SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JANUARY 28, 2022

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. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JANUARY 28, 2022

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_____	101	CAF 19 00540	Mtr of JACIEON M.
_____	103	CA 21 00269	THANEY & ASSOCIATES, CPAS, P.C. V SCOTT GERKEN

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

422

CA 20-01179

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

JACQUELINE M. MINICH AND DAVID MINICH,
PLAINTIFFS-RESPONDENTS,

V ORDER

JENNIFER L. ELLIOT, DEFENDANT,
THOMAS E. NOWAK AND COLLEEN M. NOWAK,
DEFENDANTS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MAX HUMANN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered May 18, 2020. The order, insofar as appealed from, denied the motion of defendants Thomas E. Nowak and Colleen M. Nowak for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 11, 2021,

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

Entered: January 28, 2022 Ann Dillon Flynn

Clerk of the Court

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

726

KA 21-00555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES ADAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered November 5, 2018. The judgment convicted defendant, upon a plea of guilty, of driving while intoxicated, as a class E felony, refusal to submit to a breath test and failure to keep right.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of count two of the indictment, vacating defendant's guilty plea to that count and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [4] [i]), "refus[ing a] breath test" (§ 1194 [1] [b]), and failure to keep right (§ 1120 [a]). Defendant pleaded guilty in the middle of trial after Supreme Court denied his request for a mistrial stemming from an evidentiary issue that arose during witness testimony.

Subject to an exception that does not apply here (*see People v Rucinski*, 24 AD3d 1171, 1173 [4th Dept 2005]; *People v Roe*, 191 AD2d 844, 845 [3d Dept 1993]), a conviction for a nonexistent offense constitutes a "fundamental" error that "cannot be waived" (*People v Martinez*, 81 NY2d 810, 812 [1992]), need not be preserved (*see People v Gant*, 189 AD3d 2160, 2161 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]), and is not forfeited by a guilty plea (*see People v Bethea*, 61 AD3d 1016, 1017 [3d Dept 2009]; *Rucinski*, 24 AD3d at 1173; *Roe*, 191 AD2d at 845). We are obligated to correct such a fundamental error sua sponte despite the parties' failure to brief the issue (*see People v McCann*, 126 AD3d 1031, 1034 [3d Dept 2015], *lv denied* 25 NY3d 1167 [2015]; *Bethea*, 61 AD3d at 1017). In this case, the purported traffic

infraction to which defendant pleaded guilty under count two of the indictment—refusing the breath test mandated by Vehicle and Traffic Law § 1194 (1) (b)—is not a cognizable offense for which a person may be charged or convicted in a criminal court (*see People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021]; *People v Malfetano*, 64 Misc 3d 135[A], 2019 NY Slip Op 51147[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2019]; *People v Villalta*, 56 Misc 3d 59, 60-61 [App Term, 2d Dept, 9th & 10th Jud Dists 2017], *lv denied* 29 NY3d 1135 [2017]; *see generally People v Prescott*, 95 NY2d 655, 659 [2001]; *People v Thomas*, 46 NY2d 100, 108 [1978], *appeal dismissed* 444 US 891 [1979]). We therefore modify the judgment accordingly (*see e.g. People v Santiago*, 56 Misc 3d 127[A], 2017 NY Slip Op 50813[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2017]; *People v Wrenn*, 52 Misc 3d 141[A], 2016 NY Slip Op 51193[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2016], *lv denied* 28 NY3d 1032 [2016]; *People v Carron*, 51 Misc 3d 135[A], 2016 NY Slip Op 50555[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2016]).

As so modified, we affirm the judgment. By pleading guilty, defendant forfeited his challenge to the merits of the court's mistrial ruling (*see e.g. People v Alvarado*, 103 AD3d 1101, 1101 [4th Dept 2013], *lv denied* 21 NY3d 910 [2013]; *People v Robles*, 160 AD2d 252, 252-253 [1st Dept 1990], *lv denied* 76 NY2d 795 [1990]; *People v Pampalone*, 48 Misc 3d 129[A], 2015 NY Slip Op 50982[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2015]; *see generally People v West*, 184 AD2d 743, 744 [2d Dept 1992], *lv denied* 81 NY2d 767 [1992]). Contrary to defendant's related contention, the court's mistrial ruling did not constitute coercion that negated the voluntariness of his subsequent guilty plea (*see People v Lawson*, 94 AD2d 809, 809-810 [3d Dept 1983]; *People v Jones*, 81 AD2d 22, 45-49 [2d Dept 1981]; *see generally Bordenkircher v Hayes*, 434 US 357, 364 [1978]; *cf. People v Grant*, 61 AD3d 177, 182-184 [2d Dept 2009]). Contrary to defendant's further contention, "it is well established that [his] monosyllabic . . . responses to questioning by [the court did] not render his plea unknowing and involuntary" (*People v Rathburn*, 178 AD3d 1421, 1421 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020] [internal quotation marks omitted]).

Defendant's remaining contention is academic. Finally, we note that the uniform sentence and commitment form fails to reflect defendant's conviction of and sentence for the traffic infraction of failing to keep right (Vehicle and Traffic Law § 1120 [a]) under count three of the indictment, and the form must be corrected accordingly.

All concur except TROUTMAN, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

775

CA 20-01593

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

DANIEL J. BECK AND DEBRA BECK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
AND PATRIOT FIELD SERVICES, INC.,
DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (BRANDON R. KING OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 6, 2020. The order denied the motion of defendant Patriot Field Services, Inc. seeking summary judgment dismissing the complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendant Patriot Field Services, Inc. are dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries Daniel J. Beck (plaintiff) sustained when a steel beam fell on his foot. Plaintiff alleged that the beam fell when the forklift being used to transport it struck a defect in the surface of Simmons Avenue. Patriot Field Services, Inc. (defendant), leased part of a building abutting Simmons Avenue near the location of the accident.

Defendant contends that Supreme Court erred in denying its motion for summary judgment dismissing the complaint and cross claims against it. We agree. "Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street" (*Ankin v Spitz*, 129 AD3d 1001, 1002 [2d Dept 2015]; *see Capretto v*

City of Buffalo, 124 AD3d 1304, 1306 [4th Dept 2015]). Defendant met its initial burden on the motion by establishing, as relevant here, that "[it] neither owned nor made special use of [Simmons Avenue], and that [it] had no connection to the condition" that caused the accident (*Belvedere v AFC Constr. Corp.*, 21 AD3d 390, 391 [2d Dept 2005]; *see Ankin*, 129 AD3d at 1002). In response, plaintiffs failed to raise a triable issue of fact.

All concur except LINDLEY and BANNISTER, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the order denying the motion of Patriot Field Services, Inc. (defendant) for summary judgment dismissing the complaint and all cross claims against it. In our view, defendant failed to establish as a matter of law that it did not make special use of Simmons Avenue or affirmatively create the defective condition on Simmons Avenue that allegedly caused plaintiff's injuries.

In support of its motion, defendant submitted, inter alia, the deposition testimony of the owner of the property abutting Simmons Avenue, who leased the premises to defendant and others. The property owner testified that defendant would store equipment and metal on Simmons Avenue and that the metal and equipment would block the road. Later in his deposition, however, the property owner testified that he was not aware of the corporate relationship between defendant and another tenant and thus did not know for certain that it was defendant who had stored the equipment and materials on Simmons Avenue. In our view, the inconsistency in the property owner's testimony simply "present[s a] credibility issue[] that must be resolved at trial" (*Hale v Meadowood Farms of Cazenovia, LLC*, 104 AD3d 1330, 1332 [4th Dept 2013]; *see generally Poreda v Krofssik*, 59 AD3d 1005, 1005-1006 [4th Dept 2009]). Defendant also offered the deposition testimony of the streets foreman of the Niagara Falls Public Works Department, who testified that the use of Simmons Avenue was limited to the companies surrounding it, that he never observed members of the public on that street, and that, although the City of Niagara Falls did not pave Simmons Avenue, he observed it paved and fenced. The streets foreman further indicated that an entity's act of blocking a road was consistent with that entity exercising control over it. We conclude that defendant's own submissions thus raised a triable issue of fact whether defendant made special use of Simmons Avenue by storing equipment and materials on it (*see Gibbs v Husain*, 184 AD3d 809, 810 [2d Dept 2020]).

With regard to the creation of the defects in Simmons Avenue, defendant submitted the deposition testimony of the streets foreman, who opined that movement on Simmons Avenue, such as the moving and storage of metal, steel, and machinery, could cause depressions and potholes in the roadway. In our view, that testimony, read in conjunction with the testimony of the property owner and the other testimony of the streets foreman, does not eliminate triable issues of fact whether defendant's use of Simmons Avenue created the defect that caused plaintiff's injury (*see Capretto v City of Buffalo*, 124 AD3d 1304, 1307 [4th Dept 2015]).

Even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised triable issues of fact with respect to defendant's special use of Simmons Avenue and whether that use created the defective condition that caused plaintiff's injury. Plaintiff submitted an affidavit of the property owner, which predated his deposition, in which he averred that, on the date of plaintiff's injury, he was the owner of the relevant property, a portion of which he leased to defendant "for the purpose of fabricating metal and steel products." He further stated his belief that defendant and other entities would often use portions of Simmons Avenue for their own purposes, using heavy equipment to move pipes, I-beams, and various pieces of steel and other building materials, which were stored on Simmons Avenue without his knowledge or consent. In our view, a trial is required to resolve the inconsistencies between the property owner's affidavit and his deposition testimony. Plaintiff also offered the affidavit of an expert civil engineer who noted that the surface of Simmons Avenue was irregular, with undulations and pitted areas, indicating that no significant improvements had been made to the road surface over the years and that Simmons Avenue was in an unsafe condition. He opined that operating and storing heavy vehicles and machinery on Simmons Avenue over time contributed to the degradation of the road surface.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

824

CA 20-00696

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

JORGE BELTRAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WATERFRONT HOUSING DEVELOPMENT FUND CORP., WATERFRONT PHASE I LLC, NORSTAR BUILDING CORPORATION, S.A.B. SPECIALTIES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

S.A.B. SPECIALTIES, LLC, THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

BLAS ZUNIGA BUILDERS, LLC, THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT. (APPEAL NO. 1.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF THOMAS W. BENDER, ORCHARD PARK (THOMAS W. BENDER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 14, 2020. The order, among other things, denied the motion of defendants-appellants and third-party plaintiff for summary judgment and denied in part the cross motion of third-party defendant to dismiss the third-party complaint.

It is hereby ORDERED that said appeal insofar as taken by defendants Waterfront Housing Development Fund Corp., Waterfront Phase I LLC, and Norstar Building Corporation is dismissed and the order is modified on the law by granting the motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence and Labor Law action against defendants to recover damages for injuries he allegedly

sustained while working on a construction project on land owned by defendants Waterfront Housing Development Fund Corp. and Waterfront Phase I LLC (Waterfront defendants). Defendant Norstar Building Corporation (Norstar) was the general contractor, defendant-third-party plaintiff S.A.B. Specialties, LLC (S.A.B.) was a subcontractor of one of Norstar's subcontractors, and third-party defendant was a subcontractor of S.A.B. S.A.B. thereafter commenced a third-party action against third-party defendant for, inter alia, contractual indemnification. In the main action, plaintiff moved for partial summary judgment on liability pursuant to Labor Law § 240 (1), and the Waterfront defendants, Norstar (collectively, defendants) and S.A.B. cross-moved for summary judgment dismissing the complaint against S.A.B. In the third-party action, defendants and S.A.B. moved for summary judgment on the contractual indemnification cause of action, and third-party defendant cross-moved for summary judgment dismissing the amended third-party complaint. In appeal No. 1, defendants and S.A.B. appeal and third-party defendant cross-appeals from an order that, inter alia, denied the motion of defendants and S.A.B. in the third-party action and that denied the cross motion of third-party defendant in part. In appeal No. 2, defendants, S.A.B., and third-party defendant appeal from an order that granted plaintiff's motion and that denied the cross motion of defendants and S.A.B.

Addressing first appeal No. 2, we note that the appeal by third-party defendant must be dismissed because third-party defendant is not aggrieved by the order in that appeal (*see Reece v J.D. Posillico, Inc.*, 164 AD3d 1285, 1285-1286 [2d Dept 2018]; *Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 900-901 [2d Dept 2018]; *see generally* CPLR 5511). Moreover, we note that defendants are aggrieved by the order in appeal No. 2 insofar as it grants plaintiff's motion but not insofar as it denies S.A.B.'s cross motion (*see Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939 [4th Dept 2011]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 676 [2d Dept 2008]; *see generally* CPLR 5511). With respect to the merits, we conclude that Supreme Court properly granted plaintiff's motion inasmuch as plaintiff met his initial burden, and defendants and S.A.B. failed to raise a triable issue of material fact in opposition (*see Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555-556 [1st Dept 2013]; *Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346, 1346-1347 [4th Dept 2007]). Furthermore, the court properly denied the cross motion because S.A.B. is an entity subject to liability under Labor Law § 240 (1) (*see Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007]). We therefore affirm the order in appeal No. 2.

In appeal No. 1, the appeal must be dismissed to the extent taken by defendants because they are not aggrieved by the subject order (*see Wheaton*, 50 AD3d at 676; *Sutherland v City of New York*, 266 AD2d 373, 374-375 [2d Dept 1999], *lv denied in part and dismissed in part* 95 NY2d 790 [2000]; *see generally* CPLR 5511). With respect to the merits in appeal No. 1, we conclude that S.A.B. is entitled to contractual indemnification from third-party defendant for the reasons stated in *Tanksley v LCO Bldg. LLC* (196 AD3d 1037, 1038 [4th Dept 2021]). The

court thus erred in denying that motion. We therefore modify the order in appeal No. 2 accordingly.

All concur except TROUTMAN, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

825

CA 20-00716

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

JORGE BELTRAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WATERFRONT HOUSING DEVELOPMENT FUND CORP., WATERFRONT PHASE I LLC, NORSTAR BUILDING CORPORATION, S.A.B. SPECIALTIES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

S.A.B. SPECIALTIES, LLC, THIRD-PARTY PLAINTIFF,

V

BLAS ZUNIGA BUILDERS, LLC, THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF THOMAS W. BENDER, ORCHARD PARK (THOMAS W. BENDER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 12, 2020. The order granted the motion of plaintiff for partial summary judgment on the issue of liability under Labor Law § 240 (1) and denied the cross motion of defendants-appellants for summary judgment dismissing the complaint against defendant S.A.B. Specialties, LLC.

It is hereby ORDERED that said appeal by third-party defendant is dismissed and the order is affirmed without costs.

Same memorandum as in *Beltran v Waterfront Hous. Dev. Fund Corp.* ([appeal No. 1] — AD3d — [Jan. 28, 2022] [4th Dept 2022]).

All concur except TROUTMAN, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

847

CA 21-00210

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

VICKI L. SAULSBURY, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

NICKI M. DURFEE, DEFENDANT-RESPONDENT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (DAVID D. MACKNIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DIMATTEO & ROACH, ATTORNEYS AT LAW, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered August 27, 2020. The order denied in part plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion insofar as it sought summary judgment on the issue of liability with respect to the first cause of action and insofar as it sought summary judgment dismissing the fourth affirmative defense and the second and third counterclaims, and as modified the order is affirmed without costs.

Memorandum: In late 2016, plaintiff and defendant entered into a sales contract whereby plaintiff agreed to sell defendant the business assets related to her operation of an exclusive H&R Block franchise for the Town of Attica (sales contract). To secure payment for the transfer of assets under the sales contract, defendant executed a promissory note in plaintiff's favor in the amount of $200,000, which was payable over 10 years in annual installments of $20,000, plus interest. The sales contract also provided, in relevant part, that the $200,000 purchase price was paid "in consideration of the sale, transfer, assignment and delivery of the [p]urchased [a]ssets and the covenants made by [plaintiff] under the [n]oncompetition [a]greement." It is undisputed, however, that at the time of the closing on the sales contract, no noncompetition agreement was provided. Indeed, the only item attached to the sales contract at closing was the promissory note. Based on the submissions in this case, the promissory note was intertwined with the sales contract (*see generally Oseff v Scotti*, 130 AD3d 797, 800-801 [2d Dept 2015]; *Lorber v Morovati*, 83 AD3d 799, 800 [2d Dept 2011]), and the parties have proceeded in this action accordingly.

A few months after the parties closed on the sales contract, plaintiff worked for defendant as an hourly employee for several months, until defendant terminated plaintiff's employment. Plaintiff was employed by defendant pursuant to a standard form "tax professional employment agreement" (employment agreement). Relevantly, the employment agreement contained several covenants not to compete that, inter alia, prohibited plaintiff from performing outside tax preparation work while working for defendant and for two years post-termination. Nothing in the employment agreement referenced the sales contract, and nothing in the sales contract referenced the employment agreement.

Although defendant paid the first installment due on the promissory note, she did not submit payment for any other installment. Plaintiff demanded payment, to no avail, and thereafter commenced this action. Specifically, she asserted two causes of action, one for defendant's default under the sales contract (first cause of action), and another for unjust enrichment. In her answer, defendant interposed as affirmative defenses that, inter alia, plaintiff's breach of a covenant not to compete absolved defendant of the obligation to pay under the promissory note (fourth affirmative defense), and that plaintiff's breach of contract entitled defendant to an offset on the balance of the promissory note (fifth affirmative defense). Defendant also asserted three counterclaims, for breach of the employment agreement, unfair competition, and tortious interference with prospective business relations.

Plaintiff moved for, inter alia, summary judgment on the first cause of action and dismissing the counterclaims and the fourth and fifth affirmative defenses, and defendant cross-moved for, inter alia, partial summary judgment on the issue of liability with respect to allegations in the first counterclaim that plaintiff breached certain sections of the employment agreement and, alternatively, for an offset against the amount owed upon the promissory note. In its order, Supreme Court granted the motion insofar as it sought summary judgment dismissing certain affirmative defenses other than the fourth and fifth affirmative defenses but otherwise denied the motion, concluding that, although plaintiff satisfied her initial burden, there were issues of fact whether defendant had a defense to her default on the promissory note based on plaintiff's alleged violation of the covenants not to compete in the employment agreement, which the court concluded was inextricably intertwined with the sales contract. The court denied the cross motion based on its conclusion that defendant had not satisfied her initial burden. Plaintiff appeals, and defendant cross-appeals.

With respect to plaintiff's appeal, we conclude that the court erred in denying the motion with respect to the first cause of action as to the issue of liability and the fourth affirmative defense. It is undisputed that plaintiff met her initial burden on the motion in those respects by submitting the promissory note, and evidence of defendant's default (*see Sandu v Sandu*, 94 AD3d 1545, 1546 [4th Dept 2012]; *North Am. Pneumatic Tube Co. v Mishkin*, 203 AD2d 944, 944 [4th Dept 1994], *lv denied* 84 NY2d 802 [1994]). We further conclude that,

in opposition, defendant did not raise a triable issue of fact with respect to any defense to her default on the promissory note sufficient to defeat the motion as to liability (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, the court determined that defendant raised an issue of fact in opposition to the motion, specifically, whether plaintiff's alleged breach of the covenants not to compete in the employment contract constituted a defense to defendant's default because the sales contract and the employment agreement were inextricably intertwined such that the covenants not to compete constituted the noncompetition agreement contemplated by, but not included in, the sales contract. That determination was erroneous.

"Generally, breach of a related contract will not in the ordinary course defeat summary judgment on [a promissory] note[]" (*Ssangyong [U.S.A.] Inc. v Sung Ae Yoo*, 88 AD2d 572, 573 [1st Dept 1982]; *see Logan v Williamson & Co.*, 64 AD2d 466, 470 [4th Dept 1978], *appeal dismissed* 46 NY2d 996 [1979]). Nonetheless, that "rule does not apply where the contract and instrument are intertwined" and inseparable (*A+Assoc. v Naughter*, 236 AD2d 655, 656 [3d Dept 1997]; *see Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995]; *see also Town of West Seneca v American Ref-Fuel Co. of Niagara*, 1 AD3d 944, 945 [4th Dept 2003]). Whether two agreements are inextricably intertwined is a question of law for the court to decide because it involves a matter of contract interpretation (*see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 291 [1973]; *Matter of Erie County Dept. of Social Servs. v Bower*, 177 AD3d 1387, 1388 [4th Dept 2019]).

Here, the sales contract and employment agreement are not inextricably intertwined such that plaintiff's purported breach of the noncompetition covenants in the latter constitute a defense to defendant's default on the promissory note (*see Frank v Wyse*, 295 AD2d 923, 924 [4th Dept 2002]; *McMann v Ballantyne Mar.*, 182 AD2d 1131, 1132 [4th Dept 1992]; *Marx v LaRouche*, 152 AD2d 927, 928 [4th Dept 1989]; *Logan*, 64 AD2d at 470). Importantly, the two agreements at issue here never reference each other, and did not incorporate any terms of the other. Indeed, both agreements were executed at different times and for entirely different purposes, and it cannot be said that the sales contract and employment agreement constituted a single integrated agreement, the terms of which were not in dispute (*cf. e.g. Fitzpatrick v Animal Care Hosp., PLLC*, 104 AD3d 1078, 1081 [3d Dept 2013]; *Lorber*, 83 AD3d at 800; *A+Assoc.*, 236 AD2d at 656). The sales contract never once mentioned that it was conditioned on plaintiff being employed by defendant, nor does the sales contract even contemplate such a scenario (*see Grasso v Shutts Agency*, 132 AD2d 768, 768-769 [3d Dept 1987], *appeal dismissed* 70 NY2d 797 [1987]). Further, the plain terms of the promissory note indicate that it is an unambiguous instrument containing an unconditional promise to pay, unadorned with any reference of the employment agreement (*see North Am. Pneumatic Tube Co.*, 203 AD2d at 944). Another factor that supports the conclusion that the sales contract and the employment agreement were not intertwined is the fact that each contained a

merger clause providing that each contract constituted its own entire agreement (*see JMG Custom Homes, Inc. v Ryan*, 45 AD3d 1278, 1280 [4th Dept 2007]).

Given the evidence establishing that the sales contract and the employment agreement are not inextricably intertwined, we conclude that any purported breach of the covenants not to compete in the employment agreement is not a defense to the first cause of action. Thus, any breach of that portion of the employment agreement by plaintiff does not raise an issue of fact with respect to whether defendant has a defense to her default on the promissory note because plaintiff's purported breach—i.e., the first counterclaim—is not "inseparable from" the first cause of action, but is rather an "independent and unliquidated counterclaim" (*Logan*, 64 AD2d at 470; *see Frank*, 295 AD2d at 924; *McMann*, 182 AD2d at 1132; *Marx*, 152 AD2d at 928). In light of the foregoing, we conclude that the court should have granted the motion insofar as it sought summary judgment on the first cause of action as to liability and dismissing defendant's fourth affirmative defense, and we therefore modify the order accordingly.

We reject defendant's contention, advanced as an alternative ground for affirmance on plaintiff's appeal (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that plaintiff was not entitled to summary judgment with respect to the first cause of action because plaintiff's failure to provide the noncompetition agreement constituted a failure of consideration with respect to the sales contract, thereby entitling her to a discharge of the entire obligation on the promissory note. We note that defendant has never sought rescission of the sales contract and plainly intends to retain and use the assets she purchased from plaintiff (*see Laughlin v Integrated Waste Servs.*, 258 AD2d 948, 948 [4th Dept 1999]; *Fugelsang v Fugelsang*, 131 AD2d 810, 812 [2d Dept 1987]). Indeed, since closing on the sales contract, defendant has continuously operated the H&R Block in Attica, despite plaintiff's failure to supply the noncompetition agreement (*see Grasso*, 132 AD2d at 769). By retaining and operating the going concern she acquired by virtue of the sales contract, defendant cannot now assert that the consideration for the transactions "wholly failed" (*United Transp. Co., Inc. v Glenn*, 225 App Div 171, 175 [3d Dept 1929]).

Contrary to plaintiff's additional contention on her appeal, however, the court properly denied her motion to the extent it sought summary judgment dismissing the fifth affirmative defense. Because it is undisputed that plaintiff never supplied the noncompetition agreement contemplated by the sales contract, there may have been a partial failure of consideration entitling defendant to an offset on the amount due on the promissory note, per the fifth affirmative defense (*see Post v Thomas*, 212 NY 264, 274 [1914], *rearg denied* 212 NY 585 [1914]; *H.H. & F.E. Bean, Inc. v Edward L. Nezelek, Inc.*, 67 AD2d 1102, 1103 [4th Dept 1979]; *see generally* UCC 3-408). We conclude that there remain issues of fact with respect to defendant's entitlement to an offset based on a partial failure of consideration because of evidence suggesting that defendant waived plaintiff's

obligation to provide the noncompetition agreement by failing to object to plaintiff's failure to supply that agreement at closing (*see generally Empire Coal Sales Corp. v Platt*, 255 App Div 791, 791 [2d Dept 1938]), and because she paid the first installment due on the promissory note and has continued to operate her business for years without seeking to ensure that the noncompetition agreement was in place. Because there is an issue of fact as to the offset, we conclude that the court properly denied plaintiff's motion insofar as it sought summary judgment on the first cause of action with respect to the issue of damages (*see generally Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Sons*, 79 AD3d 1082, 1083-1084 [2d Dept 2010]; *Merritt Meridian Constr. Co. v Paramount Fabricators*, 221 AD2d 420, 421 [2d Dept 1995]).

We further conclude that, contrary to the parties' respective contentions on the appeal and cross appeal, the court properly denied both the motion and cross motion with respect to the first counterclaim because there remain triable issues of material fact whether plaintiff violated the covenants not to compete contained in the employment agreement (*see generally Zuckerman*, 49 NY2d at 562). Further, although the employment agreement is separate and distinct from the sales contract and the promissory note, we reject plaintiff's contention that the first counterclaim should be severed inasmuch as plaintiff has failed to meet her burden to show that "a joint trial would result in substantial prejudice" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 106 AD3d 1453, 1453 [4th Dept 2013]; *see* CPLR 603).

Finally, we agree with plaintiff that the court should have granted the motion to the extent that she sought summary judgment dismissing the second and third counterclaims. Specifically, we conclude that the second and third counterclaims—for unfair competition and tortious interference with prospective business relations—were duplicative of the first counterclaim—for breach of contract—because those counterclaims are predicated on the same conduct purportedly prohibited by the contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 418 [1st Dept 2020]). We therefore further modify the order accordingly.

All concur except DeJoseph, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

919

CA 20-01068

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

DWAYNE D. TANKSLEY, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LCO BUILDING LLC AND CITYVIEW CONSTRUCTION MANAGEMENT, LLC, DEFENDANTS-APPELLANTS.

CITYVIEW CONSTRUCTION MANAGEMENT, LLC, THIRD-PARTY PLAINTIFF-APPELLANT,

V

TUNDO CONSTRUCTION & DESIGN, INC., THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT, ET AL., THIRD-PARTY DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO, BARRY MCTIERNAN AND MOORE, NEW YORK CITY (MARK A. COLLESANO OF COUNSEL), FOR DEFENDANT-APPELLANT LCO BUILDING LLC.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT CITYVIEW CONSTRUCTION MANAGEMENT, LLC, AND THIRD-PARTY PLAINTIFF-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (BRYAN R. FORBES OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

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

Appeals from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 6, 2020. The order, among other things, granted plaintiff's motion for partial summary judgment and denied in part the cross motion of defendant-third-party plaintiff Cityview Construction Management, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying plaintiff's motion insofar as it sought partial summary judgment on liability on the second cause of action against defendant Cityview Construction Management, LLC, and granting that part of the cross motion of that defendant seeking summary judgment dismissing the first cause of action against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiff was injured when he fell through a skylight opening in the roof on which he was working in connection with a construction project. Plaintiff commenced this action for damages against, inter alia, defendant LCO Building LLC (LCO), the owner of the property, and defendant-third-party plaintiff Cityview Construction Management, LLC (Cityview), the construction manager (collectively, defendants), alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Cityview commenced a third-party action against, inter alia, plaintiff's employer, third-party defendant Tundo Construction & Design, Inc. (Tundo). Cityview, LCO and Tundo appeal from an order that, inter alia, granted plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action against defendants, denied those parts of Cityview's cross motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) and common-law negligence causes of action against it, denied that part of Cityview's cross motion seeking summary judgment on the second third-party complaint against Tundo, and granted plaintiff's application seeking leave to amend his pleadings to include a Labor Law § 241 (6) claim premised on a violation of 12 NYCRR 23-1.7.

Addressing first Cityview's appeal, we reject Cityview's contention that Supreme Court should have granted Cityview's cross motion insofar as it sought summary judgment dismissing the Labor Law § 241 (6) cause of action against it on the ground that Cityview is not a general contractor or agent of LCO and, thus, not subject to liability under that section of the Labor Law. "An entity is a contractor within the meaning of Labor Law . . . § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project" (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007] [internal quotation marks omitted]). Additionally, "an entity that serves as a construction manager may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" (*Robinson v Spragues Wash. Sq., LLC*, 158 AD3d 1318, 1319-1320 [4th Dept 2018] [internal quotation marks omitted]). Here, Cityview's own submissions in support of its cross motion raise triable issues of fact whether Cityview had the authority to supervise or control the injury-producing work, and thus whether it may be held liable as a general contractor or an agent of the owner (*see Stiegman v Barden & Robeson Corp.* [appeal No. 2], 162 AD3d 1694, 1697 [4th Dept 2018]; *Predmore v EJ Constr. Group, Inc.*, 51 AD3d 1405, 1406 [4th Dept 2008], *lv dismissed* 10 NY3d 952 [2008]).

We agree with Cityview, however, that the court erred in denying that part of Cityview's cross motion seeking summary judgment dismissing the common-law negligence cause of action against it, which was based on Cityview's alleged supervision and control over plaintiff's work, and we therefore modify the order accordingly. Cityview met its initial burden on its cross motion of establishing that it did not exercise supervisory control over the manner or method of plaintiff's work that caused plaintiff's injury, and plaintiff

failed to raise an issue of fact in opposition (*see Bellreng v Sicoli & Massaro, Inc.* [appeal No. 2], 108 AD3d 1027, 1030-1031 [4th Dept 2013]).

Contrary to Cityview's contention, the court properly granted plaintiff's application seeking leave to amend the pleadings to include a Labor Law § 241 (6) claim premised on the alleged violation of 12 NYCRR 23-1.7 (b) (1), which concerns hazardous openings. "[A] plaintiff may be entitled to leave to amend his or her [pleadings or] bill of particulars where, as here, he or she makes a showing of merit, raises no new factual allegations or legal theories, and causes the defendant no prejudice" (*Shaw v Scepter, Inc.*, 187 AD3d 1662, 1665 [4th Dept 2020]; *see Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]).

Contrary to Cityview's further contention, the court properly denied that part of Cityview's cross motion seeking summary judgment on the second third-party complaint with respect to the cause of action for contractual indemnification against Tundo. The indemnification provision in the contract between Cityview and Tundo requires indemnification only for damages that were caused by the negligent acts or omissions of Tundo or its subcontractors, and we conclude that there are questions of fact whether Tundo was negligent in, inter alia, the scheduling of the contractors (*see Bellreng*, 108 AD3d at 1031; *Guarnieri v Essex Homes of WNY*, 24 AD3d 1266, 1266-1267 [4th Dept 2005]; *see also Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1279 [4th Dept 2007]).

On their respective appeals, Cityview and Tundo contend that the court should have denied plaintiff's motion for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) cause of action against Cityview. We agree, and we therefore further modify the order accordingly. Even assuming, arguendo, that plaintiff met his initial burden on his motion with respect to Cityview, we conclude that Cityview's submissions in opposition raised a triable issue of fact whether it lacked the authority to supervise or control the injury-producing work (*see Mora v Nakash*, 118 AD3d 964, 966 [2d Dept 2014]). We further conclude, however, that, contrary to LCO's contention on its appeal, the court properly granted plaintiff's motion with respect to it. It is well settled that, "[i]n order to prevail on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his or her injuries" (*Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 985 [2d Dept 2012]). Here, plaintiff established that LCO's failure to provide adequate fall protection was a proximate cause of the accident (*see Lord v Whelan & Curry Constr. Servs. Inc.*, 166 AD3d 1496, 1497 [4th Dept 2018]). Plaintiff submitted his own deposition testimony, in which he testified that, at the time of his injury, he was removing the plywood covering of the skylight hole as part of his work of preparing to install the final roofing. Plaintiff further testified that, upon removing the plywood, he fell through the skylight hole, and he was given no safety device to protect him from falling. Even

assuming, arguendo, that the plywood cover constituted a safety device, as LCO contends, we note that "the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]). While the plywood cover "may have provided proper protection when it was in place over the opening, . . . once it was removed plaintiff was exposed to an elevation-related risk which required additional precautionary measures or devices" (*Clark v Fox Meadow Bldrs.*, 214 AD2d 882, 884 [3d Dept 1995]). In opposition, LCO failed to raise an issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries, in particular, whether he was provided with an adequate safety device and failed to use it (*see Lord*, 166 AD3d at 1497).

Finally, LCO's contention that the court erred in granting that part of Cityview's cross motion seeking summary judgment dismissing plaintiff's Labor Law § 200 cause of action against it is not properly before us because LCO is not aggrieved with respect to that part of the order (*see generally* CPLR 5511; *Smalley v Harley-Davidson Motor Co. Group LLC*, 134 AD3d 1490, 1493 [4th Dept 2015]).

All concur except DeJoseph, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

944

KA 17-00505

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TSHOMBE A. HARRIS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 3, 2017. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, unlawful fleeing a police officer in a motor vehicle in the third degree, operating a motor vehicle not equipped with a court ordered ignition interlock device, reckless driving, and refusal to submit to a breath test.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of refusal to submit to a breath test and dismissing count 16 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), unlawful fleeing a police officer in a motor vehicle in the third degree (Penal Law § 270.25), operating a motor vehicle not equipped with a court ordered ignition interlock device (Vehicle and Traffic Law § 1198 [9] [d]), reckless driving (§ 1212), and refusal to submit to a breath test (§ 1194 [1] [b]).

As a preliminary matter, inasmuch as defendant was convicted by the jury of the nonexistent offense of refusal to submit to a breath test, we modify the judgment by reversing that part convicting him of count 16 of the indictment and dismissing that count (*see People v Adams*, — AD3d —, — [Jan. 28, 2022] [4th Dept 2022]; *People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021]; *see also People v Martinez*, 81 NY2d 810, 811-812 [1993]).

Defendant's contention that the evidence is not legally sufficient to support the conviction is preserved for our review only

to the extent that he challenges the counts of DWI as a class D felony, unlawful fleeing a police officer in a motor vehicle in the third degree, and reckless driving (*see People v Gray*, 86 NY2d 10, 19 [1995]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction with respect to those counts (*see People v Watkins*, 180 AD3d 1222, 1230 [3d Dept 2020], *lv denied* 35 NY3d 1030 [2020]; *People v Goldblatt*, 98 AD3d 817, 819 [3d Dept 2012], *lv denied* 20 NY3d 932 [2012]; *People v McGraw*, 57 AD3d 1516, 1517 [4th Dept 2008]).

We also reject defendant's contention that the verdict is against the weight of the evidence. Based on our dismissal of count 16, we do not address defendant's contention with respect to that count. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]; *People v Shank*, 26 AD3d 812, 813-814 [4th Dept 2006]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court erred in allowing the People to introduce evidence of his prior bad acts that occurred during a previous arrest for DWI. Even assuming, arguendo, that the court erred in admitting that evidence (*see generally People v Leonard*, 29 NY3d 1, 6-8 [2017]; *People v Hudy*, 73 NY2d 40, 54-56 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]), we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). The evidence of defendant's guilt is overwhelming (*see People v Dean*, 145 AD3d 1633, 1633 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017]; *People v Donaldson*, 46 AD3d 1109, 1110 [3d Dept 2007]; *People v Erickson*, 156 AD2d 760, 762-763 [3d Dept 1989], *lv denied* 75 NY2d 966 [1990]), and "there is no significant probability that the jury would have acquitted defendant if the allegedly improper *Molineux* evidence had been excluded" (*People v Casado*, 99 AD3d 1208, 1212 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]).

Finally, defendant contends that the court erred by failing to conduct a minimal inquiry into his complaints about defense counsel. That contention lacks merit. Defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Morris*, 183 AD3d 1254, 1255 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Rather, defendant made only " 'vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense' " (*People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]) and "conclusory assertions that he and defense counsel disagreed about . . . strategy" (*People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). In any event, we conclude that the court "conducted

the requisite 'minimal inquiry' to determine whether substitution of counsel was warranted" (*People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018], quoting *People v Sides*, 75 NY2d 822, 825 [1990]). The record establishes that the court "allowed defendant to air his concerns about defense counsel, and . . . reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]), and "properly concluded that defense counsel was 'reasonably likely to afford . . . defendant effective assistance' of counsel" (*People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], quoting *People v Medina*, 44 NY2d 199, 208 [1978]; *see Chess*, 162 AD3d at 1579).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

945

KA 21-00595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW D. RINGROSE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered April 16, 2015. The judgment convicted defendant upon a plea of guilty of rape in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment entered in Monroe County convicting him upon a plea of guilty of two counts of rape in the second degree (Penal Law § 130.30 [1]). Pursuant to the plea agreement, County Court sentenced defendant to two consecutive eight-year determinate terms of imprisonment that were to run concurrently with an aggregate prison term of 14 to 24 years previously imposed on defendant in Ontario County for rape in the third degree, criminal sexual act in the third degree, and six counts of luring a child. On appeal from the Ontario County judgment, however, this Court modified that judgment by reversing those parts convicting defendant of six counts of luring a child (*People v Ringrose*, 186 AD3d 1137 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). As a result, the aggregate term of imprisonment with respect to the Ontario County judgment became four years (*id.* at 1138).

We agree with defendant, and the People correctly concede, that, under the circumstances of this case, the judgment in Monroe County must be reversed and the plea vacated (*see People v Peterson*, 186 AD3d 1092, 1092 [4th Dept 2020]). "The critical question is whether the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea" (*People v Rowland*, 8 NY3d 342, 345 [2007]). Here, when

defendant pleaded guilty in Monroe County, the court expressly informed him that the aggregate 16-year term of imprisonment would run concurrently with the aggregate 14-to-24-year term already imposed in Ontario County, and thus the plea would result in no or relatively little additional prison time (*see generally People v Monroe*, 21 NY3d 875, 877-878 [2013]; *People v Valerio*, 176 AD3d 1625, 1626 [4th Dept 2019]). Once the Ontario County sentence was reduced as a result of our determination on the prior appeal to a term of four years, defendant lost the benefit previously conferred by the concurrent nature of the Monroe County plea, and "we cannot say defendant would have accepted the plea bargain . . . had it not been for his [14-to-24]-year sentence in the [Ontario County] case, now reduced to [four years]" (*Rowland*, 8 NY3d at 345; *cf. People v Freeman*, 159 AD3d 1337, 1337 [4th Dept 2018], *lv denied* 31 NY3d 1147 [2018]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

950

CA 20-01407

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

KATHLEEN QUINN-JACOBS AND DAVID QUINN-JACOBS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROSS MOQUIN, M.D., ET AL., DEFENDANTS,
AND CROUSE HOSPITAL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

EDELMAN & EDELMAN, P.C., NEW YORK CITY (JOHN CHERUNDOLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered October 13, 2020. The order, insofar as appealed from, denied that part of the motion of plaintiffs seeking leave to amend their bill of particulars.

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

Memorandum: In this medical malpractice action, plaintiffs appeal, in appeal No. 1, from an order that denied their motion seeking, inter alia, leave to amend the bill of particulars to add the names of certain individuals for whose acts plaintiffs alleged Crouse Hospital (defendant) was vicariously liable. In appeal No. 2, plaintiffs appeal from a subsequent order that denied their motion for leave to renew with respect to the prior order. We affirm in both appeals.

In appeal No. 1, we conclude that Supreme Court did not abuse its discretion in declining to grant leave to amend the bill of particulars to add "Donna Diliberto, R.N." as an individual for whose acts defendant was vicariously liable (*see Silber v Sullivan Props., L.P.*, 182 AD3d 512, 513 [1st Dept 2020]; *see generally Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]). Inasmuch as the claims underlying the remaining proposed amendments to the bill of particulars had been dismissed upon defendant's prior motion for summary judgment (*Quinn-Jacobs v Moquin*, 195 AD3d 1463, 1464 [4th Dept 2021]), there was no basis for plaintiffs to seek leave to amend the bill of particulars to make those remaining proposed amendments (*see St. John v State of New York*, 124 AD3d 1399, 1400 [4th Dept 2015];

Farruggia v Town of Penfield, 119 AD3d 1320, 1322 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]).

In appeal No. 2, contrary to plaintiffs' contention, we conclude that they failed to present any new facts or a change in law warranting leave to renew (*see* CPLR 2221 [e] [2], [3]; *see generally Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482 [4th Dept 2003]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

951

CA 21-00260

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

KATHLEEN QUINN-JACOBS AND DAVID QUINN-JACOBS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROSS MOQUIN, M.D., ET AL., DEFENDANTS,
AND CROUSE HOSPITAL, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

EDELMAN & EDELMAN, P.C., NEW YORK CITY (JOHN CHERUNDOLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORRELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 3, 2021. The order denied the motion of plaintiffs for leave to renew that part of their motion seeking leave to amend the bill of particulars.

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

Same memorandum as in *Quinn-Jacobs v Moquin* ([appeal No. 1] — AD3d — [Jan. 28, 2022] [4th Dept 2022]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

966

CAF 20-00166

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

IN THE MATTER OF JOSEPH R. ANDREWS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AUTUMN APPLEGATE, RESPONDENT-RESPONDENT.

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

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered January 21, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petitioner therapeutic visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, inter alia, modified a prior order of custody and visitation by awarding the father therapeutically supervised visitation with the subject child. While this appeal was pending, Family Court entered an order upon the consent of the parties that resolved custody and visitation issues with respect to the subject child. We conclude that the superseding order renders this appeal moot (*see Matter of Warren v Hibbs*, 136 AD3d 1306, 1306 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]; *Matter of Salo v Salo*, 115 AD3d 1368, 1368 [4th Dept 2014]). We further conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

All concur except DeJoseph, J., who is not participating.

Entered: January 28, 2022 Ann Dillon Flynn

Clerk of the Court

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

972

CA 21-00034

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

ROBERT T. VAN DE MARK, PLAINTIFF-APPELLANT,

V ORDER

MBR CAPITAL PARTNERS, LLC, ET AL., DEFENDANTS.
(ACTION NO. 1.)

TRACEY TAYLOR, FORMERLY KNOWN AS TRACEY BERNARDONI, PLAINTIFF-RESPONDENT,

V

ROBERT T. VAN DE MARK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

THE LAW OFFICE OF ANNEMARIE E. STEWARD, WILLIAMSVILLE (ANNEMARIE E. STEWARD OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 29, 2020. The order granted the motion of Tracey Taylor, formerly known as Tracey Bernardoni, leave to intervene in action No. 1 and denied the motion of Robert T. Van De Mark to dismiss the amended complaint in action No. 2.

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

All concur except DeJoseph, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

973

CA 21-00037

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

ROBERT T. VAN DE MARK, PLAINTIFF-APPELLANT,

V ORDER

MBR CAPITAL PARTNERS, LLC, ET AL., DEFENDANTS.
(ACTION NO. 1.)

TRACEY TAYLOR, FORMERLY KNOWN AS TRACEY BERNARDONI, PLAINTIFF-RESPONDENT,

V

ROBERT T. VAN DE MARK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.
(ACTION NO. 2.)
(APPEAL NO. 2.)

THE LAW OFFICE OF ANNEMARIE E. STEWARD, WILLIAMSVILLE (ANNEMARIE E. STEWARD OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 15, 2020. The order granted the motion of Tracey Taylor, formerly known as Tracey Bernardoni, to vacate a judgment and denied the motion of plaintiff Robert T. Van De Mark to amend a judgment nunc pro tunc.

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

All concur except DeJoseph, J., who is not participating.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

978

KA 21-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL TALLUTO, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), dated December 11, 2020. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act and designated him a sexually violent offender.

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

Memorandum: In this proceeding under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order that, inter alia, designated him a "sexually violent offender" pursuant to Correction Law § 168-k (2). We reject defendant's challenge to that designation.

A " '[s]exually violent offender' means a sex offender who has been convicted of a sexually violent offense" (Correction Law § 168-a [7] [b]). A " '[s]exually violent offense,' " among other things, is "a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [New York] felony [enumerated in section 168-a (3) (a)] *or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred*" (§ 168-a [3] [b] [emphasis added]). It is undisputed that defendant was convicted of a felony in Michigan "for which [he] is required to register as a sex offender in [that] jurisdiction" (*id.*). Defendant's Michigan conviction thus constitutes a " '[s]exually violent offense' " as defined by the second of the two disjunctive clauses that comprise section 168-a (3) (b). It follows that defendant was properly designated a sexually violent offender, even though he would not qualify as such had he committed the same conduct in New York (*see* § 168-a [3] [a]; [7] [b]).

This result, we acknowledge, is illogical and unfair. As the dissent explains, the second disjunctive clause of Correction Law § 168-a (3) (b) makes the first disjunctive clause largely—but not

entirely—superfluous, and it treats many out-of-state convictions more harshly than identical in-state convictions. Indeed, the dissent makes a compelling case that the second disjunctive clause of section 168-a (3) (b) is simply a legislative drafting error.

But our hands are tied. "[A]ll statutes must have a construction according to the language employed, and where no ambiguity exists courts cannot correct supposed defects" (*Benton v Wickwire*, 54 NY 226, 228-229 [1873]; *see Schoenefeld v State of New York*, 25 NY3d 22, 26 [2015]; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 548-549 [1983]). The language of Correction Law § 168-a (3) (b) is plain and unambiguous, and we " 'may not resort to rules of construction' " to defeat such a legislative pronouncement (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107 [1997]). Indeed, " 'no rule of construction gives the court[s] discretion to declare the intent of [a] law *when the words are unequivocal*' " (*id.*). If "the wording of the statute has created an 'unintended consequence,' . . . it is the prerogative of the legislature, not [the courts], to correct it" (*Matter of Lisa T. v King E.T.*, 30 NY3d 548, 556 [2017]). Parenthetically, we note that defendant does not attack the constitutionality of section 168-a (3) (b) as written.

Defendant's remaining contention is without merit.

All concur except CARNI, J.P., and LINDLEY, J., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. Although the People did not submit a brief on appeal, they conceded below, in our view correctly, that defendant should not be designated a sexually violent offender because the felony he committed in Michigan would not be a sexually violent offense if committed in New York. Over the objection of both defendant and the People, County Court determined that such designation is mandated by Correction Law § 168-a (3) (b), notwithstanding that the Board of Examiners of Sex Offenders did not consider defendant to be a sexually violent offender and there was no evidence at the Sex Offender Registration Act (SORA) hearing that his out-of-state sexual offense involved violence or the use of force. Although the majority finds this result to be illogical and unfair, it concludes, not unreasonably, that our hands are tied by the literal terms of the statute and we must therefore affirm. We come to a different conclusion.

The majority accurately lays out the relevant statutory scheme. A sexually violent offender is defined as a sex offender "who has been convicted of a sexually violent offense" (Correction Law § 168-a [7] [b]). In New York, a sexually violent offense is a conviction for a crime enumerated in Correction Law § 168-a (3) (a). For out-of-state convictions, section 168-a (3) (b) defines a sexually violent offense as a conviction for an offense that "includes all the essential elements of any such felony provided for in paragraph (a)," or a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred."

Stated otherwise, for out-of-state convictions a sexually violent offense is an offense that matches the essential elements of a sexually violent offense in New York, or any felony for which the defendant had to register as a sex offender in the other state. The second part of the definition in Correction Law § 168-a (3) (b) renders the first part largely meaningless because, for practical purposes, every out-of-state offense that meets the essential elements test will be an out-of-state felony for which registration is required in the other state.

Moreover, as defendant points out, the definition of a " '[s]exually violent offense' " in section 168-a (3) (b) as a felony in any other jurisdiction for which the offender must register as a sex offender is, word for word, the same definition of a mere " '[s]ex offense' " for out-of-state convictions set forth in section 168-a (2) (d) (ii), thereby collapsing the distinction between violent and non-violent sex offenses as they apply to out-of-state offenders who reside in New York.

It has been noted that the latter definition of a sexually violent offense in Correction Law § 168-a (3) (b) may be the result of a legislative drafting error. In the 2020 Report of the Advisory Committee on Criminal Law and Procedure to the Chief Judge of the State of New York, the Advisory Committee concluded that the second definition "was presumably included in error" and offered a plausible explanation for how the mistake was made. The Advisory Committee therefore recommended that the legislature amend the statute by deleting the "errant phrase" in order to clarify that an out-of-state felony is a sexually violent offense if, and only if, it includes the essential elements of a sexually violent offense in New York. Although a bill was introduced in the Assembly to amend the statute accordingly, it has not been enacted into law.

With respect to the case at hand, there is no dispute that the felony for which defendant was convicted in Michigan does not include "all of the essential elements" of an offense enumerated in section 168-a (3) (a). Thus, if defendant had committed that felony in New York, he would not qualify as a sexually violent offender. Nevertheless, because defendant was required to register as a sex offender in Michigan based on his felony conviction in that state, he meets the second definition of a sexually violent offender under section 168-a (3) (b), even though, as the People conceded at the SORA hearing, there is no evidence that defendant used force or violence during the commission of his felony. The question presented is whether, in light of the clear and unambiguous language of section 168-a (3) (b), we are powerless to correct what the majority agrees is an illogical and unfair result.

"In interpreting the statute we are guided by a well-settled principle of statutory construction: courts normally accord statutes their plain meaning, but 'will not blindly apply the words of a statute to arrive at an unreasonable or absurd result' " (*People v Santi*, 3 NY3d 234, 242 [2004], quoting *Williams v Williams*, 23 NY2d 592, 599 [1969]). Thus, while courts are "governed by the principle

that we must interpret a statute so as to avoid an unreasonable or absurd application of the law" (*People v Garson*, 6 NY3d 604, 614 [2006] [internal quotation marks omitted]), courts should also strive to give " 'effect and meaning' " to every part of a statute (*Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296 [2011]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 98).

Here, we conclude that a literal application of the words contained in Correction Law § 168-a (3) (b) would not only fail to give meaning to the essential elements test set forth in the statute, but it would also lead to an unreasonable if not absurd result, i.e., the designation of defendant as a sexually violent offender when he did not use violence or threats of violence during the course and commission of the underlying felony and when the out-of-state crime he committed would not be a sexually violent offense if committed in New York. As a result of the designation, defendant must register for life as a sex offender even though he was found to be only a level one risk at the SORA hearing. In our view, the sexually violent offender designation should be reserved for those offenders who are truly violent and hence more dangerous than nonviolent offenders.

We would therefore modify the order by vacating the sexually violent offender designation, and otherwise affirm.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1019

KA 19-01644

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TANEASHA HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 6, 2019. The judgment convicted defendant upon a jury verdict of falsifying business records in the second degree (58 counts).

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of 58 counts of falsifying business records in the second degree (Penal Law § 175.05 [1]), defendant contends that County Court erred in admitting exhibits 5, 6, 7, 17 and 18 in evidence.

Defendant failed to preserve for our review her contention that she was denied her right of confrontation with respect to exhibits 5, 6 and 7 (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]). In any event, after reviewing the pertinent factors (*see generally People v Rawlins*, 10 NY3d 136, 151-156 [2008], *cert denied* 557 US 934 [2009]), we conclude that the records at issue, i.e., wage reports compiled by the New York State Department of Labor, are not testimonial in nature (*see generally People v Freycinet*, 11 NY3d 38, 41-42 [2008]). Consequently, contrary to defendant's further contention, we conclude that she "was not deprived of effective assistance by defense counsel's failure to object [on confrontation grounds to the admission of exhibits 5, 6 and 7] inasmuch as any such objection would have had little or no chance of success" (*People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]).

Defendant next challenges the admission of exhibit 17 on foundation grounds. Defendant's contention that some of the documents in exhibit 17 were not properly admitted as business records because

the People failed to establish that they were prepared contemporaneously with or within a short time of the events described therein is not preserved for our review. The objection by defendant to "the admission of that exhibit did not encompass [her] present contention" (*People v Evans*, 59 AD3d 1127, 1128 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]; *see generally* CPL 470.05 [2]). In any event, we reject that contention inasmuch as the requisite foundation for admission of exhibit 17 as a business record was established (*see generally People v Brown*, 13 NY3d 332, 341 [2009]; *People v Cratsley*, 86 NY2d 81, 89-91 [1995]). Contrary to defendant's further contention, that exhibit was properly admitted as a business record notwithstanding that the People did not call the person who created that document as a witness at defendant's trial (*see People v Nashal*, 130 AD3d 480, 481 [1st Dept 2015], *lv denied* 26 NY3d 1010 [2015]; *see e.g. People v Darden*, 142 AD3d 863, 864 [1st Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *see generally People v Kennedy*, 68 NY2d 569, 579-580 [1986]).

With respect to defendant's contention that the court erred in admitting exhibit 18 in evidence, we conclude that "the court did not err in allowing the prosecution to introduce summaries of other documents that had been introduced into evidence and previously provided to the defense, pursuant to the voluminous writings exception to the best evidence rule" (*People v Hutchings*, 142 AD3d 1292, 1294 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016] [internal quotation marks omitted]; *see generally People v Potter*, 255 AD2d 763, 767 [3d Dept 1998]).

We reject defendant's further contention that, because she was questioned without *Miranda* warnings by a Department of Labor Investigator, the court erred in refusing to suppress the statement that she made to him. Even were we to assume that the Investigator was acting as an agent of the police (*cf. generally People v Rodriguez*, 135 AD3d 1181, 1184-1185 [3d Dept 2016], *lv denied* 28 NY3d 936 [2016]), it is well settled that "the safeguards required by *Miranda* are not triggered unless a suspect is subject to custodial interrogation . . . [and t]he standard for assessing a suspect's custodial status is whether a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave" (*People v Paulman*, 5 NY3d 122, 129 [2005] [internal quotation marks omitted]; *see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v Figueroa*, 156 AD3d 1348, 1348 [4th Dept 2017], *lv denied* 31 NY3d 1013 [2018]). Here, we conclude that defendant was not in custody at the time she spoke to the Investigator, and thus *Miranda* warnings were not required (*see People v Rodriguez*, 111 AD3d 1333, 1333-1334 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *People v Murphy*, 43 AD3d 1276, 1277 [4th Dept 2007], *lv denied* 9 NY3d 1008 [2007]).

Contrary to defendant's contention, after viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v*

Bleakley, 69 NY2d 490, 495 [1987]), including with respect to the element of defendant's intent to defraud (*see People v Daymon*, 156 AD3d 1417, 1417 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]; *People v Pettersen*, 130 AD3d 1536, 1537 [4th Dept 2015], *lv denied* 26 NY3d 1010 [2015]; *see generally People v Taylor*, 14 NY3d 727, 729 [2010]).

Finally, the sentence is not unduly harsh or severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1025

CA 20-01585

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

ROBERT MALVESTUTO, JR., AND KAREN MALVESTUTO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF LANCASTER, DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DOLCE FIRM, BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 24, 2020. The order, among other things, granted in part plaintiffs' motion for summary judgment and granted in part defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of plaintiffs' motion for summary judgment on the issue of liability on the second and third causes of action and on the issue of comparative negligence, denying that part of defendant's cross motion for 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 commenced this action seeking damages for injuries sustained by Robert Malvestuto, Jr. (plaintiff) while he was working in a trench at a construction site on land owned by defendant. As he was performing his work, plaintiff was struck in the leg by the bucket of an excavator situated on the edge of the trench above him. Plaintiffs moved for summary judgment on, inter alia, the issue of liability on the Labor Law §§ 240 (1) and 241 (6) causes of action, i.e., the second and third causes of action, and on the issue of plaintiff's alleged comparative negligence. Defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiffs' motion with respect to liability on the Labor Law § 240 (1) cause of action and the section 241 (6) cause of action insofar as it was based on alleged violations of 12 NYCRR 23-9.4 (c) and 23-9.5 (a). The court also granted plaintiffs' motion with respect to the issue of plaintiff's lack of comparative negligence. The court granted defendant's cross motion with respect to the Labor Law § 200 cause of action, i.e., the first cause of action, and the Labor Law

§ 241 (6) cause of action insofar as it was based on other alleged regulatory violations. Defendant appeals, and plaintiffs cross-appeal.

We agree with defendant on its appeal that the court erred in granting plaintiffs' motion with respect to liability under Labor Law § 240 (1), and we therefore modify the order accordingly. Plaintiffs' own submissions created a triable issue of fact concerning the manner in which the accident occurred (*see generally Militello v Landsman Dev. Corp.*, 133 AD3d 1378, 1379 [4th Dept 2015]), specifically whether plaintiff was injured due to a risk contemplated by the statute or, alternatively, by " 'the usual and ordinary dangers of a construction site' " (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005]; *see Mohamed v City of Watervliet*, 106 AD3d 1244, 1245-1246 [3d Dept 2013]). However, we reject defendant's contention that the court erred in denying its cross motion with respect to the Labor Law § 240 (1) cause of action inasmuch as defendant's submissions raised the same triable issue of fact (*see generally Sims v City of Rochester*, 115 AD3d 1355, 1355-1356 [4th Dept 2014]).

We agree with defendant on its appeal that the court erred in granting plaintiffs' motion with respect to liability on the Labor Law § 241 (6) cause of action insofar as it is premised upon alleged violations of 12 NYCRR 23-9.4 (c) and 23-9.5 (a). The issue of fact concerning the manner in which the accident occurred precludes a determination as a matter of law whether either of those regulations were violated (*see Smith v Torre*, 247 AD2d 896, 897 [4th Dept 1998]; *see also Shaw v Scepter, Inc.*, 187 AD3d 1662, 1665 [4th Dept 2020]). For the same reason, we reject defendant's contention that the court erred in denying its cross motion with respect to the section 241 (6) cause of action insofar as it is premised upon violations of those regulations, but we agree with defendant that the court erred in determining that plaintiff was free from comparative negligence (*see generally Baum v Javen Constr. Co., Inc.*, 195 AD3d 1378, 1380 [4th Dept 2021]). We therefore further modify the order by denying plaintiffs' motion with respect to the issues of liability on the section 241 (6) cause of action and plaintiff's comparative negligence.

Contrary to plaintiffs' contention on their cross appeal, the court properly denied their motion and granted defendant's cross motion with respect to the Labor Law § 241 (6) cause of action insofar as it was based upon the alleged violation of 12 NYCRR 23-4.2 (k). That regulation " '[is] not sufficiently specific to support a cause of action under Labor Law § 241 (6)' " (*Vanderwall v 1255 Portland Ave. LLC*, 128 AD3d 1446, 1447 [4th Dept 2015]).

Lastly, we agree with plaintiffs on their cross appeal that the court erred in granting defendant's cross motion with respect to the Labor Law § 200 cause of action, and we therefore further modify the order accordingly. There is a triable issue of fact whether plaintiff's injuries stemmed "from a dangerous condition on the premises" and whether defendant had "control over the work site and actual or constructive notice of the dangerous condition" (*Ozimek v*

Holiday Val., Inc., 83 AD3d 1414, 1416 [4th Dept 2011]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1026

CA 20-01556

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

TED W. RITTS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID L. COLLEY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOWANDA REHABILITATION AND NURSING CENTER, ALSO KNOWN AS GNH LLC, DEFENDANT-RESPONDENT.

HOGANWILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (JONATHAN J. SCHUTRUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 27, 2020. 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 reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this action to recover damages arising from injuries sustained by plaintiff's decedent while he was a patient at a nursing home facility owned and operated by defendant. The complaint asserted causes of action for medical malpractice and violations of Public Health Law § 2801-d. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

We agree with plaintiff that Supreme Court erred in granting the motion because defendant did not meet its initial burden thereon. It is well settled that "a defendant's burden is not met if the defendant's expert renders an opinion that is . . . unsupported by competent evidence" (*Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017] [internal quotation marks omitted]). "[I]t is equally well settled that 'opinion evidence must be based on facts in the record or personally known to the witness' " (*id.*, quoting *Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]). Inasmuch as "summary judgment is the procedural equivalent of a trial . . . [, t]he moving party must sufficiently demonstrate entitlement to judgment, as a matter of law, by tender of evidentiary proof in admissible form" (*Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 1461 [4th Dept 2019]

[internal quotation marks omitted]).

Here, defendant's experts proffered opinions about decedent's care at the nursing home facility that were not based on facts in the record because defendant failed to submit any of decedent's medical records, certified or otherwise, to support those opinions. Additionally, those opinions were not based on facts personally known to the experts. Thus, the experts' affidavits are " 'speculative or unsupported by any evidentiary foundation' " (*Schuster v Dukarm*, 38 AD3d 1358, 1359 [4th Dept 2007], quoting *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]), and have "no probative value" (*Daniels v Meyers*, 50 AD3d 1613, 1614 [4th Dept 2008]; *see Lillie v Wilmorite, Inc.*, 92 AD3d 1221, 1222 [4th Dept 2012]; *Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [4th Dept 2008]). Because defendant failed to meet its initial burden on the motion, the burden never shifted to plaintiff, and denial of the motion "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1047

CA 21-00044

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

SPRINGWOOD VILLAGE, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STANLEY HOLDINGS LLC AND THOMAS STANLEY,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GERALD P. GORMAN, HAMBURG, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 8, 2020. The order denied the motion of plaintiff for summary judgment in lieu of complaint and deemed the moving and responding papers to be the complaint and answer.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted in part with respect to the issue of liability, the second ordering paragraph is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: By motion for summary judgment in lieu of complaint (*see* CPLR 3213), plaintiff sought to recover on a promissory note executed by defendant Stanley Holdings LLC, and a guarantee for the same executed by defendant Thomas Stanley. The promissory note was related to the purchase by Stanley Holdings LLC of real property owned by plaintiff, and was secured by a mortgage on the property. Supreme Court denied plaintiff's motion and deemed the moving and responding papers to be the complaint and answer. We reverse.

Around the time that the amount owed on the note became due, counsel for defendants received communication from an email account that he believed to be controlled by counsel for plaintiff. The email account provided defendants with instructions for wiring the amount owed on the note, defendants followed those instructions, and the account acknowledged receipt of the funds. That email account, however, bore a domain name that differed by one character from the account actually used by counsel for plaintiff. It is undisputed on this appeal that the emails directing the wire transfer and acknowledging its receipt were not sent by counsel for plaintiff, and instead represented a fraudulent attempt to intercept the funds due to plaintiff under the note.

We agree with plaintiff that it established prima facie entitlement to summary judgment on the issue of liability with respect to the promissory note and guarantee "by submitting the note[] and guarantee[], together with an affidavit of nonpayment" (*Birjukow v Niagara Coating Servs., Inc.*, 165 AD3d 1586, 1587 [4th Dept 2018]; *see Giller v Weiss*, 140 AD3d 1117, 1118 [2d Dept 2016]). In opposition thereto, defendants failed to " 'come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense of the note' " (*Sandu v Sandu*, 94 AD3d 1545, 1546 [4th Dept 2012]).

We therefore reverse the order, grant plaintiff's motion in part with respect to the issue of liability and vacate the second ordering paragraph, which deemed the moving and responding papers as the complaint and answer, and we remit the matter to Supreme Court for a determination of damages.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1048

CA 21-00202

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

THOMAS BRUCKEL, PATRICIA BRUCKEL, SALLY HIRTH
AND ROBERT SIRACUSA,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CONESUS, ET AL., RESPONDENTS-DEFENDANTS,
AND CARL MYERS ENTERPRISES, INC.,
RESPONDENT-DEFENDANT-APPELLANT.
(PROCEEDING NO. 1.)

THOMAS BRUCKEL, PATRICIA BRUCKEL, SALLY HIRTH
AND ROBERT SIRACUSA,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

TOWN OF CONESUS, ET AL., RESPONDENTS-DEFENDANTS,
AND CARL MYERS ENTERPRISES, INC.,
RESPONDENT-DEFENDANT-APPELLANT.
(PROCEEDING NO. 2.)

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 23, 2020 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, annulled a building permit.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated on the law and in the exercise of discretion without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In these hybrid CPLR article 78 proceedings and actions for declaratory judgment and money damages, respondent-defendant Carl Myers Enterprises, Inc. (CME) appeals from a judgment that, inter alia, annulled a building permit obtained by CME and annulled a decision by a local planning board. The judgment is supported by a 19-page written decision drafted by counsel for petitioners-plaintiffs (petitioners), with only three minor modifications made by Supreme

Court.

We agree with CME that the court erred in adopting, almost verbatim, the proposed decision drafted by petitioners' counsel as the final determination in this case (*see Bright v Westmoreland County*, 380 F3d 729, 731 [3d Cir 2004]). "When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions" (*id.*). Even assuming, arguendo, that CME could or should have objected to the court's error, we would exercise our discretion to correct that error notwithstanding CME's failure to object. We therefore vacate the judgment in its entirety and remit the matter to Supreme Court for consideration and determination of any pending issue or motion.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1054

KA 20-01243

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNY STEVENS, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), dated September 18, 2020. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level two sex offender stemming from his 1996 conviction in Virginia for the statutory rape of a 14-year-old female "without the use of force." Defendant was 18 years old at the time of the offense, which the Board of Examiners of Sex Offenders characterized as an "isolated incident." Defendant successfully completed both sex offender treatment and substance abuse treatment, and he has not been convicted of any other sex crime. Under these circumstances, we agree with defendant, in the exercise of our own discretion, that his presumptive level two classification overestimates his "dangerousness and risk of sexual recidivism" (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Carter*, 138 AD3d 706, 707-708 [2d Dept 2016]). We therefore modify the order by determining that defendant is a level one risk (*see People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *see also People v Brocato*, 188 AD3d 728, 728-729 [2d Dept 2020]; *People v Fisher*, 177 AD3d 615, 615-616 [2d Dept 2019]). Defendant's remaining contention is academic in light of our determination.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1056

KA 19-00896

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL COLON, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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 (M. William Boller, A.J.), rendered October 1, 2018. The judgment convicted defendant after a nonjury trial of burglary in the second degree and menacing in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and menacing in the third degree (§ 120.15). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support the burglary conviction. The victim's testimony that defendant forced his way into her apartment without her permission is legally sufficient to establish that he unlawfully entered the apartment (*see People v Hernandez*, 193 AD3d 1413, 1414 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Cotton*, 184 AD3d 1145, 1147 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]). Defendant's intent to commit a crime inside the apartment "may be inferred from the 'circumstances of the entry' " (*Hernandez*, 193 AD3d at 1414). Contrary to defendant's further contention, the evidence is legally sufficient to support the menacing conviction. Defendant's criminal intent may be inferred from the totality of his conduct (*see People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019]; *People v Bryant*, 13 AD3d 1170, 1171 [4th Dept 2004], *lv denied* 4 NY3d 884 [2005]). Thus, there is a valid line of reasoning and permissible inferences from which a rational factfinder could have found that defendant intentionally placed or attempted to place the victim in fear of physical injury (*see* § 120.15; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1057

KA 18-02423

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOR RIVERA, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 15, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree, assault in the second degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), assault in the second degree (§ 120.05 [2]), and assault in the third degree (§ 120.00 [2]). Defendant's conviction stems from a fight in which three victims sustained, inter alia, stab wounds. Defendant contends that Supreme Court erred in refusing to suppress identification testimony of one of the victims because that victim was in the hospital on pain medication at the time he was shown a photo array. That contention is unpreserved for our review because defendant did not raise it at the suppression hearing (*see People v Johnson*, 194 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *see generally* CPL 470.05 [2]). In any event, his contention is without merit. We conclude that, while the effect of pain medications on the identifying witness "may be relevant with respect to the issue of the reliability of the identification, it has no bearing on the issue before the court in determining whether to suppress the identification, i.e., 'whether the identification . . . resulted from impermissibly suggestive police conduct' " (*People v Richardson*, 72 AD3d 1578, 1579 [4th Dept 2010]).

Contrary to defendant's further contention, the court properly denied his repeated severance motions, inasmuch as defendant failed to demonstrate the requisite good cause for a discretionary severance from the codefendant's trial (*see* CPL 200.40 [1]; *People v Mahboubian*,

74 NY2d 174, 183 [1989]; *People v Lundy*, 178 AD3d 1389, 1389 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). Although defendant asserted that his defense was in irreconcilable conflict with that of the codefendant, he failed to make that showing before trial (*see People v Spencer*, 181 AD3d 1257, 1262 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]; *Lundy*, 178 AD3d at 1389; *People v Sutton*, 71 AD3d 1396, 1397 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]), and no such conflict arose during the trial (*see People v Isaac*, 195 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see generally People v Cardwell*, 78 NY2d 996, 998 [1991]).

Defendant contends that the conviction of assault in the first degree is not based on legally sufficient evidence. Defendant's contention is preserved only in part (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), but it is without merit in any event. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is " 'a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Gorton*, 195 AD3d 1428, 1428 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Jaramillo*, 97 AD3d 1146, 1147 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]; *People v Brown*, 57 AD3d 260, 261 [1st Dept 2008]).

Defendant's contention that the conviction of assault in the second degree is not based on legally sufficient evidence is preserved only in part (*see generally Gray*, 86 NY2d at 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, defendant's contention that the conviction of assault in the third degree is not based on legally sufficient evidence is not preserved for our review (*see generally Gray*, 86 NY2d at 19).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1068

CA 21-00079

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

GARY REICHMUTH, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FAMILY VIDEO MOVIE CLUB, INC., DANCYN, INC., DOING BUSINESS AS LITTLE CAESARS PIZZA, EMILY JOHNSON AND DANIEL JOHNSON, DEFENDANTS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DOLCE FIRM, BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered December 2, 2020. The order denied the motion of plaintiff for summary judgment and denied the cross motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he stepped and fell off the sidewalk in front of a Little Caesars restaurant. The property on which the restaurant was located was allegedly owned by defendant Family Video Movie Club, Inc. (Family Video) and a portion of the property was allegedly leased by defendants Dancyn, Inc., doing business as Little Caesars Pizza, Daniel Johnson, and Emily Johnson, who also operated the restaurant. Plaintiff moved for summary judgment against Family Video on liability and for summary judgment dismissing the affirmative defense in defendants' answers that alleged comparative negligence. Defendants cross-moved for summary judgment dismissing the complaint. Defendants appeal and plaintiff cross-appeals from an order that denied the motion and cross motion. We affirm.

Addressing the cross appeal first, contrary to plaintiff's contention, we conclude that Supreme Court properly denied that part of the motion seeking summary judgment against Family Video on the issue of liability. In support of the motion, plaintiff submitted, inter alia, an affidavit from an expert who opined that the sidewalk violated several building codes and standards of the American National

Standards Institute. Such evidence, however, " 'constituted only some evidence of negligence' rather than negligence per se" (*Hartnett v Zuchowski*, 175 AD3d 1831, 1832 [4th Dept 2017]; *see Morreale v Froelich*, 125 AD3d 1280, 1281 [4th Dept 2015]) and is insufficient to meet plaintiff's initial burden on that part of the motion (*Hartnett*, 175 AD3d at 1832).

We reject plaintiff's further contention on cross appeal that the court erred in denying the motion with respect to the affirmative defense of comparative negligence. " '[T]he question of a plaintiff's comparative negligence almost invariably raises a factual issue for resolution by the trier of fact' " (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019 [4th Dept 2003]; *see Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]). Here, plaintiff failed to meet his initial burden of establishing "a total absence of comparative negligence as a matter of law" (*Dasher*, 305 AD2d at 1019; *see McCarthy v Hameed*, 191 AD3d 1462, 1463 [4th Dept 2021]).

Contrary to defendants' contention on appeal, we conclude that the court properly denied their cross motion for summary judgment dismissing the complaint. The court properly determined based upon the conflicting expert affidavits that there is an issue of fact whether a dangerous condition existed on the property (*see Hanley v Affronti*, 278 AD2d 868, 869 [4th Dept 2000]). We have considered defendants' remaining contentions and conclude that they are without merit.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1071

CA 21-00246

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF CITY OF ROME,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF ASSESSORS, ASSESSOR OF TOWN OF LEWIS,
BOARD OF ASSESSMENT REVIEW,
RESPONDENTS-RESPONDENTS-APPELLANTS,
ADIRONDACK CENTRAL SCHOOL DISTRICT AND COUNTY
OF LEWIS, INTERVENORS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

GOLDMAN ATTORNEYS PLLC, ALBANY (PAUL J. GOLDMAN OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

FERRARA FIORENZA PC, EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS AND INTERVENORS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered February 9, 2021 in a proceeding pursuant to RPTL article 7. The order and judgment, among other things, granted corrected assessments for the tax years 2013-2017.

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

Memorandum: Petitioner appeals and respondents and intervenors cross-appeal from an order and judgment that, inter alia, partially granted petitioner's tax certiorari petitions. We affirm for reasons stated in the decision at Supreme Court. We write only to note that, contrary to the parties' respective contentions, the court's determinations are not against the weight of the evidence (*see generally Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1072

CA 21-00944

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF CITY OF ROME,
PETITIONER-APPELLANT-RESPONDENT,

V ORDER

BOARD OF ASSESSORS, ASSESSOR OF TOWN OF LEWIS,
BOARD OF ASSESSMENT REVIEW,
RESPONDENTS-RESPONDENTS-APPELLANTS,
ADIRONDACK CENTRAL SCHOOL DISTRICT AND COUNTY
OF LEWIS, INTERVENORS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDMAN ATTORNEYS PLLC, ALBANY (PAUL J. GOLDMAN OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

FERRARA FIORENZA PC, EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS AND INTERVENORS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered December 1, 2020 in a proceeding pursuant to RPTL article 7. The order, among other things, granted corrected tax assessments for the tax years 2013-2017.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1073

CA 20-01600

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

JOHN P. GAUGHAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENSEO HEALTH, LLC, AND IDA M. CAMPAGNA,
DEFENDANTS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (STEPHEN A. MANUELE OF COUNSEL), FOR DEFENDANT-APPELLANT CENSEO HEALTH, LLC.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR DEFENDANT-APPELLANT IDA M. CAMPAGNA.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 19, 2020. The order granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: On appeal from an order granting plaintiff's motion for partial summary judgment on liability, defendants contend that Supreme Court erred in granting the motion because plaintiff failed to meet his initial burden of establishing that he sustained a serious injury proximately caused by the subject motor vehicle accident (*see generally* Insurance Law § 5102 [d]) and, in any event, defendants raised an issue of fact in that regard. We reject that contention. Plaintiff met his initial burden of establishing that he sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories by submitting the affidavit of his expert, who provided evidence that the range of motion of plaintiff's spine was limited up to 50% when compared to a normal range of motion and that those limitations were permanent (*cf. Mutombo v Certified Document Destruction & Recycling, Inc.*, 193 AD3d 1432, 1433-1434 [4th Dept 2021]; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]). In addition, the expert opined that the injuries to plaintiff's spine were caused by the motor vehicle accident inasmuch as a review of plaintiff's medical records revealed that plaintiff had made no similar complaints of pain regarding his spine prior to the accident

(*cf. Grier v Mosey*, 148 AD3d 1818, 1820 [4th Dept 2017]). In opposition, defendants failed to raise an issue of fact through the affidavit of their expert physician, who found similar limitations to plaintiff's range of motion (*see Maurer v Colton* [appeal No. 3], 180 AD3d 1371, 1373-1374 [4th Dept 2020]; *Clark v Boorman*, 132 AD3d 1323, 1325 [4th Dept 2015]). Although the defense expert attributed plaintiff's injuries to age-related degeneration, the expert failed to account for the absence of pain in plaintiff's spine prior to the accident. Thus, the expert's opinion "was conclusory and therefore 'insufficient to establish that plaintiff's pain might be . . . unrelated to the accident' " (*Ashquabe v McConnell*, 46 AD3d 1419, 1419 [4th Dept 2007]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1074

CA 21-00303

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

JAMES KERKHOF, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF RUBIANN KERKHOF, DECEASED, AND ACEA M. MOSEY, ERIE COUNTY PUBLIC ADMINISTRATOR, AS CO-EXECUTOR OF THE ESTATE OF RUBIANN KERKHOF, DECEASED, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

LASALLE AMBULANCE INC., DOING BUSINESS AS AMERICAN MEDICAL RESPONSE, DOING BUSINESS AS RURAL/METRO CORP., AND CARLOS R. ROSALES, DEFENDANTS-RESPONDENTS-APELLANTS.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 16, 2021. The order, among other things, permitted plaintiffs to bring a motion for summary judgment and denied the motion for summary judgment on the issues of negligence and serious injury.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 20, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1077

KA 21-00061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTEN N. DEMAY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered November 24, 2020. The judgment convicted defendant, upon her plea of guilty, of petit larceny.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of petit larceny (Penal Law § 155.25), defendant contends that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Because defendant has completed serving the sentence imposed, her contention with respect to the severity of the sentence is moot, and we therefore need not reach her contention with respect to the validity of the waiver of the right to appeal (*see People v Seppe*, 188 AD3d 1716, 1716 [4th Dept 2020]; *People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]; *People v Bald*, 34 AD3d 1362, 1362 [4th Dept 2006]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1093

CA 20-01409

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

MICHAEL ROYSTER, PLAINTIFF-RESPONDENT,

V ORDER

BREAKWATERS TOWNHOMES ASSOCIATION OF BUFFALO, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JACQUELINE R. GARREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARSH ZILLER LLP, BUFFALO (LINDA MARSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 20, 2020. The order denied defendant's motion for leave to file its jury demand nunc pro tunc.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 17, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1094

CA 21-00716

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

MICHAEL ROYSTER, PLAINTIFF-RESPONDENT,

V ORDER

BREAKWATERS TOWNHOMES ASSOCIATION OF BUFFALO, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JACQUELINE R. GARREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARSH ZILLER LLP, BUFFALO (LINDA MARSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 3, 2021. The judgment awarded plaintiff $273,976.26 as against defendant.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 17, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1098

KA 20-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN C. FORSHEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Orleans County Court (Michael M. Mohun, A.J.), entered August 26, 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 County Court erred in refusing to grant him a downward departure. That contention is not preserved for our review (*see People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *People v Ortiz*, 186 AD3d 1087, 1088 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *People v Webb*, 162 AD3d 918, 919 [2d Dept 2018], *lv denied* 32 NY3d 904 [2018], *rearg denied* 33 NY3d 1053 [2019]). In any event, defendant's contention lacks merit because he failed to demonstrate that there exist mitigating circumstances of a kind or to a degree not otherwise taken into account by the SORA guidelines that warrant a downward departure (*see People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]; *Webb*, 162 AD3d at 919). Defendant identifies, as a mitigating factor, his high scores in educational and vocational programs that he participated in while incarcerated. Although defendant is correct that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), defendant did not meet his burden of establishing by a preponderance of the evidence that he had any response, let alone an exceptional response, to *treatment* (*see Stack*, 195 AD3d at 1560; *People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *People v Scott*, 186 AD3d 1052,

1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]). Rather, it was undisputed that he refused to participate in the sex offender counseling and treatment program. Defendant's performance in educational and vocational programs was adequately taken into account in assessing his presumptive risk level inasmuch as he was assessed zero points for conduct while confined despite having an extensive history of disciplinary infractions (*see People v Leung*, 191 AD3d 1023, 1024 [2d Dept 2021], *lv denied* 37 NY3d 910 [2021]; *People v Herbert*, 186 AD3d 1732, 1733 [2d Dept 2020], *lv denied* 36 NY3d 905 [2021]). Moreover, even if defendant demonstrated an appropriate mitigating factor, we would nevertheless conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *Antonetti*, 188 AD3d at 1632; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

In light of our conclusion, we reject defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to request a downward departure (*see People v Whiten*, 187 AD3d 1661, 1662 [4th Dept 2020]; *People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1100

KA 20-00791

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY WILSON, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered February 20, 2020. The judgment convicted defendant upon his plea of guilty of reckless endangerment in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25), 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 therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Defendant's further contention that his guilty plea was not knowingly, intelligently, and voluntarily entered is actually a contention that County Court erred in imposing a $1,000 fine that was not part of the negotiated plea agreement without affording him an opportunity to withdraw his plea (*see generally People v Kelly*, 126 AD3d 1328, 1328 [4th Dept 2015]). Although defendant failed to preserve his contention for our review by failing to object to the imposition of the fine or by moving to withdraw his plea or to vacate the judgment of conviction (*see id.*), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Kelly*, 126 AD3d at 1328). With respect to the merits, as the People correctly concede, the court improperly enhanced defendant's sentence by imposing "a fine that was not part of the negotiated plea agreement" (*People v Roberts*, 139 AD3d 1092, 1092 [2d

Dept 2016]; *see People v Stevens*, 186 AD3d 1833, 1833 [3d Dept 2020]). With respect to the remedy, under the circumstances of this case, we conclude that it is "appropriate to vacate the provision of the defendant's sentence imposing a fine, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty" (*Roberts*, 139 AD3d at 1092; *see Stevens*, 186 AD3d at 1833). We therefore modify the judgment accordingly.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1105

KA 19-01903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAPOLEON CLEMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered July 23, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree (two counts).

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, inter alia, criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court failed to make the requisite minimal inquiry into his serious request to substitute counsel. Even assuming, arguendo, that defendant's contention "is not foreclosed by his guilty plea because it 'implicates the voluntariness of the plea' " (*People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]), we conclude that "defendant abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]; *see Jeffords*, 185 AD3d at 1418; *cf. People v Morris*, 183 AD3d 1254, 1254-1255 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]).

Defendant further contends that the plea was not knowingly, voluntarily, and intelligently entered because the court neglected to ask him if the firearm in question was loaded, which is an element of CPW in the second degree as charged in the indictment. That contention is actually a challenge to the factual sufficiency of the plea allocution, and it is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Pryce*, 148 AD3d 1629, 1629-1630 [4th Dept

2017], *lv denied* 29 NY3d 1085 [2017]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666-667 [1988]; *cf. People v Rosario*, 166 AD3d 1498, 1498 [4th Dept 2018]).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1109

CA 19-00459

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

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

V MEMORANDUM AND ORDER

SCOTT M., RESPONDENT-APPELLANT,
FOR CIVIL MANAGEMENT PURSUANT TO MENTAL
HYGIENE LAW ARTICLE 10.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Wyoming County (John L. Michalski, A.J.), entered October 17, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, granted the petition for confinement and adjudged that respondent is a dangerous sex offender requiring confinement to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition for confinement is dismissed, and the matter is remitted to Supreme Court, Wyoming County, for further proceedings in accordance with the following memorandum: In this Mental Hygiene Law article 10 proceeding, respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and confining him to a secure facility. As relevant here, a " '[d]angerous sex offender requiring confinement' " is a sex offender "suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex offenses if not confined" (Mental Hygiene Law § 10.03 [e]). The statutory scheme "clearly envisages a distinction between sex offenders who have *difficulty* controlling their sexual conduct and those who are *unable* to control it. The former are to be supervised and treated as 'outpatients' and *only the latter may be confined*" (*Matter of State of New York v Michael M.*, 24 NY3d 649, 659 [2014] [emphasis added]). In other words, only where the offender is "*presently 'unable'* to control his [or her] sexual conduct" may he or she be confined under section 10.03 (e) (*Matter of State of New York v George N.*, 160 AD3d 28, 33 [4th Dept 2018] [emphasis added]).

Here, we agree with respondent that petitioner failed to meet its burden of proving, by clear and convincing evidence, that he is "presently 'unable' to control his sexual conduct" and is thus a dangerous sex offender requiring confinement (*id.*; *see Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]). Contrary to petitioner's contention, the record does not establish that respondent touched an unknown adult female without her knowledge on an unknown date; rather, the record reflects only the possibility that such an act might have taken place. The balance of respondent's alleged SIST violations are technical missteps that do not evince an " 'inability' " to control sexual misconduct (*George N.*, 160 AD3d at 31). We note that the report of petitioner's expert failed to meaningfully address respondent's successful integration into the community while on SIST. At most, petitioner established that respondent "was struggling with his sexual urges, not that he was unable to control himself" (*Michael M.*, 24 NY3d at 659), and that is legally insufficient to justify confinement under Mental Hygiene Law § 10.03 (e) (*see Michael M.*, 24 NY3d at 659-660). We therefore reverse the order, dismiss the petition for confinement, and remit the matter for further proceedings (*see id.* at 660; *George N.*, 160 AD3d at 34).

Respondent's remaining contentions are academic in light of our determination.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1110

CA 21-00218

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

NORTHWOODS, L.L.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHERRY HALE, DEFENDANT-APPELLANT.

THE LAW OFFICES OF JENNIFER A. HURLEY, LLP, BUFFALO (JENNIFER A. HURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (ANDREA K. DILUGLIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 20, 2021. The order and judgment, among other things, granted plaintiff's motion for summary judgment in lieu of complaint.

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

Memorandum: By motion for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff commenced this action to recover on guarantees executed by defendant, a member of two limited liability companies that leased commercial property from plaintiff. We reject defendant's contention that Supreme Court erred in granting the motion. Plaintiff met its initial burden by submitting the guarantees, the underlying leases, and evidence of nonpayment (*see Birjukow v Niagara Coating Servs., Inc.*, 165 AD3d 1586, 1587 [4th Dept 2018]; *Wells Fargo Bank, N.A. v Deering*, 134 AD3d 1468, 1469 [4th Dept 2015]). In opposition, defendant failed " 'to establish, by admissible evidence, the existence of a triable issue [of fact] with respect to a bona fide defense' " (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *see Birjukow*, 165 AD3d at 1587). Contrary to defendant's contention, the guarantees are " 'absolute and unconditional' " inasmuch as they "contain language obligating the guarantor to payment without recourse to any defenses or counterclaims" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch*, 25 NY3d at 493).

Defendant's contention that the subject guarantees are not "instrument[s] for the payment of money only" (CPLR 3213) is not properly before us because defendant raised it for the first time in her reply brief (*see Scheer v Elam Sand & Gravel Corp.*, 177 AD3d 1290,

1292 [4th Dept 2019]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1114

CA 21-00560

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

WEST GATES CIP, LLC, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 130902.)

BIERSDORF & ASSOCIATES, P.A., NEW YORK CITY (RYAN R. SIMATIC OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Debra A. Martin, J.), entered October 15, 2020. The judgment awarded claimant money damages.

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

Memorandum: Claimant commenced this action seeking direct and indirect damages for defendant's appropriation by condemnation of a portion of claimant's commercial property. Following a trial, the Court of Claims awarded claimant $109,800, plus interest, with no award for indirect damages. We affirm.

Contrary to claimant's contention, the court correctly applied claimant's burden of proof and determined that claimant failed to satisfy its burden of establishing indirect damages. Where, as here, a claimant contends that the highest and best use of the property is something other than its current or existing use, it must be shown "that there is a reasonable probability that its asserted use could or would have been made within the reasonably near future" (*Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535, 536 [1974], *rearg denied* 34 NY2d 916 [1974]; *see Tehan's Catalog Showrooms, Inc. v State of New York* [appeal No. 2], 118 AD3d 1497, 1498 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]; *Kupiec v State of New York*, 45 AD3d 1416, 1417 [4th Dept 2007]). It is claimant's burden to make that showing (*see DiGiacomo v State of New York*, 182 AD3d 977, 979 [3d Dept 2020]; *Rodman v State of New York*, 109 AD2d 737, 737 [2d Dept 1985]) by a preponderance of the evidence (*see Sixth Ave. R.R. Co. v Metropolitan El. Ry. Co.*, 138 NY 548, 553 [1893]). The claimant must establish that the use is economically, legally, and physically feasible as well as maximally profitable (*see DiGiacomo*, 182 AD3d at 979; *Matter of*

City of Syracuse Indus. Dev. Agency [Alterm, Inc.], 20 AD3d 168, 170 [4th Dept 2005]). A speculative or hypothetical use is insufficient (*see Broadway Cary Corp.*, 34 NY2d at 536; *Matter of Village of Haverstraw [AAA Electricians, Inc.]*, 114 AD3d 955, 956 [2d Dept 2014], *lv denied* 24 NY3d 906 [2014]; *City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d at 170-171).

Here, claimant failed to meet its burden of establishing that the highest and best use of the condemned property was for the construction of an "end cap" unit adjacent to a supermarket. Claimant submitted no proof that construction of an end cap was a reasonable probability within the reasonably near future (*see Broadway Cary Corp.*, 34 NY2d at 536). Indeed, among other things, claimant failed to establish that construction was physically or legally feasible inasmuch as it would require moving a sewer line, and claimant made no showing that municipal approval for that move was reasonably probable (*see Matter of City of New York [Rudnick]*, 25 NY2d 146, 149-150 [1969]; *Rodman*, 109 AD2d at 737-738) or that moving the line was financially feasible (*see Broadway Assoc. v State of New York*, 18 AD3d 687, 688 [2d Dept 2005], *lv denied* 5 NY3d 710 [2005]). Thus, we decline to disturb the court's award, which was based upon the expert evidence offered by defendant, i.e., the party prevailing on the use question, without adjustments (*see Matter of City of New York [Eman Realty Corp.]*, 197 AD3d 705, 708 [2d Dept 2021]; *Crosby v State of New York*, 54 AD2d 1064, 1065 [4th Dept 1976]).

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1116

CA 21-00574

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

IN THE MATTER OF ARBITRATION BETWEEN THE
BOARD OF EDUCATION OF THE PORT BYRON CENTRAL
SCHOOL DISTRICT, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000 (CAYUGA COUNTY LOCAL 806, CSEA, INC.),
RESPONDENT-RESPONDENT.

FERRARA FIORENZA, EAST SYRACUSE (MILES G. LAWLOR OF COUNSEL), FOR PETITIONER-APPELLANT.

DAREN RYLEWITZ, GENERAL COUNSEL, LIVERPOOL (D. JEFFREY GOSCH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 1, 2020 in a proceeding pursuant to CPLR article 75. The order dismissed the petition to stay arbitration and granted the cross motion of respondent to compel arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration with respect to a grievance of respondent concerning the calculation of bargaining unit members' benefit-related service credits. Petitioner appeals from an order that, inter alia, dismissed the petition. We reject petitioner's contention that certain provisions of the collective bargaining agreement concerning the multi-step grievance process constitute conditions precedent to arbitration. "Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration" (*Matter of Enlarged City School Dist. of Troy [Troy Teachers Assn.]*, 69 NY2d 905, 907 [1987]; *see Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1496 [4th Dept 2013]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1119

KA 19-00894

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE COLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 27, 2019. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The two pleas were entered in a single plea proceeding. As defendant contends and the People correctly concede in each appeal, defendant did not validly waive his right to appeal inasmuch as Supreme Court "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Dragone*, 192 AD3d 1487, 1487-1488 [4th Dept 2021]). Nevertheless, we conclude that the sentence in each appeal is not unduly harsh or severe. Finally, we note that the certificate of conviction in appeal No. 1 does not reflect defendant's status as a second felony offender, and it must be amended accordingly (*see People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1120

KA 19-00895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE COLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 27, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Same memorandum as in *People v Cole* ([appeal No. 1] — AD3d — [Jan. 28, 2022] [4th Dept 2022]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1121

KA 19-01168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID SEAY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 6, 2019. The judgment convicted defendant upon a plea of guilty of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), 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 the sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to an indeterminate term of imprisonment of 3 1/3 to 4 years, and it must be amended to reflect that he was sentenced to an indeterminate term of imprisonment of 1 1/3 to 4 years (*see People v Massey*, 173 AD3d 1801, 1805 [4th Dept 2019]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1124

KA 16-00127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BARKLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Alex R. Renzi, J.), rendered October 14, 2015. The judgment convicted defendant upon a nonjury 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 after a nonjury trial of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, we conclude that the People established a sufficient foundation for the admission in evidence of recordings of telephone calls that defendant made while he was incarcerated (*see People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Williams*, 55 AD3d 1398, 1399 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]; *People v Manor*, 38 AD3d 1257, 1258 [4th Dept 2007], *lv denied* 9 NY3d 847 [2007]). Defendant's further contention, that a different number of compact discs containing recorded jail calls were admitted at trial than at the *Sirois* hearing (*see generally People v Geraci*, 85 NY2d 359, 365 [1995]), is not preserved for our review inasmuch as defendant failed to object to the admission of the recordings in evidence at trial on that ground (*see* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that Supreme Court erred in admitting in evidence, as part of the People's case-in-chief, the grand jury testimony of the victim, who stopped cooperating with the prosecution and did not appear for trial. Although the prosecution generally may not use the grand jury testimony of an absent witness on its direct case, New York courts "have adopted an exception to this rule where it has been shown that the defendant procured the witness's

unavailability through violence, threats or chicanery" (*Geraci*, 85 NY2d at 365; *see People v Butler*, 148 AD3d 1540, 1541 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]). Such testimony is admissible where, as here, the court conducts a *Sirois* hearing at which the People "demonstrate by clear and convincing evidence that the defendant engaged in misconduct aimed at least in part at preventing the witness from testifying and that those misdeeds were a significant cause of the witness's decision not to testify" (*People v Smart*, 23 NY3d 213, 220 [2014]; *see People v Williams* [appeal No. 2], 175 AD3d 980, 981 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]; *People v Vernon*, 136 AD3d 1276, 1278 [4th Dept 2016], *lv denied* 27 NY3d 1076 [2016]). With respect to defendant's contention that the witness may have refused to testify due to her substance abuse issues or for other reasons and that the court thus erred in concluding that her refusal was due to defendant's actions, we note that "at a hearing held pursuant to *Sirois* and *Geraci*, the court may infer the requisite causation from the evidence of the defendant's coercive behavior and the actions taken by the witness in direct response to or within a close temporal proximity to that misconduct" (*Smart*, 23 NY3d at 220-221).

With respect to defendant's final contention, we conclude that any error in the admission, pursuant to the prompt outcry exception to the hearsay rule (*see generally People v Rosario*, 17 NY3d 501, 511-512 [2011]), of the statements made by the victim to the police at the scene of the crime is harmless. The victim gave the same description of the incident during her grand jury testimony as she gave to the police at the scene, and defendant was standing next to the victim at the scene. The evidence against defendant was overwhelming, and there was no significant probability that, had the error not occurred, the outcome of the trial would have been different (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Indeed, we note that the court, which was the factfinder in this nonjury trial, specifically stated that it would have reached the same result without that evidence.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1129

KA 19-00446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYRELL HAYGOOD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Gordon J. Cuffy, A.J.), rendered January 30, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that Supreme Court violated his right to be present at a material stage of trial when it excluded him, but not his attorney, from portions of the *Molineux* hearing, specifically, in-chambers discussions concerning an affidavit in which a witness alleged that he had knowledge of defendant's gang affiliation. The identity of the witness was shielded by a stipulated protective order, and we therefore conclude that the "potential for input from defendant was outweighed by valid concerns for the witness['s] safety, underlying the need for defendant's exclusion" (*People v Baker*, 139 AD3d 591, 591 [1st Dept 2016], *lv denied* 28 NY3d 1025 [2016]; *see People v Frost*, 100 NY2d 129, 135 [2003]; *People v Israel*, 176 AD3d 413, 414 [1st Dept 2019], *lv denied* 34 NY3d 1129 [2020]).

We conclude that the testimony regarding defendant's membership in a gang was properly admitted at trial inasmuch as it was relevant to establish motive and intent and to explain defendant's relationship with the victim (*see People v Bailey*, 32 NY3d 70, 83 [2018]; *People v Polk*, 84 AD2d 943, 945 [4th Dept 1981]) and the prejudicial effect of that testimony did not outweigh its probative value (*see People v Alvino*, 71 NY2d 233, 241-242 [1987]). Moreover, the court alleviated

any prejudice to defendant by providing an appropriate limiting instruction (*see generally People v Cruz*, 261 AD2d 930, 930 [4th Dept 1999], *lv denied* 93 NY2d 1016 [1999]).

Defendant's sentence is not unduly harsh or severe. We have examined defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1131

KA 19-00340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALAUDEEN ROOTS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered August 15, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted promoting prison contraband 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 attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Contrary to defendant's contention, we conclude that the plea colloquy establishes that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Mess*, 186 AD3d 1069, 1069 [4th Dept 2020]; *see generally People v Thomas*, 34 NY3d 545, 559-560 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Although defendant's challenge to the voluntariness of his plea survives his valid waiver of the right to appeal (*see Thomas*, 34 NY3d at 558; *People v Seaberg*, 74 NY2d 1, 10 [1989]), by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the plea was not voluntarily entered (*see People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see also People v Lopez*, 71 NY2d 662, 665 [1988]). This case does not fall within the rare exception to the preservation requirement (*see generally Lopez*, 71 NY2d at 666). In any event, we conclude that defendant's contention lacks merit (*see People v Hunt*, 188 AD3d 1648, 1649 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]; *People v Green*, 132 AD3d 1268, 1269 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016], *reconsideration denied* 28 NY3d 930 [2016]).

To the extent that defendant contends that County Court erred in

accepting his plea because the record lacked the " 'strong evidence of actual guilt' " that would be required for an *Alford* plea (*People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]), we conclude that defendant's contention is misplaced inasmuch as he did not enter an *Alford* plea (*see People v Gale*, 130 AD2d 588, 588 [2d Dept 1987]). Insofar as defendant challenges the factual sufficiency of the plea allocution, that challenge is encompassed by his valid waiver of the right to appeal (*see People v Oliver*, 178 AD3d 1463, 1464 [4th Dept 2019]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1133

CAF 21-00622

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

IN THE MATTER OF MATTHEW M. AND TRESEA M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-APPELLANT;

WAKISSA T., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

DEENA K. MUELLER-FUNKE, BUFFALO, FOR PETITIONER-APPELLANT.

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

TINA M. HAWTHORNE, BUFFALO, ATTORNEY FOR THE CHILD.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 27, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, denied in part petitioner's motion for respondent to submit to a parenting assessment and mental health evaluation.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, petitioner appeals in appeal Nos. 1 and 2 from two orders that, inter alia, denied in part petitioner's motions pursuant to Family Court Act § 251 seeking an examination of respondent mother. Petitioner contends that Family Court exceeded its authority by ordering it to obtain and pay for a risk assessment to be performed by a licensed mental health counselor. We affirm. At oral argument on petitioner's motions, the court charted its course for resolving the motions, explaining the type of evaluation that it believed to be most appropriate under the circumstances and naming who it intended to appoint to perform the evaluation. Petitioner could have raised any of its arguments at that time, or by written submission in the months between oral argument on the motions and the court's issuance of its email decision, but it did not do so. Thus, we conclude that petitioner's contention is not properly before us inasmuch as petitioner raises it for the first time on appeal (*see Matter of Daniel K. [Roger K.]*, 166 AD3d 1560, 1560-1561 [4th Dept 2018], *lv denied* 32 NY3d 919 [2019]; *Matter of Paige K. [Jay J.B.]*, 81 AD3d

1284, 1284 [4th Dept 2011]). The contentions raised by the mother and by the attorney for the second-eldest child are " 'beyond our review' " inasmuch as neither party filed a notice of appeal (*Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1134

CAF 20-01527

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

IN THE MATTER OF AUGUSTIN G., KAYRIANIZ G., AND JOSEPH A.S., III.

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

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT;

WAKISSA T., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DEENA K. MUELLER-FUNKE, BUFFALO, FOR PETITIONER-APPELLANT.

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

ANTHONY CHABALA, BUFFALO, ATTORNEY FOR THE CHILDREN.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 28, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, denied in part petitioner's motion for respondent to submit to a parenting assessment and mental health evaluation.

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

Same memorandum as in *Matter of Matthew M. (Wakissa T.)* (— AD3d — [Jan. 28, 2022] [4th Dept 2022]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1142

KA 19-00500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH PUGLISI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 7, 2018. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree (four counts) and petit larceny (six counts).

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 four counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and six counts of petit larceny (§ 155.25), defendant contends that he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1144

KA 19-01377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN FARRELL, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 2, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal contempt in the first degree and orders of protection were entered in conjunction with the judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by amending order of protection No. 2018-000498 to delete the stay-away and no-contact directives with respect to defendant's son in paragraphs 1 and 14 thereof, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [b] [i]). Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless conclude that his sentence is not unduly harsh or severe.

Defendant's challenge to order of protection No. 2018-000498—i.e., the final order of protection in favor of, inter alia, defendant's son—would survive even a valid waiver of the right to appeal (*see People v May*, 138 AD3d 1146, 1147 [2d Dept 2016], *lv denied* 27 NY3d 1153 [2016]; *People v Lilley*, 81 AD3d 1448, 1448 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]). On the merits of that challenge, we note that a final stay-away or no-contact protective order in a criminal action may be issued only in favor of the "defendant's victims or witnesses in th[e given] matter," i.e., the victims of or witnesses to the crime of which the defendant was convicted (*People v Dolan*, 140 AD3d 1681, 1682 [4th Dept 2016]; *see* CPL 530.12 [5] [a]; CPL 530.13 [4] [a]; *People v Cooke*, 119 AD3d 1399, 1401 [4th Dept 2014], *affd* 24 NY3d 1196 [2015], *cert denied* 577 US 1011 [2015]). Thus, "[i]nasmuch as [defendant's son was] not

defendant's victim[] or witness[ ] in this matter, the order of protection may not require defendant to stay away from [or avoid contact with his son]" (*Dolan*, 140 AD3d at 1682; *see Cooke*, 119 AD3d at 1401; *People v Raduns*, 70 AD3d 1355, 1355 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010], *reconsideration denied* 15 NY3d 808 [2010]). Contrary to Supreme Court's view and the People's assertion, the appropriateness of a stay-away or no-contact directive with respect to defendant's son is properly addressed in Family Court, not in this criminal prosecution (*see Matter of Brianna L. [Marie A.]*, 103 AD3d 181, 188 [2d Dept 2012]; *see generally Matter of Granger v Misercola*, 21 NY3d 86, 91 [2013]). We therefore modify the judgment accordingly.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1153

CAF 20-01177

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

IN THE MATTER OF ANTHONY BURNETT, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GABRIELLE SMITH, RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

CHARU NARANG, BROCKPORT, FOR PETITIONER-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered August 27, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody and primary physical residence of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner father sole custody and primary physical residence of the two subject children, with visitation to the mother. We affirm.

Generally, "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008] [internal quotation marks omitted]; *see Matter of Crill v Crill*, 181 AD3d 1199, 1200 [4th Dept 2020]). Here, we reject the mother's contention that Family Court's determination is not supported by a sound and substantial basis in the record. To the contrary, after reviewing the appropriate factors (*see generally Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]), we conclude that the totality of the circumstances supports the court's determination that it is in the best interests of the subject children to award sole custody and primary physical residence to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 174 [1982]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]). With respect to the mother's specific contention that the court erred by separating the subject children

from the mother's other children, it is well settled that "the presence of half siblings of the child[ren] in [the mother's] home is not dispositive, although it is a factor to be considered in making custody determinations" (*Matter of Slade v Hosack*, 77 AD3d 1409, 1409 [4th Dept 2010]; *see generally Eschbach*, 56 NY2d at 173). Here, the record reflects that the subject children were previously separated from their half siblings when the mother assaulted two of those siblings, which led to all of the mother's children being initially placed in foster care, and the two subject children being placed with the father thereafter. Based on those factors and the other evidence in the record, we conclude that the court's determination that it is in the best interests of the subject children that they be separated from their half siblings is supported by a sound and substantial basis in the record (*see Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016]; *Matter of Luke v Luke*, 90 AD3d 1179, 1182 [3d Dept 2011]; *see also Matter of Colleen F. v Frank K.*, 49 AD3d 1228, 1230 [4th Dept 2008]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1163

KA 20-00313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERTO PINET, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CAITLIN M. CONNELLY 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 (Thomas J. Miller, J.), rendered November 1, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *People v Maddison*, 191 AD3d 1393, 1393 [4th Dept 2021], *lv denied* 36 NY3d 1121 [2021]; *see also People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that the photo array identification procedure was unduly suggestive because he was the only person depicted "leaning back and staring in an intimidating manner." Defendant failed to preserve that contention for our review because he did not raise that specific ground at the suppression hearing (*see People v Goins*, 191 AD3d 1399, 1399 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]; *People v Lundy*, 178 AD3d 1389, 1390 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). In any event, defendant's contention is without merit. The photo array depicts "six males of similar age, skin tone, hairstyle, and physical features" (*Goins*, 191 AD3d at 1399; *see People v Hoffman*, 162 AD3d 1753, 1755 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]). We conclude that " 'the subjects depicted in the photo array are sufficiently similar in appearance so that the viewer's attention is not drawn to any one photograph in such a way as to indicate that the

police were urging a particular selection' " (*People v Plumley*, 111 AD3d 1418, 1420 [4th Dept 2013], *lv denied* 22 NY3d 1140 [2014]; *see People v Johnson*, 194 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *Goins*, 191 AD3d at 1399-1400).

Defendant contends that resentencing is required because County Court failed to conduct a sufficient inquiry into his request to represent himself. "[A]n application to proceed pro se must be denied unless defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel . . . To this end, trial courts must conduct a 'searching inquiry' to clarify that defendant understands the ramifications of such a decision" (*People v Stone*, 22 NY3d 520, 525 [2014]). We reject defendant's contention that the waiver of his right to counsel was invalid because the court failed to advise defendant during the colloquy regarding that waiver of the disadvantages of proceeding pro se at sentencing and of his sentencing exposure (*see People v Rogers*, 186 AD3d 1046, 1048 [4th Dept 2020], *lv denied* 36 NY3d 931 [2020]). The Court of Appeals has consistently " 'eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry' " to ensure that a defendant's decision to forgo counsel is knowing, voluntary, and intelligent (*People v Providence*, 2 NY3d 579, 583 [2004], quoting *People v Arroyo*, 98 NY2d 101, 104 [2002]; *see People v Smith*, 92 NY2d 516, 520-521 [1998]). Here, upon our review of "the whole record, not simply . . . [the] waiver colloquy" (*Providence*, 2 NY3d at 581), we conclude that defendant made a knowing, voluntary, and intelligent waiver of his right to counsel (*see generally People v Chandler*, 109 AD3d 1202, 1203 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]).

Defendant also contends that resentencing is required because the court failed to provide him with a copy of his presentence report. A defendant who is representing himself has the right to examine and copy the presentence report prior to sentencing (*see* CPL 390.50 [2] [a]; *People v Diaz*, 34 NY3d 1179, 1181 [2020]). Here, defendant failed to object to not having a copy of the presentence report at sentencing, and thus failed to preserve his contention for our review (*see People v Whilby*, 188 AD3d 425, 426 [1st Dept 2020], *lv denied* 36 NY3d 1060 [2021]). In any event, it is well established that "the mere absence of any reference to the presentence report at sentencing is 'insufficient to rebut the presumption of regularity accorded to judicial proceedings' " (*id.*). It is presumed that defendant had a copy of the presentence report, and thus there is no basis to remit for resentencing.

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1168

KA 19-00992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY TYLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 24, 2017. The judgment convicted defendant upon a nonjury verdict of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of robbery in the third degree (Penal Law § 160.05). We reject the contention of defendant that County Court erred in refusing to suppress identification evidence on the ground of an unlawful arrest. The victim reported that he had been robbed at gunpoint outside a liquor store and provided the police a description of the suspect. In addition, the police viewed surveillance video, which, although it did not depict the actual robbery, showed a man following the victim as he left the store. The vehicle used by the suspect was also depicted in the surveillance video. Approximately 26 hours later, the police found a vehicle matching the description of the one used by the suspect parked on a street approximately one mile from the robbery. The police pulled alongside the vehicle and an officer, while speaking to the driver, observed a man, later identified as defendant, sitting in the passenger seat. Defendant matched the description of the suspect as given by the victim and appeared to be the same man as shown on the videotape. Defendant was also wearing the same jacket as shown on the videotape. Contrary to the contention of defendant, we conclude that the police had probable cause to arrest him (*see People v Jean*, 176 AD3d 585, 586 [1st Dept 2019], *lv denied* 34 NY3d 1129 [2020]; *People v Jackson*, 168 AD3d 473, 473-474 [1st Dept 2019], *lv denied* 33 NY3d 977 [2019]; *People v Hamilton*, 17 AD3d 1052, 1053-1054 [4th Dept 2005]).

We reject defendant’s contention that the evidence is legally

insufficient to establish that he robbed the victim. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is " 'a valid line of reasoning and permissible inferences from which a [factfinder] could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, after viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

1

KA 18-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR M. PACE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 5, 2017. The judgment convicted defendant upon a plea of guilty of attempted 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Defendant contends and the People correctly concede that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal "mischaracterized [the waiver] 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 —, 140 S Ct 2634 [2020]; *see People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Brooks*, 187 AD3d 1587, 1588 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021] [internal quotation marks omitted]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-00975

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSVALDO MONTALVO-SANTIAGO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 9, 2019. The judgment convicted defendant, upon a plea of guilty, of attempted course of sexual conduct against a child 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 attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566, *cert denied* — US —, 140 S Ct 2634 [2020]). The sentence, however, is not unduly harsh or severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-00409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MUHAMMAD IRVING, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 2, 2019. The judgment convicted defendant upon a plea of guilty of burglary in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of burglary in the third degree (Penal Law § 140.20). As defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid. During the plea colloquy, County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]) and, therefore, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). In addition, the court's explanation that the waiver would foreclose *any* review by a higher court "utterly 'mischaracterized the nature of the right [that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]).

Although defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence, we nonetheless conclude that the sentence is

not unduly harsh or severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-00450

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARED KOEBERLE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 8, 2017. The judgment convicted defendant upon a jury verdict of rape in the first degree (two counts), sexual abuse in the first degree (two counts), endangering the welfare of a child, and incest in the first degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of rape in the first degree (Penal Law § 130.35 [4]), two counts of sexual abuse in the first degree (§ 130.65 [4]), two counts of incest in the first degree (§ 255.27), and one count of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the evidence is legally insufficient to support the conviction. At the close of the People's proof, defendant moved for a trial order of dismissal, and the court reserved decision. Although defendant renewed the motion at the close of his proof and again after the jury rendered its verdict, County Court never ruled on the motion. Thus, we may not address defendant's contention because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Capitano*, 198 AD3d 1324, 1325 [4th Dept 2021] [internal quotation marks omitted]; *see People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see Capitano*, 198 AD3d at 1325; *Bennett*, 180 AD3d at 1358). In light of our

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CAF 20-00837

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

IN THE MATTER OF STEVEN L. COOLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

REBECCA A. ROLOSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

KEITH R. LORD, PHELPS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Jason L. Cook, A J.), entered July 7, 2020 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

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

Same memorandum as in *Matter of Cooley v Roloson* ([appeal No. 2] — AD3d — [Jan. 28, 2022] [4th Dept 2022]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CAF 20-00838

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

IN THE MATTER OF STEVEN L. COOLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

REBECCA A. ROLOSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

KEITH R. LORD, PHELPS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Jason L. Cook, A.J.), entered July 7, 2020 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Seneca County, for further proceedings in accordance with the following memorandum: Petitioner father appeals in appeal No. 1 from an order granting respondent mother's motion to dismiss his petition alleging that the mother violated an order of custody and visitation entered upon the consent of the parties. The father appeals in appeal No. 2 from an order that granted the mother's motion to dismiss the father's petition seeking modification of the same order of custody and visitation.

In appeal No. 1, we reject the father's contention that Family Court erred in granting the motion to dismiss his violation petition. The court properly determined that the father failed to establish by clear and convincing evidence that the mother violated the terms of the custody order with respect to the child's school (*see generally Matter of Mauro v Costello*, 162 AD3d 1475, 1475-1476 [4th Dept 2018]).

In appeal No. 2, we agree with the father that the court erred in granting the mother's motion to dismiss the modification petition on the ground that the father failed to meet his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether modification of the custody and visitation arrangement is in the best interests of the child (*see Matter of Amrane v Belkhir*, 141 AD3d 1074, 1075-1076 [4th Dept 2016]). "[A]lteration of an established custody [and visitation] arrangement will be ordered only upon a showing of a

change in circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225 [4th Dept 2006]; *see Matter of Higgins v Higgins*, 128 AD3d 1396, 1396 [4th Dept 2015]; *Matter of Connie L.C. v Edward C.B.*, 45 AD3d 1374, 1375 [4th Dept 2007]). Where, as here, " 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom' " (*Matter of Walters v Francisco*, 63 AD3d 1610, 1611 [4th Dept 2009]). Here, the father testified that, at the time the order of custody and visitation was entered into and for a short time thereafter, the mother and the father were communicating effectively and, in addition to scheduled visitation, were able to agree to further overnight and weekend visitation. That arrangement subsequently changed, however, and the father could not get the mother to agree to any visitation time apart from his scheduled day. The father further testified that communication with the mother regarding additional visitation time essentially ended after he moved to a new home 30 miles away. Taking the father's testimony as true and considering the circumstances of the father's move and the development of "extreme acrimony between the parties," we conclude that the father met his burden of showing a change in circumstances warranting an inquiry into the best interests of the child (*Matter of Skipper v Pugh*, 128 AD3d 972, 972 [2d Dept 2015]; *see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see also Matter of Maher v Maher*, 1 AD3d 987, 988 [4th Dept 2003]). Therefore, we reverse the order in appeal No. 2, deny the motion, reinstate the petition, and remit the matter to Family Court for a hearing to determine whether modification of the parties' existing order of custody and visitation is in the child's best interests.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01586

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

IN THE MATTER OF APPLICATION OF CITY OF JAMESTOWN, PETITIONER-RESPONDENT,

V ORDER

TOWN COUNCIL OF TOWN OF ELLICOTT AND BOARD OF TRUSTEES OF VILLAGE OF FALCONER, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered October 30, 2020 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition and determined that the subject annexation petition is legally compliant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

15

CA 20-01587

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

IN THE MATTER OF APPLICATION OF CITY OF JAMESTOWN, PETITIONER-RESPONDENT,

V ORDER

TOWN COUNCIL OF TOWN OF ELLICOTT AND BOARD OF TRUSTEES OF VILLAGE OF FALCONER, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended judgment (denominated amended decision and order) of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered November 17, 2020 in a proceeding pursuant to CPLR article 78. The amended judgment, inter alia, granted the petition and determined that the subject annexation petition is legally compliant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

16

CA 20-01588

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

IN THE MATTER OF APPLICATION OF CITY OF JAMESTOWN, PETITIONER-RESPONDENT,

V ORDER

TOWN COUNCIL OF TOWN OF ELLICOTT AND BOARD OF TRUSTEES OF VILLAGE OF FALCONER, RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a second amended judgment (denominated second amended decision and order) of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered November 24, 2020 in a proceeding pursuant to CPLR article 78. The second amended judgment, inter alia, granted the petition and determined that the subject annexation petition is legally compliant.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

17

CA 21-01065

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

IN THE MATTER OF ARBITRATION BETWEEN
ANDREW DEWOLF, PETITIONER-APPELLANT,

V ORDER

WAYNE COUNTY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ANDREW DEWOLF, PETITIONER-APPELLANT PRO SE.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered February 26, 2021 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, dismissed the petition with prejudice.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

18

CA 21-01069

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

IN THE MATTER OF ARBITRATION BETWEEN
ANDREW DEWOLF, PETITIONER-APPELLANT,

V ORDER

WAYNE COUNTY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ANDREW DEWOLF, PETITIONER-APPELLANT PRO SE.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered May 6, 2021 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, denied petitioner's motion seeking leave to renew or reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Matter of Rochester Genesee Regional Transp. Auth. v Stensrud*, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]) and the order is affirmed without costs.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

22

CA 21-00314

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

IN THE MATTER OF CIMATO ENTERPRISES, INC.,
PETITIONER-APPELLANT,

V ORDER

TOWN OF CLARENCE, TOWN OF CLARENCE TOWN BOARD
AND PATRICK CASILIO, PETER DICOSTANZO,
ROBERT A. GEIGER, CHRISTOPHER D. GREENE AND
PAUL SHEAR, SAID PERSONS CONSTITUTING TOWN OF
CLARENCE TOWN BOARD, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR PETITIONER-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered February 2, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

24

CA 21-00334

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

IN THE MATTER OF GESHAWN CRITTLETON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 23, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Board of Parole denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole in December 2021, at which time he was given an "open date" for release. Consequently, this appeal must be dismissed as moot (*see Matter of Brisbane v Annucci*, 159 AD3d 1579, 1580 [4th Dept 2018]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see Hill*, 149 AD3d at 1541; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714–715 [1980]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

25

TP 20-01546

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF RASHOD COSTON, PETITIONER,

V ORDER

JAMES THOMPSON, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, RESPONDENT.

RASHOD COSTON, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Erie County [John L. Michalski, A.J.], entered November 17, 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

35

CAF 21-01190

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF DYLAN P. HOCHREITER,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KAITLYNN A. WILLIAMS,
RESPONDENT-PETITIONER-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT-APPELLANT.

JAMES P. VACCA, ROCHESTER, FOR RESPONDENT-PETITIONER-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Monroe County (John J. Ark, A.J.), entered August 23, 2021 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted the parties joint legal custody of the subject child and granted respondent-petitioner primary physical residency of the subject child with permission to relocate to North Carolina.

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

Memorandum: Petitioner-respondent father appeals from an amended order that, inter alia, awarded the parties joint legal custody of their child and granted respondent-petitioner mother primary physical residence with permission to relocate with the child to North Carolina. We affirm.

We reject the father's contention that Family Court failed to consider all relevant factors in making its best interests determination. We note at the outset that, "[i]nasmuch as this case involves an initial custody determination, 'it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied' " (*Forrestel v Forrestel*, 125 AD3d 1299, 1299 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]). " 'Although a court may consider the effect of a parent's [proposed] relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination' " (*id.* at 1299-1300). "[T]he relevant issue is whether it is in the best interests of the child to reside primarily with the mother or the father" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal*

dismissed 19 NY3d 887 [2012], 20 NY3d 1052 [2013]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1989]). Here, we conclude that the record demonstrates that the court weighed the appropriate factors in making its custody determination, including the mother's proposed relocation, as well as the continuity and stability of the existing custodial arrangement, the relative fitness of the parents and the length of time the custodial arrangement has continued, the quality of each parent's home environment, the ability of each parent to provide for the child's emotional and intellectual development, and the financial status and ability of each parent to provide for the child (*see generally Fisher v Fisher*, 148 AD3d 1783, 1784 [4th Dept 2017]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). We further conclude that the court's determination that the child's best interests would be served by awarding the parties joint legal custody with primary physical residence with the mother in North Carolina is supported by a sound and substantial basis in the record and should not be disturbed (*see generally Fisher*, 148 AD3d at 1784).

The father's further contention that the court improperly interjected itself into the fact-finding hearing is unpreserved for our review (*see Matter of Denise L. v Michael L.*, 138 AD3d 1172, 1173 [3d Dept 2016]).

The father's remaining contention is academic in light of our determination.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

39

CA 21-00617

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

NEW WAVE ENERGY CORP., JOHN LUDTKA AND NICHOLAS JERGE, PLAINTIFFS-APPELLANTS,

V ORDER

ENERGYMARK, LLC, AND KEVIN CLOUGH, DEFENDANTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (ALICE J. CUNNINGHAM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 13, 2021. The order denied plaintiffs' motion to compel and granted defendants' cross motion for a protective order.

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: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

42

CA 20-01135

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF THOMAS R. FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Gerald J. Popeo, A.J.), entered August 11, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner in a secure treatment facility.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

52

KA 19-01655

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KODY W. MCKEE, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 19, 2019. The judgment convicted defendant, upon a plea of guilty, of aggravated family offense (two counts).

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

67

CA 20-01197

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

GARY MYERS AND CYNTHIA MYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

INVACARE CORPORATION, DEFENDANT,
RELIANT PHARMACY CORP., RELIANT MEDICAL
EQUIPMENT, THE MCGUIRE GROUP, INC., FRANCIS
JAMES MCGUIRE, DOING BUSINESS AS RELIANT
MEDICAL EQUIPMENT & SUPPLY,
DEFENDANTS-RESPONDENTS,
KALEIDA HEALTH AND BUFFALO GENERAL HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT D. BARONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE FIRM, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARGNESI BRITT, PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

MONACO COOPER LAMME & CARR, PLLC, ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 8, 2020. The order denied the motion of defendants-appellants for, among other things, summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 14, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

68

CA 20-01318

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

GARY MYERS AND CYNTHIA MYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

INVACARE CORPORATION, DEFENDANT,
RELIANT PHARMACY CORP., RELIANT MEDICAL
EQUIPMENT, THE MCGUIRE GROUP, INC.,
FRANCIS JAMES MCGUIRE, DOING BUSINESS
AS RELIANT MEDICAL EQUIPMENT & SUPPLY,
DEFENDANTS-RESPONDENTS,
KALEIDA HEALTH AND BUFFALO GENERAL HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT D. BARONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE FIRM, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARGNESI BRITT, PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

MONACO COOPER LAMME & CARR, PLLC, ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 6, 2020. The order, among other things, dismissed with prejudice all claims and cross claims against defendants Reliant Pharmacy Corp., Reliant Medical Equipment, The McGuire Group, Inc., Francis James McGuire, doing business as Reliant Medical Equipment & Supply, and Invacare Corporation.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 14, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

69

CA 20-01627

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

GARY MYERS AND CYNTHIA MYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

INVACARE CORPORATION, DEFENDANT,
RELIANT PHARMACY CORP., RELIANT MEDICAL
EQUIPMENT, THE MCGUIRE GROUP, INC., FRANCIS
JAMES MCGUIRE, DOING BUSINESS AS RELIANT
MEDICAL EQUIPMENT & SUPPLY,
DEFENDANTS-RESPONDENTS,
KALEIDA HEALTH AND BUFFALO GENERAL HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT D. BARONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE FIRM, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARGNESI BRITT, PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

MONACO COOPER LAMME & CARR, PLLC, ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 7, 2020. The order granted the motion of defendants-appellants for leave to reargue and upon reargument the court adhered to its original decision as set forth in the order of the court entered September 8, 2020.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 14, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

71

TP 21-01128

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

IN THE MATTER OF DARRYL SHELTON, 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 August 6, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner 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: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

81

CA 20-01449

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

MARIE THERESE ARAUJO, C.R.N.A., ET AL.,
PLAINTIFFS-RESPONDENTS,

V ORDER

CNY ANESTHESIA GROUP, P.C., DEFENDANT-APPELLANT.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. WANG OF COUNSEL), FOR DEFENDANT-APPELLANT.

NOLAN HELLER KAUFFMAN LLP, ALBANY (BRIAN DEINHART OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 22, 2020. The order granted the motion of plaintiffs for summary judgment and denied the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Maple-Gate Anesthesiologists, P.C. v Nasrin*, 182 AD3d 984, 985-986 [4th Dept 2020]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

84

CA 21-00196

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

JOHN T. DELZOTTO, PLAINTIFF-RESPONDENT,

V ORDER

KATHLEEN LEBOY, MAXIAMILLION M. HERNANDEZ,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 7, 2021. The order, among other things, denied the motion of defendants Kathleen Laboy and Maxiamillion M. Hernandez to dismiss the action and vacate a prior order granting plaintiff summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 18, 2021,

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

88

KA 20-00915

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMICH M. DAVIS, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 28, 2011. The judgment convicted defendant upon a plea of guilty of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We affirm.

In 2011, County Court sentenced defendant, in absentia, with defense counsel present. In 2016, defendant was returned to the court on a bench warrant. At that appearance, defense counsel requested an adjournment to allow for, inter alia, the preparation of an updated presentence report and to permit him to investigate whether he would move for defendant to withdraw his guilty plea. The court denied defense counsel's request, and stated that the sentence imposed in 2011 would start that day, thereby executing the previously imposed sentence.

Defendant contends that the court abused its discretion in denying defense counsel's request for an adjournment, thereby depriving him of his right to counsel at a critical stage of the proceedings. We reject that contention. We conclude that the court did not abuse its discretion in denying the request for an adjournment (*see generally People v Ippolito*, 242 AD2d 880, 880-881 [4th Dept 1997], *lv denied* 91 NY2d 874 [1997]). However, even assuming, arguendo, that it had, we conclude that the denial did not deprive defendant of his right to counsel at a critical stage of the proceedings. It is well established that "where a defendant is sentenced in absentia while represented by counsel, the critical stage

of the sentencing process and, hence, the criminal proceeding itself for all nisi prius court purposes, terminates upon the imposition of sentence. Subsequent execution of the sentence is not a critical stage of the defendant's criminal proceeding" (*People v Harris*, 79 NY2d 909, 910 [1992]; *see People v Burgos*, 246 AD2d 394, 394 [1st Dept 1998]; *People v Blas*, 192 AD2d 540, 540 [2d Dept 1993], *lv denied* 82 NY2d 751 [1993]). There is nothing in the record here to establish that the court improperly sentenced defendant in absentia and, therefore, when defendant returned to court on the bench warrant, it was merely for execution of the sentence (*cf. People v Bigby*, 96 AD3d 1429, 1430 [4th Dept 2012]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

89

KA 20-01034

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE REYES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 5, 2020. 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.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

90

KA 20-01035

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE REYES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 5, 2020. 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.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

99

CA 21-00593

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

JOSEPH G. STANDISH, PLAINTIFF-APPELLANT,

V ORDER

VILLAGE OF ALBION, VILLAGE OF ALBION POLICE DEPARTMENT AND RANDALL BOWER, SHERIFF OF ORLEANS COUNTY, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JON LOUIS WILSON, LOCKPORT (JON LOUIS WILSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS VILLAGE OF ALBION AND VILLAGE OF ALBION POLICE DEPARTMENT.

Appeal from an order of the Supreme Court, Orleans County (Frank Caruso, J.), entered February 2, 2021. The order denied the motion of plaintiff for bifurcation.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

100

CAF 19-00427

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JACIEON M. AND NYLANI R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

INDIA M., RESPONDENT-APPELLANT,
AND MARKEEF R., RESPONDENT.
(APPEAL NO. 1.)

BETH A. RATCHFORD, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (AMANDA L. OREN OF COUNSEL), FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Caroline Morrison, A.J.), entered February 13, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent India M. neglected the subject children.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

101

CAF 19-00540

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JACIEON M. AND NYLANI R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

INDIA M., RESPONDENT-APPELLANT,
AND MARKEEF R., RESPONDENT.
(APPEAL NO. 2.)

BETH A. RATCHFORD, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (AMANDA L. OREN OF COUNSEL), FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Caroline Morrison, A.J.), entered February 13, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject children continue to be temporarily removed to the care and custody of petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Dagan B. [Calla B.]* [appeal No. 3], 192 AD3d 1458, 1458-1459 [4th Dept 2021]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

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

103

CA 21-00269

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THANEY & ASSOCIATES, CPAS, P.C.,
PLAINTIFF-APPELLANT,

V ORDER

SCOTT GERKEN, KASPERSKI, DINAN & RINK CPAS, LLC,
AND RYAN KRETCHMER, DEFENDANTS-RESPONDENTS.

THE GLENNON LAW FIRM, P.C., ROCHESTER (CRAIG D. PETERSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT SCOTT GERKEN.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KASPERSKI, DINAN & RINK CPAS, LLC, AND RYAN KRETCHMER.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 25, 2021. The order, insofar as appealed from, granted the motion of defendant Scott Gerken to dismiss the first and second causes of action in the amended complaint, and granted that part of the motion of defendants Kasperski, Dinan & Rink CPAs, LLC and Ryan Kretchmer seeking to dismiss the eleventh cause of action in the amended complaint.

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

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court