to run" (Penal Law § 70.30 [1] [a]). In that situation, "the Penal Law provides for a method whereby two or more sentences are *made into one*: the result . . . is a single, indeterminate sentence . . . [Consequently,] a prisoner serving multiple sentences is subject to all the sentences, whether concurrent or consecutive, that make up the merged or aggregate sentence he is serving" (*People v Buss*, 11 NY3d 553, 557-558 [2008]). Thus, petitioner's contention that he is currently being held only on the expired sentence on the sodomy conviction lacks merit. To the contrary, he is currently incarcerated on the merged or aggregate sentence that resulted when he was sentenced on the sodomy conviction to indeterminate terms that were to run concurrently with the undischarged portion of the indeterminate life sentence imposed on the murder conviction.

Moreover, habeas corpus relief "is unavailable because petitioner would not be entitled to immediate release from custody even in the event that his contentions had merit" (*People ex rel. Almodovar v Berbary*, 67 AD3d 1419, 1420 [4th Dept 2009], *lv denied* 14 NY3d 703 [2010]; *see generally People ex rel. Douglas v Vincent*, 50 NY2d 901, 903 [1980]; *People ex rel. Ward v Russi*, 219 AD2d 862, 862 [4th Dept 1995], *lv denied* 87 NY2d 803 [1995]), inasmuch as petitioner does not dispute that he is still subject to the indeterminate life sentence imposed on the murder conviction.

We have considered petitioner's remaining contentions and we conclude that they do not require modification or reversal of the judgment.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

746

TP 20-00251

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

IN THE MATTER OF JOHN HINSPETER, PETITIONER,

V MEMORANDUM AND 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.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER 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 [Michael M. Mohun, A.J.], entered February 11, 2020) 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 the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.11 (7 NYCRR 270.2 [B] [14] [ii]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II hearing, that he violated inmate rules 113.11 (7 NYCRR 270.2 [B] [14] [ii] [possession of altered item]) and 116.11 (7 NYCRR 270.2 [B] [17] [ii] [tampering with State or personal property without authorization]). Contrary to petitioner's contention, the Hearing Officer did not improperly preclude him from calling a deputy superintendent as a witness inasmuch as the hearing record establishes that this witness had no material or nonredundant information with respect to the retaliation claim alleged by petitioner (*see* 7 NYCRR 253.5 [a]). Petitioner's contention that the Hearing Officer was required to make an inquiry into certain inmate witnesses' respective refusals to testify is unpreserved because petitioner failed to object on that ground at the hearing (*see Matter of Clark v Annucci*, 170 AD3d 1499, 1500 [4th Dept 2019]). We reject petitioner's additional contention

that the determination that he violated inmate rule 116.11 is not supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

As respondent correctly concedes, however, the determination that petitioner violated inmate rule 113.11 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Lago v Annucci*, 177 AD3d 1309, 1310 [4th Dept 2019]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see id.*).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

752

KA 16-01593

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER ZANDERS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered August 11, 2016. The judgment convicted defendant upon a nonjury verdict of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the verdict is against the weight of the evidence inasmuch as his statements to the police were involuntary and should have been disregarded by County Court, and the record lacked credible evidence that he had the intent to cause serious physical injury. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). First, the People established beyond a reasonable doubt the voluntariness of defendant's statements, and thus it cannot be said that the court, which relied on and accepted those statements, rendered a verdict that is contrary to the weight of the evidence (*see People v Scippio*, 144 AD3d 1184, 1186-1187 [3d Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Vieou*, 107 AD3d 1052, 1053-1054 [3d Dept 2013]; *see also People v Lewis*, 140 AD3d 1593, 1594-1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Second, the People established beyond a reasonable doubt that defendant was liable as an accessory (*see generally People v Molson*, 89 AD3d 1539, 1540 [4th Dept 2011], *lv denied* 18 NY3d 960 [2012]; *People v Alexander*, 51 AD3d 1380, 1383 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]). " 'Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime[], intentionally aid another in the conduct constituting the offense[]' " (*People v Williams*, 179 AD3d 1502, 1502

[4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *see* § 20.00; *People v Nafi*, 132 AD3d 1301, 1302 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]). Here, defendant's statements to the police and the testimony at trial established that defendant knew that the man who shot the victim had a firearm, defendant provided transportation for the shooter to the scene of the shooting, he gave the man a hoody to conceal the weapon, he knew that the man was probably going to shoot someone, and he acted as a lookout for the police for the man. Defendant had a "community of purpose" with (*People v Scott*, 25 NY3d 1107, 1110 [2015]) and " 'shared in the intention of' " the shooter (*Williams*, 179 AD3d at 1503; *see Molson*, 89 AD3d at 1540).

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

756

KAH 19-01485

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TIMOTHY D. BUSH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

A. AWOPETU, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), dated May 3, 2019 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner appeals from a judgment denying his petition for a writ of habeas corpus. Because petitioner concedes that he has been released to parole supervision, the appeal has been rendered moot (*see People ex rel. Sabino v New York State Dept. of Corr. & Community Supervision*, 178 AD3d 1446, 1447 [4th Dept 2019]; *People ex rel. Luck v Squires*, 173 AD3d 1767, 1767 [4th Dept 2019]). We conclude that the exception to the mootness doctrine does not apply (*see People ex rel. Winters v Crowley*, 166 AD3d 1525, 1525 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). While this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances of this case (*see People ex rel. Stokes v New York State Div. of Parole*, 144 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

757

CA 20-00008

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

ALBERT G. FRACCOLA, JR., INDIVIDUALLY AND AS 50% SHAREHOLDER, PRESIDENT AND DIRECTOR, COMMITTEEMAN OF ONE AND "CREDITOR" OF 1ST CHOICE REALTY, INC. IN OF THE PARTIES DISSOLUTION UNDER N.Y.S.B.C.L. SECS. 1005, 1006 AND 1007 AND AS "CREDITOR" AGAINST 1ST CHOICE REALTY, INC. AND ON BEHALF OF ALL OTHER CREDITORS AND STOCKHOLDERS IN A SIMILAR SITUATION AND WHO MAY COME IN CONTRIBUTE TO THE EXPENSE OF THIS ACTION, PLAINTIFF-APPELLANT,

V ORDER

1ST CHOICE REALTY, INC., A DOMESTIC CORPORATION IN DISSOLUTION, ET AL., DEFENDANTS, CHAD CARSTENSEN, INDIVIDUALLY AND AS EXECUTOR UNDER THE ESTATE OF PHYLLIS FRACCOLA, ALSO KNOWN AS PHYLLIS S. FRACCOLA, DECEASED, FILE NO.: 2016-376; PHILLIP FRACCOLA, AS SUBSTITUTE EXECUTOR UNDER THE ESTATE OF PHYLLIS FRACCOLA ALSO KNOWN AS PHYLLIS S. FRACCOLA, DECEASED, FILE NO.: 2016-376, PHILLIP FRACCOLA AS TRUSTEE OF THE "SAPORITO IRREVOCABLE TRUST" AND PHILLIP FRACCOLA AS TRUSTEE OF THE PHYLLIS FRACCOLA TRUST, THE PHYLLIS FRACCOLA FAMILY TRUST; "SEPARATE SHARE TRUST FORMER BENEFICIARY OF ALAN FRACCOLA", AND PHILLIP FRACCOLA AS TRUSTEE OF THE "SEPARATE TRUST SHARE FORMER BENEFICIARY OF ALAN FRACCOLA", DEFENDANTS-RESPONDENTS.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

PETER M. HOBAICA, LLC, UTICA (PETER M. HOBAICA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 9, 2019. The amended order denied the motion of plaintiff for a default judgment.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

767

TP 20-00222

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF REGINALD ROSS, 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.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 [Michael M. Mohun, A.J.], entered February 5, 2020) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

768

TP 20-00252

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DWANE COX, 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.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET 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 [Michael M. Mohun, A.J.], entered February 11, 2020) to review a determination of respondent. The determination found after a tier III 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: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

777

CAF 19-00998

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF CAMERON M., TATIANA P.,
AND BRIELLE P.
---------- MEMORANDUM AND ORDER
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

KEIRA P., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered May 1, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, adjudged that she neglected the subject children. We affirm. We reject the mother's contention that the children's out-of-court statements were not sufficiently corroborated. The statements of each child to petitioner's caseworker "provided sufficient cross-corroboration inasmuch as they 'tend to support the statements of the others and, viewed together, give sufficient indicia of reliability to each [child's] out-of-court statements' " (*Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]; *see Matter of Ricky A. [Barry A.]*, 162 AD3d 1747, 1748 [4th Dept 2018]).

Contrary to the mother's further contention, the finding of neglect is supported by a preponderance of the evidence. As relevant here, a neglected child is one "whose physical, mental, or emotional condition has been impaired or is imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (Family Ct Act § 1012 [f] [i] [B]).

Although "[p]roof of mental illness alone will not support a finding of neglect," such evidence will support a finding of neglect if it establishes "a causal connection between the parent's condition, and actual or potential harm to the child[ ]" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018] [internal quotation marks omitted]; *cf. Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1445 [4th Dept 2015]). Here, the testimony of petitioner's caseworkers established that the mother behaved erratically while shopping with her 10-year-old daughter and, on the trip home, began driving in such a dangerous manner that the daughter exited the vehicle and walked the rest of the way home. When the mother arrived outside the home, she told her 13-year-old son that she had to wash herself, whereupon she removed her clothes in the yard and began to spray herself with a hose. When the daughter arrived home on foot, she discovered her mother washing herself in that manner. The next day, the children informed the caseworkers that the mother, who was diagnosed with bipolar disorder and psychosis, had not taken her medication in over 20 days. That same day, according to the testimony of the maternal grandmother, the mother struck the son with a closed fist. We conclude that the evidence is sufficient to establish a causal connection between the mother's failure to treat her mental illness and actual or potential harm to the children (*see Lyndon S.*, 163 AD3d at 1434).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

778

CAF 19-00287

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF KIMBERLY CHATT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JUSTIN T. ALLEN, RESPONDENT-RESPONDENT.

PAUL B. WATKINS, FAIRPORT, FOR PETITIONER-APPELLANT.

DIMATTEO & ROACH, ATTORNEYS AT LAW, WARSAW (DAVID M. ROACH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered January 17, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, ordered that custody of the subject child shall remain with respondent.

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

Memorandum: Petitioner mother appeals from an order that, inter alia, maintained custody of the subject child with respondent father. We affirm. Initially, we note that the parties do not dispute that the mother demonstrated a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in the child's best interests (*see Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]; *see generally Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1265 [4th Dept 2019]). Nevertheless, the determination of Family Court, following a hearing, that the best interests of the child would be served by an award of sole custody to the father is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), particularly where, as here, the determination is based in part upon the court's " 'superior ability to evaluate the character and credibility of the witnesses' " with respect to, inter alia, allegations regarding domestic violence (*Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). Furthermore, contrary to the mother's contention, the record establishes that the court's determination has a sound and substantial basis in the record (*see Matter of Clark v Kittles*, 160 AD3d 1420,

1421 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

779

CA 19-02256

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

ANDREA L. HENDERSHOT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL S. HENDERSHOT, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

ANDREA L. HENDERSHOT, PLAINTIFF-RESPONDENT PRO SE.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 31, 2019. The order, among other things, granted that part of plaintiff's motion seeking to increase her visitation with the parties' children.

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

Memorandum: In this post-judgment proceeding, defendant father appeals, as limited by his brief, from an order to the extent that it granted that part of the motion of plaintiff mother seeking to increase her visitation with the subject children. We agree with the father that the mother, as the party seeking to modify the visitation provisions of the judgment of divorce, was required to "demonstrat[e] a sufficient change in circumstances since the time of the [judgment] to warrant an inquiry into the best interests of the children" (*Matter of William F.G. v Lisa M.B.*, 169 AD3d 1428, 1429 [4th Dept 2019]; *see Matter of Chromczak v Salek*, 173 AD3d 1750, 1751 [4th Dept 2019]; *Matter of Smith-Gilsey v Grisanti*, 111 AD3d 1424, 1424 [4th Dept 2013]). We reject the father's further contention that the mother failed to meet that burden.

Initially, we conclude that where, as here, "[Supreme] Court failed to make an express finding that there was a change in circumstances, we have the authority to 'review the record to ascertain whether the requisite change in circumstances existed' " (*Matter of Allen v Boswell*, 149 AD3d 1528, 1528 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *see Matter of Grabowski v Smith*, 182 AD3d 1002, 1003 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]).

Here, the record establishes that the father was living entirely in Canandaigua when the judgment of divorce was issued, and the

judgment granted him significant time with the children during the week. The mother established, however, that the father then began attending college in Ithaca and living there during the week, and the children were being cared for entirely by the paternal grandmother during the times the father was out of town. In addition, the mother moved back to Canandaigua from Albany at approximately the time that the judgment was issued. Thus, "the combined effect of the parties' 'relocation[s] was a change of circumstances warranting a reexamination of the existing custody [and visitation] arrangement' " (*Shaw v Shaw*, 155 AD3d 1673, 1674 [4th Dept 2017]; *see Matter of Dench–Layton v Dench–Layton*, 123 AD3d 1350, 1351 [3d Dept 2014]; *see generally Matter of VanDusen v Riggs*, 77 AD3d 1355, 1355 [4th Dept 2010]). Furthermore, although " 'not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances' " (*Matter of Rulinsky v West*, 107 AD3d 1507, 1508 [4th Dept 2013]; *see Matter of Rohr v Young*, 148 AD3d 1681, 1681 [4th Dept 2017]; *Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1725 [4th Dept 2016]), and here the 12- and 14-year-old children stated that they wished to spend more time with the mother.

Finally, we reject the father's contention that the court delegated to the children its responsibility to set a visitation schedule (*cf. Matter of Lakeya P. v Ajja M.*, 169 AD3d 1409, 1411 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Jeffrey T. v Julie B.*, 35 AD3d 1222, 1222 [4th Dept 2006]), "inasmuch as the record establishes that [the schedule issued by the court] is the product of the court's careful weighing of [the] appropriate factors . . . , and it has a sound and substantial basis in the record" (*Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). Contrary to the father's contention, the mere fact that the attorney for the children drafted the schedule is of no moment. Orders and judgments are frequently drafted by counsel for the parties (*see e.g. Burke v Burke*, 174 AD2d 973, 973 [4th Dept 1991]; *see generally* 22 NYCRR 202.48 [c]; *Funk v Barry*, 89 NY2d 364, 366-367 [1996]) and, absent some error in drafting an order (*see e.g. Curet v DeKalb Realty, LLC*, 127 AD3d 914, 915-916 [2d Dept 2015]), which the father does not allege, it is a fully enforceable order of the court.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

793

KA 16-00641

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. WILSON, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 5, 2016. The appeal was held by this court by order entered September 27, 2019, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (175 AD3d 1800 [4th Dept 2019]). The proceedings were held.

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.

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court "to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet" (*People v Wilson*, 175 AD3d 1800, 1801 [4th Dept 2019]). Upon remittal, the court convened a reconstruction hearing, heard testimony of the parties' trial counsel, and closed the hearing without making any determination. That was error. The intent of our prior decision was for the court to make a determination, not merely to conduct a hearing (*id.*; *see People v Henderson*, 148 AD3d 1779, 1780 [4th Dept 2017]; *see generally People v Johnson*, 96 AD3d 1586, 1587 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]). It is of course better for the hearing court, which has the advantage of seeing the witnesses and hearing their testimony, to make the determination following a reconstruction hearing, particularly where, as here, witness credibility is at issue (*see People v James*, 221 AD2d 963, 963 [4th Dept 1995]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to determine whether defense counsel consented to the annotated verdict sheet (*see Wilson*, 175 AD3d at 1801).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

795

KA 19-00664

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASMINE HARLEE, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered August 23, 2018. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that her purported waiver of the right to appeal is not valid and challenges the severity of the sentence.

We agree with defendant that the "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US — [Mar. 30, 2020]). Here, "[t]he written waiver of the right to appeal signed by defendant [at the time of the plea] and the verbal waiver colloquy conducted by [County Court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], quoting *Thomas*, 34 NY3d at 565). In particular, the written waiver, upon which the court relied in eliciting defendant's understanding during the verbal waiver colloquy, mischaracterized the appeal waiver as constituting an absolute bar to the taking of a first-tier direct appeal and even improperly stated that the rights defendant was waiving included the right "to prosecute the appeal as a poor person, to have an attorney assigned in the event that [she was] indigent, and to submit a brief and/or to argue before the appellate court on any issues relating to the conviction or sentence" (*see Thomas*, 34 NY3d at 554, 566; *Youngs*, 183 AD3d at 1229). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant

comprehended the nature of the waiver of appellate rights' " (*Thomas*, 34 NY3d at 565-566; *see Youngs*, 183 AD3d at 1229).

We nevertheless reject defendant's challenge to the severity of the sentence.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

799

KA 17-01700

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCELL BROOKS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 28, 2017. The judgment convicted defendant upon his plea of guilty of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of assault in the first degree (Penal Law § 120.10 [3]), defendant contends and the People correctly concede that his waiver of the right to appeal is invalid because Supreme Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — [Mar. 30, 2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*id.* [internal quotation marks omitted]). Nevertheless, we reject defendant's contention that the court erred in refusing to suppress his written statement to the police. It is well settled that a statement given freely and voluntarily is admissible in evidence (*see Miranda v Arizona*, 384 US 436, 478 [1966]). Here, we conclude that defendant's statement was not the product of custodial interrogation because a reasonable person, innocent of any crime, would not have thought that he or she was in police custody (*see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v Hernandez*, 181 AD3d 530, 530-531 [1st Dept 2020], *lv denied* 35 NY3d 1066 [2020]; *People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]). The *Huntley* hearing testimony established that defendant entered the police station of his own accord without being accompanied by a police officer and waited in the lobby for a detective to arrive. He was not handcuffed, nor was he subjected to accusatory questioning.

Defendant further contends that, inasmuch as the record of the plea colloquy does not establish that he understood the plea colloquy or the consequences of the plea, the court abused its discretion in denying that part of his motion seeking to withdraw his plea on the ground of involuntariness. Defendant, however, "failed to preserve his contention for our review by failing to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground" (*People v Lawrence*, 118 AD3d 1501, 1501 [4th Dept 2014], *lv denied* 24 NY3d 1220 [2015]). Furthermore, the exception to the preservation doctrine does not apply because this is not one of those rare cases in which "defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]). To the extent that defendant contends that he was deprived of a reasonable opportunity to advance his argument in support of his request to withdraw the guilty plea, we reject his contention. The court properly denied the motion without any inquiry because defendant's affidavit in support of his motion was conclusory, and thus the motion was "patently insufficient on its face" (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *cf. People v Henderson*, 137 AD3d 1670, 1671 [4th Dept 2016]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

801

KA 17-00027

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD MIRABELLA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Thomas E. Moran, J.), dated November 28, 2016. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him following a jury trial of, inter alia, two counts of sexual abuse in the first degree (Penal Law § 130.65 [4]). We affirmed the judgment of conviction on direct appeal (*People v Mirabella*, 126 AD3d 1367 [4th Dept 2015], *lv denied* 25 NY3d 1168 [2015]) and thereafter denied defendant's motion seeking leave to reargue (*People v Mirabella*, 138 AD3d 1513 [4th Dept 2016], *lv dismissed* 28 NY3d 934 [2016]). Defendant made the motion herein to vacate the judgment of conviction on the ground that defense counsel was ineffective for, inter alia, failing to obtain expert testimony to rebut the testimony of the People's expert on the subject of Child Sexual Abuse Accommodation Syndrome (CSAAS) and failing to advise defendant that the ultimate decision whether defendant should testify was defendant's to make.

We conclude that Supreme Court properly denied the motion without a hearing with respect to the issue of a CSAAS expert for the defense. We agree with the court that even assuming, arguendo, that defense counsel did not retain or consult a CSAAS expert for the defense, defense counsel nevertheless provided effective representation to defendant in his cross-examination of the People's CSAAS expert. Significantly, defense counsel " 'carefully highlighted on cross-

examination' " that CSAAS was not a diagnostic tool for proving whether sexual abuse had occurred or whether the victims' accounts were truthful (*People v Washington*, 122 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]), and thus he established that the People's expert could give no evidence with respect to the ultimate issue of the case, i.e., defendant's guilt. The court therefore properly determined that defense counsel provided meaningful representation in addressing the expert testimony presented by the People (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We agree with defendant, however, that the court erred in denying his motion without a hearing with respect to whether defense counsel fulfilled his duty of advising defendant that his decision to testify was ultimately his own, not defense counsel's, to make (*see People v Cosby*, 82 AD3d 63, 66 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]). Defendant has made a proper showing for a hearing by asserting a viable legal basis for the motion, substantiated by his own unrefuted sworn allegations and other evidentiary submissions (*see* CPL 440.30 [4] [a]-[d]), and neither the mandatory denial provisions of CPL 440.10 (2) nor the permissive denial provisions of CPL 440.10 (3) apply to this case (*see* CPL 440.30 [2], [5]). *Cosby*, relied on by both the court and the People in support of denying the motion, is distinguishable from this case inasmuch as a hearing pursuant to CPL 440.30 (5) was held in *Cosby*, thereby permitting us to determine on the merits that defendant was not deprived of his constitutional right to effective assistance of counsel and, consequently, that his right to a fair trial was not seriously compromised (*see* 82 AD3d at 67-68). No such determination on the merits can be made on the record before us. We therefore reverse the order and remit the matter to Supreme Court for a hearing pursuant to CPL 440.30 (5) on that part of defendant's motion.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

802

CAF 19-00395

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF VICTOR MORALES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

YAIMEL VAILLANT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 14, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 8, respondent mother appeals in appeal No. 1 from an order that, inter alia, granted the petition of petitioner father seeking modification of the existing custody and visitation order by awarding him sole legal and physical custody of the parties' child, with visitation to the mother. In appeal No. 2, the mother appeals from an order of protection issued upon a finding that she committed the family offense of reckless endangerment in the second degree against the child.

Contrary to the mother's contention in appeal No. 1, Family Court properly determined that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody and visitation arrangement is in the best interests of the child (*see Matter of Greene v Kranock*, 160 AD3d 1476, 1476 [4th Dept 2018]). Here, "according due deference to the court's assessment of witness credibility" (*Matter of Voorhees v Talerico*, 128 AD3d 1466, 1466 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]), we conclude that the evidence at the hearing established the requisite change in circumstances based on, inter alia, the mother's inability to handle the then 3½-year-old child's purported misbehavior and her resort to inappropriate physical discipline to punish the child (*see Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1360 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]; *Matter of Samuel v Samuel*, 64

AD3d 920, 921 [3d Dept 2009]; *Matter of Hagans v Harden*, 12 AD3d 972, 973 [3d Dept 2004], *lv denied* 4 NY3d 705 [2005]) and the parties' "heightened inability 'to communicate in a manner conducive to sharing joint custody' " (*Murray v Murray*, 179 AD3d 1546, 1546 [4th Dept 2020]; *see Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]; *Matter of York v Zullich*, 89 AD3d 1447, 1448 [4th Dept 2011]).

Contrary to the mother's further contention in appeal No. 1, we conclude that the court properly determined that modifying the existing custody and visitation order was in the best interests of the child. The record establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors . . . and . . . has a sound and substantial basis in the record" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018] [internal quotation marks omitted]; *see DeJesus*, 136 AD3d at 1360; *see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]).

We agree with the mother in appeal No. 2, however, that the father failed to establish by a fair preponderance of the evidence that the mother committed the family offense of reckless endangerment in the second degree (Penal Law § 120.20; *see* Family Ct Act §§ 812 [1]; 832) inasmuch as the mother's acts did not create a substantial risk of serious physical injury (*see* Penal Law § 10.00 [10]; *Matter of Hefley v Luck*, 179 AD3d 797, 798 [2d Dept 2020]). We therefore reverse the order in appeal No. 2 and dismiss the petition.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

803

CAF 19-00408

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF VICTOR MORALES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

YAIMEL VAILLANT, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 14, 2019 in a proceeding pursuant to Family Court Act article 8. The order directed respondent to refrain from committing any criminal offense against the subject child.

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

Same memorandum as in *Matter of Morales v Vaillant* ([appeal No. 1] — AD3d — [Oct. 2, 2020] [4th Dept 2020]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

806

CAF 19-00615

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CRYSTAL L. RICHTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH T. RICHTER, RESPONDENT-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 14, 2019 in a proceeding pursuant to Family Court Act article 6. The order modified a prior visitation order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order modifying a prior visitation order. The appeal is moot with respect to the older child because she is now 18 years old (*see Matter of Rossborough v Alatawneh*, 129 AD3d 1537, 1538 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 982 [2015]). Contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record for Family Court's determination with respect to the best interests of the younger child (*see Matter of Pierce v Pierce*, 151 AD3d 1610, 1610-1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

807

CAF 19-01509

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF AIMEE KERR, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS KERR, RESPONDENT-RESPONDENT.

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

MICHAEL A BENSON, SPRINGVILLE, FOR RESPONDENT-RESPONDENT.

EMILY A. VELLA, SPRINGVILLE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered June 5, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, determined that respondent's live-in girlfriend shall not be required to be supervised when interacting with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, determined that the live-in girlfriend of respondent father shall not be required to be supervised when interacting with the subject children. Contrary to the contention of the mother, we conclude that the determination of Family Court is supported by a sound and substantial basis in the record and should not be disturbed (*see Matter of Common v Pirro*, 184 AD3d 1087, 1088 [4th Dept 2020]; *Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]). Although the father's girlfriend acknowledged that she had a lengthy criminal history and past substance abuse issues that led to her losing custody of her own children, the court credited the girlfriend's testimony that she had been drug free for seven years, was employed, and had been a law-abiding citizen since her most recent conviction in 2012. The court also credited the testimony of the girlfriend's sister and mother, who had no concerns about the girlfriend interacting with children. We see no basis to disturb the court's credibility determination, which is entitled to great deference (*see Matter of Garland v Goodwin*, 13 AD3d 1059, 1059-1060 [4th Dept 2004]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

808

CAF 19-00187

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF DEBRA M. WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DARLENE I. REID AND JENNIFER L. JOHNSON,
RESPONDENTS-RESPONDENTS.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered January 2, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent Jennifer L. Johnson to dismiss the petition.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking, inter alia, to modify prior custody orders by granting her sole legal and residential custody of her daughter and son. Contrary to the mother's contention, Family Court properly granted without a hearing the motion of respondent Jennifer L. Johnson, the children's aunt (aunt), seeking to dismiss the petition. A hearing is not automatically required whenever a parent seeks modification of a custody order and, here, the mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing (*see Matter of Chase v Chase*, 181 AD3d 1323, 1324 [4th Dept 2020], *lv dismissed in part and denied in part* 35 NY3d 996 [2020]; *Matter of Gworek v Gworek* [appeal No. 1], 158 AD3d 1304, 1304 [4th Dept 2018]). Contrary to the mother's contention, the allegations in the petition regarding her employment and residence did not demonstrate a change in circumstances inasmuch as the mother held the same job and lived in the same residence at the time she filed her petition as she did at the time of the custody trial in 2017. The mother also alleged as a change in circumstances that the aunt had started the son on medication without seeking the court's permission. The mother, however, has not included in the record the court's prior custody orders or evidence of some other directive of the court concerning medication. The record is therefore not adequate to permit review of the mother's allegation (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31

NY3d 909 [2018]; *Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286-1287 [4th Dept 2016]). The mother further alleged as a change in circumstances that her children expressed a preference for living with her. "[A]lthough not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances" (*Matter of Rohr v Young*, 148 AD3d 1681, 1681 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Cole v Nofri*, 107 AD3d 1510, 1511 [4th Dept 2013], *lv denied* 22 NY3d 1083 [2014]). Here, however, the children were 7 years old and 5 years old, and we consider them too young and not of sufficient maturity for their alleged desires to reside with the mother to demonstrate a change in circumstances (*see generally Fox v Fox*, 177 AD2d 209, 211 [4th Dept 1992]). We have examined the mother's remaining allegations of purported changes in circumstances, and we agree with the court that none of them warranted a hearing or precluded the grant of the aunt's motion.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

814

CA 19-01134

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE FORECLOSURE OF DELINQUENT TAX LIENS FOR THE YEAR 2017 (2-YEAR), OR PRIOR, BY A PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW OF THE STATE OF NEW YORK BY COUNTY OF OSWEGO, PETITIONER-RESPONDENT.

ORDER

CHA CONSULTING, INC., RESPONDENT-APPELLANT.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD J. SHEATS OF COUNSEL), FOR RESPONDENT-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR PETITIONER-RESPONDENT.

HARRIS BEACH, PLLC, SYRACUSE (KELLY C. GRIFFITH OF COUNSEL), FOR CENTRAL NY RACEWAY PARK, INC.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered May 6, 2019. The order denied the motion of respondent CHA Consulting, Inc., for severance and joinder or consolidation.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 23, August 5 and 6, 2020, and filed in the Oswego County Clerk's Office on August 10, 2020,

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

815

CA 19-02189

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

GEOFFREY DUBEY, PLAINTIFF-APPELLANT,

V ORDER

RONEN ZOUR AND ROC CITY PARTNERS, LLC,
DEFENDANTS-RESPONDENTS.

ALDOUS PLLC, NEW YORK CITY (KENNETH E. ALDOUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROTHENBERG LAW, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT RONEN ZOUR.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 17, 2019. The judgment, among other things, dismissed all of plaintiff's causes of action.

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: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

820

TP 20-00253

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF TREMAINE GREEN, PETITIONER,

V MEMORANDUM AND 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.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET 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 [Michael M. Mohun, A.J.], entered February 11, 2020) to review a determination of respondent. The determination found after a tier III hearing that petitioner violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules while participating in a visitation session. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]; *Matter of Richardson v Annucci*, 153 AD3d 1012, 1012-1013 [3d Dept 2017]). Although petitioner also contends that a correction officer improperly terminated the visitation session, petitioner failed to raise that contention in his administrative appeal. Thus, petitioner failed to exhaust his administrative remedies with respect to that contention, and this Court lacks the discretionary authority to consider it (*see Matter of Yarborough v Annucci*, 164 AD3d 1667, 1668 [4th Dept 2018]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

834

CA 19-01554

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND BANNISTER, JJ.

SOLVAY BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FEHER RUBBISH REMOVAL, INC., AND LARRY FEHER,
DEFENDANTS-APPELLANTS.

RONALD TEPLITSKY, AS TEMPORARY RECEIVER,
RESPONDENT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 1, 2019. The order, among other things, granted the motion of Ronald Teplitsky to settle and approve his accounts as temporary receiver.

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

Memorandum: Defendants appeal from an order granting the motion of the temporary receiver by, inter alia, settling and approving the receiver's accounts and directing the disbursement of funds. Although defendants raised several contentions in their brief on appeal, they withdrew all but one contention. With respect to that remaining contention, the sole ground upon which defendants assert that Supreme Court erred in approving the order of payment by the receiver is raised for the first time on appeal and thus not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]; *see also Radio Eng'g Indus., Inc. v York*, 14 AD3d 893, 894 [3d Dept 2005]). "An issue may not be raised for the first time on appeal . . . where[, as here,] it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]; *see Lowe's Home Ctrs., Inc. v Beachy's Equip. Co., Inc.*, 49 AD3d 1213, 1214-1215 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]). The contentions raised for the first time in defendants' reply brief are likewise not properly before us (*see Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5

NY3d 702 [2005]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

843

TP 20-00307

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF TREMAINE GREEN, PETITIONER,

V ORDER

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

TREMAINE GREEN, PETITIONER PRO SE.

LETITIA JAMES, 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, Cayuga County [Thomas G. Leone, A.J.], entered February 18, 2020) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996])

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

849

CAF 19-01622

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF BETH A. JOHNSON,
PETITIONER-RESPONDENT,

V ORDER

JOHN A. JOHNSON, RESPONDENT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

CAROLYN R. KELLOGG, WELLSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered August 20, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical custody of the subject child.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

852

CAF 19-01570

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DANIEL J. LINDSEY,
PETITIONER-APPELLANT,

V ORDER

ALISON M. LINDSEY, RESPONDENT-RESPONDENT.

RYAN JAMES MULDOON, AUBURN, FOR PETITIONER-APPELLANT.

SCOTT A. OTIS, WATERTOWN, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Donald P. VanStry, R.), entered August 19, 2019 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

855

CA 19-01950

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW BY NFR GATEWAY, LLC
(NABISCO), PETITIONER-RESPONDENT,

V ORDER

CITY OF NIAGARA FALLS, COUNTY OF NIAGARA,
ASSESSOR OF CITY OF NIAGARA FALLS, AND BOARD
OF ASSESSMENT REVIEW OF CITY OF NIAGARA FALLS,
RESPONDENTS-APPELLANTS.

CITY SCHOOL DISTRICT OF CITY OF NIAGARA FALLS,
INTERVENOR-APPELLANT.

JAMES C. ROSCETTI, NIAGARA FALLS, FOR INTERVENOR-APPELLANT AND RESPONDENTS-APPELLANTS.

WOLFGANG & WEINMANN, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 20, 2019 in proceedings pursuant to RPTL article 7. The order, among other things, determined the fair market value of the properties at issue.

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: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

862

KA 18-01780

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESUS CASTRO-UBILES, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER, THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 5, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that his waiver of the right to appeal is invalid and that he received ineffective assistance of counsel. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the judgment should be affirmed inasmuch as we reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). Moreover, defendant has not made the required showing, nor even alleged, that there is a reasonable probability "that he would have proceeded to trial absent counsel's alleged deficiencies" (*People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; *see People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

866

TP 19-01519

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHARLES SMITH, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND DIRECTOR OF SEGREGATION HOUSING, D. VENETOZZI, RESPONDENTS.

CHARLES SMITH, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered July 31, 2019) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

872

CAF 18-01672

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ZAIRE S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DESIREE S., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN MORRISSEY OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 20, 2018 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

873

CAF 19-00175

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF KEONA S. WATKINS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE M. HART, RESPONDENT-APPELLANT,
AND GREGORY A. LATTA, RESPONDENT-RESPONDENT.

CHARLES D. STEINMAN, ESQ., PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a corrected order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 19, 2018 in a proceeding pursuant to Family Court Act article 6. The corrected order, inter alia, granted petitioner sole custody of the subject child.

It is hereby ORDERED that the corrected 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 a corrected order of Family Court that, inter alia, granted custody of the subject child to petitioner, the child's adult sister. We affirm.

"It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998], quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]).

Here, petitioner met her burden of establishing the existence of extraordinary circumstances to give her standing to seek custody of the child (*see Matter of Thomas v Small*, 142 AD3d 1345, 1345 [4th Dept 2016]). The child was removed from the mother's custody immediately after her birth and was placed in the custody of the Monroe County Department of Human Services. The child remained in foster care for almost two years before being placed with petitioner. At the time of the trial, the child had been in petitioner's care for almost a year and had never lived with the mother. The foregoing evidence, along with the mother's admission in a separate neglect proceeding to neglect of the child, supplied the threshold showing of extraordinary circumstances (*see Matter of Jackson v Euson*, 153 AD3d 1655, 1656 [4th

Dept 2017]; *Matter of North v Yeagley*, 96 AD3d 949, 950 [2d Dept 2012]; *Matter of Donna KK. v Barbara I.*, 32 AD3d 166, 169 [3d Dept 2006]). Contrary to the mother's further contention, the record supports the court's determination that it was in the child's best interests for petitioner to have custody (*see Jackson*, 153 AD3d at 1656; *see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). We note that the mother failed to testify at the trial or present any proof to counter petitioner's petition for custody.

We reject the mother's contention that the court erred in substituting a new Attorney for the Child (AFC) during the trial without adjourning the trial. On the start of the second day of the two-day trial, the original AFC was recused due to a conflict of interest, and the court thus properly appointed a new AFC (*see generally Matter of Miller v Miller*, 220 AD2d 133, 136 n 2 [3d Dept 1996]). Although the mother belatedly objected to the substitution without a postponement of the trial, we conclude that the court did not abuse its discretion in denying the request for an adjournment. The new AFC had not met with the mother, the child, or petitioner, but, as the court noted, the mother had not responded to the prior AFC, and there was no indication that she would respond to the new AFC. Moreover, in light of the child's young age, she would not have been able to express her wishes to the AFC. The new AFC actively participated in the trial and assured the court that she would look at a copy of the transcripts and submit a written closing summation at a later time, which she did (*see Matter of Clime v Clime*, 85 AD3d 1671, 1672 [4th Dept 2011]; *Matter of Storch v Storch*, 282 AD2d 845, 848 [3d Dept 2001], *lv denied* 96 NY2d 718 [2001]). Although the mother contends that it is "highly unlikely" that the AFC ever reviewed a transcript of the trial, that contention is mere speculation (*see Matter of Matthew W. v Meagan R.*, 68 AD3d 468, 469 [1st Dept 2009]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

874

CA 19-00848

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNTS OF JEFFREY C. ALLES, AS EXECUTOR OF THE ESTATE OF HARRY R. ALLES, DECEASED, PETITIONER-RESPONDENT.

ORDER

JEANNE L. DEKEYSERLING AND JONATHAN ALLES, OBJECTANTS-APPELLANTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNTS OF JEFFREY C. ALLES, AS TRUSTEE OF THE HARRY R. ALLES REVOCABLE LIVING TRUST, DATED JUNE 11, 2011, PETITIONER-RESPONDENT.

JEANNE L. DEKEYSERLING AND JONATHAN ALLES, OBJECTANTS-APPELLANTS.
(PROCEEDING NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR OBJECTANT-APPELLANT JEANNE L. DEKEYSERLING.

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR OBJECTANT-APPELLANT JONATHAN ALLES.

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO (THOMAS F. HEWNER OF COUNSEL), AND MAGAVERN MAGAVERN GRIMM LLP (ELLEN GRIMM SPENCER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered March 21, 2019. The order, inter alia, denied objections to accountings of petitioner.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

878

CA 19-01918

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JOSEPH ROESCH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL
NEW YORK PSYCHIATRIC CENTER,
RESPONDENT-RESPONDENT.

JOSEPH ROESCH, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 24, 2019 in a CPLR article 78 proceeding. The judgment denied petitioner's application for poor person status and dismissed the petition.

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

Memorandum: Petitioner, a resident of Central New York Psychiatric Center (Center), submitted a poor person application seeking to pursue a CPLR article 78 proceeding against respondent to obtain a refund of money he alleges was improperly taken by the Center as reimbursement for items that petitioner broke or damaged at the Center. Supreme Court denied the application and dismissed the petition. We affirm. An application to proceed as a poor person should be granted if it " 'is not frivolous or, stated another way, . . . has arguable merit' " (*Matter of Young v Monroe County Clerk's Off.*, 46 AD3d 1379, 1380 [4th Dept 2007]; *see* CPLR 1101 [a], [f] [1]). "[T]he determination whether to grant permission to proceed as a poor person lies within the sound discretion of the trial court" (*Young*, 46 AD3d at 1380), and we conclude that the court did not abuse its discretion here (*see Jefferson v Stubbe*, 107 AD3d 1424, 1424 [4th Dept 2013], *appeal dismissed and lv denied* 22 NY3d 928 [2013]).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

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

895

CA 19-00917

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH ROESCH,
PETITIONER-APPELLANT,

V ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL
NEW YORK PSYCHIATRIC CENTER, NEW YORK STATE
OFFICE OF MENTAL HEALTH, RESPONDENT-RESPONDENT.

JOSEPH ROESCH, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 30, 2019 in a proceeding pursuant to CPLR article 78. The judgment denied petitioner's application for poor person status and dismissed the petition.

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

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court