SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED DECEMBER 23, 2022

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_____	1244/20	KA 17 00529	PEOPLE V RONALD K. JOHNSON
_____	436/21	KA 18 01832	PEOPLE V REBECCA RUIZ
_____	683	OP 22 00329	HBC VICTOR LLC V TOWN OF VICTOR
_____	686	CA 21 01518	ERIC N. CHAMBERS V TOWN OF SHELBY
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_____	807	CA 21 01570	HOSPITALITY CONCEPTS, LLC V JAY BERNHARDT
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_____	826	CA 21 01170	DAWN M. JACKSON V 681 FILLMORE, LLC
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_____	895	KA 19 00980	PEOPLE V MIGUEL PARILLA
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_____	906	CA 21 01483	LOUIS MUSSARI V DARNELL MURRAY
_____	908	CA 21 01112	SHANIEKA WRIGHT V JEREMIAH WILSON
_____	909	CA 22 00350	HOI TRINH V FATHER JOSEPH THIEN NGUYEN
_____	918	CAF 21 00381	ELIJAH F. TRETTS V ASHLEY M. SAWICKI
_____	919	CAF 21 00383	ASHLEY M. SAWICKI V ELIJAH F. TRETTS
_____	927	CA 22 00431	FARID POPAL V ZACHARY MARGULIS-OHNUMA

_____	932	TP 22 00945	WILLIE G. ROOTS V ANTHONY ANNUCCI
_____	935	KA 21 01628	PEOPLE V DAQUAN SINGLETARY
_____	947	CA 22 00008	TAMARA LEIGH GUTIERREZ V WILLIAM MICHAEL GUTIERREZ
_____	955	TP 22 01030	ALBERT WILLIAMS V ANTHONY ANNUCCI
_____	963	CA 22 00621	DANA M. MERIZZI V RUTH PIPHER
_____	970	CA 21 01083	TREY A. B.
_____	1001	KA 21 01032	PEOPLE V JOSHUA L. REEDY
_____	1006	CAF 21 00777	PATRICK A. KOCH V SARA L. GORECKI
_____	1011	CA 21 01367	WILLIAM DALY V ANTHONY J. COSTELLO & SON DEVELOPME
_____	1012	CA 22 00010	GARDEN VILLAGE APARTMENTS, LLC V CSC SERVICEWORKS, INC.
_____	1026	CAF 21 01097	ONTARIO COUNTY SUPPORT COLLECTION U V THOMAS C. DAVIS
_____	1027	CAF 21 01600	STEUBEN COUNTY COMMISSIONER OF SOCI V THOMAS C. DAVIS
_____	1035	CA 22 00383	SAM GOLDSTEIN V LINCOLN LIFE & ANNUITY COMPANY OF
_____	1049	CAF 21 01225	ONEIDA COUNTY DEPARTMENT OF SOCIAL V DAMIEN W.
_____	1051	CA 21 01637	CYNTHIA M. LEWANDOWSKI V EDNA LOUISE LIQUIDATIONS,

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1188/19

CA 19-00726

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

CRAIG L. WILSTON, JR., PLAINTIFF,

V ORDER

FIELD ASSET SERVICES, LLC, DOING BUSINESS
AS ASSURANT FIELD ASSET SERVICES, ET AL.,
DEFENDANTS,
HSBC BANK USA, N.A., AND HSBC MORTGAGE
CORPORATION (USA), DEFENDANTS-RESPONDENTS.

FIELD ASSET SERVICES, LLC, DOING BUSINESS AS
ASSURANT FIELD ASSET SERVICES, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

KENNEDY PROPERTY MANAGEMENT, THIRD-PARTY
DEFENDANT,
AND THE HANOVER INSURANCE COMPANY, THIRD-PARTY
DEFENDANT-APPELLANT.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (PETER T. SHAPIRO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BRAFF, HARRIS, SUKONECK & MALOOF, NEW JERSEY (KEITH HARRIS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON ADOFF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 24, 2018. The order denied the motion of third-party defendant The Hanover Insurance Company for summary judgment dismissing the third-party complaint against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 24, 2020,

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1244/20

KA 17-00529

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD K. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 7, 2016. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree. The judgment was affirmed by order of this Court entered April 30, 2021 (193 AD3d 1429), and defendant on August 23, 2021 was granted leave to appeal to the Court of Appeals from the order of this Court (37 NY3d 993), and the Court of Appeals on November 17, 2022 reversed the order and remitted the case to this Court for further proceedings (— NY3d — [Nov. 17, 2022]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Johnson*, — NY3d —, 2022 NY Slip Op 06537 [2022], *revg People v Johnson*, 193 AD3d 1429 [4th Dept 2021]). We previously dismissed the appeal from the judgment insofar as it imposed sentence, and we otherwise affirmed the judgment convicting defendant, upon his plea of guilty, of rape in the second degree (Penal Law § 130.30 [1]) in full satisfaction of a two-count indictment charging him with rape in the first degree under section 130.35 (2) and rape in the second degree under section 130.30 (1). Defendant contended that County Court erred in denying his motion to dismiss the indictment on the ground that, inter alia, his state constitutional due process rights were violated by extensive preindictment delay, and we concluded that, after review of the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), defendant was not denied due process of law by the preindictment delay (*Johnson*, 193 AD3d at 1430-1431). The Court of Appeals reversed our

determination, reasoning that we had "misinterpreted the *Taranovich* framework" (*Johnson*, — NY3d at —, 2022 NY Slip Op 06537 at *4), and remitted the matter to this Court for "factual and legal review . . . under the proper framework" (*id.*).

After review of defendant's contention upon remittitur, we conclude that he was not deprived of due process of law by the preindictment delay. In determining whether defendant was deprived of due process, we must consider the factors set forth in *Taranovich*, which are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (37 NY2d at 445; *see People v Decker*, 13 NY3d 12, 14-15 [2009]; *People v Stefanovich*, 207 AD3d 1047, 1049 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). "[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed" (*People v Romeo*, 12 NY3d 51, 55 [2009], *cert denied* 558 US 817 [2009]), but "it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal" (*People v McFadden*, 148 AD3d 1769, 1771 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *see Decker*, 13 NY3d at 15).

Here, as the People correctly concede, the first *Taranovich* factor weighs in defendant's favor inasmuch as the period of preindictment delay was extensive, exceeding seven years. The fourth factor, on the other hand, militates against dismissal of the indictment inasmuch as defendant was not incarcerated prior to indictment.

With respect to the second factor, the evidence at a hearing on defendant's motion established that the delay was not caused by any bad faith on the part of the People (*see Stefanovich*, 207 AD3d at 1050; *People v Lewis*, 199 AD3d 1441, 1442 [4th Dept 2021], *lv denied* 38 NY3d 1034 [2022], *cert denied* — US —, 143 S Ct 262 [2022]). It was attributable, in part, to a backlog in DNA testing at the crime laboratory, the minor victim's inability to identify the rapist, and difficulties law enforcement had in locating and maintaining contact with the victim (*see People v McFadden*, 148 AD3d 1769, 1771 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *People v White*, 108 AD3d 1236, 1238 [4th Dept 2013], *lv denied* 22 NY3d 1044 [2013]). To the extent that the delay was attributable to the People's inadvertence or a failure to prioritize the case, however, the second factor favors defendant irrespective of the absence of bad faith (*see Stefanovich*, 207 AD3d at 1050; *People v Wheeler*, 289 AD2d 959, 960 [4th Dept 2001]; *see generally Taranovich*, 37 NY2d at 446).

With respect to the third factor, the charge of rape in the first degree "is quite serious" and the nature of that charge "is directly related to the issues of complexity and may, therefore, account for some of the delay" (*Johnson*, — NY3d at —, 2022 NY Slip Op 06537 at *3; *see Stefanovich*, 207 AD3d at 1050; *White*, 108 AD3d at 1237).

With respect to the fifth factor, the record reflects that the delay may have impaired defendant's ability to defend against the charge of rape in the first degree. Under the particular circumstances of this case, however, the impairment of defendant's ability to defend against that charge did not adversely impact the resulting plea inasmuch as defendant secured a plea to the strict liability crime of rape in the second degree, to which he had no defense, in full satisfaction of the indictment, with the minimum lawful sentence for a second violent felony offender. After balancing all the relevant factors, therefore, we conclude that defendant's right to due process was not violated (*see People v Ramlall*, 34 NY3d 1154, 1155 [2020]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

436/21

KA 18-01832

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REBECCA RUIZ, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (MARILYN FIORE-LEHMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered June 19, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree. The judgment was reversed by order of this Court entered August 26, 2021 (197 AD3d 915), and the People were granted leave to appeal to the Court of Appeals from the order of this Court, and the Court of Appeals on December 15, 2022 reversed the order and remitted the case to this Court for a determination of the facts and issues raised but not determined on the appeal to this Court (— NY3d — [Dec. 15, 2022]).

Now, upon remittitur from the Court of Appeals and having considered the facts and issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Ruiz*, — NY3d —, 2022 NY Slip Op 07092 [2022], *revg* 197 AD3d 915 [4th Dept 2021]). We previously reversed the judgment convicting defendant of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), concluding that County Court erred in denying her request to instruct the jury on the defense of temporary and lawful possession of a firearm (*Ruiz*, 197 AD3d at 916-917). The Court of Appeals reversed our order, stating that defendant "was not entitled to the temporary and lawful possession charge" because she "used the weapon in a dangerous manner" (*Ruiz*, 2022 NY Slip Op 07092, *2). The Court of Appeals remitted the matter to this Court "for a determination of the facts and issues raised but not determined" previously (*id.*).

After review of defendant's contention upon remittitur, we conclude that the sentence is not unduly harsh and severe.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

683

OP 22-00329

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

IN THE MATTER OF HBC VICTOR LLC, PETITIONER,

V OPINION AND ORDER

TOWN OF VICTOR, RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent. The determination authorized condemnation of certain real property owned by petitioner.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Opinion by LINDLEY, J.P.:

Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Town of Victor (Town), authorizing the condemnation of certain real property owned by petitioner in Ontario County. The property in question is connected to an enclosed regional shopping center known as Eastview Mall, owned by Eastview Mall, LLC. Until recently, the subject property was occupied by a Lord & Taylor department store, one of five anchor tenants at the mall. The operator of the Lord & Taylor store filed for bankruptcy in August 2020 and closed the store permanently in February 2021 during the COVID-19 pandemic.

In November 2021, while petitioner was attempting to secure a new tenant for the property, the Town passed a resolution authorizing a public hearing to start the condemnation process. At the public hearing, petitioner objected to the proposed taking and presented evidence that it was maintaining the property and actively seeking a new tenant, which petitioner explained was not easy to find during the pandemic. The Town thereafter adopted resolutions approving the acquisition of petitioner's property via condemnation and determining that the taking will not have a potential significant adverse impact on the environment.

Petitioner challenges the taking on a number of grounds, contending, inter alia, that neither the condemnation notice nor the Town's determination and findings specifically identifies or describes a legitimate public project, as required by EDPL 207 (C) (3). We agree. Indeed, the Town readily acknowledges that it has not yet decided what to do with the property after obtaining title, and the notice merely states that "[t]he proposed Acquisition is required for and is in connection with a certain project . . . consisting of facilitating the productive reuse and redevelopment of the vacant and underutilized Proposed Site through municipal and/or economic development projects . . . by attracting and accommodating new tenant(s) and/or end user(s)." In its determination and findings, the Town stated that "no specific future uses or actions have been formulated and/or specifically identified."

Because the Town has not indicated what it intends to do with the property, we are unable to determine whether "the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1810 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]). Of course, "[t]he existence of a public use, benefit, or purpose underlying a condemnation is a sine qua non" to the government's ability to exercise its powers to take private property through eminent domain (*Matter of 49 WB, LLC v Village of Haverstraw*, 44 AD3d 226, 238 [2d Dept 2007], *abrogated on other grounds by Hargett v Town of Ticonderoga*, 13 NY3d 325 [2009]; *see Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed and lv denied* 14 NY3d 924 [2010]).

As our colleagues in the Second Department have noted, "the existence of a 'public use' must be determined *at the time of the taking* since the requirement of public use would otherwise be rendered meaningless by bringing 'speculative future public benefits' which might never be realized within its scope" (*Matter of Gabe Realty Corp. v City of White Plains Urban Renewal Agency*, 195 AD3d 1020, 1023 [2d Dept 2021] [emphasis added], quoting *Daniels v Area Plan Commn. of Allen County*, 306 F3d 445, 466 [7th Cir 2002]; *see generally Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 484-486 [1975], *appeal dismissed* 423 US 1010 [1975]). In simple terms, the government cannot take your land and then decide later what to do with it without running afoul of the Takings Clause of the Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment.

Relying in part on *Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency* (112 AD3d 1351 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]), the Town nevertheless contends that its "lack of a particularized plan as to how the Town will redevelop the Property does not negate the existence of a valid and legitimate public use in satisfaction of the EDPL." According to the Town, *GM Components Holdings, LLC* stands for the proposition that a municipality may acquire property for redevelopment

"without having decided" how the property will be used. We cannot agree.

In *GM Components Holdings, LLC*, the Town of Lockport Industrial Development Agency (IDA) operated an industrial park and sought to condemn 91 acres of vacant land adjacent to the park (112 AD3d at 1351). With respect to the underlying public purpose, the IDA stated that it intended to sell the property to a business that wished to locate in the area, thereby creating jobs and adding to the tax base (*id.*). The IDA had previously sold numerous other parcels of land in the industrial park for that same purpose (*id.* at 1352). Although the IDA did not have a buyer in mind, the IDA made clear what it intended to do with the condemned property, to wit, sell it to a business that would locate in the industrial park.

Here, in contrast, the Town professes to have no idea what it intends to do with petitioner's property. The Town does not even rule out simply transferring title to Eastview Mall, LLC, which owns the adjoining mall and whose principals asked the Town to condemn the property. Again, unless and until the Town says what it plans to do with the property upon taking, we cannot determine whether the taking will serve a public use. Nor can we determine whether, as petitioner alleges, the condemnation will result in a "merely incidental public benefit coupled with a dominant private purpose," which would invalidate the taking (*Syracuse Univ.*, 71 AD3d at 1433; *see generally Kelo v City of New London*, 545 US 469, 485 [2005], *reh denied* 545 US 1158 [2005]).

Although "the remediation of substandard or insanitary conditions (i.e., urban blight) is a proper basis for the exercise of the power of eminent domain" (*Gabe Realty Corp.*, 195 AD3d at 1022; *see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 524 [2009], *rearg denied* 14 NY3d 756 [2010]), there is no indication in the record that petitioner's property is in a blighted condition. To the contrary, the evidence at the public hearing established that petitioner has cleaned and maintained the premises since the Lord & Taylor vacancy and continues to pay property taxes at the assessed value of more than $4,000,000. We do not equate mere vacancy with blight, especially when the vacancy occurs unexpectedly in the midst of a global pandemic.

The Town's reliance on *Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency* (188 AD3d 1601 [4th Dept 2020]) is misplaced inasmuch as the property condemned in that case had "experienced deterioration since it became vacant" years earlier (*id.* at 1602). There is no evidence, or even an allegation, of deterioration here.

In sum, we conclude that petitioner met its burden of establishing that the Town's proposed taking does not rationally relate to any conceivable public purpose (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986]; *cf. Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 303 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]), and that the

Town's determination and findings must be rejected. Because the Town lacks authority to condemn the property, petitioner is entitled to be reimbursed for reasonable attorney's fees and costs pursuant to EDPL 702 (B) (*see Hargett*, 13 NY3d at 330; *Gabe Realty Corp.*, 195 AD3d at 1023). Petitioner may submit an application to this Court upon notice to the Town.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

686

CA 21-01518

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

ERIC N. CHAMBERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF SHELBY AND TOWN OF SHELBY CODE ENFORCEMENT OFFICER, DEFENDANTS-RESPONDENTS.

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Orleans County (Frank Caruso, J.), entered September 22, 2021. The order and judgment granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In this action to recover damages for malicious prosecution and abuse of process, plaintiff appeals from an order and judgment granting defendants' motion for summary judgment dismissing the complaint. This action arises from the filing of three informations pursuant to Executive Law § 382 (2) by defendants, charging plaintiff with violations of, inter alia, the Uniform Fire Prevention and Building Code on three properties. A violation of section 382 (2) is a misdemeanor offense (*see Matter of Ophardt v Vasquez*, 74 AD3d 1742, 1744 [4th Dept 2010], *appeal dismissed* 15 NY3d 867 [2010]) subject to a fine, a term of imprisonment, or both (*see* § 382 [2]). Plaintiff commenced this action after the charges were withdrawn.

Plaintiff contends that summary judgment was premature because further discovery was needed. We reject that contention. Plaintiff failed "to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant[s]" (*Buto v Town of Smithtown*, 121 AD3d 829, 830 [2d Dept 2014] [internal quotation marks omitted]; *see* CPLR 3212 [f]; *Gannon v Sadeghian*, 151 AD3d 1586, 1588 [4th Dept 2017]), and we agree with defendants that "the [m]ere hope that somehow . . . plaintiff[] will uncover evidence that will prove a case is insufficient for denial of the motion"

(*Gannon*, 151 AD3d at 1588 [internal quotation marks omitted]).

We also reject plaintiff's contention that Supreme Court erred on the merits in granting defendants' motion. It is well settled that, in order "[t]o obtain recovery for malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice" (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]; *see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]; *Bratge v Simons*, 173 AD3d 1623, 1624 [4th Dept 2019]). Thus, "[p]robable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution" (*Bratge*, 173 AD3d at 1624 [internal quotation marks omitted]; *see Britt v Monachino*, 73 AD3d 1462, 1462 [4th Dept 2010]). "In the context of a malicious prosecution cause of action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Dann v Auburn Police Dept.*, 138 AD3d 1468, 1470 [4th Dept 2016] [internal quotation marks omitted]; *see Colon v City of New York*, 60 NY2d 78, 82 [1983], *rearg denied* 61 NY2d 670 [1983]; *Broyles v Town of Evans*, 147 AD3d 1496, 1496-1497 [4th Dept 2017]).

Here, plaintiff does not dispute that there were violations of, inter alia, the Uniform Fire Prevention and Building Code on the properties. Instead, plaintiff contends that defendants had failed to engage in the steps necessary to determine that he was the owner of the properties within the meaning of the New York State Uniform Fire Prevention and Building Code Act (Executive Law § 370 *et seq.*; *see* § 382 [2]), and therefore defendants lacked probable cause to believe that plaintiff violated Executive Law § 382 (2). Contrary to plaintiff's contention, defendants met their initial burden by establishing that plaintiff was the "owner" of the properties. The term "owner" is not defined in the Uniform Fire Prevention and Building Code Act (*see* § 372). "Where the interpretation of [a] statute turns on the definition of words not defined therein, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1704 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018] [internal quotation marks omitted]; *see Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]). The term "owner" means "[s]omeone who has the right to possess, use, and convey something; a person in whom one or more interests are vested" (Black's Law Dictionary [11th ed 2019], owner). Here, we conclude that defendants established probable cause to believe that plaintiff was the "owner" of the properties inasmuch as it is undisputed that plaintiff operated his business on one of the properties, identified the properties as his in correspondence with defendants, had control over whether to permit inspections of the premises, identified himself as the owner of two of the properties in prior applications for a junkyard license from defendants, and leased the other property to a tenant. Consequently, the court properly

concluded that defendants met their burden of establishing probable cause to believe that plaintiff, as the owner of the properties, committed a crime by violating Executive Law § 382 (2) (*see generally Bratge*, 173 AD3d at 1624). We further conclude that plaintiff failed to raise an issue of fact in opposition with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We similarly conclude that defendants established their entitlement to judgment as a matter of law with respect to the abuse of process claim. "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *see Liss v Forte*, 96 AD3d 1592, 1593 [4th Dept 2012]). Here, defendants met their initial burden on the motion with respect to that claim by establishing that they "did not use process in a perverted manner to obtain a collateral objective" (*Liss*, 96 AD3d at 1593 [internal quotation marks omitted]). Plaintiff in response failed to raise an issue of fact to defeat that part of the motion. Although plaintiff alleged that defendants filed an excessive number of misdemeanor charges against him in an effort to deplete his resources, "the gist of [an] action for abuse of process . . . is the improper use of process *after* it is issued" (*Curiano*, 63 NY2d at 117 [internal quotation marks omitted and emphasis added]). Here, plaintiff does "not contend that the [informations] issued by defendants w[ere] improperly used after [they] w[ere] issued but only that defendants acted maliciously in [filing the informations]. A malicious motive alone, however, does not give rise to a cause of action for abuse of process" (*id.*; *see Liss*, 96 AD3d at 1593).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

687

CA 21-01218

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

SKANEATELES COUNTRY CLUB, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OLIVIA CAMBS, DEFENDANT-APPELLANT.

GOEDE, DEBOEST & CROSS, PLLC, NAPLES, FLORIDA (PETER J. CAMBS OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 26, 2021. The judgment granted the motion of plaintiff for summary judgment, declared that the subject agreement is a license terminable at plaintiff's will and denied the cross motion of defendant for summary judgment.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is denied, the declaration is vacated, the counterclaims are reinstated, the cross motion is granted, the complaint is dismissed, and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that the subject agreement is a license not terminable at plaintiff's will.

Memorandum: Plaintiff is a country club that owns property containing boat slips adjacent to Skaneateles Lake. The parties entered into an assignment agreement (agreement) pursuant to which, inter alia, plaintiff transferred the use and occupancy rights of one of its boat slips to defendant, a member of the country club. The agreement was executed along with a boat slip payment agreement (payment agreement) whereby defendant contributed $5,000 to fund construction of the boat slips. Defendant was one of 80 members of plaintiff who initially agreed to contribute money to the construction costs for the boat slips and who would, in return, be assigned the use and occupancy of a boat slip on the premises. The agreement required defendant to, inter alia, pay an annual maintenance fee and comply with plaintiff's rules and policies. It is undisputed that, at all relevant times, defendant has complied with those provisions.

Following a small claims dispute over the computation of the

annual maintenance fee, plaintiff elected to terminate the agreement along with defendant's corresponding right to use and occupy a boat slip on the premises. It thereafter commenced this action seeking a declaration that the agreement is a license terminable at will by plaintiff. Defendant answered and asserted two counterclaims, the first seeking a declaration that the agreement is not terminable at will by plaintiff and the second seeking a permanent injunction requiring plaintiff to provide defendant access to the identical boat slip currently assigned to her under the same terms and conditions as set forth in the agreement. Defendant appeals from a judgment that granted plaintiff's motion for summary judgment on the complaint and dismissing the counterclaims, declared that the agreement is a license terminable at will by plaintiff, and denied defendant's cross motion for summary judgment on her counterclaims and dismissing the complaint.

Defendant contends that Supreme Court erred in granting plaintiff's motion and in denying her cross motion. We agree. We conclude that the agreement, despite being a license, does not provide plaintiff with the right to terminate it at will and, under these circumstances, defendant is entitled on her cross motion to a declaration in her favor under the first counterclaim and to the injunction sought in the second counterclaim. A license is "a revocable privilege given 'to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands' " (*Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 656 [2014], quoting *Trustees of Town of Southampton v Jessup*, 162 NY 122, 126 [1900]). Although, generally speaking, licenses are terminable at will (*see generally Quik Park 808 Garage, LLC v 808 Columbus Commercial Owner LLC*, 187 AD3d 488, 489 [1st Dept 2020]; *Z. Justin Mgt. Co., Inc. v Metro Outdoor, LLC*, 137 AD3d 577, 578 [1st Dept 2016]; *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]), that does not mean that all licenses must be terminable at will regardless of the language contained in the license agreement. Parties to an agreement are, of course, free to agree otherwise. The agreement is in writing and must be construed according to well-settled principles of contractual interpretation by engaging in " 'the process of determining from the words and other objective manifestations of the parties what must be done or forborne by the respective parties in order to conform to the terms of the[ ] agreement[]' " (*Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019]). "In construing a contract we look to its language, for 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 [2014], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Contrary to plaintiff's contention, the fact that the subject matter of the agreement is a license entitling defendant to use and occupy a boat slip does not automatically afford plaintiff a right to terminate the agreement at will. Indeed, plaintiff's contention that the terms of the agreement entitle it to terminate the license to use

the boat slip at any time and at its sole option is contrary to the reasonable expectations of the parties as expressed in the agreement (*see Bestform, Inc. v Herman*, 23 AD3d 253, 253-254 [1st Dept 2005], *lv denied* 6 NY3d 705 [2006]), and fails to "achieve[] 'a practical interpretation of the expressions of the parties' " (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010]). Here, the terms of the agreement unambiguously state that defendant is required to pay the annual maintenance fee and to comply with plaintiff's rules and policies, thereby establishing through implication that plaintiff may terminate the license only when defendant fails to comply with those specified terms (*see generally Albanese v Consolidated Rail Corp.*, 245 AD2d 475, 476 [2d Dept 1997]). Plaintiff's interpretation of the agreement as permitting plaintiff to terminate the license at will, despite the aforementioned provisions governing defendant's obligations, renders those specific provisions nugatory, contrary to the general approach to interpreting contracts (*see generally Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 148 [2013]; *Laba v Carey*, 29 NY2d 302, 308 [1971], *rearg denied* 30 NY2d 694 [1972]).

Additionally, the agreement expressly permits defendant to terminate it and receive a return of the monies contributed pursuant to the payment agreement, less any monies owed to plaintiff. We agree with defendant that the express inclusion of a right of termination for her compels the conclusion that the exclusion of any corresponding express right for plaintiff to terminate the agreement was intentional (*see generally Quadrant Structured Prods. Co., Ltd.*, 23 NY3d at 560; *Dunn Auto Parts, Inc. v Wells*, 198 AD3d 1269, 1271 [4th Dept 2021]). Thus, the very structure of the agreement establishes that the license is not terminable at will by plaintiff.

We also note that "[t]he most fundamental canon of contract interpretation, taking precedence over all others, is that primary attention be given to the purpose of the parties in making the contract" (*Massachusetts Mut. Life Ins. Co. v Thorpe*, 260 AD2d 706, 709 [3d Dept 1999], *lv denied* 93 NY2d 814 [1999]; *see Morgan v Herzog*, 301 NY 127, 135 [1950]). "A fair and reasonable interpretation, consistent with that purpose, must guide the courts in enforcing the agreement" (*Matter of Cromwell Towers Redevelopment Co. v City of Yonkers*, 41 NY2d 1, 6 [1976]). Here, we conclude that plaintiff's interpretation of the agreement as allowing it to terminate the license at will is unreasonable because it implies that, under such circumstances, plaintiff would have no obligation to return the monies that defendant contributed to the construction of the boat slips, which patently undermines the purpose and intent of the parties as memorialized in the agreement (*see generally Greenfield*, 98 NY2d at 569).

In light of the foregoing, we reverse the judgment, deny the motion, vacate the declaration, reinstate the counterclaims, grant the cross motion, dismiss the complaint, and grant judgment in favor of defendant declaring that the agreement is a license not terminable at plaintiff's will.

All concur except NeMoyer and Bannister, JJ., who dissent and vote to affirm in the following memorandum: We agree with the majority's conclusion that the parties' agreement at issue constituted a license and not a lease. We respectfully disagree, however, with the majority's further conclusion that the parties' license was not revocable at will by plaintiff, the licensor.

Generally, licenses for real property are revocable at will by the licensor (*see Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 656 [2014]; *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]; *see also Sarfaty v Evangelist*, 142 AD2d 995, 996 [4th Dept 1988]). There are limited exceptions to that general rule. For instance, a license may not be revocable at will if the conduct of the licensor makes it inequitable to permit the licensor to revoke it (*see generally Sarfaty*, 142 AD2d at 996; *Ski-View, Inc. v State of New York*, 129 Misc 2d 106, 110 [Ct Cl 1985]).

Here, the parties' agreement is unambiguously a license, and we must therefore view it in light of the general rule whereby a license is terminable at will by the licensor. We conclude that the agreement does not unambiguously express an intention on behalf of the parties that the general rule should not apply, and we further conclude that there is no basis for determining that any exception to the general rule applies (*see generally Sarfaty*, 142 AD2d at 996). Therefore, we conclude that the judgment should be affirmed.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

688

CA 22-00399

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

LAURA CICERO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA O'ROURKE AND VERONA STREET ANIMAL SOCIETY, DEFENDANTS-RESPONDENTS.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT PATRICIA O'ROURKE.

MOLOD SPITZ & DESANTIS, NEW YORK CITY (DAVID B. OWENS OF COUNSEL), FOR DEFENDANT-RESPONDENT VERONA STREET ANIMAL SOCIETY.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered March 2, 2022. The order denied the motion of plaintiff for leave to amend the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained after she was bitten by a dog owned by defendant Verona Street Animal Society (Verona Street). The incident took place at the residence of defendant Patricia O'Rourke, who was providing a foster home for the dog until Verona Street could find someone to adopt him. The complaint asserts strict liability causes of action against both defendants, alleging that they knew or should have known about the dog's vicious propensities (*see generally Bard v Jahnke*, 6 NY3d 592, 596-597 [2006]; *Collier v Zambito*, 1 NY3d 444, 446-447 [2004]).

While this case was pending, the Court of Appeals decided *Hewitt v Palmer Veterinary Clinic, P.C.* (35 NY3d 541 [2020]), in which a woman was injured by a dog while she was in the waiting room of the defendant veterinary clinic. The Court held that the "vicious propensities notice requirement" (*id.* at 549), typically applicable in an action to recover for injury caused by a domestic animal, did not apply to the veterinary clinic inasmuch as that clinic's agents had "specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed" (*id.* at 548). Instead, the Court applied negligence principles,

explaining that veterinarians or other agents of such a practice "may—either unavoidably in the course of treatment, or otherwise—create circumstances that give rise to a substantial risk of aggressive behavior" (*id.*). Due to their specialized knowledge, the Court concluded, "veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate this risk" (*id.* at 549).

Relying on *Hewitt*, plaintiff moved for leave to amend her complaint to assert a negligence cause of action against O'Rourke, contending that the vicious propensities notice requirement is inapplicable because O'Rourke did not own the offending dog. In the alternative, plaintiff contended that the *Hewitt* exception to the vicious propensities notice requirement applied because O'Rourke had specialized knowledge of dogs and substantial control over her home, where the incident took place. Supreme Court denied the motion, and we now affirm.

" 'Although leave to amend a pleading should be freely granted absent prejudice or surprise . . . , leave to amend should be denied where . . . the proposed amendment is patently lacking in merit' " (*Brown v Erie Ins. Co.*, 207 AD3d 1144, 1146 [4th Dept 2022]; *see* CPLR 3025 [b]; *Dionisio v Geo. De Rue Contrs., Inc.*, 38 AD3d 1172, 1174 [4th Dept 2007]). Here, we conclude that the court did not abuse its discretion in denying plaintiff's motion for leave to amend the complaint inasmuch as the proposed negligence cause of action against O'Rourke patently lacks merit under existing caselaw (*see generally Brown*, 207 AD3d at 1146).

In *Bard*, the Court of Appeals held that "when harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule articulated in *Collier*" (6 NY3d at 599 [emphasis added])—"i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities" (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *see Collier*, 1 NY3d at 446–447). Although O'Rourke does not own the dog that bit plaintiff, "[a]n owner's strict liability for damages arising from the vicious propensities and vicious acts of a dog 'extends to a person who harbors the animal although not its owner' " (*Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2d Dept 2015], quoting *Molloy v Starin*, 191 NY 21, 28 [1908]; *see Vikki-Lynn A. v Zewin*, 198 AD3d 1342, 1342 [4th Dept 2021]; *Cruz v Stachowski*, 142 AD3d 1326, 1328 [4th Dept 2016]). The *Bard* rule also extends to dog sitters (*see Russell v Hunt*, 158 AD3d 1184, 1185 [4th Dept 2018]).

Even assuming, arguendo, that the *Bard* rule did not preclude plaintiff from asserting a negligence cause of action against O'Rourke, we note that plaintiff would still have to establish in support of her negligence cause of action that O'Rourke had knowledge of the dog's alleged "vicious propensities" (*Strunk v Zoltanski*, 62 NY2d 572, 578 [1984]). As the Court of Appeals stated in *Hewitt*,

"[t]he vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet owners—such as landlords who rent to pet owners—under a negligence standard" (35 NY3d at 548, citing *Strunk*, 62 NY2d at 578).

Here, plaintiff's proposed negligence cause of action against O'Rourke does not allege that O'Rourke had knowledge of the dog's vicious propensities; instead, it alleges that O'Rourke was negligent because she did not "investigate the subject dog accepted from the foster care program . . . before introducing it to her property, thereby creating a dangerous condition on the property which she had a nondelegable duty to keep reasonably safe." The proposed complaint therefore fails to state a viable negligence cause of action against O'Rourke.

Finally, we reject plaintiff's alternative contention that the exception set forth in *Hewitt* should apply here due to O'Rourke's alleged specialized knowledge of dogs. In our view, a volunteer dog sitter such as O'Rourke does not have the knowledge and expertise of a veterinarian, and O'Rourke's home is not analogous to a veterinary clinic (*see generally Hewitt*, 35 NY3d at 548-549).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

701

KA 19-01440

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES TUBBINS, 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 (M. William Boller, A.J.), rendered May 24, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), defendant contends that Supreme Court erred in refusing to suppress, as the products of an unlawful search and seizure, physical evidence and his statements to the police. We agree.

According to the evidence adduced at the suppression hearing, two police officers on routine patrol at night observed three individuals with open bottles and containers of alcohol seated at a picnic table in a grassy area outside of a vacant house known as a location for criminal activity, and saw a fourth individual smoking marihuana in the driveway. After an initial inquiry about what the individuals were doing, the officers approached the picnic table, where defendant was sitting with a cup, at which point defendant jumped up and attempted to run off. One of the officers grabbed and tackled defendant in front of the vacant house, and defendant was handcuffed. According to the officers, defendant was placed under arrest for

violation of the local open container ordinance and for obstructing governmental administration. The police recovered a gun from defendant during a pat-down search at the scene and a bag of cocaine from defendant's person during a search after defendant was transported to central booking.

Following the suppression hearing and submission of a post-hearing memorandum of law by the People, the court issued a written decision in which it determined, as its conclusion of law, that "[t]he police had probable cause to issue defendant a citation [for] violation of a city ordinance and [t]respass" and, "[w]hen defendant ran prior to receiving the citation, the police had probable cause to stop and arrest defendant for [o]bstructing [g]overnmental [a]dministration." The court concluded that the searches of defendant at the scene uncovering the weapon and at central booking resulting in the discovery of cocaine were lawful incident to that arrest. The court therefore refused to suppress the physical evidence seized and defendant's statements to the police.

Initially, there is no dispute that, based on their observations of defendant and two other individuals sitting at a picnic table with open bottles and containers of alcohol outside of a vacant house known as a location for criminal activity and of a fourth individual smoking marihuana in the driveway, the officers had at least "an objective credible reason not necessarily indicative of criminality" justifying their approach of the group to request information by asking the "basic, nonthreatening question[]" about what the members of the group were doing (*People v Hollman*, 79 NY2d 181, 185 [1992]; *see id.* at 190; *see generally People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). The central question on appeal is therefore whether the officers had probable cause to arrest defendant for obstructing governmental administration on the ground that defendant interfered with the officers' ability to issue citations for a trespass violation (*see* Penal Law § 140.05) and a violation of the open container ordinance (*see* Buffalo City Code ch 69) when, immediately following the officers' approach and inquiry, defendant jumped up from the picnic table and began to run away. We agree with defendant, and the People do not dispute, that the officers did not have probable cause to arrest him for obstructing governmental administration.

As relevant here, "[a] person is guilty of obstructing governmental administration when he [or she] intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act" (Penal Law § 195.05). "The plain meaning of the statute and the accompanying commentary clearly demonstrate that the *mens rea* of this crime is an intent to frustrate a public servant in the performance of a specific function" (*People v Brooks*, 171 AD3d 778, 780 [2d Dept 2019] [internal quotation marks omitted]; *see* § 15.05 [1]). In addition, where, as here, the operative obstruction is interference,

such interference "ha[s] to be, in part at least, physical in nature" (*People v Case*, 42 NY2d 98, 102 [1977]; *see People v Dumay*, 23 NY3d 518, 524 [2014]; *Matter of Davan L.*, 91 NY2d 88, 91 [1997]).

Here, according to the court's decision, the officers had probable cause to believe that defendant intentionally attempted to prevent them from performing the official function of issuing citations for trespass and violation of the open container ordinance. As defendant contends, however, although the officers testified that they were planning to issue citations for violation of the open container ordinance as they approached the picnic table, there is no evidence that, when defendant jumped up from the table and attempted to run away, the officers were in the process of issuing the citations (*cf. People v Hagood*, 93 AD3d 533, 534 [1st Dept 2012], *lv denied* 19 NY3d 973 [2012]) or that they had given any directive for defendant to remain in place while they issued such citations (*cf. Davan L.*, 91 NY2d at 91; *People v Graham*, 54 AD3d 1056, 1058 [2d Dept 2008]; *People v Romeo*, 9 AD3d 744, 745 [3d Dept 2004]). The officers thus had no reasonable basis to believe that defendant had the requisite intent—i.e., the conscious objective—to prevent them from issuing citations (*see* Penal Law §§ 15.05 [1]; 195.05). Consequently, as defendant contends and the People correctly concede, we conclude that the officers lacked probable cause to arrest defendant for obstructing governmental administration. The court therefore erred in determining that the searches of defendant at the scene uncovering the weapon and at central booking resulting in the discovery of cocaine constituted proper searches incident to a lawful arrest for obstructing governmental administration.

The People nonetheless contend, as they asserted in their post-hearing memorandum of law, that the officers had probable cause to arrest defendant for trespass and violation of the open container ordinance, and that the searches of defendant were incident to a lawful arrest on that basis. We agree with defendant for the reasons that follow that we have no authority to affirm on the ground proposed by the People (*see People v Smith*, 202 AD3d 1492, 1494 [4th Dept 2022]).

Under CPL 470.15 (1), "[u]pon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant." That provision is "a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Concepcion*, 17 NY3d 192, 195 [2011]). "[W]here the trial court's decision is fully articulated[,] the Appellate Division's review is limited to those grounds" (*Nicholson*, 26 NY3d at 826). The Appellate Division engages in "the type of appellate overreaching prohibited by CPL 470.15 (1)" when it "renders a decision on grounds explicitly

different from those of the trial court, or on grounds that were clearly resolved in a defendant's favor" (*id.*; *see LaFontaine*, 92 NY2d at 472).

Here, the court determined that the officers' arrest of defendant, and thus the subsequent searches and seizures incident to that arrest, were lawful solely on the ground that the officers had probable cause to arrest defendant for obstructing governmental administration. Despite being presented with the People's argument, the court declined to uphold the searches and seizures as incident to a lawful arrest for trespass or violation of the ordinance. Thus, the court's determination that the officers had probable cause to arrest defendant for obstructing governmental administration, and that the searches and seizures were incident to a lawful arrest for that offense, "was the only issue decided *adversely* to defendant at the trial court" (*LaFontaine*, 92 NY2d at 474). That determination "alone constituted the *ratio decidendi* for upholding the legality of the [searches and seizures] and denying the suppression of evidence" (*id.*). Our "review, therefore, is confined to that issue alone" (*id.*; *see People v Richards*, 151 AD3d 1717, 1719 [4th Dept 2017]; *see also Smith*, 202 AD3d at 1494).

Based on the foregoing, inasmuch as the officers lacked probable cause to arrest defendant for obstructing governmental administration, we conclude that the court erred in refusing to suppress the physical evidence and defendant's statements to the police as the fruits of an unlawful arrest (*see generally People v Ortiz*, 31 AD3d 1112, 1113-1114 [4th Dept 2006], *lv denied* 7 NY3d 869 [2006]) and that defendant's guilty plea must be vacated (*see Richards*, 151 AD3d at 1720; *People v Savage*, 137 AD3d 1637, 1639-1640 [4th Dept 2016]). Moreover, because such a determination results in suppression of all evidence supporting the crimes charged, the indictment must be dismissed (*see Richards*, 151 AD3d at 1720; *Savage*, 137 AD3d at 1640).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

707

CA 21-01725

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

MICHAEL P., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF T.P., INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JONAH DOMBROSKI AND STANLEY DOMBROSKI, DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, SYRACUSE (JAMIE M. RICHARDS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered November 22, 2021. The order granted the motion of defendants to dismiss the complaint and awarded attorney's fees and costs to defendants.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated, and the award of attorney's fees and costs to defendants is vacated.

Memorandum: Plaintiff commenced this personal injury action seeking damages for dog bite injuries allegedly sustained by T.P. (child), his child with nonparty L.M.E. At the time of the alleged dog bite, plaintiff and L.M.E. shared joint legal custody of the child, but plaintiff had physical custody while L.M.E. had regularly scheduled parenting time, including on alternate weekends. L.M.E. resided with defendant Jonah Dombroski (Jonah), who rented the residential property from his father, defendant Stanley Dombroski (Stanley). The child was allegedly attacked and bitten by a dog while visiting the residential property during L.M.E.'s weekend parenting time.

Plaintiff sought to recover under theories of strict liability and negligence on the ground that the child, while lawfully present on residential property owned by Stanley, suffered injuries when he was attacked and bitten by a dog with known vicious propensities that was owned or harbored by Jonah. Defendants moved to dismiss the complaint for failure to state a cause of action and sought an award of attorney's fees and costs on the ground that the action was frivolous; defendants' affidavits submitted in support of the motion, however, stated that they were seeking summary judgment. Plaintiff now appeals from an order that granted defendants' motion by, among other things,

dismissing the complaint with prejudice, adjudging that the action was frivolous, and awarding defendants costs and reasonable attorney's fees. We reverse.

We note at the outset that, although the relief sought in defendants' notice of motion differed from that sought in their supporting affidavits (*see Anderson v Kernan*, 133 AD3d 1234, 1234 [4th Dept 2015]), Supreme Court, in its decision, effectively treated the motion as one for summary judgment by focusing on the proof submitted in support of and in opposition to the motion (*see* CPLR 3211 [c]; *Kempf v Magida*, 37 AD3d 763, 765 [2d Dept 2007]), and plaintiff does not contend on appeal that the court erred in doing so (*see M & R Ginsburg, LLC v Segel, Goldman, Mazzotta & Siegel, P.C.*, 121 AD3d 1354, 1354 n [3d Dept 2014]; *cf. Smithers v County of Oneida*, 138 AD3d 1504, 1504 [4th Dept 2016]).

With respect to the applicable law, "an owner of a dog may be liable for injuries caused by that animal only when the owner had or should have had knowledge of the animal's vicious propensities" (*Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 547 [2020]; *see Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Bard v Jahnke*, 6 NY3d 592, 599 [2006]; *Collier v Zambito*, 1 NY3d 444, 446 [2004]). "Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities" (*Collier*, 1 NY3d at 448). "Strict liability can also be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]" (*Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2d Dept 2015]; *see Quilty v Battie*, 135 NY 201, 204 [1892]; *Cruz v Stachowski*, 142 AD3d 1326, 1328 [4th Dept 2016]; *see also* 1B NY PJI 2:220 at 588 [2022]).

Furthermore, "[a] landlord who, with knowledge that a prospective tenant has a vicious dog which will be kept on the premises, nonetheless leases the premises to such tenant without taking reasonable measures, by pertinent provisions in the lease or otherwise, to protect persons who might be on the premises from being attacked by the dog may be held liable [under a negligence standard] to a person who while thereafter on the premises is bitten by the dog" (*Strunk v Zoltanski*, 62 NY2d 572, 573-574 [1984]; *see Hewitt*, 35 NY3d at 548; *id.* at 552 [Wilson, J., concurring]; *Strunk*, 62 NY2d at 575-576). When, "during the term of the leasehold[,] a landlord becomes aware of the fact that [the] tenant is harboring an animal with vicious propensities, [the landlord] owes a duty to protect third persons from injury . . . if [the landlord] 'had control of the premises or other capability to remove or confine the animal' " (*Cronin v Chrosniak*, 145 AD2d 905, 906 [4th Dept 1988], quoting *Strunk*, 62 NY2d at 575; *see Rodgers v Horizons at Monticello, LLP*, 130 AD3d 1285, 1286 [3d Dept 2015]; *Southern v Valentine*, 263 AD2d 954, 954 [4th Dept 1999]).

Here, we conclude that defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of

law. With respect to Jonah's potential liability, defendants' own submissions raise a triable issue of fact regarding the ownership of the dog (*see Bailey v Veitch*, 28 AD3d 1079, 1081 [4th Dept 2006]) inasmuch as Jonah's denial of ownership in his affidavit simply conflicts with the evidence stated by plaintiff in his verified complaint—which is considered an affidavit—that Jonah owned the dog (*see* CPLR 105 [u]; *Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 891-892 [2013]). To the extent that the court determined that plaintiff could not maintain the action against Jonah to recover for the child's injuries because the dog belonged to a family member, the court misinterpreted the facts and misapplied the law. As stated, there is a question of fact whether Jonah, who is unrelated to the child, owned the dog (*see Bailey*, 28 AD3d at 1081) and, even if the dog was owned by L.M.E. as alleged in Jonah's affidavit, " '[s]trict liability can . . . be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]' " (*Cruz*, 142 AD3d at 1328; *see Dufour v Brown*, 66 AD3d 1217, 1217-1218 [3d Dept 2009]). In that regard, defendants' own submissions raise an issue of fact whether Jonah harbored the dog inasmuch as Jonah averred that the dog had resided with him and his family over a period of years (*see Cruz*, 142 AD3d at 1328).

Defendants also failed to establish as a matter of law that they neither knew nor should have known that the dog had any vicious propensities (*see Young v Grizanti*, 164 AD3d 1661, 1662 [4th Dept 2018]), which is necessary to negate a component of both strict liability on the part of an owner or harborer and negligence on the part of a landlord (*see Hewitt*, 35 NY3d at 548). We agree with plaintiff that the conclusory, "self-serving affidavits of [Jonah] and [Stanley] about their lack of knowledge of [the dog's alleged vicious propensities] are insufficient to establish as a matter of law" that they were unaware of any such propensities (*Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]). "Such self-serving affidavits raise 'question[s] of credibility for the finder of fact, not the court, to resolve' " (*id.*). Moreover, "where[, as here], knowledge is a key fact at issue, and peculiarly within the possession of the movant[s] . . . , summary judgment will ordinarily be denied" (*Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 262 [2d Dept 1984]; *see Kindzierski v Foster*, 217 AD2d 998, 1000 [4th Dept 1995]). Inasmuch as defendants' submissions show that the dog resided with Jonah and in a residence owned by Stanley for a period of over three years, knowledge of any vicious propensities or prior dangerous behavior on the part of the dog would be peculiarly within the possession of defendants.

Further with regard to Stanley's potential liability, the court erred in determining that defendants established as a matter of law that Stanley lacked the requisite control over the dog. Stanley admitted in his affidavit that, although he did not live at the residence, he owned the property and acted as a landlord by renting the property to Jonah, and his affidavit makes clear that he was aware that the dog was present on the premises. Despite those facts, Stanley never suggested that he lacked control of the premises and,

beyond a single conclusory declaration that he "was never in control of the dog," Stanley did not even attempt to show how he lacked the ability to have the dog removed or confined if he so chose. We thus conclude that Stanley failed to eliminate a material issue of fact whether he "had control of the premises or other capability to remove or confine the animal" (*Strunk*, 62 NY2d at 575; *see Baisi v Gonzalez*, 97 NY2d 694, 695 [2002]).

Inasmuch as defendants failed to make the required prima facie showing of entitlement to judgment as a matter of law, the court should have denied their motion regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 1462 [4th Dept 2019]). Nonetheless, even assuming, arguendo, that defendants met their initial burden on the motion, we agree with plaintiff that defendants' motion is premature because discovery, including depositions concerning ownership of the dog and whether the dog previously exhibited any vicious propensities of which defendants were aware, has not been completed (*see Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531-1532 [4th Dept 2010]). Indeed, plaintiff's opposition papers show that defendants failed to respond to plaintiff's discovery demands, including for depositions, and that showing remains unrebutted by defendants, who did not file a reply below or a respondents' brief on appeal. Thus, as plaintiff has asserted both in opposition to the motion and on appeal, he is entitled to discovery and the motion should have been denied on that basis as well (*see* CPLR 3212 [f]).

We also agree with plaintiff that the court erred in awarding defendants attorney's fees and costs pursuant to CPLR 8303-a (*see Penn Iron & Metal Co. v Gross*, 192 AD2d 1059, 1060 [4th Dept 1993]). The statute provides in pertinent part that, in an action for personal injury, the court shall award costs and reasonable attorney's fees not exceeding $10,000 if an action commenced or continued by a plaintiff is found to be frivolous by the court (*see* CPLR 8303-a [a]). As relevant to the basis for the court's determination here, in order for the action to be frivolous under the statute, the court was required to find that the action was commenced or continued "in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law" (CPLR 8303-a [c] [ii]).

Here, none of the reasons given by the court support its conclusion that plaintiff's action is frivolous. The court first reasoned that plaintiff's "failure to appropriately respond" to defendants' motion with his own affidavit or the affidavit of a fact witness established that plaintiff's attorney "failed to undertake even a cursory investigation into the basis for . . . [p]laintiff's claim, and when faced with assertions that directly controverted the . . . claim, was unable to produce any response in opposition." We conclude that the court, based on a flawed understanding of how plaintiff should have responded to the motion, reached an unwarranted conclusion regarding whether plaintiff had a reasonable basis in fact for the action. Contrary to the court's determination, the record

establishes that plaintiff's attorney sought to further investigate and develop the claim and that plaintiff responded appropriately to defendants' motion inasmuch as plaintiff's attorney explained in detail, with substantiation from evidentiary submissions, that defendants' counsel had refused to respond to the discovery demands, including for depositions, that plaintiff needed to oppose the motion. For that reason, and because defendants' failure to meet their initial burden meant that the motion should have been denied regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad*, 64 NY2d at 853; *Christopher P.*, 174 AD3d at 1462), the court had no legitimate basis on which to conclude that the nature of plaintiff's opposing papers reflected that plaintiff had commenced or continued the action in bad faith without any reasonable basis in fact (*cf.* CPLR 8303-a [c] [ii]).

The court also reasoned that plaintiff acted in bad faith because he "appear[ed] to have unilaterally initiated this action without the consent or cooperation" of L.M.E., even though they shared joint custody. The court's speculation that plaintiff did not consult L.M.E. lacks an evidentiary basis in the record. Further, the court did not explain how commencing an action on behalf of the child to recover for the allegedly severe injuries he sustained from the dog attack was a violation of plaintiff's custodial obligations and, even if it was a violation, it does not follow therefrom that the personal injury action against defendants has no reasonable basis in law or fact.

The court further reasoned that plaintiff acted in bad faith because L.M.E. "was not made a defendant" even though the evidence showed that the child, the dog, L.M.E., and Jonah "all resided together at the time" of the subject incident. Contrary to the court's factual determination, the evidence—i.e., the custody documents solicited by the court—does not establish that the child resided at the residential property with L.M.E., Jonah, and the dog; rather, L.M.E. had only visitation, not physical custody, and the child was present for a weekend visit. Moreover, the fact that L.M.E. was not made a defendant is immaterial. As plaintiff points out, there is no requirement that L.M.E. be named as a defendant and, in fact, the record discloses that part of plaintiff's theory of liability is that Jonah, not L.M.E., is the owner or harborer of the dog and that Jonah is therefore liable as the owner or for harboring the dog at the residential property that he rents from Stanley.

In sum, a review of the record reveals that, contrary to the court's determination, "the action against [defendants] was not begun in bad faith nor was it frivolous" (*Penn Iron & Metal Co.*, 192 AD2d at 1060).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

723

CA 22-00243

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

INNER HARBOR PHASE I L.P.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COR INNER HARBOR COMPANY LLC, COR WEST KIRKPATRICK STREET COMPANY LLC, JEFFREY L. AIELLO, JOSEPH B. GERARDI, STEVEN F. AIELLO, PAUL G. JOYNT, LORI A. AIELLO FAMILY TRUST, LAURIE R. GERARDI FAMILY TRUST, MANNION & COPANI,
DEFENDANTS-APPELLANTS,

AND ZHIYAO DING, ALSO KNOWN AS DAN DING, INDIVIDUALLY AND ON BEHALF OF SIMILARLY SITUATED LIMITED PARTNERS OF INNER HARBOR PHASE I L.P.,
PROPOSED INTERVENOR-APPELLANT.

CULLEN AND DYKMAN LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KIRWAN LAW FIRM, PC, SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PROPOSED INTERVENOR-APPELLANT.

LYNN, D'ELIA, TEMES & STANCZYK, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 25, 2021. The order, inter alia, denied in part the motion of defendants to dismiss the second through fifth causes of action and denied the cross motion of Zhiyao Ding, also known as Dan Ding, insofar as he sought leave to intervene.

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

Memorandum: In this action arising from an alleged breach of a $4,000,000 promissory note owed to plaintiff, defendants appeal from an order that, among other things, denied in part their motion to dismiss certain causes of action pursuant to, inter alia, CPLR 3211 (a) (1) and (7). Appellant Zhiyao Ding, also known as Dan Ding, appeals, as limited by his brief, from the same order insofar as it denied his cross motion to intervene, filed on behalf of himself and various other proposed intervenors. Supreme Court also denied

plaintiff's cross motion seeking, in effect, summary judgment on the first cause of action, which asserted a breach of promissory note cause of action against defendant COR Inner Harbor Company LLC (COR LLC) only. Although plaintiff filed a notice of cross appeal, it does not raise any contentions related thereto, and we therefore deem plaintiff's cross appeal abandoned and dismissed (*see* 22 NYCRR 1250.10 [a]; *Brown v State of New York* [appeal No. 2], 144 AD3d 1535, 1537 [4th Dept 2016], *affd* 31 NY3d 514 [2018]; *Lancaster Manor LLC v Comprehensive at Lancaster, LLC*, 202 AD3d 1446, 1446 [4th Dept 2022]).

Contrary to the various contentions of defendants and Ding, we conclude that the order should be affirmed in all respects.

Plaintiff is a limited partnership that loaned $4,000,000 to COR LLC for the purpose of building a hotel at the Inner Harbor in Syracuse. Plaintiff's limited partners were 10 foreign investors who sought to obtain green cards pursuant to the EB-5 Immigrant Investor Program (EB-5 Program) (*see* 8 USC § 1153 [b] [5] [A]). In furtherance of the project, COR LLC applied for and received site plan approval from the City of Syracuse (City), i.e., the owner of the property upon which the hotel was to be built. Shortly thereafter, however, the City transferred title to the land to defendant COR West Kirkpatrick Street Company LLC (COR Kirkpatrick), which, according to plaintiff, is owned and controlled by the same parties who own and control COR LLC.

Several months later, plaintiff and COR LLC executed a promissory note, and plaintiff thereafter transferred $4,000,000 to COR LLC's attorneys at defendant Mannion & Copani (Law Firm) to be held in escrow pending transfer to COR LLC. Pursuant to the escrow agreement, the Law Firm was to disburse the funds to COR LLC. Despite that provision in the escrow agreement, the Law Firm transferred large portions of the funds to COR Kirkpatrick, and it is alleged that any funds distributed to COR LLC were "immediately transferred" to COR Kirkpatrick. At no point did plaintiff object to the transfers but, inasmuch as COR LLC received no consideration for the transfers to COR Kirkpatrick, COR LLC was left completely devoid of assets.

Although COR Kirkpatrick had no legal obligation to make payments on the promissory note, it made some payments. All payments ceased when the first addendum came due. When plaintiff sought information from COR LLC, plaintiff was informed that COR LLC was insolvent inasmuch as it had no interest in the hotel and had no tangible assets.

Plaintiff thereafter commenced this action against COR LLC, COR Kirkpatrick, the Law Firm and the individual members or owners of COR LLC (individual defendants). In the first cause of action, plaintiff alleged that COR LLC breached the promissory note. In the second cause of action, plaintiff asserted a fraud cause of action against all defendants. In the third cause of action, against only the Law Firm, plaintiff alleged that the Law Firm breached the escrow agreement by releasing funds to COR Kirkpatrick rather than to COR LLC. In the fourth and fifth causes of action, which were asserted

against all defendants, plaintiff alleged that defendants engaged in fraudulent conveyances in violation of former sections 273, 274 and 276 of the Debtor and Creditor Law. In lieu of an answer, defendants jointly moved to dismiss all of the causes of action except the first. Ding, on behalf of himself and the other proposed intervenors, making up the individual members of plaintiff, cross-moved to intervene, contending that plaintiff would not adequately protect their interests inasmuch as they were the parties that actually contributed the money toward the project in the hopes of obtaining green cards pursuant to the EB-5 Program (*see* 8 USC § 1153 [b] [5] [A]).

Defendants contend that, although the court granted the motion insofar as it sought dismissal of the second cause of action and dismissal of the fourth and fifth causes of action against the Law Firm, the court should have dismissed the third cause of action and the fourth and fifth causes of action in their entirety pursuant to CPLR 3211 (a) (1) because plaintiff ratified the transfer of assets from COR LLC to COR Kirkpatrick. We reject that contention. "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In other words, the submitted documents must " 'utterly refute[]' " the allegations in the complaint and " 'conclusively establish[ ] a defense as a matter of law' " (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021], quoting *Goshen*, 98 NY2d at 326). Here, we conclude that the documentary evidence does not establish ratification as a matter of law. "Ratification is the act of knowingly giving sanction or affirmance to an act that would otherwise be unauthorized and not binding" (*Northland E., LLC v J.R. Militello Realty, Inc.*, 163 AD3d 1401, 1405 [4th Dept 2018] [internal quotation marks and emphasis omitted]; *see Green Tree Servicing, LLC v Feller*, 159 AD3d 1246, 1247-1248 [3d Dept 2018]).

Although the documentary evidence may establish all of the facts alleged by defendants, including the fact that plaintiff's loan was unsecured and that plaintiff knew that COR LLC intended to transfer the funds to COR Kirkpatrick, there is no evidence that plaintiff knew that COR LLC would not receive any consideration for the transfers, thus rendering COR LLC insolvent and rendering plaintiff unable to receive any of the benefits of its bargain (*see Dawes v Dawes*, 110 AD3d 1450, 1452 [4th Dept 2013]; *cf. In re Lyondell Chem. Co.*, 503 BR 348, 383-385 [SD NY 2014], *abrogated on other grounds by In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F3d 98 [2d Cir 2016]). Indeed, there is no evidence that plaintiff could have possibly anticipated that COR LLC would intentionally render itself insolvent in that manner, as the complaint alleges.

Defendants further contend that the court should have granted the motion insofar as it sought to dismiss the complaint against the individual defendants on the ground that the complaint fails to allege facts warranting a piercing of COR LLC's corporate veil. "The concept of piercing the corporate veil is a limitation on the accepted

principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). It is well settled that "New York law disfavors disregard of the corporate form" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]). Nevertheless, "a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Here, contrary to defendants' contention, plaintiff raised sufficient allegations that the individual defendants "exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011] [internal quotation marks omitted]; *see generally Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015], *rearg denied* 25 NY3d 1193 [2015]). Indeed, although "[t]he mere claim that the [entity] was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil" (*Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008]; *see Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 965 [2d Dept 2018]), plaintiff sufficiently alleged that "corporate funds were purposefully diverted to make [COR LLC] judgment-proof," and such allegations "are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407-408 [1st Dept 2014]; *see Villnave Constr. Servs., Inc. v Crossgates Mall Gen. Co. Newco, LLC*, 201 AD3d 1183, 1188 [3d Dept 2022]; *see generally Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012]).

We reject defendants' further contention that the court should have granted the motion insofar as it sought to dismiss the fourth and fifth causes of action against the individual defendants on the ground that the complaint fails to allege that the loan proceeds were transferred to the individual defendants or that the individual defendants used the proceeds for personal or improper purposes. As noted above, those causes of action allege violations of former sections 273, 274 and 276 of the Debtor and Creditor Law. Because the alleged actions of defendants took place before the Debtor and Creditor Law was amended, we analyze defendants' contention under the provisions of that law that were in effect at the time of the events in question. Inasmuch as we have concluded that the allegations are sufficient to pierce the corporate veil and we must "accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks omitted]), we conclude that the factual allegations in the complaint are sufficient to state causes of action against the

individual defendants for a violation of those former sections of the Debtor and Creditor Law (*cf. Chang v Danjonro, Inc.*, 81 AD3d 510, 511 [1st Dept 2011]; *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]).

Contrary to defendants' additional contention, the court properly denied the motion insofar as it sought to dismiss the third cause of action under CPLR 3211 (a) (7). Accepting the facts in the complaint as true and according plaintiff the benefit of every favorable inference, we conclude that the third cause of action asserts a claim against the Law Firm for breach of contract (*see Maspeth Fed. Sav. & Loan Assn. v Elizer*, 197 AD3d 1253, 1254 [2d Dept 2021]; *see generally Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Finally, we conclude that the court did not err in denying Ding's cross motion. As a preliminary matter, we note that we have not considered new matters that were improperly raised for the first time in Ding's "[r]eply [a]ffidavit" submitted in connection with his cross motion (*see generally Whitley v Pieri*, 48 AD3d 1175, 1176 [4th Dept 2008]). With respect to the contentions properly before us, it is well established that "[w]hether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677 [2d Dept 2010]; *see Jones v Town of Carroll*, 158 AD3d 1325, 1327 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]). Here, however, we conclude that Ding failed to establish that his interests were not adequately represented by plaintiff (*see* CPLR 1012 [a] [2]; *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844 [2d Dept 2009]), and failed to establish that he had a real and substantial interest in the outcome of the litigation (*see Romonoff Rest. & Cabaret v World Wide Asset Mgt. Corp.*, 273 AD2d 292, 293 [2d Dept 2000]; *cf. Matter of Norstar Apts. v Town of Clay*, 112 AD2d 750, 751 [4th Dept 1985]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

728

CA 22-00201

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

ON THE WATER PRODUCTIONS, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS GLYNOS AND RYAN EVANS,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF SILVERBERG AND SILVERBERG, LLP, BUFFALO (DAVID K. SILVERBERG OF COUNSEL), FOR DEFENDANT-APPELLANT NICHOLAS GLYNOS.

STAMM LAW FIRM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR DEFENDANT-APPELLANT RYAN EVANS.

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 10, 2021. The order, among other things, granted plaintiff's motion for summary judgment and denied the cross motion of defendant Ryan Evans for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking various relief arising from defendant Nicholas Glynos's alleged breach of a contract to sell plaintiff a 53-foot yacht (vessel) and the alleged conversion of the vessel by Glynos and defendant Ryan Evans, the sales broker who arranged the transaction. The second amended complaint seeks specific performance of the parties' oral contract and damages for the alleged conversion of the vessel, as well as an award of punitive damages and attorneys' fees. In his answer to the second amended complaint, Glynos asserted a counterclaim for breach of contract, alleging that plaintiff still owes a balance of $108,281.18 on the parties' oral contract, while Evans, in his answer to the second amended complaint, asserted various counterclaims based on plaintiff's alleged failure to pay his commission.

Following discovery, plaintiff moved for, in effect, partial summary judgment on liability on the breach of contract and conversion causes of action in the second amended complaint, and Evans cross-moved for summary judgment on his counterclaims. Supreme Court

granted the motion and denied the cross motion. Defendants separately appeal. For the reasons that follow, we modify the order by denying plaintiff's motion and otherwise affirm.

In granting plaintiff's motion, the court determined that it was compelled to deem admitted the assertions set forth in plaintiff's statement of material facts because neither defendant submitted a counter statement of undisputed facts pursuant to the Uniform Rules for the New York State Trial Courts (*see* 22 NYCRR 202.8-g [b], [former (c)]). That was error. Although the court had discretion under section 202.8-g (former [c]) to deem the assertions in plaintiff's statement of material facts admitted, it was not required to do so (*see Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 850-851 [3d Dept 2022]; *see also Smith v MDA Consulting Engrs., PLLC*, — AD3d —, 2022 NY Slip Op 06389, *1 [4th Dept 2022]). "[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g" was not mandated (*Leberman*, 207 AD3d at 851 [internal quotation marks omitted]).

Here, considering that plaintiff's statement of material facts did not fully comply with 22 NYCRR 202.8-g (d) and ignored the pivotal factual dispute arising from discovery, we conclude that, although it would have been better practice for defendants to "submit a paragraph-by-paragraph response to plaintiff's statement" (*Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506, 507 [1st Dept 2014]), "the court abused its discretion in deeming the entire statement admitted" (*Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1338 [4th Dept 2015]).

In light of that determination, we conclude that plaintiff failed to meet its initial burden on its motion. Plaintiff submitted evidence establishing that it paid $529,896.01 toward the purchase of the vessel, which is far more than the renegotiated price of $399,000 that was orally agreed upon by the parties during a meeting at a pizza parlor in Ohio in the spring of 2015. That amount consists of payments made directly by plaintiff to Glynos and Evans, as well as payments made by plaintiff on Glynos's behalf to a bank that had a lien on the vessel arising from a secured loan extended to Glynos.

In further support of the motion, however, plaintiff submitted the deposition testimony of Glynos and Evans. At his deposition, Glynos testified that plaintiff's authorized representative agreed during the meeting at the pizza parlor that none of the payments made by plaintiff prior to that date would be credited toward the new purchase price. According to Glynos, plaintiff's representative said at the meeting that his wife, who is plaintiff's owner, "wants that boat, whatever it costs," and that the representative agreed that the only payments that plaintiff would get credit for were those made on the boat loan to the bank. All other prior payments were "null and void," with the parties starting "all fresh" with the new purchase price of $399,000, Glynos testified. Evans offered similar testimony during his deposition. Plaintiff's representative, on the other hand, vehemently denied agreeing to any forfeiture of prior payments. "I'd have to be an idiot to allow any payments not to be applied towards the purchase," he testified at his deposition.

If plaintiff's representative agreed to forfeit the money plaintiff paid for the vessel prior to the pizza parlor meeting, as defendants testified in their depositions, then plaintiff still owes Glynos money on the $399,000 contract—approximately $108,000, according to Glynos—and defendants' repossession of the vessel may therefore have been lawful, or at least not a conversion. Although the veracity of defendants' testimony in that regard is called into question by other evidence submitted by plaintiff on its motion, we cannot conclude that the testimony is incredible as a matter of law, i.e., "manifestly untrue, physically impossible, contrary to experience or self-contradictory" (*Lewis v Carrols LLC*, 158 AD3d 1055, 1056-1057 [4th Dept 2018] [internal quotation marks omitted]; *see Key Bank of N.Y. v Dembs*, 244 AD2d 1000, 1000-1001 [4th Dept 1997]). The conflict in deposition testimony regarding whether plaintiff's representative agreed to the forfeiture of prior payments "raises a question of credibility to be resolved at trial" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1470 [4th Dept 2013] [internal quotation marks omitted]), necessitating the denial of plaintiff's motion regardless of the sufficiency of the opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, we conclude that the court properly denied the cross motion of Evans inasmuch as he failed to meet his initial burden of establishing entitlement to judgment as a matter of law on his counterclaims (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

733

CAF 21-00672

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

IN THE MATTER OF GINA R., NASIR-JABAR R., JUAN R., AMALIA M., AND JAHMAR M.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

CHRISTINA R., RESPONDENT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered September 10, 2021 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the finding that respondent neglected the subject children based on her repeated use of marihuana while caring for them and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order following a fact-finding hearing that, inter alia, determined that the mother neglected the subject children. As a preliminary matter, we exercise our discretion to treat the mother's notice of appeal from the order following the fact-finding hearing as a valid notice of appeal from the subsequently entered order of fact-finding and disposition (*see* CPLR 5520 [c]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]; *Matter of Hunter K. [Robin K.]*, 142 AD3d 1307, 1308 [4th Dept 2016]).

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to

be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]; *see Matter of Olivia W. [Courtney W.]*, 184 AD3d 1080, 1080-1081 [4th Dept 2020]).

Here, we conclude that there is a sound and substantial basis in the record supporting Family Court's determination that petitioner met its burden of establishing that the youngest of the subject children was neglected (*see generally Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]) by presenting evidence that the mother wrapped the infant to sleep, on more than one occasion, in loose blankets, despite repeated warnings that doing so created a substantial risk to the child (*see Matter of Aerobella T. [Bartolomeo V.]*, 170 AD3d 1453, 1455-1456 [3d Dept 2019]; *Matter of Evelyn EE. v Ayesha FF.*, 143 AD3d 1120, 1127-1128 [3d Dept 2016], *lv denied* 28 NY3d 913 [2017]).

We agree with the mother, however, that the court erred in applying Family Court Act § 1046 (a) former (iii) in determining that petitioner established a prima facie case that the subject children were neglected based solely on the mother's use of marihuana, without presenting evidence that the children's condition was impaired or at imminent risk of impairment (*see* Family Ct Act § 1046 [a] [iii]; *Matter of Mahkayla W. [Raheem W.]*, 206 AD3d 599, 600 [1st Dept 2022]; *Matter of Saaphire A.W. [Lakesha B.]*, 204 AD3d 488, 489 [1st Dept 2022]), and we therefore modify the order by vacating that finding. "The Marihuana Regulation and Taxation Act (L 2021, ch 92) amended Family [Court] Act § 1046 (a) (iii), in pertinent part, by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided '[that there is] a separate finding that the child's physical[,] mental or emotional condition was impaired or is in imminent danger of becoming impaired' " (*Matter of Micah S. [Rogerio S.]*, 206 AD3d 1086, 1090 n 5 [3d Dept 2022]). The amendment to section 1046 (a) (iii) went into effect on March 31, 2021 (*see* L 2021, ch 92), two days before the court rendered its decision in this case and, "[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision" (*Rocky Point Drive-In, L.P. v Town of Brookhaven*, 21 NY3d 729, 736 [2013]; *see Matter of Wendy B v Ronald B*, 53 AD2d 160, 162 [3d Dept 1976]). Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. We

therefore remit the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana (*see generally Matter of Jessica R.*, 78 NY2d 1031, 1032-1033 [1991]; *Matter of Alfonzo H. [Cassie L.]*, 77 AD3d 1410, 1411 [4th Dept 2010]).

We have considered the mother's remaining contentions and conclude that none warrants further modification or reversal of the order.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

756

KA 17-01154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY M. ANDERSON, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered March 31, 2017. 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 upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [12]), arising from an incident in which he attacked a 69-year-old man employed by a restaurant as a security officer, who was preventing defendant from entering the restaurant because defendant was attempting to bring outside liquor into the establishment. During the incident, defendant repeatedly struck the security officer in the head with his hands, and the video of the incident shows defendant kicking the officer in the head as the officer lay on the ground. Defendant contends that the verdict is against the weight of the evidence with respect to the element of physical injury. We affirm.

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). At trial, the People did not contend that the victim's physical condition was impaired. Rather, they relied solely on the evidence that the victim suffered substantial pain. " '[S]ubstantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th

Dept 2013], *lv denied* 22 NY3d 1156 [2014]). "Motive is relevant because an offender more interested in displaying hostility than in inflicting pain will often not inflict much of it" (*Chiddick*, 8 NY3d at 448). Here, photos of the injury were introduced at trial, and the security officer testified that, after the attack, he was dizzy, light-headed and had a pain level above 8½ out of 10, and that, for up to a month thereafter, he had pain in his head. In addition, the victim was prescribed ibuprofen for the pain, he obtained emergency medical treatment, and he followed up with further treatment with his own physician. Furthermore, the video recording of the incident shows that defendant engaged in an unprovoked attack on an elderly security guard with the obvious intent to cause harm. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence on the issue of physical injury (*see People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we note that the certificate of conviction must be corrected to reflect that Joanne M. Winslow, J., presided at trial and sentencing (*see People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

758

KA 19-01824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANNABEL PIETROCARLO, DEFENDANT-APPELLANT.

ANDREW D. FISKE, BUFFALO, 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 (Christopher J. Burns, J.), rendered July 16, 2019. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting her, after a nonjury trial, of assault in the second degree as an accessory (Penal Law §§ 20.00, 120.05 [12]), and petit larceny (§ 155.25), in connection with an incident where she and three other members of her family (codefendants) allegedly acted in concert to attack and cause physical injury to the victim, i.e., defendant's father. We affirm.

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 her conviction of assault in the second degree as an accessory. As relevant here, a person is guilty of assault in the second degree when, "[w]ith intent to cause physical injury to a person who is sixty-five years of age or older, he or she causes such injury to such person, and the actor is more than ten years younger than" the victim (Penal Law § 120.05 [12]). To establish defendant's guilt as an accessory under Penal Law § 20.00, the People were required to prove that defendant had "a shared intent, or community of purpose with the principal [actor] . . . , and that [s]he intentionally aided the principal in bringing forth [the] result" (*People v Nelson*, 178 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]; *see People v Allah*, 71 NY2d 830, 832 [1988]; *People v McDonald*, 172 AD3d 1900, 1901 [4th Dept 2019]).

Contrary to defendant's contention, this is not a case where she

was convicted based solely on her presence at the scene of the crime (*cf. People v Tucker*, 72 NY2d 849, 850 [1988]; *see generally Matter of Tatiana N.*, 73 AD3d 186, 190-191 [1st Dept 2010]). The victim specifically identified defendant as the instigator of the physical altercation, testifying that defendant reached for some money that was in the victim's right pants pocket and placed her arm around his throat, whereupon he stumbled to the ground. Further, in our view, the victim's testimony at trial is legally sufficient to establish that defendant acted in concert with the codefendants to cause physical injury to the victim. It is immaterial that the victim could not conclusively state whether defendant actually kicked him during the attack or whether she caused him injury (*see People v Hill*, 251 AD2d 129, 129 [1st Dept 1998], *lv denied* 92 NY2d 899 [1998]) because the victim's testimony that he was surrounded by defendant and the codefendants and was kicked on all sides following a confrontation about money allows for the reasonable inference that defendant and the codefendants collectively delivered the blows that caused the victim's injuries and that they shared the common purpose of injuring him (*see People v Staples*, 19 AD3d 1096, 1097 [4th Dept 2005], *lv denied* 5 NY3d 810 [2005]; *People v Rosario*, 199 AD2d 92, 93 [1st Dept 1993], *lv denied* 82 NY2d 930 [1994]).

Defendant also contends that the evidence is legally insufficient to support her conviction of petit larceny because there is no evidence that she possessed or spent the money that was taken from the victim during the incident. We reject that contention. "A person is guilty of petit larceny when he [or she] steals property" (Penal Law § 155.25). " 'A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself [or herself] or a third person, he [or she] wrongfully takes, obtains or withholds such property from an owner thereof' " (*People v Jensen*, 86 NY2d 248, 252 [1995], quoting § 155.05 [1]). "Property" includes, inter alia, any amount of money (§ 155.00 [1]), and an owner is "any person who has a right to possession thereof superior to that of the taker, obtainer or withholder" (§ 155.00 [5]; *see People v Hightower*, 18 NY3d 249, 254 [2011]). "The offense of larceny is complete when there has been 'a taking or severance of the goods from the possession of the owner' and even momentary possession of another's property by the accused is sufficient" (*People v Smith*, 140 AD2d 259, 260-261 [1st Dept 1988], *lv denied* 72 NY2d 924 [1988], quoting *Harrison v People*, 50 NY 518, 523 [1872]).

Viewed in the light most favorable to the People (*see Contes*, 60 NY2d at 621), the evidence established that, during the incident, defendant reached into the victim's right pants pocket and removed the money contained there, thereby taking property from an individual with a superior right thereto (*see* Penal Law § 155.00 [5]; *Hightower*, 18 NY3d at 254; *Smith*, 140 AD2d at 260-261). Even assuming, arguendo, that defendant did not ultimately secure the money that she had taken out of the victim's pocket—i.e., that she did not possess or spend the money after taking it from the victim—her responsibility for the petit larceny "is not diminished because [her] act of carrying away the [money] (asportation) is frustrated at an early stage" (*People v*

Robinson, 60 NY2d 982, 983 [1983]). Indeed, a defendant "can be guilty of larceny even though his [or her] removal of the victim's possessions [was] interrupted before completion" (*id.* at 984). Thus, there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant committed petit larceny, and therefore the evidence is legally sufficient to support the conviction on that count (*People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019] [internal quotation marks omitted]; *see generally People v Baldwin*, 173 AD3d 1748, 1748-1749 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

Additionally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although "an acquittal [of either crime] would not have been unreasonable" based on the conflicting accounts of what occurred during the altercation (*Danielson*, 9 NY3d at 348; *see People v Gibson*, 89 AD3d 1514, 1515 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012]), " 'matters of credibility are for the [factfinder] to resolve' " (*People v Pierce*, 303 AD2d 966, 966 [4th Dept 2003], *lv denied* 100 NY2d 565 [2003]), and we cannot conclude on this record that the factfinder "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *see People v Lankford*, 162 AD3d 1583, 1584 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *People v Zafuto*, 72 AD3d 1623, 1624 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

759

KA 20-00956

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUBIN JONES, III, DEFENDANT-APPELLANT.

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

RUBIN JONES, III, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 12, 2020. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the second degree (two counts) and endangering the welfare of an incompetent or physically disabled person 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 two counts of criminal sexual act in the second degree (Penal Law § 130.45 [2]) and one count of endangering the welfare of an incompetent or physically disabled person in the first degree (§ 260.25). As an initial matter, defendant correctly contends in his main brief and the People correctly concede that defendant's waiver of the right to appeal is invalid because County 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]). We further agree with defendant that the waiver of the right to appeal is invalid because the court " 'conflated the appeal waiver with the rights automatically waived by the guilty plea' " (*People v Smith*, 156 AD3d 1336, 1336 [4th Dept 2017], *lv denied* 31 NY3d 987 [2018]). Consequently, "the record fails to 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 Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016],

lv denied 27 NY3d 1067 [2016] [internal quotation marks omitted]; *see People v Wright*, 193 AD3d 1348, 1349 [4th Dept 2021], *lv denied* 37 NY3d 969 [2021]).

Defendant contends in his main brief that the court should have afforded him the opportunity to withdraw his guilty plea because his statement of innocence at sentencing cast doubts on whether the plea was knowingly, intelligently, and voluntarily entered. Defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Scales*, 118 AD3d 1500, 1500 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014]; *see generally People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). We further conclude that defendant failed to preserve for our review his contention in his pro se supplemental brief that he was coerced into taking the plea by statements made by the court (*see generally People v Kelly*, 145 AD3d 1431, 1431 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]; *People v Lando*, 61 AD3d 1389, 1389 [4th Dept 2009], *lv denied* 13 NY3d 746 [2009]).

We reject defendant's contention in his main brief that the sentence is unduly harsh and severe.

Defendant's challenge in his pro se supplemental brief to the legal sufficiency of the evidence before the grand jury does not survive his guilty plea (*see People v Hansen*, 95 NY2d 227, 232 [2000]; *People v Scarbrough*, 162 AD3d 1575, 1575 [4th Dept 2018], *lv denied* 34 NY3d 1081 [2019], *reconsideration denied* 35 NY3d 974 [2020]; *People v Oswold*, 151 AD3d 1756, 1756-1757 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]). Review of defendant's contention in his pro se supplemental brief that the indictment contained duplicitous counts was forfeited by his plea of guilty (*see People v Bracewell*, 26 AD3d 812, 812 [4th Dept 2006], *lv denied* 7 NY3d 752 [2006]; *see generally People v Beattie*, 80 NY2d 840, 842 [1992]).

Finally, we note that the certificate of conviction erroneously states that defendant was convicted of endangering the welfare of an incompetent or physically disabled person in the first degree under Penal Law § 265.25, and it must be amended to correctly reflect that defendant was convicted of that offense under Penal Law § 260.25 (*see generally People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

761

KA 19-00213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARQUIN Q. CALDWELL, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), rendered December 7, 2018. The judgment convicted defendant upon a jury verdict of criminal contempt in the first degree (six counts) and aggravated family offense (six counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the convictions of criminal contempt in the first degree (Penal Law § 215.51 [c]) under counts 4, 6, 8, 10 and 12 of the indictment to criminal contempt in the second degree (§ 215.50 [3]), and by vacating the sentences imposed on those counts and on count 5, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for sentencing on the convictions of criminal contempt in the second degree and resentencing on count 5.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts each of criminal contempt in the first degree (Penal Law § 215.51 [c]) and aggravated family offense (§ 240.75 [1]). The final five counts of criminal contempt in the first degree, i.e., counts 4, 6, 8, 10 and 12 of the indictment, are based on evidence establishing that an order of protection had been issued against defendant for the benefit of a person and that on five occasions defendant made telephone calls from the Monroe County Jail to that person. As defendant contends, and the People correctly concede, the evidence with respect to those counts is legally insufficient. With respect to those counts, the People were required to establish that defendant committed the crime of criminal contempt in the second degree (§ 215.50 [3]), and that he did so "by violating that part of a duly served order of protection . . . which requires the . . . defendant to stay away from the person or persons on whose behalf the order was issued" (§ 215.51 [c]). Here, defendant was in

jail when the calls at issue were made and the People failed to "prove[], beyond a reasonable doubt, that defendant had any contact with the protected person during the charged incident[s]" (*People v Crittenden*, 188 AD3d 1739, 1740 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]; *see People v Dewall*, 15 AD3d 498, 499-501 [2d Dept 2005], *lv denied* 5 NY3d 787 [2005]). Nevertheless, the evidence is legally sufficient to establish the lesser included offense of criminal contempt in the second degree (*see generally Crittenden*, 188 AD3d at 1741), and we therefore modify the judgment accordingly. We have considered defendant's remaining challenges to the legal sufficiency of the evidence and we conclude that they do not require reversal or further modification of the judgment.

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of criminal contempt in the first degree under count one of the indictment, criminal contempt in the second degree and aggravated family offense 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]).

Finally, we note that a discrepancy between the sentencing minutes and the certificate of conviction and uniform sentence and commitment form requires vacatur of the sentence imposed on the conviction of aggravated family offense under count five of the indictment. The minutes from the sentencing proceeding indicate that Supreme Court directed that the sentence on that count be served consecutively to the remaining sentences, but both the certificate of conviction and uniform sentence and commitment form indicate that all of the sentences are to be served concurrently. Inasmuch as the court clerk who prepared those documents may have erred in writing that the sentences imposed are to be served concurrently, and because it is well settled that courts have the " 'inherent power to correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth' " (*People v Minaya*, 54 NY2d 360, 364 [1981], *cert denied* 455 US 1024 [1982]; *see People v Gammon*, 19 NY3d 893, 895-896 [2012]), we further modify the judgment by vacating the sentence imposed on count five of the indictment and we remit the matter to Supreme Court for resentencing on that count so that the court may correct the record by indicating whether that sentence imposed on count five is to run consecutively to or concurrently with the sentences imposed on other counts. Because we are remitting for resentencing on that count, we also direct the court on remittal to sentence defendant on the five counts of criminal contempt in the second degree.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

762

KA 21-01012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARL REYNOLDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered March 18, 2021. The judgment convicted defendant after a nonjury trial of criminal sexual act in the third degree, sexual abuse in the third degree (three counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of three counts of sexual abuse in the third degree (Penal Law § 130.55) and one count each of criminal sexual act in the third degree (§ 130.40 [2]) and endangering the welfare of a child (§ 260.10 [1]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012] [internal quotation marks omitted]). Determination of the instant case rested on the credibility of the witnesses, and "we cannot say that [County Court] failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984 [2002], *lv denied* 99 NY2d 556 [2002]).

Contrary to defendant's further contention, the court did not err in denying his request for a missing witness charge. As the party requesting the charge, defendant bore the initial burden of establishing " '(1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, (2) that

such witness can be expected to testify favorably to the opposing party, and (3) that such party had failed to call the witness to testify' " (*People v Lewis-Bush*, 204 AD3d 1424, 1426 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022], quoting *People v Smith*, 33 NY3d 454, 458-459 [2019]). Defendant failed to meet that initial burden (*see generally People v Desius*, 188 AD3d 1626, 1629 [4th Dept 2020], *lv denied* 36 NY3d 1096 [2021]). Defendant contends, with respect to the multifactor missing witness analysis, that this Court is barred from considering any other factor than the specific factor of the missing witness analysis explicitly referenced by the court when it denied defendant's request for a missing witness charge. We reject that contention (*see People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]). Significantly, the court, in its denial of defendant's request, did not explicitly reject the arguments advanced by the People to support denial on the basis of the other factors of the multifactor analysis, and therefore we are not precluded from considering those factors (*cf. People v Garcia*, 192 AD3d 1463, 1467 [4th Dept 2021]).

As defendant correctly concedes, defendant's contention that he was deprived of a fair trial due to instances of prosecutorial misconduct during the prosecutor's summation is unpreserved because defense counsel did not object to any of the purportedly improper comments (*see People v Moore*, 198 AD3d 1304, 1305 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022]). In any event, we reject that contention and conclude that no prosecutorial misconduct occurred. Inasmuch as we conclude that there was no prosecutorial misconduct, we reject defendant's related contention that he was denied effective assistance of counsel based on defense counsel's failure to object to certain alleged improprieties during the prosecutor's summation (*see People v Cordell*, 188 AD3d 1620, 1621-1622 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]).

Finally, we note that the uniform sentence and commitment sheet incorrectly states that defendant was convicted of three counts under Penal Law § 130.22, and thus it must be amended to reflect that these convictions were under Penal Law § 130.55 (*see generally People v McLamore*, 191 AD3d 1413, 1415 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

764

OP 22-00744

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

IN THE MATTER OF BOWERS DEVELOPMENT, LLC, AND ROME PLUMBING & HEATING SUPPLY CO., INC., PETITIONERS,

V MEMORANDUM AND ORDER

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY AND CENTRAL UTICA BUILDING, LLC, RESPONDENTS.

FOGEL & BROWN, P.C., SYRACUSE (MICHAEL A. FOGEL OF COUNSEL), FOR PETITIONERS.

PAUL J. GOLDMAN, ALBANY, FOR RESPONDENT ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR RESPONDENT CENTRAL UTICA BUILDING, LLC.

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent Oneida County Industrial Development Agency to condemn certain real property.

It is hereby ORDERED that the determination is annulled on the law without costs and the petition is granted.

Memorandum: Petitioners commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent Oneida County Industrial Development Agency (OCIDA) to condemn certain real property by eminent domain. Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act (SEQRA)] and EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see* EDPL 207 [C]; *Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed and lv denied* 14 NY3d 924 [2010]).

We agree with petitioners that OCIDA lacked the requisite authority to acquire the subject property. As an industrial

development agency, OCIDA's statutory purposes are, inter alia, to "promote, develop, encourage and assist in the acquiring . . . [of] . . . commercial . . . facilities" (General Municipal Law § 858). OCIDA's powers of eminent domain are restricted by General Municipal Law § 858 (4), which provides, in relevant part, that an industrial development agency shall have the power "[t]o acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law, or otherwise and to use, real property . . . therein necessary for its corporate purposes." The purposes enumerated in the statute do not include projects related to hospital or healthcare-related facilities (*see* § 858). While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project. We therefore annul the determination and grant the petition (*see Syracuse Univ.*, 71 AD3d at 1435; *see generally Schulman v People*, 10 NY2d 249, 255-256 [1961]; *Peasley v Reid*, 57 AD2d 998, 999 [3d Dept 1977]).

In light of our determination, petitioners' remaining contentions are academic (*see Matter of Hargett v Town of Ticonderoga*, 35 AD3d 1122, 1124 [3d Dept 2006], *lv denied* 8 NY3d 810 [2007]).

All concur except CURRAN, J., who dissents and votes to confirm the determination and dismiss the petition in the following memorandum: I respectfully dissent from the majority's conclusion that respondent Oneida County Industrial Development Agency (OCIDA) lacked the requisite statutory authority to acquire the subject property via eminent domain pursuant to its broad purposes as set forth in General Municipal Law § 858 because I conclude that OCIDA's determination that construction of a surface parking lot on the subject property constitutes a "commercial facility" is neither irrational nor unreasonable. Inasmuch as I agree with respondents that acquisition of the subject property serves a public purpose (*see generally Matter of Truett v Oneida County*, 200 AD3d 1721, 1722 [4th Dept 2021], *lv denied* 38 NY3d 907 [2022]), and further agree that petitioners' remaining contentions are without merit, I would confirm the determination and dismiss the petition.

I.

Following an extensive review process that concluded in 2015, the Mohawk Valley Hospital System (MVHS) began the process of consolidating its healthcare services for Oneida, Herkimer, and Madison counties into an integrated healthcare campus to be located in a blighted section of the downtown area of the City of Utica. In 2017, MVHS received a $300 million grant from the New York State Department of Health to situate the integrated healthcare campus at the downtown location. The central feature of the new campus will be Wynn Hospital, which has received its certificate of need and is currently under construction. Since its inception, MVHS's plan for

the healthcare campus has included a private medical office building (MOB) to be located on Columbia Street behind Wynn Hospital. Also from its inception, the plan envisioned surface level parking to be located adjacent to the MOB. MVHS owns three of the four parcels along Columbia Street that would be leased to the MOB operator both for the MOB itself as well as for the adjacent surface level parking.

MVHS ultimately elected to have respondent Central Utica Building, LLC (CUB), a for-profit company founded by private physicians, own and operate the MOB. CUB's MOB would, in addition to servicing its own patients on a for-profit basis, provide outpatient services deemed valuable to MVHS for its integrated heathcare campus. CUB has specific occupancy plans for the MOB, including approximately 20,000 square feet dedicated to a group of cardiologist physicians, and 18,000 square feet for the purpose of operating "a[] [Public Health Law a]rticle 28 licensed, Medicare certified multi-specialty ambulatory surgery center with six operating rooms." CUB has secured financing for its MOB proposal.

The fourth parcel along Columbia Street—i.e., the subject property—is owned by petitioner Rome Plumbing & Heating Supply Co., Inc. The subject property is an approximately one-acre piece of real property that has, for years, been slated to be part of the surface level parking area located immediately adjacent to the MOB. Petitioner Bowers Development, LLC (Bowers) purports to be the contract vendee for the subject property. Bowers allegedly plans to construct its own MOB on the one-acre parcel, despite not having identified any physician group willing to service it, and not having any arrangement with MVHS or any ability to use the adjacent parcels owned by MVHS for parking.

Meanwhile, CUB submitted an application with OCIDA for financial assistance on the MOB project. It also requested that OCIDA take the subject property through the exercise of its eminent domain power under General Municipal Law § 858 (4). Before deciding whether to invoke its eminent domain powers to acquire the subject property, OCIDA conducted a public hearing during which Bowers agreed with CUB that a MOB located near the hospital would benefit downtown Utica, address urban blight, and enhance patient care. During the review process, one of petitioners' main objections was that OCIDA lacked the requisite statutory authority under General Municipal Law § 858 to use its eminent domain power because that statute "provides the current list of projects for which industrial development agencies have authority," and that list "does not include hospital or health-related projects." Further, inasmuch as "[t]he proposed CUB project is a hospital or health-related project . . . , the CUB project is not a type of project [for] which OCIDA has jurisdiction or authority." In its determination and findings, OCIDA expressly rejected those contentions and concluded that taking the subject property was within its power because it was for a "commercial facility"—i.e., the surface parking lot—noting, inter alia, that its determination of what constitutes a commercial project is entitled to judicial deference so long as it is reasonable (*see Matter of Nearpass v Seneca County*

Indus. Dev. Agency, 152 AD3d 1192, 1193 [4th Dept 2017]). Thereafter, petitioners commenced this original proceeding pursuant to EDPL 207 seeking to annul OCIDA's determination to condemn the subject property via eminent domain.

II.

In a proceeding brought pursuant to EDPL 207, "[t]he scope of our review is necessarily narrow since [the] exercise of the eminent domain power is a legislative function" (*Matter of West 41st St. Realty v New York State Urban Dev. Corp.*, 298 AD2d 1, 6 [1st Dept 2002], *appeal dismissed* 98 NY2d 727 [2002], *cert denied* 537 US 1191 [2003]; *see Kaskel v Impellitteri*, 306 NY 73, 80 [1953], *rearg denied and mot to amend remittitur granted* 306 NY 609 [1953], *cert denied* 347 US 934 [1954]; *Matter of New York City Hous. Auth. v Muller*, 270 NY 333, 339 [1936]). As a result, this Court's review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with SEQRA and EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see* EDPL 207 [C]). As noted above, the issue in dispute here is whether OCIDA had the requisite statutory authority to use its eminent domain power to take the subject property.

It is "well established that an [industrial development agency] is 'authorized by statute to exercise the State's eminent domain powers' " (*Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 41 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]; *see generally* General Municipal Law § 858 [4]). Thus, there is no dispute that OCIDA has the statutory authority to acquire the subject property. The particular point upon which the majority and I disagree is whether OCIDA has exercised that statutory power "for its corporate purposes" (General Municipal Law § 858 [4]).

The power of eminent domain—i.e., "[t]he right to take private property for public use"—"is an inherent and unlimited attribute of sovereignty whose exercise may be governed by the [l]egislature within constitutional limitations and by the [l]egislature within its power delegated to municipalities" (*Matter of Mazzone*, 281 NY 139, 146-147 [1939], *rearg denied* 281 NY 671 [1939]). Thus, in the context of an eminent domain proceeding such as this one, the courts have recognized "the structural limitations upon our review of what is essentially a legislative prerogative" (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 526 [2009], *rearg denied* 14 NY3d 756 [2010]). Consistent with that limited scope of review, there also is a "longstanding policy of deference to legislative judgments in this field" (*Kelo v City of New London*, 545 US 469, 480 [2005]; *see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 262 [2010]). A reasonable difference in opinion between the judiciary and the agency lawfully exercising the State's eminent domain power is an insufficient predicate for the courts to supplant the agency's essentially legislative determination (*see Goldstein*, 13 NY3d at 526). Ultimately, "a court may only substitute its own judgment for that of

the legislative body authorizing the project when such judgment is irrational or baseless" (*Kaur*, 15 NY3d at 254).

To that end, "[t]he burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless" (*Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1271 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]). "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the agency's determination should be confirmed" (*Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 720 [1989] [internal quotation marks omitted]; *see Butler*, 39 AD3d at 1271-1272).

Here, the sole basis upon which the majority rests its decision to annul OCIDA's determination—and thereby intervenes into what is effectively the legislative process—is its conclusion that, as a matter of law, General Municipal Law § 858 does not authorize OCIDA to acquire the subject property via eminent domain. The majority grounds that conclusion on its determination that OCIDA's " 'corporate purposes' " do not include "projects related to hospital or healthcare-related facilities." It further concludes, in summary fashion and without any elaboration, that OCIDA's use of eminent domain here "was not [for] a commercial purpose." The majority's conclusion on that latter issue, however, gives no deference to OCIDA's express determination that it was exercising its lawful eminent domain power in furtherance of its express corporate purpose to "promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing," inter alia, "commercial" facilities, and "thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the [S]tate of New York" (General Municipal Law § 858). Nowhere does the majority conclude that OCIDA's determination was irrational or that it lacked any foundation or basis (*see Kaur*, 15 NY3d at 254; *Waldo's, Inc.*, 74 NY2d at 720-721; *Butler*, 39 AD3d at 1271-1272). Thus, by failing to address OCIDA's expressly stated basis for concluding that it had the statutory authority to exercise its eminent domain power—i.e., that it was done in furtherance of a commercial purpose—the majority has not only failed to afford OCIDA any deference with respect to its legislative determination (*see Goldstein*, 13 NY3d at 526), it has entirely supplanted OCIDA by improperly making its own de novo determination of that question as a matter of law (*see Kaur*, 15 NY3d at 254; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 418 [1986]). In essence, the majority's conclusion makes it appear as though a legislative body—here, OCIDA—played no role at all in the exercise of the State's eminent domain power.

III.

In addition to the deference we generally accord legislative

determinations made by agencies in the exercise of the eminent domain power, I note that this Court also follows established precedent requiring us to defer to an agency's interpretation of a broad ambiguous statutory term, provided that the agency's interpretation of that ambiguous term is not irrational or unreasonable (*see Nearpass*, 152 AD3d at 1193; *Matter of Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency*, 147 AD3d 1414, 1416 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]). Here, OCIDA expressly relied upon *Nearpass* in determining that it had the statutory authority to acquire the subject property because it was acting in furtherance of a "commercial" purpose—i.e. the same term involved in *Nearpass*. In my view, pursuant to *Nearpass*, we must defer to OCIDA's reasonable interpretation of the word "commercial" contained in General Municipal Law § 858, which OCIDA concluded gave it the power to condemn the subject property via eminent domain for the purpose of constructing the surface parking lot.

In *Nearpass*, the Seneca County Industrial Development Agency (SCIDA) granted tax abatement relief to a resort and casino. In the ensuing CPLR article 78 proceeding, the petitioners contested SCIDA's determination that the resort and casino served, inter alia, a "commercial" purpose within the definition of a "project" under General Municipal Law § 854 (4) (*Nearpass*, 152 AD3d at 1192-1193). On appeal, this Court rejected the petitioners' contentions and affirmed the dismissal of the petition. Specifically, we held that "the broad statutory term[] 'commercial' . . . [is] ambiguous insofar as [it is] susceptible to conflicting interpretations" (*id.* at 1193). Thus, "SCIDA's interpretation [was] entitled to great deference, and must be upheld as long as it [was] reasonable" (*id.* [internal quotation marks omitted]). On that question, we concluded that SCIDA's interpretation that the project was commercial or recreational was not "irrational or unreasonable" (*id.* [internal quotation marks omitted]).

In my view, we should come to a similar conclusion here—the term "commercial" contained in General Municipal Law § 858 is just as broad and ambiguous as it is in section 854, and therefore OCIDA's interpretation of that term as encompassing the creation of the surface parking lot was reasonable. Thus, giving deference to OCIDA's interpretation of the relevant statute, we should conclude that it did not lack the requisite statutory authority to condemn the subject property via eminent domain. More specifically, there can be little doubt that the general purposes upon which an industrial development agency may exercise its "express powers" (*Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 151 AD3d 1532, 1534 [3d Dept 2017], *affd* 33 NY3d 131 [2019]; *see* General Municipal Law § 858) are set forth in broad terms. Indeed, this Court, as well as the Third Department, have expressly referred to those purposes as being broad in nature (*see Matter of Town of Minerva v Essex County Indus. Dev. Agency*, 173 AD2d 1054, 1056 [3d Dept 1991]; *Matter of Grossman v Herkimer County Indus. Dev. Agency*, 60 AD2d 172, 178 [4th Dept 1977]; *see also Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 300 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]). Thus, recognizing that the purposes contained in

General Municipal Law § 858 are set forth in broad terms, I conclude that OCIDA's determination that acquisition of the subject property for the purpose of constructing a surface parking lot was in furtherance of a "commercial" purpose "is supported by a rational basis" and is "not 'irrational or unreasonable' " (*Iskalo 5000 Main LLC*, 147 AD3d at 1415-1416; *see Nearpass*, 152 AD3d at 1193). Indeed, I note that we are required to afford "statutes providing for improvements inuring to the public benefit" a liberal construction (McKinney's Cons Laws of NY, Book 1, Statutes § 342), and therefore we should not constrict General Municipal Law § 858 either by finding that the purpose here was not among its expressly included ones or that it was excluded by implication.

Here, the majority fails to address *Nearpass* and ignores its obvious application to the resolution of this appeal. Although this case and *Nearpass* arise out of slightly different contexts—i.e., interpreting different provisions of the General Municipal Law—they both ultimately involve the same question of statutory interpretation in the context of administrative decision-making. As noted, they also both involve the same broad and ambiguous statutory term—i.e., the word "commercial." It would be one thing if the majority acknowledged *Nearpass* and explained why, despite that case's central holding, OCIDA's determination that the project here was "commercial"—i.e., its interpretation of General Municipal Law § 858—was irrational or unreasonable. Although I would disagree with that bottom-line conclusion, at least the majority would have afforded OCIDA the deference required of its statutory interpretation of a broad ambiguous term, in the context of an eminent domain proceeding, where deference is already accorded to the overarching legislative determinations being made.

Furthermore, unlike the majority, I conclude that the absence of any express reference to hospitals or healthcare facilities among the purposes listed in General Municipal Law § 858 is ultimately irrelevant to whether OCIDA has the power to condemn the subject property in furtherance of a commercial purpose. The part of section 858 describing an industrial development agency's broad purposes lists certain types of projects, but does so using the word "including." In other words, the list of project types contained in that paragraph is not exclusive. Thus, it makes no difference that neither a hospital nor a healthcare-related facility is expressly listed in the purposes paragraph.

In any event, as OCIDA correctly contends, the MOB that would be serviced by the subject property for the development of a surface parking lot is neither a "hospital" nor a "health-related facility" as those terms are generally understood (*see* Public Health Law § 2994-a [18]; 10 NYCRR 700.2 [a] [4], [5]). Thus, the majority's generic reference to an undefined "healthcare-related facilit[y]" adds nothing to the exclusion it reads into General Municipal Law § 858. It appears that, in its essence, the majority's conclusion stands for the proposition that, if a proposed parking lot is part of a hospital's or heathcare-related facility's campus, however tangentially, an industrial development agency may not utilize its eminent domain power

to acquire property for that purpose because a “hospital” or “health-related facility” is either not among the broadly defined purposes in section 858 or is somehow excluded from them. I know of no principle of statutory construction, or any precedent, that supports such a conclusion and I respectfully decline to follow it.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

766

CA 21-01545

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

RYAN WEAVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DERONDE TIRE SUPPLY, INC., ET AL., DEFENDANTS,
AND ESTES EXPRESS LINES, DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered October 20, 2021. The order, insofar as appealed from, granted the motion of plaintiff for leave to reargue his opposition to the motion of defendant Estes Express Lines for summary judgment and, upon reargument, denied the motion of defendant Estes Express Lines for summary judgment dismissing the complaint and cross claims against it.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for personal injuries he sustained when tires that were being moved by a forklift struck him when they fell from the forklift after it drove over a crack in the concrete floor. Insofar as relevant to this appeal, the complaint asserted a negligence cause of action against Estes Express Lines (defendant), which owned the premises on which plaintiff was injured, alleging that defendant negligently permitted a dangerous condition to exist on the premises that contributed to his injury, i.e., the crack in the concrete floor. Defendant moved for summary judgment dismissing the complaint and all cross claims against it, and Supreme Court granted the motion on the ground that defendant was an out-of-possession landlord that did not retain control of the leased premises. Thereafter, plaintiff moved for leave to reargue his opposition to the motion, and defendant now appeals from an order that granted leave to reargue and, upon reargument, denied defendant's motion for summary judgment.

We agree with defendant that it met the initial burden on its motion of establishing that it was an out-of-possession landlord not liable for plaintiff's injuries. It is well settled that "[a]n

out-of-possession landlord is not liable for injuries that occur on the premises after the transfer of possession and control to a tenant unless the landlord (1) is contractually obligated to repair the premises or (2) has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision" (*Reichberg v Lemel*, 29 AD3d 664, 665 [2d Dept 2006]; *see Ferro v Burton*, 45 AD3d 1454, 1454-1455 [4th Dept 2007]). In support of its motion, defendant submitted the lease between it and plaintiff's employer (lessee). The lease does not include a general requirement that defendant repair or maintain the premises, including the floor, and instead limits defendant's responsibility to repair the premises to structural defects in the bearing walls and roof. The lessee was responsible for all other maintenance and repairs. Further, defendant established that it relinquished control of the premises. Although the lease permitted defendant to enter the premises for purposes of inspection and making repairs required as a result of a default by the lessee, that contractual right standing alone is "insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" (*Addeo v Clarit Realty, Ltd.*, 176 AD3d 1581, 1582 [4th Dept 2019] [internal quotation marks omitted]). " '[A]n out-of-possession landlord who reserves th[e] right [to enter the leased premises for the purposes of inspection and emergency and structural repair] may be held liable for injuries to a third party only where a specific statutory violation exists' " (*Regensdorfer v Central Buffalo Project Corp.*, 247 AD2d 931, 932 [4th Dept 1998]; *see Schwegler v City of Niagara Falls*, 21 AD3d 1268, 1269-1270 [4th Dept 2005]). Here, plaintiff failed to allege a specific statutory violation pertaining to the condition of the floor and, instead, alleged that the state of the concrete floor on the premises resulted in violations of the Property Maintenance Code of New York and the Code of the Town of Tonawanda (Town Code). Even assuming, arguendo, that violations of regulations as opposed to statutory violations would suffice (*see Brown v BT-Newyo, LLC*, 93 AD3d 1138, 1139 [3d Dept 2012], *lv denied* 19 NY3d 815 [2012]; *cf. Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 n 3 [1987]; *Boice v PCK Dev. Co., LLC*, 121 AD3d 1246, 1248 [3d Dept 2014]), we conclude that "the cited provisions of the Property Maintenance Code [and the Town Code] are either inapplicable or general rather than specific" (*Brown*, 93 AD3d at 1139).

However, plaintiff raised a triable issue of fact whether defendant was liable based on its contractual obligation to maintain the structural integrity of the roof and walls. We therefore conclude that, contrary to defendant's contention, the court properly granted the motion for leave to reargue (*see generally* CPLR 2221 [d] [2]; *Smith v City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept 2014]), and, upon reargument, properly denied defendant's motion for summary judgment. In opposition to defendant's motion, plaintiff submitted an affidavit from one of plaintiff's former colleagues and from a code enforcement officer, who each averred that the damage to the floor may have been caused by water damage or water infiltration due to poor maintenance of the roof and walls. Plaintiff's former colleague further averred that defendant had conducted annual inspections of the

property and had previously repaired damage to the floor of the premises. Thus, there is a question of fact concerning defendant's liability for defects in the condition of the floor (*see Young v J.M. Moran Props.*, 259 AD2d 1037, 1038 [4th Dept 1999]; *see generally Meyers-Kraft v Keem*, 64 AD3d 1172, 1173 [4th Dept 2009]).

All concur except CURRAN and MONTOUR, JJ., who dissent and vote to modify in accordance with the following memorandum: We agree with the majority that Estes Express Lines (defendant) met its initial burden on its motion for summary judgment dismissing the complaint and the cross claims against it by establishing that it was an out-of-possession landlord not liable for plaintiff's personal injuries. We depart from the majority's further conclusion, however, that in opposition to defendant's motion, plaintiff raised a triable issue of fact whether defendant was liable based upon its contractual obligation to maintain the structural integrity of the roof and walls of the premises. We therefore dissent, and we would modify the order by granting defendant's motion for summary judgment dismissing the complaint and all cross claims against defendant.

Contrary to the view of the majority, we conclude that the affidavits submitted by plaintiff were insufficient to defeat the motion for summary judgment. As the majority notes, it is true that defendant was contractually "responsible for structural defects in the bearing walls and roof." The affidavits submitted by plaintiff, however, are wholly speculative to the extent that they allege that defendant made previous repairs to the floor in the area where plaintiff sustained his injury, or that the crack in the concrete floor that allegedly contributed to plaintiff's injury was caused by water infiltrating through the roof or walls. Such speculation is insufficient to raise a triable issue of fact (*see Zetes v Stephens*, 108 AD3d 1014, 1017 [4th Dept 2013]; *Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Other than the speculation contained in the affidavits submitted by plaintiff, there is no evidence in the record establishing any nexus between structural defects in the bearing walls and roof, which were defendant's responsibility to repair, replace and maintain, and the floor defect that allegedly caused plaintiff's injuries.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

769

CA 22-00501

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

ROBERT HYDE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BVSHSSF SYRACUSE LLC, HUEBER-BREUER CONSTRUCTION CO. INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

STANLEY LAW OFFICE, SYRACUSE (ANTHONY MARTOCCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered March 31, 2022. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion of plaintiff is granted.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he allegedly sustained on a construction site when he fell to the ground from a third-floor wooden platform on the exterior of the building. At the time of the incident, workers on the project would access a particular floor of the building by using a temporary elevator (lift) that was erected on the exterior of the building by defendant Hueber-Breuer Construction Co. Inc. (HBC), the general contractor of the project. At each floor, workers would step off the lift onto a temporary wooden platform landing constructed on the exterior of the building. A temporary access door was used to enter the building from the wooden platform. The access door was equipped with a make-shift lock that kept the door shut. The lock was on the outside, which prevented a person inside the building from opening the door when locked. The person operating the lift was responsible for locking the door prior to moving the lift to another floor. At the time of the incident, plaintiff and other workers had taken the lift to the third floor and entered the building to gather waste. Another worker subsequently moved the lift to another floor but did not lock the third-floor access door because the lock on that door had been removed. The accident occurred when plaintiff was pulling a waste cart and walked

backwards through the unlocked access door, onto and then off of the wooden platform, falling to the ground.

Plaintiff moved for partial summary judgment on liability with respect to his Labor Law § 240 (1) claim against HBC and defendant BVSHSSF Syracuse LLC (BVSHSSF), the owner of the building (collectively, defendants). Supreme Court, inter alia, denied plaintiff's motion and plaintiff now appeals from the order to that extent.

We agree with plaintiff that the court erred in denying his motion for partial summary judgment on liability with respect to his Labor Law § 240 (1) claim against HBC and BVSHSSF. Plaintiff met his burden of establishing the absence of an adequate safety device that could have prevented his fall, namely, a lock on the third-floor access door (*see Lagares v Carrier Term. Servs., Inc.*, 177 AD3d 1394, 1395 [4th Dept 2019]; *Lord v Whelan & Curry Constr. Servs., Inc.*, 166 AD3d 1496, 1497 [4th Dept 2018]). In opposition, defendants failed to raise a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries (*see Lagares*, 177 AD3d at 1395). Here, there is no evidence in the record that plaintiff removed the lock and was therefore the sole proximate cause of the accident (*cf. Kuntz v WNYG Hous. Dev. Fund Co. Inc.*, 104 AD3d 1337, 1338 [4th Dept 2013]). Moreover, even assuming, arguendo, that plaintiff was negligent in walking backwards out the access door and in failing to look back prior to going through the door to ensure the lift was there, we conclude that such "actions [would] render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]" (*Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

770

CA 21-01135

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

IN THE MATTER OF FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO THE IN REM
PROVISIONS OF THE ERIE COUNTY TAX ACT AND
THE RESOLUTION OF THE ERIE COUNTY LEGISLATURE
AS SHOWN BY RESOLUTION NO. 54 AT PAGE 179 OF
THE MINUTES OF THE PROCEEDINGS OF SAID LEGISLATURE FOR THE YEAR 2019.

MEMORANDUM AND ORDER

MELISSA NEAL, PETITIONER-RESPONDENT;

FEDDER LOFTS, LLC, RESPONDENT,
AND COUNTY OF ERIE, RESPONDENT-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Erie County Court (Susan M. Eagan, J.), entered July 15, 2021. The order, among other things, directed respondent County of Erie to transfer title of certain property to petitioner.

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

Memorandum: In this in rem tax foreclosure action pursuant to the Erie County Tax Act (ECTA), respondent County of Erie (County) obtained a judgment of foreclosure with respect to certain property owned by Black Rock Trade Center, Inc. (Black Rock) based on Black Rock's tax delinquency, and the County then sold the property to petitioner at a public auction. Respondent Fedder Lofts, LLC (Fedder) thereafter moved by order to show cause seeking, inter alia, to vacate the sale of the property. County Court granted the motion by, inter alia, rescinding petitioner's purchase of the property on equity grounds. On a prior appeal by petitioner, we reversed that order (*Matter of Foreclosure of Tax Liens [Neal–Fedder Lofts, LLC]*, 193 AD3d 1379 [4th Dept 2021]).

Petitioner subsequently moved by order to show cause seeking, inter alia, to compel the County to transfer title of the property to her pursuant to the terms of sale between the County and petitioner. The County now appeals from the order granting the part of the motion

seeking that relief. The County contends that it does not own the property or hold a transferrable interest and thus lacks the authority to complete the sale to petitioner because, several months before our decision on the prior appeal, the delinquent taxes on the property were paid, the County issued a certificate of redemption to Black Rock, and Black Rock thereafter sold the property and transferred title to Fedder. We agree with petitioner that the County's instant contention was previously raised by the County during the litigation of petitioner's prior appeal, where the County contended in a motion, in its respondent's brief, and at oral argument on the appeal that petitioner's appeal should be dismissed as moot. We rejected that contention based on our determination "that the purported redemption, the issuance of the certificate of redemption, and the purported sale and transfer of title from Black Rock to Fedder are nullities" (*Neal-Fedder Lofts, LLC*, 193 AD3d at 1380-1381). "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the [County] Court as well as on the appellate court" (*Massey v Byrne*, 164 AD3d 416, 416 [1st Dept 2018] [internal quotation marks omitted]; *see Johnson v Optometrix, Inc.*, 85 AD3d 1542, 1544 [4th Dept 2011], *lv denied* 17 NY3d 710 [2011]). Thus, contrary to the County's contention, in light of this Court's determination in the prior appeal, the court properly declined to reconsider the issue on petitioner's motion. Further, the County has not shown any "subsequent evidence or change of law" that would warrant reconsideration by this Court of our decision (*Massey*, 164 AD3d at 416 [internal quotation marks omitted]; *see generally Matter of Dagan B. [Calla B.]*, 172 AD3d 1905, 1906 [4th Dept 2019], *lv denied* 33 NY3d 912 [2019]).

Finally, we reject the County's further contention that, subsequent to our determination on the prior appeal, it properly rescinded the sale to petitioner pursuant to section ten of the terms of sale. That section does not give the County the authority to rescind the sale and instead merely limits the damages to petitioner in the event the County is unable to convey title pursuant to the terms of sale. Inasmuch as we have already rejected the County's contention that the property was purportedly redeemed and transferred to Fedder and that the County is thus unable to convey title to petitioner, we affirm.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

771

CA 22-00101

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

COLLEEN O'HARA AND ROBERT O'HARA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (DANIEL J. MUSCARELLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 19, 2022. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Colleen O'Hara (plaintiff) allegedly sustained when she stepped in a hole while walking on a lawn in a public park located within defendant, City of Buffalo. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint. We affirm.

Defendant sought summary judgment dismissing the complaint on the ground that it did not receive prior written notice of the allegedly dangerous condition that caused plaintiff's injuries. It is well settled that a "municipality that has adopted a 'prior written notice law' cannot be held liable for a defect within the scope of the law absent the requisite written notice" (*Albano v Suffolk County Community Coll.*, 66 AD3d 719, 719 [2d Dept 2009]), and Charter of the City of Buffalo § 21-2 provides that "[n]o civil action shall be maintained against the city for damage or injuries to person or property sustained in consequence of any street, part or portion of any street including the curb thereof and any encumbrances thereon or attachments thereto, tree, bridge, viaduct, underpass, culvert, parkway or park approach, sidewalk or crosswalk, pedestrian walk or path, or traffic-control sign or signal, being defective, out of repair, unsafe, dangerous or obstructed" unless defendant received prior written notice of the allegedly dangerous condition. Nevertheless, it is also well settled that " '[p]rior written notice

provisions, enacted in derogation of common law, are always strictly construed' " (*Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009], quoting *Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]; *see Horst v City of Syracuse*, 191 AD3d 1297, 1300 [4th Dept 2021]). Thus, in support of its motion, defendant was required to establish that the area where the accident occurred is within the purview of the statute (*see generally Pulver v City of Fulton Dept. of Pub. Works*, 113 AD3d 1066, 1066 [4th Dept 2014]).

Here, the evidence defendant submitted in support of its motion failed to establish that the alleged defect that caused plaintiff's injury was located within any of the areas enumerated in Charter of the City of Buffalo § 21-2. We therefore conclude that defendant "failed to demonstrate its prima facie entitlement to judgment as a matter of law because it did not show that the area where the plaintiff fell was within the scope of the applicable prior written notice provisions" (*Giarraffa v Town of Babylon*, 84 AD3d 1162, 1162 [2d Dept 2011]; *see Cieszynski v Town of Clifton Park*, 124 AD3d 1039, 1040-1041 [3d Dept 2015]; *see generally Davis v County of Nassau*, 166 AD2d 498, 498 [2d Dept 1990]). Consequently, the motion was properly denied "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, defendant's contention that it is entitled to summary judgment because it lacked actual or constructive notice of the allegedly dangerous condition is not properly before us because it is raised for the first time on appeal (*see Matter of Schmidt v City of Buffalo Planning Bd.*, 174 AD3d 1413, 1414-1415 [4th Dept 2019]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

772

CA 21-01196

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

GREGORY K. JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AUBURN COMMUNITY HOSPITAL, PATSY M. IANNOLO AND EASTERN FINGER LAKES EMERGENCY MEDICAL CARE, PLLC, DEFENDANTS-APPELLANTS.

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (ERIN MEAD OF COUNSEL), FOR DEFENDANT-APPELLANT AUBURN COMMUNITY HOSPITAL.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (GABRIELLE L. BULL OF COUNSEL), FOR DEFENDANTS-APPELLANTS PATSY M. IANNOLO AND EASTERN FINGER LAKES EMERGENCY MEDICAL CARE, PLLC.

HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRENCE J. HOFFMANN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Cayuga County (Gail Donofrio, J.), entered August 18, 2021. The order denied the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant Auburn Community Hospital and dismissing the first cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of defendants' medical malpractice and ordinary negligence. Plaintiff was examined by defendant physician Patsy M. Iannolo in the emergency department at defendant Auburn Community Hospital (hospital). Defendant Eastern Finger Lakes Emergency Medical Care, PLLC (EFL) managed that department. Ativan was administered to plaintiff pursuant to Iannolo's order. Approximately two hours later, Iannolo ordered that plaintiff be discharged. Plaintiff started driving himself home and, about half an hour after plaintiff was discharged, plaintiff's vehicle struck another vehicle and ultimately struck a nearby residence. The accident report listed possible causes for the collision as plaintiff's "falling asleep at the wheel" or suffering from "a medical condition." Plaintiff asserted causes of action sounding in medical malpractice and ordinary negligence, contending, inter alia, that defendants negligently discharged him from the hospital while he was

under the effects of Ativan. Iannolo and EFL moved, and the hospital separately moved, for summary judgment dismissing the third amended complaint against them, and Supreme Court denied those motions. Iannolo and EFL jointly appeal, and the hospital appeals separately.

Contrary to defendants' contentions in both appeals, defendants failed to meet their initial burden on their motions with respect to the medical malpractice cause of action and, thus, the burden never shifted to plaintiff to raise a triable issue of fact in opposition (*see generally Kubera v Bartholomew*, 167 AD3d 1477, 1479 [4th Dept 2018]; *Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]). Among other things, the evidence submitted by Iannolo and EFL raised issues of fact whether Iannolo deviated from the standard of care by discharging plaintiff at a time when the concentration of Ativan in his system was at or near its peak and while plaintiff was experiencing the effects of the medication, including drowsiness. Those submissions also raised issues of fact whether any such deviation was a proximate cause of plaintiff's injuries (*see generally Kubera*, 167 AD3d at 1479). Regarding the hospital's motion, the evidence that the hospital submitted raised issues of fact whether, inter alia, a nurse employed by the hospital deviated from the standard of care and committed an act of negligence independent of Iannolo (*see generally Almonte v Shaukat*, 204 AD3d 402, 403-404 [1st Dept 2022]; *Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713 [4th Dept 2010]), by failing to explain the discharge instructions to plaintiff or advise him of the possible effects of Ativan, and whether any such deviation was a proximate cause of plaintiff's injuries (*see generally Almonte*, 204 AD3d at 403-404).

In its appeal, the hospital further contends that the court erred in denying its motion with respect to the negligence cause of action against it. We agree with the hospital, and we therefore modify the order accordingly. "A complaint sounds in medical malpractice rather than ordinary negligence where, as here, the challenged conduct [by a nurse] 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' to a particular patient" (*Cullinan v Pignataro*, 266 AD2d 807, 808 [4th Dept 1999], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). Under the circumstances of this case, plaintiff's third amended complaint sounds in medical malpractice as alleged in his second cause of action, as opposed to ordinary negligence as alleged in his first cause of action (*see generally Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 571 [2015]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

773

CA 21-01619

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

IN THE MATTER OF TOWN OF OGDEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY WOLF, RESPONDENT-APPELLANT.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANY PENBERTHY OF COUNSEL), FOR RESPONDENT-APPELLANT.

KEITH O'TOOLE, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered April 24, 2021. The order, inter alia, affirmed that part of an order of the Ogden Town Court determining that respondent's dog was a dangerous dog under Agriculture and Markets Law § 123.

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

Memorandum: Respondent appeals from an order of County Court that, inter alia, affirmed Town Court's determination that the dog was a dangerous dog under Agriculture and Markets Law § 123 and that the victim had sustained serious physical injury when the dog attacked her without justification. We dismiss the appeal as moot because the issues in this case no longer present a live controversy inasmuch as "the dog died during the pendency of this appeal" (*Board of Mgrs. of the Cove Club Condominium v Jacobson*, 107 AD3d 414, 414 [1st Dept 2013]). 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]).

Entered: December 23, 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 21-01663

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

RYAN FOOTE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES MARCH AND HUBER & HUBER, INC.,
DEFENDANTS-RESPONDENTS.

DUPEE & MONROE, P.C., GOSHEN (JON C. DUPEE, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 5, 2021. The order, inter alia, denied the motion of plaintiff for partial 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 that he allegedly sustained when the vehicle he was operating was rear-ended by a vehicle driven by James March (defendant) and owned by defendant Huber & Huber, Inc. Plaintiff appeals from an order that, inter alia, denied plaintiff's motion for partial summary judgment on the issue of negligence and seeking dismissal of four of defendants' affirmative defenses.

We reject plaintiff's contention that Supreme Court erred in denying his motion with respect to the issue of defendants' negligence. It is well settled that a rear-end collision with a vehicle "establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . [, and, i]n order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision" (*Niedzwiecki v Yeates*, 175 AD3d 903, 904 [4th Dept 2019] [internal quotation marks omitted]). "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; *see Niedzwiecki*, 175 AD3d at 904; *Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018]).

Here, plaintiff failed to meet his initial burden on his motion inasmuch as he submitted the deposition testimony of defendant, in which he " 'provided a nonnegligent explanation for the collision,' " i.e., that the collision occurred when plaintiff suddenly slowed down or stopped in front of his vehicle while plaintiff was attempting to change lanes (*Gardner v Chester*, 151 AD3d 1894, 1896 [4th Dept 2017]; *see Shah v Nowakowski*, 203 AD3d 1737, 1741 [4th Dept 2022]). Thus, plaintiff's own submissions raise "a triable issue of fact as to whether a nonnegligent explanation exists for the rear-end collision" (*Bell v Brown*, 152 AD3d 1114, 1115 [3d Dept 2017]; *see Niedzwiecki*, 175 AD3d at 904).

In light of our determination, we reject plaintiff's further contention that the court erred in denying that part of his motion seeking partial summary judgment dismissing four of defendants' affirmative defenses. Inasmuch as plaintiff failed to establish that he is entitled to partial summary judgment on the issue of negligence, he also failed to establish that he is entitled to partial summary judgment dismissing those four affirmative defenses, which are related to the issue of negligence.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

775

TP 21-00254

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

IN THE MATTER OF ONONDAGA CENTER FOR REHABILITATION AND HEALTHCARE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT, ET AL., RESPONDENTS.

COWART DIZZIA LLP, NEW YORK CITY (CARI-ANN LEVINE OF COUNSEL), FOR PETITIONERS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Anthony J. Paris, J.], entered October 26, 2020) to review a determination of respondents. The determination denied an application for Medicaid benefits.

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

Memorandum: Petitioner is a skilled nursing facility and the designated authorized representative of the estate of Mary King. King was a former resident of the nursing facility. Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination of respondent, made after a fair hearing, that affirmed the denial of an application for Medicaid benefits filed on behalf of King. The Onondaga County Department of Social Services (DSS) had denied the application based on the applicant's failure to provide documentation necessary to determine King's eligibility for such benefits.

"In reviewing a Medicaid eligibility determination made after a fair hearing, the court must review the record, as a whole, to determine if the [respondent's] decisions are supported by substantial evidence and are not affected by an error of law" (*Matter of Capri v Daines*, 90 AD3d 1530, 1530 [4th Dept 2011] [internal quotation marks omitted]). Contrary to petitioner's contention, the determination of respondent that King did not show good cause for failing to submit required documentation is supported by substantial evidence. "An applicant for . . . public assistance is exempt from complying with

any requirement concerning eligibility for public assistance if the applicant . . . establishes that good cause exists for failing to comply with the requirement" (18 NYCRR 351.26 [a]). Good cause for failure to comply with an eligibility requirement exists when "(1) the applicant . . . has a physical or mental condition which prevents compliance; (2) the applicant's . . . failure to comply is directly attributable to social services district error; or (3) other extenuating circumstances, beyond the control of the applicant . . . , exist[] which prevent the applicant . . . from being reasonably expected to comply with an eligibility requirement" (*id.*). In this case, substantial evidence supports the conclusion that King failed to meet her burden of "notifying the social services district of the reasons for failing to comply with an eligibility requirement and for furnishing evidence to support any claim of good cause" (18 NYCRR 351.26 [b]; *see Matter of Hill v Zucker*, 172 AD3d 1895, 1896 [4th Dept 2019]). Although petitioner further contends that DSS failed to conduct a collateral investigation (*see* 18 NYCRR 360-2.3 [a] [3]), that issue was not raised at the fair hearing and was instead improperly raised for the first time in the petition (*see Hill*, 172 AD3d at 1896-1897). Petitioner's contention therefore is not properly before us, and we have no discretionary authority to review it (*see id.* at 1897).

Finally, petitioner contends that respondent's determination was superseded by subsequent actions of DSS and by a subsequent decision after the fair hearing rendered by respondent. Petitioner, however, failed to raise that issue in its petition. We therefore conclude that the contention is not properly before us, and we do not consider its merits (*see Matter of Oliver v D'Amico*, 151 AD3d 1614, 1616-1617 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018], *rearg denied* 31 NY3d 1066 [2018]; *see generally Matter of Bottom v Annucci*, 26 NY3d 983, 985 [2015]).

Entered: December 23, 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 19-02171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE ROBLES, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDDIE ROBLES, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 16, 2019. The judgment convicted defendant upon his 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 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]). The charges arose after two police officers heard a dispatch reporting gun shots fired near a particular intersection. Based on that information, one of the police officers used his department-issued iPad to review camera footage of the incident. Among other things, the officer observed a black male, thin to medium build, about five feet eight inches tall, dressed in dark clothing, and walking a yellow dog on a pink leash. Approximately two hours later as the officers were patrolling near the area of the intersection, they observed defendant, who partially matched the suspect in the video, walking a few blocks from the incident. The officers approached defendant, detained him and, after a struggle, recovered a gun from his person. Subsequently, in response to a pre-*Miranda* inquiry from one of the officers, defendant admitted to possessing the firearm. Supreme Court refused to suppress both the statement and the evidence of the firearm.

Defendant contends in his main and pro se supplemental briefs that the court erred in refusing to suppress the handgun found on his person inasmuch as the officers did not have reasonable suspicion to detain and subsequently frisk him (*see generally People v De Bour*, 40

NY2d 210, 223 [1976]). We reject that contention. The evidence at the suppression hearing established that the officers had an articulable reason for initially approaching defendant "to conduct a common-law inquiry, i.e., they had 'a founded suspicion that criminal activity [was] afoot' " (*People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). More particularly, the officers encountered defendant within a few blocks of the location identified in the dispatch. Defendant was wearing clothing similar to that worn by the suspect observed in the video and was walking what appeared to be the same yellow dog with a pink leash. Considering the totality of the circumstances, including the information the police had from the video and the testimony from one of the officers that he noticed a bulge in defendant's front waistband, we conclude that the officers thereafter developed reasonable suspicion to detain defendant (*see People v Benjamin*, 51 NY2d 267, 271 [1980]; *see also People v Williams*, 136 AD3d 1280, 1283 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2017], *lv denied* 29 NY3d 954 [2017]). Contrary to defendant's further contention, despite some inconsistencies, the officers' testimony was not so "incredible or improbable as to warrant disturbing the . . . court's determination of credibility" (*People v Addison*, 199 AD3d 1321, 1322 [4th Dept 2021] [internal quotation marks omitted]).

We agree with defendant's contention in his main brief, however, that the court should have suppressed the statement defendant made in response to the officer's questions inasmuch as defendant was in custody at the time but had not waived his *Miranda* rights. " 'The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' " (*People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; *see People v Clanton*, 151 AD3d 1576, 1578 [4th Dept 2017]). "Although the police may ask a suspect preliminary questions at a crime scene in order to find out what is transpiring . . . , where criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" (*Clanton*, 151 AD3d at 1578 [internal quotation marks omitted]). Here, after defendant had been restrained and handcuffed, an officer asked defendant, "what's going on? Are you all right? Are you okay?" Defendant responded, "you saw what I had on me. I was going to do what I had to do." We conclude that the interaction between defendant and the officer "had traveled far beyond a 'threshold crime scene inquiry' " and, under the circumstances, it was likely that the officer's particular questions " 'would elicit evidence of a crime and, indeed, it did elicit an incriminating response' " (*id.*; *cf. People v Kenyon*, 108 AD3d 933, 936 [3d Dept 2013], *lv denied* 21 NY3d 1075 [2013]).

Although we conclude that the court should have suppressed defendant's statement to police, we further conclude that the particular circumstances of this case permit the rare application of the harmless error rule to defendant's guilty plea (*see Clanton*, 151

AD3d at 1579). "[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he [or she] states or reveals his [or her] reason for pleading guilty" (*People v Grant*, 45 NY2d 366, 379-380 [1978]). "The *Grant* doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' " (*People v Wells*, 21 NY3d 716, 719 [2013]). Here, the court properly refused to suppress the firearm found on defendant's person. Because that evidence would have been admissible at trial, we conclude that there is no reasonable possibility that the court's error in failing to suppress defendant's statement admitting possession of the firearm contributed to his decision to plead guilty (*see Clanton*, 151 AD3d at 1579; *cf. Grant*, 45 NY2d at 379-380).

Defendant's contention in his main brief that his plea was not knowingly, intelligently, and voluntarily entered because the court failed to advise him of all the constitutional rights he would be forfeiting upon pleading guilty is unpreserved for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Williams*, 185 AD3d 1535, 1535 [4th Dept 2020], *lv denied* 35 NY3d 1116 [2020]). In any event, defendant's contention is without merit. Reviewing "the record as a whole and the circumstances of the plea in its totality," we conclude that the plea was knowing, intelligent, and voluntary (*People v Tucker*, 169 AD3d 1368, 1369 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019] [internal quotation marks omitted]; *see People v Walker*, 151 AD3d 569, 569 [1st Dept 2017]).

We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following memorandum: I agree with the majority that Supreme Court erred in refusing to suppress the statement that defendant made to the police while in custody at the crime scene but before he was advised of the *Miranda* warnings. Unlike the majority, however, I do not find the error to be "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). I would therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress defendant's statement, and remit the matter to Supreme Court for further proceedings on the indictment.

The Court of Appeals has repeatedly advised that harmless error analysis will "rarely, if ever," apply in cases involving guilty pleas "unless at the time of plea [the defendant] states or reveals his [or her] reason for pleading guilty" (*People v Grant*, 45 NY2d 366, 379-380 [1978]). "This is especially true when the defendant has unsuccessfully sought to suppress a confession" (*id*. at 380). Because defendants usually do not say why they are pleading guilty, "an

appellate court is rarely in a position to determine whether denial of a suppression motion played any part in a defendant's decision to plead" (*People v Lloyd*, 66 NY2d 964, 965 [1985]). An erroneous suppression ruling may be deemed harmless, however, "if the defendant articulates a reason for [the plea] that is independent of the incorrect preplea court ruling . . . or an appellate court is satisfied that the decision to accept responsibility was not influenced by the error" (*People v Wells*, 21 NY3d 716, 719 [2013] [internal quotations marks omitted]).

Here, the People do not argue that harmless error analysis applies, and defendant failed to articulate a reason for his plea that is independent of the erroneous suppression ruling. The majority nevertheless concludes that there is no reasonable possibility that the court's erroneous suppression ruling contributed to defendant's decision to plead guilty. I see no basis in the record to reach that conclusion. Although the majority relies on our 3-2 decision in *People v Clanton* (151 AD3d 1576 [4th Dept 2017]), in which we found a preplea error to be harmless without identifying anything in the record indicating that defendant would have pleaded guilty regardless of the error, I do not find the reasoning of *Clanton* to be persuasive.

Again, as a general rule, "an appellate court is rarely in a position to determine whether denial of a suppression motion played any part in a defendant's decision to plead, making harmless error rules generally inapplicable in such situations" (*Lloyd*, 66 NY2d at 965), and this is not one of those rare cases in which the defendant said something on the record from which we can conclude that he would have pleaded guilty without regard to the error. I therefore respectfully dissent.

Entered: December 23, 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 21-00589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY SACCONE, DEFENDANT-APPELLANT.

ANTHONY BELLETIER, SYRACUSE, 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 (Matthew J. Doran, J.), rendered November 19, 2018. The judgment convicted defendant, upon a plea of guilty, of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, aggravated vehicular homicide, and leaving the scene of an incident without reporting.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of, inter alia, aggravated vehicular homicide (Penal Law § 125.14 [4]) and leaving the scene of an incident without reporting (Vehicle and Traffic Law § 600 [2] [a]) in satisfaction of an indictment that included three counts of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]). The charges arose from an early morning collision between a vehicle operated by defendant and a vehicle occupied by two teenagers and their 20-year-old friend, all three of whom died of the resultant injuries. According to the indictment, defendant engaged in reckless driving by traveling at a speed of approximately 86 miles per hour on a road with a speed limit of 35 miles per hour, crossing over a double solid yellow line in the road, and going through a red light at an intersection, where he struck the victims' vehicle broadside. Defendant allegedly was under the combined influence of cocaine and alcohol, with an estimated blood alcohol content of .18% at the time of the accident. Following the collision, defendant fled the scene on foot and did not call for help or check on the victims. The police K–9 unit tracked defendant to his mother's nearby house where he was hiding and placed him under arrest. Pursuant to the plea agreement, County Court sentenced defendant to an aggregate indeterminate term of imprisonment of 10 to 30 years.

Prior to sentencing, defendant moved to withdraw his plea, contending that he was factually innocent and that the plea was involuntarily entered because he did not have enough time to discuss the plea offer with his attorney, who, inter alia, pressured him into pleading guilty and failed to conduct a proper investigation. We reject defendant's contention that the court abused its discretion in denying the motion without a hearing (*see People v Rivera*, 195 AD3d 1591, 1591-1592 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]; *see People v Manor*, 27 NY3d 1012, 1013-1014 [2016]). Here, although the court did not conduct a hearing, it "allowed defendant to argue his motion to withdraw his plea, thus giving him a reasonable opportunity to advance his claims" (*People v Shorter*, 179 AD3d 1445, 1446 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Moreover, the court properly denied the motion. Defendant's claims that his attorney pressured him were belied by his statements during the plea colloquy that he was satisfied with the services provided by his attorney and that no one had coerced or threatened him into pleading guilty (*see People v Rodgers*, 162 AD3d 1500, 1501-1502 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]). Similarly, "defendant was not entitled to a hearing on his uncorroborated assertion that his . . . attorney misadvised him regarding the minimum time he would have to serve" before he would be released on parole inasmuch as defendant stated that his plea was not influenced by any off-the-record promises or representations (*People v Avery*, 18 AD3d 244, 244 [1st Dept 2005], *lv denied* 5 NY3d 825 [2005]; *see People v Ramos*, 63 NY2d 640, 643 [1984]). Defendant also admitted during the colloquy to all the elements of the crimes to which he pleaded guilty, and his subsequent assertions of innocence were unsubstantiated (*see People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]).

Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered. Defendant's claims that he was coerced into pleading guilty by a "gross overcharge" in the indictment and because the court rushed him into making a decision are not preserved for our review because he did not raise those particular arguments in his motion to withdraw the plea (*see People v Gray*, 189 AD3d 2135, 2135 [4th Dept 2020], *lv denied* 36 NY3d 1120 [2021]). Although preserved, we reject defendant's contention that he was coerced into pleading guilty by "baseless" new misdemeanor charges that were ultimately dismissed. The fact that a possible new prosecution "may have influenced defendant's decision to plead guilty is insufficient to establish that the plea was coerced" (*People v Hobby*, 83 AD3d 1536, 1536 [4th Dept 2011], *lv denied* 17 NY3d 859 [2011]; *see People v Williams*, 170 AD3d 1666, 1667 [4th Dept 2019]; *see generally People v Hollman*, 197 AD3d 484, 486-487 [2d Dept 2021], *lv denied* 37 NY3d 1146 [2021]).

To the extent that defendant contends that his plea was involuntary because he showed "reluctance" during the colloquy, we

reject that contention. It is true, as defendant points out, that he made several statements during the plea colloquy in which he appeared to dispute some of the facts alleged by the People. The record establishes, however, "that the court conducted the requisite further inquiry and that defendant's responses to the court's subsequent questions removed any doubt about his guilt" (*People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *see People v Lopez*, 71 NY2d 662, 666 [1988]).

Defendant contends that his waiver of the right to appeal is invalid and that his negotiated sentence is unduly harsh and severe considering that he has no prior criminal record and received "very close" to the maximum aggregate sentence permitted by law for the two felonies to which he pleaded guilty. Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Lobdell*, 203 AD3d 1573, 1574 [4th Dept 2022], *lv denied* 38 NY3d 1034 [2022]; *People v Martin*, 199 AD3d 1402, 1402 [4th Dept 2021], *lv denied* 37 NY3d 1162 [2022]), we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). As noted, defendant's plea satisfied three counts of murder in the second degree, thereby reducing his sentencing exposure (*see generally People v Hogan*, 269 AD2d 787, 787 [4th Dept 2000], *lv denied* 95 NY2d 798 [2000]).

Defendant's challenge to the sufficiency of the grand jury evidence with respect to the three counts of murder in the second degree that were dismissed as satisfied by the plea is not properly before us (*see People v Pelchat*, 62 NY2d 97, 108 [1984]).

Entered: December 23, 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 21-00848

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

IN THE MATTER OF VICTOR MCRAE, JR.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

QASHEEKA S. BROWN,
RESPONDENT-PETITIONER-RESPONDENT.

SCOTT T. GODKIN, WHITESBORO, FOR PETITIONER-RESPONDENT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-PETITIONER-RESPONDENT.

LAWRENCE BROWN, BRIDGEPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Peter L. Angelini, R.), entered May 24, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, found petitioner-respondent in willful violation of a court order.

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

Memorandum: Petitioner-respondent father appeals from an order that, inter alia, granted respondent-petitioner mother's petition seeking to hold the father in contempt for violating the provisions of the parties' order of custody. Contrary to the father's contention, Family Court did not err in granting the mother's petition. "To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and that the person alleged to have violated that order had actual knowledge of its terms" (*Matter of Mauro v Costello*, 162 AD3d 1475, 1475 [4th Dept 2018] [internal quotation marks omitted]). "In addition, it must be established that the offending conduct defeated, impaired, impeded, or prejudiced a right or remedy of the complaining party" (*id.* [internal quotation marks omitted]; *see* Judiciary Law § 753 [A]; Family Ct Act § 156). "A court's determination finding a party in contempt of an order will not be disturbed absent an abuse of discretion" (*Matter of Beesmer v Amato*, 162 AD3d 1260, 1261 [3d Dept 2018]; *see Rech v Rech*, 162 AD3d 1731, 1732 [4th Dept 2018]). Here, the order of custody provided the father with visitation every other weekend and continued a provision permitting "such other and further visitation as the parties may agree [on]." The mother established that she and the father agreed to extend one of his weekend visitations with one of the

children until Monday morning. The father conceded that the child was not returned to the mother at the agreed time, and the mother established that she was required to obtain an order to show cause as well as police assistance in order to regain custody of the child several days later. Thus, the mother established by clear and convincing evidence that the father violated the order of custody (*see Rech*, 162 AD3d at 1732).

The father's contention that the court erred in failing to grant him primary physical custody of the children is unpreserved inasmuch as he did not seek primary physical custody of the children (*see Matter of Mountzouros v Mountzouros*, 191 AD3d 1388, 1389 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021]; *see generally Matter of Pontillo v Johnson-Kosiorek*, 196 AD3d 1163, 1165 [4th Dept 2021]; *Matter of Colleen GG. v Richard HH.*, 135 AD3d 1005, 1006-1007 [3d Dept 2016]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

784

CAF 21-01374

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

IN THE MATTER OF PAMELA S. NOWLAN AND
BRIAN L. NOWLAN, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BRITTANY M. CUNNINGHAM AND JAMES C. PIERCE,
RESPONDENTS-APPELLANTS.

BRITTANY M. CUNNINGHAM, PETITIONER-APPELLANT,

V

PAMELA S. NOWLAN AND BRIAN L. NOWLAN,
RESPONDENTS-RESPONDENTS.

MARK A. SCHLECHTER, ITHACA, FOR RESPONDENT-PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered August 26, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted in part the petition of petitioners-respondents and modified a prior visitation order.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent-petitioner mother and respondent father (parents) each appeal from an order that, inter alia, modified a prior order of visitation by increasing the visitation allowed to petitioners-respondents, the paternal grandparents of the subject child (grandparents). We affirm.

The parents contend that the grandparents failed to establish a change of circumstances warranting an inquiry into the best interests of the child. Initially, we note that the mother waived that contention inasmuch as she alleged in her own cross petition that there had been such a change in circumstances (*see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see generally Matter of Tinucci v Voltra*, 158 AD3d 1075, 1076

[4th Dept 2018]). In any event, we conclude that "the continued deterioration of the parties' relationship is a significant change in circumstances warranting an inquiry into whether a modification of visitation is in the child's best interests" (*Matter of Vaccaro v Vaccaro*, 178 AD3d 1410, 1411 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Noble v Gigon*, 165 AD3d 1640, 1640 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]).

The parents contend that there is not a sound and substantial basis in the record to support Family Court's determination that modification of the parties' visitation arrangement was in the child's best interests (*see generally Tinucci*, 158 AD3d at 1076). We reject that contention. Although the court did not specify the factors it relied on in conducting its best interests analysis (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), "[o]ur authority in determinations of custody [and visitation] is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *see Howell*, 103 AD3d at 1231). Among the factors for the court to consider are "whether the alleged change implicates the 'fitness' of one of the parties . . . , the nature and quality of the relationships between the child and the parties . . . and the existence of a prior agreement" (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 381 [2004]).

Here, after reviewing the appropriate factors, we conclude that the totality of the circumstances supports the determination that it is in the best interests of the child to increase the grandparents' visitation (*see id.*). Among other things, and despite some animosity between the parties, the record supports the determination that the grandparents have had a loving and close relationship with the child since her birth (*see generally Matter of Danial R.B. v Ledyard M.*, 35 AD3d 1232, 1232-1233 [4th Dept 2006]).

We have considered the parents' remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: December 23, 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 22-00261

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

LORI J. OLIVIERI, PLAINTIFF,

V MEMORANDUM AND ORDER

BARNES & NOBLE, INC., ET AL., DEFENDANTS.

BARNES & NOBLE, INC., THIRD-PARTY PLAINTIFF,

V

NATIONAL JANITORIAL SOLUTIONS INCORPORATED,
ET AL., THIRD-PARTY DEFENDANTS.

NATIONAL JANITORIAL SOLUTIONS INCORPORATED,
FOURTH-PARTY PLAINTIFF-RESPONDENT,

V

RJS JANITORIAL, LLC, FOURTH-PARTY
DEFENDANT-APPELLANT.

GALLO VITUCCI KLAR LLP, NEW YORK CITY (C. BRIGGS JOHNSON OF COUNSEL), FOR FOURTH-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT/FOURTH-PARTY PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 15, 2021. The amended order granted the motion of third-party defendant/fourth-party plaintiff for summary judgment on contractual indemnification against fourth-party defendant and denied the cross motion of fourth-party defendant for summary judgment dismissing the amended fourth-party complaint.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs, the motion of third-party defendant/fourth-party plaintiff National Janitorial Solutions Incorporated is denied, the cross motion of fourth-party defendant RJS Janitorial, LLC is granted and the amended fourth-party complaint is dismissed.

Memorandum: Plaintiff commenced the underlying negligence action against defendant/third-party plaintiff, Barnes & Noble, Inc. (BN), among others, seeking to recover damages for injuries she allegedly

sustained as a result of a slip and fall at one of BN's stores. BN subsequently commenced a third-party action against third-party defendant/fourth-party plaintiff National Janitorial Solutions Incorporated (NJS), among others, with whom BN had contracted for janitorial services at its stores. NJS then commenced a fourth-party action, denominated by the parties as a second third-party action, against fourth-party defendant RJS Janitorial, LLC (RJS), with whom NJS had subcontracted for janitorial services at the subject store. NJS asserted causes of action for contribution and common-law and contractual indemnification against RJS, and RJS now appeals from an amended order that granted the motion of NJS for summary judgment on its contractual indemnification cause of action, subject to an inquest on damages, and denied the cross motion of RJS for summary judgment dismissing the fourth-party complaint.

In a prior order in the underlying action, Supreme Court determined that plaintiff could not establish that the floor in BN's store was negligently maintained and the court therefore granted the motion of BN for summary judgment dismissing the complaint against it; that order was later affirmed by this Court (*Olivieri v Barnes & Noble, Inc.*, 203 AD3d 1589, 1589-1590 [4th Dept 2022], *affg* 2020 NY Slip Op 34752[U] [Sup Ct, Erie County 2021] [*Olivieri I*]). Thereafter, in the third-party action against NJS, the court granted in part the motion of BN for summary judgment on its cause of action for contractual indemnification against NJS. NJS appealed, and we concluded that the court properly granted summary judgment on BN's cause of action for contractual indemnification from NJS insofar as it is based on plaintiff's claim or action inasmuch as the indemnification provision in the contract between BN and NJS did not "condition the indemnification of [BN] upon a finding that [NJS] was negligent or at fault" (*Olivieri v Barnes & Noble, Inc.*, 208 AD3d 1001, 1004 [4th Dept 2022] [internal quotation marks omitted] [*Olivieri II*]).

Now on appeal, RJS contends that the court should have granted its cross motion because the specific terms of the contractual indemnification provision in the agreement here—i.e., the contract between NJS and RJS—unlike the provision at issue in *Olivieri II*, were not triggered by the mere assertion of a claim but required a finding of an actual breach of the agreement by RJS. Thus, it is RJS's position that, because no breach of the agreement can be found, the indemnification provision cannot be triggered in this case, and NJS's contractual indemnification cause of action against RJS should have been dismissed on that basis. We agree.

"[T]he right to contractual indemnification depends upon the specific language of the contract" (*Kelley v Episcopal Church Home & Affiliates, Inc.*, 199 AD3d 1448, 1450 [4th Dept 2021] [internal quotation marks omitted]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Thus, a "contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently

clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks omitted]). Moreover, in the absence of ambiguity, "it is the responsibility of the court to interpret [the contract]" (*Town of Eden v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88 [4th Dept 2001], *lv denied* 97 NY2d 603 [2001] [internal quotation marks omitted]).

Here, the indemnification provision provided that RJS would "indemnify, defend and hold harmless" NJS from "all liabilities, claims, actions, lawsuits, demands, costs, losses, damages, and expenses arising out of or relating to the acts and/or omissions of [RJS] . . . arising out of [RJS's] performance under this Agreement." The provision then defined the "acts against which NJS is indemnified" to include, but not be limited to, "damages or injuries arising through the use of improper or defective materials or tools, or the lack of adequate supervision, or the failure to obtain all necessary permits, registrations and licenses, or the failure to comply with all applicable federal, state and local laws, regulations and/or ordinances or through breach of this Agreement or otherwise." Under the rule of ejusdem generis, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series" (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 104 [1st Dept 2006] [internal quotation marks omitted]; *see Camperlino v Bargabos*, 96 AD3d 1582, 1583-1584 [4th Dept 2012]). Inasmuch as each of the specific words used in the series here described negligent acts or omissions, the general term "otherwise" must likewise be understood to refer to negligent acts or omissions. Thus, we conclude that the agreement here defined the acts or omissions covered by the indemnity provision "to include, inter alia, negligence 'or any other misfeasance, malfeasance, [or] non-feasance' " (*Darien Lake Theme Park & Camping Resort, Inc. v Contour Erection & Siding Sys., Inc.*, 16 AD3d 1055, 1056 [4th Dept 2005]). Because RJS was not negligent here, the indemnification provision was not triggered and RJS is entitled to summary judgment dismissing the cause of action for contractual indemnification. Likewise, because RJS was not negligent, the claims for common-law indemnification and contribution have no merit (*see Stone v Williams*, 64 NY2d 639, 642 [1984]). The court thus erred in granting the motion and denying the cross motion.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

788

CA 21-01455

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

IN THE MATTER OF RANDOLPH CONRAD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUSAN CONRAD, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-RESPONDENT.

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered May 25, 2021. The order, among other things, adjudged that respondent have sole legal and physical custody of the subject child and set forth a schedule for petitioner's parenting time.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the third ordering paragraph the phrase "Sunday at 4:00 PM" and substituting therefor the phrase "the start of school on Monday," striking from the third ordering paragraph the phrase "Mother shall pick the child up at Father's residence on Sunday at the end of Father's parenting time," and striking from the fifth ordering paragraph the phrase "one week of interrupted parenting time during the summer and shall provide notification to Mother of the week he is requesting" and substituting therefor the phrase "four weeks of uninterrupted parenting time during the summer, with no more than two consecutive weeks at a time, and shall provide notification to Mother of the weeks he is requesting" and as modified the order is affirmed without costs.

Memorandum: In this Family Court Act article 6 proceeding, petitioner father appeals from an order that, inter alia, modified the parties' custody and visitation arrangement by awarding respondent mother sole legal and primary physical custody of the child and reducing the father's parenting time with the child.

The father waived his contention that the mother failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the child inasmuch as he alleged in his own modification petition that there had been such a change in

circumstances (*see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]; *see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). Contrary to the father's related contention, we conclude that "there is a sound and substantial basis in the record to support [Supreme Court's] determination that it was in the child's best interests to award [sole custody] to the mother" (*Rice*, 167 AD3d at 1530 [internal quotation marks omitted]; *see Matter of Vaccaro v Vaccaro*, 178 AD3d 1410, 1411 [4th Dept 2019]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]).

We agree with the father, however, that the court abused its discretion in reducing his parenting time with the child (*see generally Matter of Shaffer v Woodworth*, 175 AD3d 1803, 1804 [4th Dept 2019]). "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 Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]). Here, we conclude that the evidence does not support the court's determination that reducing the father's parenting time was in the child's best interests (*see Matter of Rosenkrans v Rosenkrans*, 154 AD3d 1123, 1126 [3d Dept 2017]; *Matter of Knox v Romano*, 137 AD3d 1530, 1532-1533 [3d Dept 2016]; *Matter of Oliver v Oliver*, 284 AD2d 934, 935 [4th Dept 2001]). Pursuant to the initial arrangement, the parties shared joint legal and physical custody of the child. The father had parenting time every day after school and overnights that alternated between Thursday night to Friday night and Thursday night to Monday morning every other week. That schedule was to remain in place until the child started kindergarten, at which time the parties would agree upon an appropriate parenting schedule, which they were unable to do. During the course of this proceeding, the court issued a temporary order granting the father parenting time with the child every other weekend from Thursday after school to Monday morning, when the father would drop the child off at school. By arrangement of the parties, the father was also picking the child up from school at 3:30 p.m. and dropping the child off to the mother at 5:00 p.m. every weekday. The father, the child's former therapist, and the child's principal all testified that the child was thriving under that parenting schedule. The child's therapist also testified that the child was deeply affected when his time with the father was reduced, prompting the parents to suspend the child's therapy in order to provide the child with additional time with the father. In addition, the child's therapist opined that the child would be negatively impacted if the father's parenting time was limited, as did the attorney for the child. We thus conclude that the child's best interests will be served by extending the father's weekend parenting time until Monday morning and granting him four weeks of parenting time during the summer, with no more than two consecutive weeks at a time (*see generally Matter of Manioci v Schreiber*, — AD3d —, 2022 NY Slip Op 06609 [4th Dept 2022]; *Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *Oliver*,

284 AD2d at 935). We therefore modify the order accordingly.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

790

CA 21-00388

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

THEODORE MOSLEY, ANNE MOSLEY, PATRICIA DUKE, JENNIFER DUKE, ALBERT LUCARELLI, ELIZABETH LUCARELLI, MARK COHEN, JOAN WLAD, DOMINICK FEOCCO, SANDRA FEOCCO, MARVIN DRUGER, STEPHEN ARGENTIERI, MICHELLE ARGENTIERI, CHRISTINE LITTY, JOHN WATERS, JANET WATERS, ANN HICKS, DAVID RIGAN, MARK FANNING, VICTORIA FANNING, JOHN PEASE AND KIRSTEN PEASE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MARIANNE PARNELL, DEFENDANT-RESPONDENT.
ET AL., DEFENDANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 10, 2021. The order denied plaintiffs' motion for summary judgment and ordered that the parties could not park vehicles on the right-of-way that is the subject of the action.

It is hereby ORDERED that said appeal from the order insofar as it relates to the second ordering paragraph is unanimously dismissed and the order is modified on the law by granting that part of the motion for summary judgment on the first cause of action insofar as it seeks a declaration of plaintiffs' rights under the easement and judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that plaintiffs have the right to construct, maintain, and use a seasonal dock within the right-of-way,

and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are property owners who have use of an easement over the property of Marianne Parnell (defendant), which is a lakefront lot on the shore of Owasco Lake. The easement, a 20-foot-wide right-of-way across the northern edge of defendant's property, affords access to the lake. Following a disagreement with defendant over the scope of plaintiffs' use of the right-of-way, specifically

whether the right-of-way encompasses the right to erect, maintain, and use a seasonal dock within the right-of-way, plaintiffs commenced this action asserting three causes of action seeking declaratory and other relief. Plaintiffs now appeal from an order that, inter alia, denied their motion for summary judgment on the second amended complaint.

Preliminarily, we note that plaintiffs' appeal from that part of the order that sua sponte prohibited the parties from parking vehicles or placing obstructions in, on, or at the right-of-way must be dismissed because that part of the order "did not decide a motion made on notice [and, a]s such, . . . is not appealable as of right" (*U.S. Bank Trust, N.A. v Hussain*, 207 AD3d 778, 779 [2d Dept 2022] [internal quotation marks omitted]; *see* CPLR 5701 [a] [2]). Plaintiffs did not seek leave to appeal, and we decline to treat the notice of appeal as an application for leave to appeal (*see* CPLR 5701 [c]; *Deutsche Bank Natl. Trust Co. v Miller*, 172 AD3d 1890, 1890 [4th Dept 2019]).

We agree with plaintiffs that Supreme Court erred in denying their motion with respect to the first cause of action insofar as it seeks a declaration that their deeds confer upon them the right to erect, maintain, and use a dock within the right-of-way, and we therefore modify the order accordingly. Plaintiffs met their initial burden on the motion by submitting, among other things, the relevant deeds, which established that there were no restrictions on the easement and that the purpose of the right-of-way was to provide ingress to and egress from the lake (*see Matter of Shanor Elec. Supply, Inc. v FAC Cont., LLC*, 73 AD3d 1445, 1446-1447 [4th Dept 2010]). Given the purpose of the easement and the absence of restrictions, "any reasonable lawful use [by plaintiffs] within the contemplation of the grant is permissible" (*id.* at 1447 [internal quotation marks omitted]), and the installation, maintenance, and use of a dock at the end of a right-of-way providing access to a lake is a "reasonable use incidental to the purpose of the easement" (*Holst v Liberatore*, 115 AD3d 1216, 1217 [4th Dept 2014] [internal quotation marks omitted]; *see Elm Lansing Realty Corp. v Knapp*, 192 AD3d 1348, 1352 [3d Dept 2021]; *Hush v Taylor*, 84 AD3d 1532, 1534-1535 [3d Dept 2011]). Defendant failed to raise a triable issue of fact in opposition.

In light of our determination, plaintiffs' contention that the court erred in denying the motion with respect to the second cause of action, asserting that plaintiffs acquired a prescriptive easement for the installation, maintenance, and use of the seasonal dock, is academic. Finally, we reject plaintiffs' contention that the court erred in denying the motion with respect to the third cause of action, seeking a declaration that defendant has placed obstacles in the right-of-way, interfering with plaintiffs' use. Plaintiffs failed to meet their initial burden on the motion of demonstrating that defendant actually obstructed plaintiffs' use of the right-of-way (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

791

CA 22-00038

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

SPINE SURGERY OF BUFFALO NIAGARA, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY,
GEICO GENERAL INSURANCE COMPANY AND GOVERNMENT
EMPLOYEES INSURANCE COMPANY, DEFENDANTS-APPELLANTS.

RIVKIN RADLER LLP, UNIONDALE (HENRY MASCIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE MORRIS LAW FIRM, P.C., BUFFALO (DANIEL K. MORRIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 25, 2021. The order denied the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff, as the assignee of certain claims for no-fault benefits, previously commenced an action against defendant GEICO Casualty Company asserting a single cause of action for prima facie tort and seeking, inter alia, punitive damages. GEICO Casualty Company moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), and Supreme Court (Montour, J.) granted the motion. On plaintiff's appeal, we affirmed the substantive ruling but modified the order to provide that the dismissal was without prejudice (*Spine Surgery of Buffalo Niagara v GEICO Cas. Co.*, 179 AD3d 1547 [4th Dept 2020]). Plaintiff thereafter commenced this action against defendants, asserting the same cause of action and again seeking, inter alia, punitive damages. Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). The court (Nugent Panepinto, J.) denied that motion, and defendants appeal.

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). A plaintiff alleging prima facie tort must therefore allege that the defendant's "sole

motivation was 'disinterested malevolence' " (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). Here, we conclude that the court erred in denying defendants' motion. Despite the additional allegations in the complaint and the additional materials that were submitted in opposition to the motion, the complaint still fails to state a cause of action for prima facie tort. Although the complaint alleges that defendants " 'acted maliciously' and 'with disinterested malice,' " (*Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co.*, 175 AD3d 1100, 1101 [4th Dept 2019]), it does not allege that defendants' "sole motivation was 'disinterested malevolence' " (*Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 333; *see Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 880 [4th Dept 2019]). "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the *sole* motivation for [the] defendant['s] otherwise lawful act" (*Medical Care of W. N.Y.*, 175 AD3d at 880 [emphasis added and internal quotation marks omitted]; *see Walden Bailey Chiropractic, P.C. v Geico Cas. Co.*, 173 AD3d 1806, 1807 [4th Dept 2019]).

In light of our determination, we do not address defendants' remaining contentions.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

794.1

CA 21-01120

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

SAMUEL A. HALABY, JR.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. DENZAK AND SARA J. DENZAK,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

FINUCANE AND HARTZELL, PITTSFORD (THOMAS CARROLL HARTZELL JR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Gail Donofrio, J.), dated May 7, 2021. The order and judgment, among other things, granted in part and denied in part the motion of defendants for a directed verdict dismissing the complaint, and granted plaintiff judgment prohibiting defendants from constructing certain structures on their property.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the fourth decretal paragraph, granting that part of defendants' motion for a directed verdict with respect to plaintiff's request for injunctive relief enjoining defendants from "constructing, placing, or maintaining any outbuildings such as steel tool sheds, lean-tos, portable or detached garages or the like except as may be permitted by the Uniform Plan of Restrictions" and dismissing the complaint to that extent and as modified the order and judgment is affirmed without costs.

Memorandum: In this action pursuant to RPAPL article 15 seeking enforcement of restrictive covenants, plaintiff appeals and defendants cross-appeal from an order and judgment that, inter alia, denied plaintiff's request for injunctive relief requiring defendants to remove a garden and surrounding fencing from their property, granted plaintiff a judgment barring defendants from "constructing, placing, or maintaining any structure/outbuilding other than pool cabanas and architecturally compatible gazebos" on their property, and denied defendants' motion for a directed verdict with respect to that relief.

Plaintiff and defendants live in the University Park subdivision in Mendon, New York. There are 10 lots in the University Park neighborhood. Each lot consists of approximately three acres of land on the south side of Tennyson Way, where the dwellings are located,

and approximately two acres of land on the north side of Tennyson Way. Plaintiff and defendants own adjacent lots. In 1992, Smith-McCall Development, Inc. recorded a Uniform Plan of Restrictions (UPR) relating to the neighborhood, with the stated purpose "to encourage development and maintenance of a fine, suburban residential development in order to promote and provide collective individual ownership benefits." Plaintiff commenced this action to enforce the UPR, claiming that defendants' installation of a fenced garden on the northern portion of their lot and their intended erection of a shed on the southern portion violated the provisions of the UPR.

"Generally, 'restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy' " (*Dodge v Baker*, 194 AD3d 1348, 1349 [4th Dept 2021], quoting *Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 431 [2004]; *see Kleist v Stern*, 174 AD3d 1451, 1453 [4th Dept 2019]). "[T]he party seeking to enforce such a restriction 'must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction' " (*Dodge*, 194 AD3d at 1349, quoting *Greek Peak v Grodner*, 75 NY2d 981, 982 [1990]; *see Kleist*, 174 AD3d at 1453). Inasmuch as "the law has long favored free and unencumbered use of real property, . . . covenants restricting use are strictly construed against those seeking to enforce them" (*Witter v Taggart*, 78 NY2d 234, 237 [1991]; *see Kleist*, 174 AD3d at 1453; *Ludwig v Chautauqua Shores Improvement Assn.*, 5 AD3d 1119, 1120 [4th Dept 2004], *lv denied* 3 NY3d 601 [2004]).

Defendants contend on their cross appeal that Supreme Court erred in concluding that plaintiff established that the restrictive covenant bars defendants from placing any shed on their lot. We agree. With respect to outbuildings, section six of the UPR states that "[n]o structures such as steel tool sheds, lean-to's or mini-barns will be permitted, excepting pool cabanas and/or such architecturally compatible gazebos or such other structure as may be permitted by the undersigned." Here, the court erroneously concluded that section six "does not permit any structure except pool cabanas and/or such architecturally compatible gazebos." In reaching that conclusion, the court relied on the language of section 1 (A) providing that "[n]o structure shall be erected, altered, placed, or permitted to remain on any of said lots other than one single-family dwelling[]." The court's interpretation ignores the language of section six "excepting pool cabanas and/or such architecturally compatible gazebos or such *other* structure as may be permitted by the undersigned" (emphasis added) from its general prohibition against "structures such as steel tool sheds, lean-to's or mini-barns." There is no basis for interpreting the term "structure" in such a limited manner, particularly considering the use of the word "other," i.e., something differing from either a pool cabana or gazebo. Rather, "a contract must be read as a whole to give effect and meaning to every term" (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017] [internal quotation marks omitted]; *see Rautenstrauch v Bakhru*, 64 AD3d 554, 556 [2d Dept 2009]). Inasmuch as plaintiff did not establish that the restrictions contained in the UPR prohibited

defendants from erecting an outbuilding other than a pool cabana or gazebo, plaintiff is not entitled to equitable relief enjoining that action and the court erred in denying defendants' motion for a directed verdict with respect to plaintiff's request to enjoin defendants from erecting such a structure (*see Single v Whitmore*, 307 NY 575, 582 [1954]; *Kleist*, 174 AD3d at 1452-1453; *cf. Dodge*, 194 AD3d at 1349). We therefore modify the order and judgment accordingly.

Further, although we agree with plaintiff that the UPR unambiguously prohibits the fencing surrounding defendants' garden, we reject plaintiff's contention on his appeal that the court erred in granting defendants' motion to dismiss that portion of the complaint seeking injunctive relief requiring defendants to remove the fencing. "[A] party is not automatically entitled to equitable relief when a violation of a restrictive covenant is established" (*Kleist v Stern*, 187 AD3d 1666, 1667 [4th Dept 2020]). Entitlement to equitable relief "depends on the particular circumstances of each case," and of particular importance is "whether enforcing [a] covenant and restriction would substantially harm the defendant without any substantial benefit to the plaintiff" (*id.*). The plaintiff must establish irreparable injury and that the balance of the equities weighs in his or her favor (*see DiMarzo v Fast Trak Structures*, 298 AD2d 909, 910-911 [4th Dept 2002]). Ultimately, "[t]he court has discretion whether to grant an equitable remedy after balancing the equities" (*Kleist*, 187 AD3d at 1667; *see DiMarzo*, 298 AD2d at 911). Here, the court properly concluded that the balance of the equities weighed in defendants' favor inasmuch as the record at trial established that defendants were not aware of the restrictions under the UPR, there is no express mention of the UPR in defendants' deed, other lots in the subdivision contained similarly fenced gardens on the north side of Tennyson Way, and "enforcement of the restriction would have little benefit to plaintiff" (*Kleist*, 187 AD3d at 1668).

We have considered the remaining contentions on plaintiff's appeal and defendants' cross appeal and conclude that none warrants further modification or reversal of the order and judgment.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

799

KA 20-01314

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREAMON ELMORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 9, 2020. The judgment convicted defendant upon a jury verdict of murder in the first degree (two counts), conspiracy in the third degree, criminal possession of a weapon in the second degree and criminal possession of a firearm.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and one count each of conspiracy in the third degree (§ 105.13), criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of a firearm (§ 265.01-b [1]).

Initially, we agree with defendant that the procedures outlined in CPL article 245 became applicable to this action as soon as that article became effective in January 2020. In 2019, the Governor signed into law a bill repealing CPL former article 240 and replacing it with CPL article 245, effective January 1, 2020 (*see* L 2019, ch 59, part LLL, §§ 1, 2, 14). Where an action is "already pending," a newly enacted statute that effects a procedural change "is applicable even then if directed to the litigation in future steps and stages . . . It is inapplicable, unless in exceptional conditions, where the effect is to reach backward, and nullify by relation the things already done" (*Matter of Berkovitz v Arbib & Houlberg, Inc.*, 230 NY 261, 270 [1921]; *see Simonson v International Bank*, 14 NY2d 281, 289 [1964]). Thus, "procedural changes are, in the absence of words of exclusion, deemed applicable to *subsequent* proceedings in pending actions" (*Simonson*, 14 NY2d at 289 [internal quotation marks omitted]; *see People v Robbins*, 206 AD3d 1069, 1071 [3d Dept 2022], *lv denied* 39 NY3d 942 [2022];

People v Hewitt, 201 AD3d 1041, 1042-1043 [3d Dept 2022], *lv denied* 38 NY3d 928 [2022]).

We nevertheless reject defendant's contention that the People violated CPL article 245 by failing to provide defendant with the criminal history of his brother, an alleged accomplice who testified for the People at trial pursuant to a plea agreement, until trial had already commenced. As relevant here, the automatic discovery provisions of CPL article 245 require that the People provide the defense with "[a] complete record of judgments of conviction for . . . all persons designated as potential prosecution witnesses" (CPL 245.20 [1] [p]), as well as, "[w]hen it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses" (CPL 245.20 [1] [q]). Each of the two instances of prior criminal conduct allegedly committed by defendant's brother, who was only 13 years old at the time the instant offenses were committed, would have been subject to the jurisdiction of Family Court, rather than the criminal courts (*see* Family Ct Act § 301.2 [1]; CPL 1.20 [42]); consequently, any adjudication could not "be denominated a conviction" and defendant's brother could not be "denominated a criminal by reason of such adjudication" (Family Ct Act § 380.1 [1]). Thus, the People were not required to disclose that information pursuant to CPL 245.20 (1) (p) or (q).

To the extent that defendant contends that the prosecution's failure to provide a certificate of compliance in accordance with CPL 245.50 (former [1]) hampered his ability to present a defense, defendant failed to demonstrate that he was prejudiced by the lack of a certificate. He did not identify any evidence or information that he had not received or that he had received too late to use effectively. Thus, Supreme Court did not abuse its discretion in determining that no sanction was required (*see generally People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Sweet*, 200 AD3d 1315, 1319-1320 [3d Dept 2021], *lv denied* 38 NY3d 930 [2022]). Defendant's related contention that the court should have dismissed the case because the People, having failed to file a certificate of compliance, could not be ready for trial pursuant to CPL 30.30 is unpreserved for our review inasmuch as he did not move, in writing, for dismissal on that ground (*see* CPL 210.20 [1] [g]; 210.45 [1]; 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]).

Defendant further contends that the court erred in denying his request that the indictment be dismissed, or that other sanctions be imposed, on the ground that unauthorized audio recordings were made of the grand jury proceeding. Initially, defendant did not ask for any sanction other than dismissal and, therefore, his contention with respect to sanctions other than dismissal of the indictment is unpreserved (*see* CPL 470.05 [2]; *People v Manigualt*, 125 AD3d 1480, 1480 [4th Dept 2015], *lv denied* 25 NY3d 1074 [2015]; *People v Pena*, 259 AD2d 350, 350 [2d Dept 1999], *lv denied* 93 NY2d 1005 [1999]). We reject defendant's contention that the court erred in denying his

request that the indictment be dismissed. A defendant may move to dismiss an indictment pursuant to CPL 210.20 on the ground that the "grand jury proceeding was defective, within the meaning of section 210.35" (CPL 210.20 [1] [c]). Of the five bases for dismissal in CPL 210.35, the only one that could apply here is the final basis, which provides that a grand jury proceeding is defective under CPL 210.20 when "[t]he proceeding otherwise fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]). The "demanding test" for invoking that provision "is met only where the prosecutor engages in an 'over-all pattern of bias and misconduct' that is 'pervasive' and typically willful, whereas isolated instances of misconduct, including the erroneous handling of evidentiary matters, do not merit invalidation of the indictment" (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014], quoting *People v Huston*, 88 NY2d 400, 408 [1996]). Here, there was no misconduct by the prosecutors. Unbeknownst to the grand jury stenographers, their new machines automatically recorded audio files in addition to the stenographer's shorthand. It was discovered by happenstance when the prosecution inquired of a stenographer in this case about a possible inaccuracy in the transcript. There was no evidence that the recordings were intentionally created or concealed, and the prosecution disclosed them immediately and without prompting. Thus, defendant did not meet the "demanding test" for establishing that the integrity of the grand jury proceeding was impaired by the inadvertent recordings (*id.*).

Defendant further contends that the court erred in denying his request for a missing witness charge. We reject that contention. Even assuming, arguendo, that defendant met his initial burden with respect to his request (*see People v Hawkins*, 84 AD3d 1736, 1737 [4th Dept 2011], *lv denied* 17 NY3d 806 [2011]), we conclude that the prosecution established that the testimony of the witness in question would have been cumulative (*see People v Ortiz*, 83 NY2d 989, 990 [1994]; *People v White*, 265 AD2d 843, 843-844 [4th Dept 1999], *lv denied* 94 NY2d 868 [1999]).

We further conclude that the court did not err in permitting a police detective to testify regarding certain software that he used to analyze cell phone location data. Here, the detective testified that he obtained data from cell phone companies, which he then inputted into the software to create a report. Contrary to defendant's contention, the detective testified to factual matters within his knowledge and did not provide an expert opinion (*see People v Carducci*, 143 AD3d 1260, 1261 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *cf. People v Ortiz*, 168 AD3d 482, 483 [1st Dept 2019], *lv denied* 33 NY3d 979 [2019]; *see also People v Box*, 181 AD3d 1238, 1242 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]).

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]).

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

802

CA 22-00165

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

ROBERT OWEN LEHMAN FOUNDATION, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ISRAELITISCHE KULTUSGEMEINDE WIEN, MICHAEL BAR, ROBERT RIEGER TRUST, JACOB BARAK, AS TRUSTEE OF THE ROBERT RIEGER TRUST, SUSAN ZIRKL MEMORIAL FOUNDATION TRUST, AND MICHAEL D. LISSNER, AS TRUSTEE OF THE SUSAN ZIRKL MEMORIAL FOUNDATION TRUST, DEFENDANTS-RESPONDENTS.

NIXON PEABODY LLP, ROCHESTER (THADDEUS J. STAUBER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DUNNINGTON BARTHOLOW & MILLER LLP, NEW YORK CITY (RAYMOND J. DOWD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MICHAEL BAR, ROBERT RIEGER TRUST, AND JACOB BARAK, AS TRUSTEE OF THE ROBERT RIEGER TRUST.

BAKER & HOSTETTER LLP, NEW YORK CITY (OREN J. WARSHAVSKY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SUSAN ZIRKL MEMORIAL FOUNDATION TRUST, AND MICHAEL D. LISSNER, AS TRUSTEE OF THE SUSAN ZIRKL MEMORIAL FOUNDATION TRUST.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 5, 2022. The order, among other things, denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts that determined that laches is not available to plaintiff as an affirmative defense against the counterclaim of defendants Michael Bar, Robert Rieger Trust, and Jacob Barak, as Trustee of the Robert Rieger Trust, and dismissed plaintiff's affirmative defense of laches as against those defendants, and reinstating that affirmative defense and as modified the order is affirmed without costs.

Memorandum: This litigation concerns a portrait made in 1917 by Austrian artist Egon Schiele of his wife, Edith. Art collector Robert Lehman, Sr., purchased that artwork in 1964 from an art gallery in London, England. Later that year, he gave the artwork to his son, Robert Owen Lehman (Robin), who, in 2016, gave the artwork to plaintiff, Robin's eponymous foundation. After plaintiff consigned the artwork to Christie's for auction, two groups asserted competing

claims of ownership of the artwork, alleging that the artwork left the possession of its rightful owner during the Holocaust. Defendant Susan Zirkl Memorial Foundation Trust claims ownership of the artwork as an heir of Karl Maylander. Defendant Robert Rieger Trust and defendant Michael Bar claim ownership as heirs of Heinrich Rieger.

Plaintiff commenced this action seeking, inter alia, a declaration that it is the rightful owner of the artwork. Susan Zirkl Memorial Foundation Trust and defendant Michael D. Lissner, as Trustee of the Susan Zirkl Memorial Foundation Trust (collectively, Maylander defendants), answered and asserted counterclaims to reclaim the artwork. Robert Rieger Trust, Bar, and defendant Jacob Barak, as Trustee of the Robert Rieger Trust (collectively, Rieger defendants), likewise answered and asserted, inter alia, counterclaims to reclaim the artwork. Plaintiff replied to defendants' counterclaims, asserting among its affirmative defenses that the counterclaims were barred by the doctrine of laches.

Plaintiff thereafter moved for summary judgment on the amended complaint and dismissing defendants' counterclaims. The Maylander defendants cross-moved for summary judgment in their favor. In deciding the motion and cross motion, Supreme Court held that laches was not available to plaintiff as an affirmative defense against the claims of either group of defendants. The court therefore denied plaintiff's motion, granted the cross motion insofar as it sought dismissal of plaintiff's laches affirmative defense against the Maylander defendants and, inter alia, dismissed plaintiff's laches affirmative defense against the Rieger defendants. Plaintiff appeals, contending that the court improperly concluded that laches was not available as an affirmative defense and that, as a result, the court erred in granting the cross motion with respect to plaintiff's laches affirmative defense, dismissing plaintiff's laches affirmative defense against the Rieger defendants, and denying the motion.

As an initial matter, we agree with plaintiff that the Holocaust Expropriated Art Recovery Act of 2016 (Pub L 114-308, 130 US Stat 1524 [114th Cong, 2d Sess, Jan. 6, 2016]) does not preclude plaintiff from asserting a laches defense to defendants' claims (*see Zuckerman v Metropolitan Museum of Art*, 928 F3d 186, 196 [2d Cir 2019], *cert denied* — US —, 140 S Ct 1269 [2020]). Contrary to plaintiff's further contention, however, we conclude that the court did not err in granting the cross motion insofar as it sought dismissal of plaintiff's laches affirmative defense to the Maylander defendants' counterclaims. The Maylander defendants met their initial burden on the cross motion of establishing that they did not have either actual or constructive knowledge of their claim of ownership of the artwork and thus did not unreasonably delay in pursuing that claim (*see generally Matter of Sierra Club v Village of Painted Post*, 134 AD3d 1475, 1476 [4th Dept 2015]). In opposition, plaintiff offered only speculation and conjecture with respect to the knowledge possessed by the Maylander defendants' predecessors as to their claim of ownership of the artwork, which is insufficient to raise a triable issue of fact (*see Zetes v Stephens*, 108 AD3d 1014, 1017 [4th Dept 2013]; *Woods v*

Design Ctr., LLC, 42 AD3d 876, 877 [4th Dept 2007]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Indeed, the record is devoid of evidence that the Maylander defendants' predecessors in interest "inexcusably slept on [their] rights so as to make a decree against [plaintiff] unfair" (*Zuckerman*, 928 F3d at 193).

The record in this case does not compel us to reach the same conclusion with respect to the Rieger defendants. Unlike the Maylander defendants, there is evidence in the record that the Rieger defendants' predecessors in interest had at least some knowledge about the collection of artwork stolen from their ancestor inasmuch as they made several restitution claims pertaining to it in the years following World War II. There is no evidence in the record, however, that the Rieger defendants' predecessors reached out to the London art gallery that exhibited and sold the subject artwork or, in the decades that followed, to either Robin or the publisher of a 1990 catalog of Schiele's work that included the subject artwork. Based on the foregoing, we conclude that triable issues of fact exist with respect to whether the Rieger defendants delayed in asserting their claim despite having the opportunity to do so (*see Zuckerman*, 928 F3d at 193-195; *see generally Sierra Club*, 134 AD3d at 1476). We therefore agree with plaintiff that the court erred in determining that laches is not available to it as a defense against the claims of the Rieger defendants and in dismissing plaintiff's affirmative defense of laches to the Rieger defendants' counterclaims, and we modify the order accordingly. Based on our conclusions herein, we reject plaintiff's further contention that the court erred in denying its motion with respect to the Rieger defendants.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

803

CA 21-01169

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

WILLIAM C. RICK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE H. TECULVER AND CAPRI M. TECULVER, INDIVIDUALLY, AND AS CO-ADMINISTRATORS OF THE ESTATE OF MATTHEW R. TECULVER, DECEASED, AND TREVOR S. BAYLE, DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (RICHARD J. ZIELINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBBINS & JOHNSON, P.C., JAMESTOWN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), dated July 27, 2021. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his snowmobile collided with a snowmobile operated by Matthew R. TeCulver (decedent) and owned by defendant Trevor S. Bayle. At the time of the collision, plaintiff and another snowmobile driver were traveling north along a snowmobile trail, while decedent, Bayle, and another driver (decedent's group) were traveling south along the same path. The collision happened as the two groups converged along a straight, flat portion of the trail. Although the parties dispute the particulars of the collision, there is no dispute that decedent was traveling on the right side of the snowmobile trail, whereas plaintiff moved his snowmobile to the left, eventually entering decedent's lane of travel. Defendants moved for, inter alia, summary judgment dismissing the complaint. Supreme Court denied the motion. Defendants appeal, and we affirm.

We conclude that defendants failed to meet their initial burden on the motion inasmuch as their own submissions raised triable issues of fact whether decedent and Bayle were negligent (*see Ebbole v Nagy*, 169 AD3d 1461, 1462 [4th Dept 2019]; *Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]). Although defendants submitted deposition testimony establishing that the accident occurred after plaintiff veered to the left into decedent's lane of travel (*see generally*

Shanahan v Mackowiak, 111 AD3d 1328, 1329 [4th Dept 2013]; *Clough v Szymanski*, 26 AD3d 894, 895 [4th Dept 2006]), defendants' submissions failed to eliminate all questions of fact with respect to the negligence of decedent and Bayle because the submissions contained evidence that decedent and Bayle were traveling at an unsafe speed at the time of the collision (*see Moore v Curtiss*, 129 AD3d 1504, 1505 [4th Dept 2015]; *see generally Haider v Zadrozny*, 61 AD3d 1077, 1078 [3d Dept 2009]; *Pinkow v Herfield*, 264 AD2d 356, 358 [1st Dept 1999]). Indeed, there also was evidence that decedent's group had been drag racing, three abreast, along the trail, which raised "factual questions concerning the reasonableness of [decedent's and Bayle's] actions under the circumstances [and] whether [decedent] could have done something to avoid the collision" (*Haider*, 61 AD3d at 1078 [internal quotation marks omitted]; *see generally Halbina v Brege*, 41 AD3d 1218, 1219 [4th Dept 2007]; *Acovangelo v Brundage*, 271 AD2d 885, 887 [3d Dept 2000]).

Because defendants failed to meet their 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]; *Smith v Szpilewski*, 139 AD3d 1342, 1343 [4th Dept 2016]).

We reject defendants' further contention that the court erred to the extent that it concluded that an issue of fact exists concerning whether plaintiff was negligent.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

804

CA 21-01770

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

ROBERT MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SILVAROLE TRUCKING INC., JOSHUA DAVIS,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ROBERT P. CAHALAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCMAHON, MARTINE & GALLAGHER, LLP, BROOKLYN (TIMOTHY D. GALLAGHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered December 10, 2021. The order granted in part the motion of plaintiff for summary judgment and denied the cross motion of defendants Silvarole Trucking Inc. and Joshua Davis seeking, inter alia, partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in part and dismissing the claim for punitive damages against defendant Silvarole Trucking Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he was struck by a tractor-trailer driven by defendant Joshua Davis in the course of his employment with defendant Silvarole Trucking Inc. (Silvarole) (collectively, defendants). Plaintiff moved for summary judgment on the issue of negligence and gross negligence, and defendants cross-moved for, inter alia, summary judgment on the issue of plaintiff's alleged comparative negligence and dismissing the complaint to the extent that it alleged gross negligence and sought punitive damages. Supreme Court granted the motion insofar as it sought summary judgment on the issue of ordinary negligence and denied the cross motion. Defendants appeal.

We conclude that the court properly granted the motion with respect to the issue of negligence. Plaintiff met his initial burden on the motion of establishing as a matter of law that Davis was negligent in his operation of the tractor-trailer inasmuch as Davis drifted out of the lane of travel and struck plaintiff while he was

walking along the side of the road (*see generally Strassburg v Merchants Auto. Group, Inc.*, 203 AD3d 1735, 1736 [4th Dept 2022]; *Bush v Kovacevic*, 140 AD3d 1651, 1652-1653 [4th Dept 2016]). Contrary to defendants' contention, they failed to raise an issue of fact whether the emergency doctrine applies here (*see Watson v Peschel*, 188 AD3d 1693, 1694-1695 [4th Dept 2020]; *Aldridge v Rumsey*, 275 AD2d 897, 897 [4th Dept 2000]). The emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]; *see Dalton v Lucas*, 96 AD3d 1648, 1648 [4th Dept 2012]). However, "[t]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making" (*Watson*, 188 AD3d at 1695 [internal quotation marks omitted]). The "emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency" (*id.* [internal quotation marks omitted]). Here, Davis averred that he placed a drink bottle in the center console cup holder and that, through no action on his part, the bottle fell from the cup holder to the floor of the cab, where it became lodged underneath the accelerator pedal. Nevertheless, the record also establishes that Davis was the only person in the vehicle, and defendants did not submit evidence that any other person was responsible for the alleged emergency (*see id.* at 1696). Thus, we conclude that defendants failed to demonstrate that the emergency encountered was not of Davis's own making, "i.e., that [Davis] did not create or contribute to it" (*id.*; *see Sweeney v McCormick*, 159 AD2d 832, 833 [3d Dept 1990]).

We reject defendants' contention that the court erred in denying that part of their cross motion seeking summary judgment dismissing plaintiff's cause of action for gross negligence and claim for punitive damages against Davis. "Because the standard for punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*Gaines v Brydges*, 198 AD3d 1287, 1287 [4th Dept 2021] [internal quotation marks omitted]; *see Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013], *rearg denied* 21 NY3d 976 [2013]). Punitive damages may be awarded "based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard" (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 200 [1990] [internal quotation marks omitted]). Viewing the evidence in the light most favorable to plaintiff, as we must in the context of defendants' cross motion (*see Gaines*, 198 AD3d at 1288; *see generally Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we conclude that defendants failed to meet their

initial burden of establishing entitlement to judgment as a matter of law. The record does not support defendants' contention that Davis acted instinctively in reaching for the bottle. Davis did not aver in his affidavit that he reacted instinctively, nor did he describe how long the bottle was wedged under the accelerator before he took his eyes off of the roadway, how much time passed between when he first noticed that his accelerator pedal was compromised and when he looked down to determine the cause of the obstruction, or how long it took him to retrieve the bottle. Davis did establish, however, that he had enough time to apply the brake and begin to slow the tractor-trailer before removing his eyes from the roadway. Defendants thus failed to meet their initial burden of establishing that Davis's conduct, specifically his decision to look for and retrieve the obstacle while the tractor-trailer was in motion—despite the fact that his brakes were in working order—did not "amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others" (*Home Ins. Co.*, 75 NY2d at 200 [internal quotation marks omitted]; *see also DiNiro v Aspen Athletic Club, LLC*, 173 AD3d 1789, 1790 [4th Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

We agree with defendants that the court erred in denying their cross motion with respect to plaintiff's claim against Silvarole for punitive damages, and we therefore modify the order accordingly. Plaintiff seeks to hold Silvarole liable for punitive damages under a theory of vicarious liability. However, punitive damages are unavailable under such a theory absent limited circumstances not present here (*see Dischiavi v Calli*, 111 AD3d 1258, 1261-1262 [4th Dept 2013]; *O'Connor v Kuzmicki*, 14 AD3d 498, 499 [2d Dept 2005]).

Finally, we reject defendants' contention that the court erred in denying their cross motion with respect to plaintiff's alleged comparative negligence. "[T]he question of a plaintiff's comparative negligence almost invariably raises a factual issue for resolution by the trier of fact" (*Gudenzi-Ruess v Custom Envtl. Sys.*, 212 AD2d 952, 953 [3d Dept 1995]; *see Strassburg*, 203 AD3d at 1736). Here, defendants argued that plaintiff was negligent per se because he failed to use the sidewalk that was available on the west side of the road, in violation of Vehicle and Traffic Law § 1156 (a), and failed to walk along the left side of the roadway, in violation of section 1156 (b). Although an unexcused violation of the Vehicle and Traffic Law constitutes negligence per se (*see Habir v Wilczak*, 191 AD3d 1320, 1321 [4th Dept 2021]; *Heffernan v Logue*, 40 AD2d 1071, 1071 [4th Dept 1972]), we conclude that defendants failed to establish that plaintiff violated those provisions of the Vehicle and Traffic Law. Section 1156 (a) requires that a pedestrian use an available sidewalk when it "may be used with safety," and section 1156 (b) requires that a pedestrian walk along the left side of the roadway "when practicable." Here, the evidence submitted by defendants established that plaintiff made a right-hand turn onto the road on which the accident occurred, heading northbound on the east side. The photographs submitted by

defendants show that a sidewalk was available along the west side of the road, but they also demonstrate that there was no crosswalk or traffic signal that would have allowed plaintiff to safely cross to the west side before the location of the accident. Inasmuch as defendants failed to meet their initial burden by establishing prima facie that plaintiff was negligent based on his alleged violation of the relevant statutes, the court did not err in denying the cross motion with respect to plaintiff's comparative negligence (*see Allen v Illes*, 55 AD3d 1312, 1313 [4th Dept 2008]; *see generally Zuckerman*, 49 NY2d at 562).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

807

CA 21-01570

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

HOSPITALITY CONCEPTS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAY BERNHARDT, BEDFORD FALLS ENTERPRISES, LLC, JGB PROPERTIES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

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

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (JEFFREY A. JAKETIC OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 13, 2021. The order granted in part the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking payment for services that it provided to defendant Bedford Falls Enterprises, LLC (BFE), which owned The Gould Hotel (hotel) in Seneca Falls. BFE sold the hotel in August 2018; however, neither BFE nor defendant Jay Bernhardt, BFE's sole member, paid the amount owed to plaintiff. Subsequently, BFE transferred certain of its monetary assets to defendant JGB Properties, LLC (JGB Properties). Bernhardt was also the sole member of JGB Properties. Following its transfer of assets, BFE had insufficient funds with which to pay the amount owed to plaintiff. In a prior action, plaintiff obtained a judgment against BFE for the unpaid amount and interest, but BFE had dissolved by that time. Plaintiff commenced the instant action seeking, inter alia, to hold Bernhardt personally liable and to set aside the conveyance to JGB Properties as fraudulent pursuant to Debtor and Creditor Law former §§ 273 and 276. Plaintiff thereafter moved for summary judgment on, inter alia, the second cause of action in the amended complaint insofar as it is premised on those former sections, and on the first cause of action. In appeal No. 1, Bernhardt, BFE, and JGB Properties (collectively, defendants) appeal from an order that, inter alia, granted those parts of plaintiff's motion for summary judgment with respect to its second cause of action, insofar as asserted against defendants on the basis of former sections 273 and 276, and

with respect to its first cause of action. In appeal No. 2, defendants appeal from a subsequent order that, inter alia, awarded attorneys' fees to plaintiff. In appeal No. 3, defendants appeal from a judgment awarding plaintiff damages, interest, costs, and attorneys' fees.

As an initial matter, we note that the appeals from the orders in appeal Nos. 1 and 2 must be dismissed inasmuch as those orders are subsumed in the final judgment in appeal No. 3. The appeal from the judgment brings up for review the propriety of the orders in appeal Nos. 1 and 2 (*see generally* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

With respect to appeal No. 3, we reject defendants' contention that Supreme Court erred in granting summary judgment to plaintiff with respect to its second cause of action insofar as asserted against defendants on the basis of Debtor and Creditor Law former §§ 273 and 276. Pursuant to former section 273 and as relevant on appeal, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to [that person's] actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Contrary to defendants' contention, plaintiff met its initial burden on the motion by establishing that BFE's conveyance to JGB Properties rendered BFE insolvent and was made without fair consideration, and defendants failed to raise an issue of fact in opposition (*see generally Berner Trucking v Brown*, 281 AD2d 924, 924-925 [4th Dept 2001]).

As to Debtor and Creditor Law former § 276, "[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Because "[d]irect evidence of fraudulent intent is often elusive[,] . . . courts will consider badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004], *lv denied* 3 NY3d 612 [2004] [internal quotation marks omitted]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014]). Upon review of the record, we conclude that plaintiff met its initial burden of establishing fraudulent intent, and that defendants failed to raise an issue of fact in opposition (*see generally NPR, LLC v Met Fin Mgt., Inc.*, 63 AD3d 1128, 1129 [2d Dept 2009]). Based on this determination, we conclude that, contrary to defendants' further contention, the court properly awarded attorneys' fees to plaintiff (*see* former § 276-a; *5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589, 590 [2d Dept 2013]).

We likewise reject defendants' contention that the court erred in granting plaintiff's motion with respect to its first cause of action, which sought to pierce the corporate veil and impose personal liability on Bernhardt. Based upon, among other things, Bernhardt's concessions in his answer and interrogatories regarding his

involvement in BFE and JGB Properties, as well as the evidence of past financial practices between those entities, we conclude that the court properly determined that plaintiff is entitled to summary judgment on its cause of action based on Bernhardt's individual liability (*see generally Cotter v Lasco, Inc.*, 196 AD3d 1041, 1042 [4th Dept 2021]; *NPR, LLC*, 63 AD3d at 1129-1130).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

808

CA 21-01571

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

HOSPITALITY CONCEPTS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAY BERNHARDT, BEDFORD FALLS ENTERPRISES, LLC, JGB PROPERTIES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (JEFFREY A. JAKETIC OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 14, 2021. The order, inter alia, awarded plaintiff attorneys' fees.

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

Same memorandum as in *Hospitality Concepts, LLC v Bernhardt* ([appeal No. 1] – AD3d – [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

809

CA 22-00091

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

HOSPITALITY CONCEPTS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAY BERNHARDT, BEDFORD FALLS ENTERPRISES, LLC, JGB PROPERTIES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 3.)

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

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (JEFFREY A. JAKETIC OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 6, 2021. The judgment awarded damages, interest, costs and attorneys' fees to plaintiff.

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

Same memorandum as in *Hospitality Concepts, LLC v Bernhardt* ([appeal No. 1] – AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

816

KA 18-02381

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN R. DEAN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 (William F. Kocher, J.), rendered July 6, 2018. The judgment convicted defendant upon a jury verdict of driving while intoxicated, a class E felony (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]), defendant contends that the verdict is against the weight of the evidence. More specifically, although defendant concedes that he was intoxicated at the time of his arrest, he contends that the People failed to prove the element of operation of a motor vehicle beyond a reasonable doubt. We reject defendant's contention.

The arresting officer testified at trial that, upon stopping a vehicle for a traffic infraction, he observed defendant hurriedly exit the vehicle from the driver's seat and walk around to the front passenger door. According to the officer, a woman was in the front passenger seat. The officer further testified that defendant, before submitting to field sobriety tests, said that the woman in the vehicle had initially been driving and that he "just started driving a little bit ago." Defendant later said to the officer, "I know I f***ed up. It's my fault." Although defendant and the woman testified that defendant was in the passenger seat when the vehicle was stopped and that defendant was not driving that evening, the conflicting testimony merely raised issues of credibility for the jury to resolve (*see generally People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). 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, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

819

TP 22-00508

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF WESTSIDE GROCERY & DELI, LLC, PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, AND KENTON BUCKNER, CHIEF OF POLICE OF THE CITY OF SYRACUSE, RESPONDENTS-DEFENDANTS.

ABRAHAM LAW PLLC, SYRACUSE (IMAN ABRAHAM OF COUNSEL), FOR PETITIONER-PLAINTIFF.

SUSAN KATZOFF, CORPORATION COUNSEL, SYRACUSE (DANIELLE R. SMITH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS.

Proceeding pursuant to CPLR article 78 and declaratory judgment action (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Deborah H. Karalunas, J.], entered April 1, 2022) to review a determination of respondents-defendants. The determination found a public nuisance following a hearing.

It is hereby ORDERED that the order insofar as it transferred that part of the action/proceeding seeking declaratory relief is unanimously vacated without costs, the declaratory judgment action and CPLR article 78 proceeding are severed, the declaratory judgment action is remitted to Supreme Court, Onondaga County, for further proceedings, and the determination is confirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul a determination, following a hearing, finding that a public nuisance existed on premises where it operated a grocery and convenience store, and imposing a $1,000 civil penalty on the premises' owner and ordering closure of the premises for a period of 12 months pursuant to the Syracuse Nuisance Abatement Ordinance (Revised General Ordinances of City of Syracuse [City Ordinance]) § 45-4 (c) and (d). We confirm the determination.

Contrary to petitioner's contention, upon our review of the record, we conclude that there is substantial evidence to support the determination that a public nuisance as defined by City Ordinance § 45-2 existed on the premises based on the evidence that there were "violation[s]" of Penal Law and other provisions enumerated in the

ordinance that resulted in six arrests, within a 24-month period, under the relevant provisions. The evidence further showed that the arrests were "predicated on events, circumstances or activities occurring on the premises" and that the "illegal activities . . . had a negative impact and seriously interfere[d] with the interest of the public in the quality of life" (City Ordinance § 45-2). The term "violation" in the context of City Ordinance § 45-2 means the existence of the prohibited conduct set out in the relevant Penal Law and other provisions identified in the ordinance, and does not require evidence that the arrests resulted in a criminal prosecution or conviction (*see generally City of New York v Castro*, 160 AD2d 651, 652 [1st Dept 1990]).

Contrary to petitioner's further contention, upon our review of the record, we conclude that there is substantial evidence to support the determination that closing the premises for a period of 12 months was necessary to abate the public nuisance (*see* City Ordinance § 45-4 [c]; *Matter of J-Bon, LLC v City of Syracuse*, 189 AD3d 2155, 2156 [4th Dept 2020]; *see also Matter of Johnson v Police Dept. of City of N.Y.*, 178 AD2d 643, 643-644 [2d Dept 1991]). Petitioner's contention that the civil penalty was improperly imposed was not raised in its petition-complaint, and is thus not properly before us (*see Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008]; *J-Bon, LLC*, 189 AD3d at 2156; *see also Matter of Allocca v Kelly*, 44 AD3d 308, 309 [1st Dept 2007]). In any event, petitioner lacks standing to challenge the civil penalty inasmuch as it was imposed on the owner of the premises, and petitioner has therefore not suffered an injury in fact (*see generally New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211-212 [2004]).

With respect to petitioner's challenge to the constitutionality of City Ordinance § 45-2, we note that "[a] declaratory judgment action is the proper vehicle for [such a] challeng[e]" (*Matter of Sibley v Watches*, 194 AD3d 1385, 1388 [4th Dept 2021], *appeal dismissed and lv denied* 37 NY3d 1131 [2021], *rearg denied* 38 NY3d 1006 [2022] [internal quotation marks omitted]; *see Matter of Nelson v Stander*, 79 AD3d 1645, 1647 [4th Dept 2010]), and we do not "have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding" (*Matter of Cookhorne v Fischer*, 104 AD3d 1197, 1197 [4th Dept 2013]). "The transfer of a declaratory judgment action to this Court is not authorized by CPLR 7804 (g)" (*Matter of Blue v Zucker*, 192 AD3d 1693, 1695 [4th Dept 2021]; *see Matter of Applegate v Heath*, 88 AD3d 699, 700 [2d Dept 2011]). We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings (*see Cookhorne*, 104 AD3d at 1197-1198). We have reviewed petitioner's remaining contentions and conclude that none warrants a different result.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

821

CA 22-00205

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

JOHN MEZZALINGUA ASSOCIATES, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE TRAVELERS INDEMNITY COMPANY,
THE PHOENIX INSURANCE COMPANY,
CAMPANY ROOFING COMPANY, INC.,
DEFENDANTS-APPELLANTS,
AND MARSH USA, INC., DEFENDANT-RESPONDENT.

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

ROBINSON & COLE LLP, HARTFORD, CONNECTICUT (GREGORY P. VARGA OF COUNSEL), AND HANCOCK ESTABROOK, LLP, SYRACUSE, FOR DEFENDANTS-APPELLANTS THE TRAVELERS INDEMNITY COMPANY AND THE PHOENIX INSURANCE COMPANY.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANT-APPELLANT CAMPANY ROOFING COMPANY, INC.

MACKENZIE HUGHES, LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 11, 2022. The judgment granted the motion of defendant Marsh USA, Inc. for summary judgment dismissing the amended complaint against it, denied the motions of defendants The Travelers Indemnity Company, The Phoenix Insurance Company and Campany Roofing Company, Inc. for summary judgment and granted the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating any determinations with respect to the motion of defendants The Travelers Indemnity Company and The Phoenix Insurance Company concerning the faulty workmanship exclusion and as modified the judgment is affirmed without costs.

Memorandum: In 2015, plaintiff hired defendant insurance broker Marsh USA, Inc. (Marsh) to help it procure an insurance policy to cover plaintiff's facility for the following year. On Marsh's recommendation, plaintiff purchased a policy ostensibly offered by

defendant insurance companies The Travelers Indemnity Company (Travelers) and The Phoenix Insurance Company (Phoenix) (collectively, insurance defendants). In October 2016, defendant Campany Roofing Company, Inc. (Campany) performed roofing work at plaintiff's facility. On multiple occasions that month, water leaked into the facility, causing damage. After the claim that plaintiff submitted to the insurance defendants was denied, plaintiff commenced this action. In the first two causes of action, plaintiff alleges that the insurance defendants breached the insurance contract and plaintiff seeks, inter alia, a judgment declaring that the insurance policy provides coverage for plaintiff's losses. In the third cause of action, plaintiff alleges that Campany was negligent in performing the roofing work and that its negligence was a proximate cause of plaintiff's damages. In the fourth cause of action, plaintiff, citing, inter alia, the denial of coverage based on the insurance policy's rain limitation provision, alleges that Marsh was negligent in procuring inadequate insurance coverage.

Marsh, the insurance defendants, and Campany separately moved for, as relevant here, summary judgment dismissing the amended complaint against them. Plaintiff opposed the motions and moved for partial summary judgment on limited issues of law with respect to the causes of action against the insurance defendants. Specifically, plaintiff sought a declaration that "the terms 'backup' and 'overflow', as set forth in [a water exclusion in the policy] are to be afforded their plain meaning and common usage" and that the policy's exception to the water exclusion applied to provide plaintiff with coverage on the two relevant dates.

Supreme Court granted Marsh's motion, denied the motions of Campany and the insurance defendants, and granted plaintiff's motion. Plaintiff, Campany, and the insurance defendants appeal.

Contrary to plaintiff's contention on its appeal, the court properly granted Marsh's motion. " 'As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' . . . 'Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[] or direct a client to obtain additional coverage' " (*Petri Baking Prods., Inc. v Hatch Leonard Naples, Inc.*, 151 AD3d 1902, 1903-1904 [4th Dept 2017]; *see 5 Awnings Plus, Inc. v Moses Ins. Group, Inc.*, 108 AD3d 1198, 1200 [4th Dept 2013]). Contrary to plaintiff's contention, Marsh met its initial burden of establishing that there was no " 'special relationship' " between it and plaintiff, i.e., no additional duties assumed by Marsh over and above the common-law duty to obtain requested coverage (*Sawyer v Rutecki*, 92 AD3d 1237, 1237 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012], quoting *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Moreover, Marsh established that plaintiff's generic request for coverage that was "equal to or better coverage" than its current policy was not a specific request that would have created a duty on the part of Marsh to obtain any particular type of coverage for plaintiff (*see Hoffend & Sons, Inc. v*

Rose & Kiernan, Inc., 7 NY3d 152, 157-158 [2006]; *5 Awnings Plus, Inc.*, 108 AD3d at 1200-1201; *cf. American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735-736 [2012], *rearg denied* 20 NY3d 1044 [2013]). In opposition to Marsh's motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to the contentions of Campany on its appeal, the court properly denied its motion inasmuch as there are triable issues of fact whether Campany was negligent in its roofing work and whether any such negligence was a proximate cause of the damages suffered by plaintiff. Where, as here, the opinion of a movant's expert is "squarely oppose[d]" by the opinion of the nonmovant's expert (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]), the court is presented with "a classic battle of the experts that is properly left to a jury for resolution" (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]).

The insurance defendants contend on their appeal that Travelers, the parent company of Phoenix, is not a proper party to this action, and that the court erred in denying their motion insofar as it sought summary judgment dismissing the amended complaint against Travelers on that ground. We reject that contention. Generally, it is well established that "[l]iability of a parent company for the [conduct] of a subsidiary does not arise from the mere ownership of a controlling shareholder interest. Rather there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored" (*Goodspeed v Hudson Sharp Mach. Co.*, 105 AD3d 1204, 1205 [3d Dept 2013] [internal quotation marks omitted]; *see SUS, Inc. v St. Paul Travelers Group*, 75 AD3d 740, 743 [3d Dept 2010]). Although Phoenix was listed as the "insuring company," we conclude that the insurance defendants failed to establish as a matter of law that Travelers did not "exercise[] complete dominion and control over [Phoenix]" (*Merrell-Benco Agency, LLC v HSBC Bank USA*, 20 AD3d 605, 609 [3d Dept 2005], *lv dismissed in part and denied in part* 6 NY3d 742 [2005] [internal quotation marks omitted]; *see Stone Ridge Country Props. Corp. v Mohonk Oil Co., Inc.*, 84 AD3d 1556, 1557 [3d Dept 2011]; *cf. SUS, Inc.*, 75 AD3d at 743).

The insurance defendants further contend that the court erred in granting plaintiff's motion for partial summary judgment concerning the policy's water exclusion and in denying their motion for summary judgment dismissing the amended complaint against them on the ground of the policy's rain limitation provision. We reject their contentions.

With respect to plaintiff's motion, the water exclusion precludes coverage related to "[w]ater or sewage that backs up or overflows or is otherwise discharged from . . . a drain." Nevertheless, the policy contains an exception to the exclusion, providing that the "exclusion does not apply to the backup or overflow of water . . . from drains within a building if the backup or overflow is not otherwise directly or indirectly caused" by other provisions of the water exclusion. It

is undisputed that, on the two occasions at issue on this appeal, rain was caused to pond or pool on plaintiff's roof because drains within the building were clogged. It is likewise undisputed that the water then breached the seals of the roofing membrane and leaked into the facility. Thus, with respect to plaintiff's motion, the question is whether the ponding water constituted "backup or overflow of water" from the interior roof drain. If so, then the exception to the water exclusion would apply and there could potentially be coverage under the policy.

It is well settled that "parties cannot create ambiguity from whole cloth where none exists, [inasmuch as] provisions 'are not ambiguous merely because the parties interpret them differently' " (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). With respect to the water exclusion, we conclude that plaintiff met its burden of establishing that there is no ambiguity inasmuch as plaintiff's interpretation of the exception to the water exclusion is the only reasonable interpretation thereof (*see generally Walker v Erie Ins. Co.*, — AD3d —, 2022 NY Slip Op 06332, *2-3 [4th Dept 2022]; *Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., L.L.C.*, 195 AD3d 1375, 1377 [4th Dept 2021], *lv dismissed* 37 NY3d 1227 [2022]). According to the insurance defendants, the exception to the water exclusion applies only if the water "start[ed] in and emanate[d] from the drain" and then reversed its flow, i.e., came back up out of the drain. We reject that contention and conclude that the insurance defendants' interpretation is inconsistent with "common speech and . . . the reasonable expectation of the average insured at the time of contracting" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 561 [2021], *rearg denied* 37 NY3d 1228 [2022] [internal quotation marks omitted]; *see generally Christodoulides v First Unum Life Ins. Co.*, 96 AD3d 1603, 1604-1605 [4th Dept 2012]). We therefore conclude that the court properly determined that plaintiff established its entitlement to judgment as a matter of law on the issues that the terms "backup" and "overflow" as used in the exception to the water exclusion should be given their "plain meaning and common usage" and that the exception applies to the two incidents at issue in this action.

With respect to the insurance defendants' motion insofar as based on the rain limitation provision of the policy, that limitation provides that there is no coverage for loss that is a consequence of damage to "[t]he 'interior of a building . . .', or to personal property in the building . . . , caused by or resulting from rain," unless "[t]he building . . . first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain . . . enters; or . . . [t]he . . . damage is caused by or results from thawing of snow, sleet or ice on the building." It is undisputed that the damage was not the result of an otherwise covered loss to the building or the thawing of snow, sleet or ice. Rather, a dispute exists whether the water that caused the damage was rain.

We agree with the insurance defendants that the water that fell on the roof of plaintiff's building during both relevant incidents was, at least initially, rain. The more significant question is

whether that water lost its character as rain when it began to pond on the roof due to the clogged drains. In other words, it must be determined "whether pooled rainwater is 'rain' or 'water' " (*Bradford Realty Servs., Inc. v Hartford Fire Ins. Co.*, 2022 WL 1486779, * 3 [5th Cir 2022]). However, even assuming, arguendo, that the insurance defendants established as a matter of law that the pooled water on the roof constituted rain (*see id.* at *4; *but see Fidelity Co-Operative Bank v Nova Cas. Co.*, 726 F3d 31, 39-40 [1st Cir 2013]), we conclude that the insurance defendants failed to meet their burden of establishing that the water that ponded on the roof was "the 'proximate, efficient and dominant cause' of the loss" (*Greenberg v Privilege Underwriters Reciprocal Exch.*, 169 AD3d 878, 880 [2d Dept 2019], quoting *Album Realty Corp. v American Home Assur. Co.*, 80 NY2d 1008, 1010 [1992], *rearg denied* 81 NY2d 784 [1993]; *see Ain v Allstate Ins. Co.*, 181 AD3d 875, 879 [2d Dept 2020]).

Here, there are multiple potential causes of the water entering plaintiff's facility, including the water that ponded on the roof, the clogged drains that caused the ponding, and defective workmanship. Inasmuch as the insurance defendants failed to establish "the proximate, efficient and dominant cause" of the loss (*Greenberg*, 169 AD3d at 880 [internal quotation marks omitted]; *cf. Kennel Delites, Inc. v T.L.S. NYC Real Estate, LLC*, 49 AD3d 302, 303 [1st Dept 2008]; *Casey v General Acc. Ins. Co.*, 178 AD2d 1001, 1002 [4th Dept 1991]; *see generally Potoff v Chubb Indem. Ins. Co.*, 60 AD3d 477, 477-478 [1st Dept 2009]; *Home Ins. Co. v American Ins. Co.*, 147 AD2d 353, 354 [1st Dept 1989]), we conclude that the court properly denied their motion for summary judgment seeking dismissal of the amended complaint against them on the basis of the rain limitation.

We agree with the insurance defendants, however, that the court erred in ruling on the faulty workmanship exclusion of the policy inasmuch as that exclusion was not the subject of any motion before the court. The court determined that there are issues of fact on the application of the faulty workmanship exclusion and that, even if the exclusion were to apply, it "would at most only exclude the roof damage" and any "ensuing loss[ ]" would be covered. We agree with the insurance defendants that the court erred in addressing coverage under the faulty workmanship exclusion because the parties were not afforded an opportunity to address that issue (*see Kamil El-Deiry & Assoc. CPA, PLLC v Excellent Home Care Servs., LLC*, 208 AD3d 1170, 1170-1171 [2d Dept 2022]; *Daimler Chrysler Ins. Co. v Keller*, 164 AD3d 1209, 1210 [2d Dept 2018]). We therefore modify the judgment by vacating any determination on the insurance defendants' motion concerning the faulty workmanship exclusion.

Finally, contrary to the contention of the insurance defendants, we conclude that there are triable issues of fact concerning whether plaintiff sustained a covered business income loss under the policy.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

825

CA 22-00540

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

THERESA M. JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARNIM P. AMADORZABALA, ALSO KNOWN AS
ARNIM P. AMADOR, DEFENDANT-APPELLANT,
PV HOLDING CORP., ET AL., DEFENDANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 1, 2022. The order, among other things, granted plaintiff's motion to compel defendant Arnim P. Amadorzabala, also known as Arnim P. Amador to answer deposition questions about his mental health history and denied the cross motion of that defendant insofar as it sought a protective order.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion to the extent that plaintiff seeks to compel the deposition testimony of defendant Arnim P. Amadorzabala, also known as Arnim P. Amador, regarding statutorily privileged medical information, including any such information contained in the mitigation report and the attached mental health records, and granting the cross motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this personal injury action after she was struck while walking across a street by a vehicle driven by Arnim P. Amadorzabala, also known as Arnim P. Amador (defendant). In the complaint, plaintiff asserted, inter alia, a cause of action against defendant for negligence and a cause of action against the remaining defendants for negligent entrustment of the vehicle that defendant was driving. Defendant was prosecuted for criminal conduct related to the accident and, after pleading guilty, he submitted to the sentencing court a mitigation report discussing his mental health records, which were included with the report. In this civil action, plaintiff moved to compel defendant to answer questions at a deposition concerning information about his mental health history that would otherwise be statutorily privileged, including the information in the mitigation report, and defendant cross-moved for, inter alia, a

protective order barring plaintiff from making any future attempts to obtain defendant's privileged mental health information. Defendant appeals from an order granting the motion and denying the cross motion insofar as it sought a protective order.

"CPLR 3121 (a) authorizes discovery of a party's mental or physical condition when that party's condition has been placed in controversy" (*Schnobrich v Schnobrich*, 198 AD2d 850, 850 [4th Dept 1993]). Nevertheless, even where a defendant's mental or physical condition is in controversy, discovery will be precluded if the information falls within the physician-patient privilege and the defendant has not waived that privilege (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). Where the physician-patient privilege has not been waived, the party asserting the privilege may "avoid revealing the substance of confidential communications made to [his or] her physician, but may not refuse to testify as to relevant medical incidents or facts concerning [himself or] herself" (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 393 [1985]; *see Schaner v Mercy Hosp. of Buffalo*, 15 AD3d 997, 999 [4th Dept 2005]).

We agree with defendant that he did not waive the physician-patient privilege by disclosing his mental health information in the sentencing phase of the related criminal proceeding. Here, defendant submitted the mitigation report in the criminal proceeding for the court's consideration in the determination of an appropriate sentence. Thus, this is not a case where a criminal defendant waived any privilege applicable to that defendant's mental health records by raising a justification or other affirmative defense to be litigated in the criminal proceeding (*cf. Szmania v State of New York* [appeal No. 2], 82 AD3d 1688, 1690 [4th Dept 2011]). Instead, the mitigation report was prepared for and "submitted directly to the court[] in connection with the question of sentence" and, as a result, the mitigation report is "confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court" (CPL 390.50 [1]; *see generally Matter of Salamone v Monroe County Dept. of Probation*, 136 AD2d 967 [4th Dept 1988]). Further, inasmuch as defendant "validly assert[ed] the privilege and has not affirmatively placed his . . . [mental health] condition in issue, . . . plaintiff may not effect a waiver of the privilege merely by introducing evidence demonstrating that . . . defendant's [mental] condition is genuinely 'in controversy' within the meaning of the statute permitting discovery of medical records" (*Dillenbeck*, 73 NY2d at 280-281). We therefore modify the order by denying the motion to the extent that plaintiff seeks to compel the deposition testimony of defendant regarding statutorily privileged medical information, including any such information contained in the mitigation report and the attached mental health records, and by granting the cross motion in its entirety. In light of our determination, defendant's remaining contention is academic.

All concur except SMITH, and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. We agree with the majority that the mental status of Arnim P.

Amadorzabala, also known as Arnim P. Amador (defendant) is in controversy inasmuch as plaintiff seeks damages for, inter alia, negligent entrustment of a vehicle, and plaintiff alleges that the employees of defendant PV Holding Corp. and its related entities were negligent in entrusting their vehicle to defendant due to his mental state. We also agree with the majority that discovery should be precluded if plaintiff seeks information that falls within the physician-patient privilege and defendant has not waived that privilege (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). We respectfully dissent, however, because we conclude that defendant waived the physician-patient privilege under the circumstances presented, and we would therefore affirm the order granting plaintiff's motion to compel defendant to answer questions at his deposition concerning information about his mental health history and denying defendant's cross motion insofar as it sought a protective order.

"In order to effect a waiver, a party must affirmatively assert the condition and place that condition in issue either by way of counterclaim or to excuse the conduct complained of by the plaintiff in the pending action or in a related matter" (*Fox v Marshall*, 91 AD3d 710, 712 [2d Dept 2012] [internal quotation marks omitted]). Thus, where, as here, a defendant is the subject of both civil and criminal proceedings arising from the same set of facts and he "relie[s] on his medical and psychiatric history to defend himself in his criminal trial, he open[s] up that information to the public, and so waive[s] his physician-client privilege as to the records [of such treatment], pursuant to CPLR 4504" (*Webdale v North Gen. Hosp.*, 7 Misc 3d 947, 955 [Sup Ct, NY County 2005], *affd for the reasons stated* 24 AD3d 153 [1st Dept 2005]). Numerous courts have concluded that a defendant who discloses privileged mental health information in a criminal action will also "waive[] any privileges applicable to his [or her] psychiatric records and documents relating to his [or her] mental condition" with respect to the civil proceeding (*Szmania v State of New York* [appeal No. 2], 82 AD3d 1688, 1690 [4th Dept 2011]).

We disagree with the majority's conclusion that defendant did not raise his mental condition as an affirmative defense in the criminal action and thus did not waive the privilege. The majority draws a distinction between defendant's actions here, i.e., disclosing otherwise privileged information as mitigation for sentencing purposes, and disclosing information for the purposes of "raising a justification or other affirmative defense to be litigated in the criminal proceeding." There is no such distinction in the case law. A defendant will waive the privilege when he or she "affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff" (*Koump v Smith*, 25 NY2d 287, 294 [1969]). Here, defendant sought to use his mental health condition, and the records establishing it, for the purpose of obtaining a lesser sentence in the criminal action, i.e., he sought "to excuse the conduct complained of by the plaintiff" (*id.*).

Contrary to the majority's analysis, the privilege is based on the long-standing rule that a patient may maintain the confidentiality

of his or her treatment records, but "the statutory prohibition having once been expressly waived by the patient, and the waiver acted upon, it could not be recalled, but the information was open to the consideration of the entire public, and the patient was no longer privileged to forbid its repetition" (*People v Bloom*, 193 NY 1, 7 [1908]). In other words, "[o]nce defendant waived that privilege for a particular purpose, the privilege was destroyed for all purposes, regardless of whether defendant had intended to limit his waiver" (*People v Martinez*, 22 AD3d 318, 318 [1st Dept 2005], *lv denied* 6 NY3d 756 [2005]). Therefore, defendant's intent that his disclosure of confidential information be limited solely to the criminal court for sentencing purposes is irrelevant to the analysis of whether he waived the privilege. To the contrary, "[w]hatever limits on disclosure of the [records] may have been intended by [the] patient, the very fact of such disclosure foreclosed any claim of privilege as to the information contained in the [records themselves]. [The] physician-patient privilege only applies to protect communications which have been made in confidence as well as in the context of the physician-patient relationship. It follows therefore that, even if the information was intended to remain confidential when it was communicated, once a patient puts the information into the hands of a third party who is completely unconnected to his or her treatment and who is not subject to any privilege, it can no longer be considered a confidence and the privilege must be deemed to have been waived as to that information" (*Matter of Farrow v Allen*, 194 AD2d 40, 44 [1st Dept 1993]; *see People v Bierenbaum*, 301 AD2d 119, 141-142 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]). Consequently, in the matter on appeal, by disclosing the details of his mental health condition to the criminal court for his own benefit, "[d]efendant waived the physician-patient privilege by disclosing records of this treatment to government employees who were not involved in treating defendant" (*People v Narducci*, 177 AD3d 511, 513 [1st Dept 2019], *lv denied* 34 NY3d 1080 [2019]). The order should therefore be affirmed.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

826

CA 21-01170

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

DAWN M. JACKSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

681 FILLMORE, LLC, GORDON FILLMORE, LLC,
WESTERN NEW YORK CHECK SERVICES, LLC, AND
FILLMORE WINE AND LIQUOR, DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (KARL E. DANIEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS 681 FILLMORE, LLC, GORDON FILLMORE, LLC AND FILLMORE WINE AND LIQUOR.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-APPELLANT WESTERN NEW YORK CHECK SERVICES, LLC.

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

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 16, 2021. The order, inter alia, denied the motions 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 to recover damages for injuries that she allegedly sustained when she slipped and fell on the sidewalk in front of premises owned or operated by defendants. Supreme Court denied defendants' respective motions for summary judgment dismissing, inter alia, the complaint against them. We affirm.

Contrary to defendants' contentions, we conclude that the court properly denied their motions inasmuch as they failed to meet their initial burden of establishing that plaintiff's injuries were caused by a storm in progress (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1187-1188 [4th Dept 2008]; *cf. Battaglia v MDC Concourse Ctr., LLC*, 175 AD3d 1026, 1027 [4th Dept 2019], *affd* 34 NY3d 1164 [2020]). In support of their motions, defendants submitted the deposition testimony of plaintiff, who testified that there was no precipitation at the time of the accident. Defendants also submitted a video of the accident showing that it was only lightly raining and there was no snow on the ground in front of the relevant properties, although there were small mounds of old accumulated snow near the

road. Inasmuch as defendants failed to meet their initial burden, the court properly denied their motions without regard to the sufficiency of plaintiff's opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

829

CA 21-00521

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK,
PLAINTIFF,

V MEMORANDUM AND ORDER

CAMI WITTMEYER, CATHY DECKER, GEORGE W. BURNETT, INC., DEFENDANTS-RESPONDENTS, MARIA R. BAUER, LAWRENCE J. ADYMY, JR., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

BRADLEY ARANT BOULT CUMMINGS, LLP, CHARLOTTE, NORTH CAROLINA (C. BAILEY KING, JR., OF THE NORTH CAROLINA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR PLAINTIFF.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 6, 2021. The order and judgment, inter alia, granted the motion of defendants Cami Wittmeyer, Cathy Decker and George W. Burnett, Inc., for leave to reargue and, upon reargument, granted the motion of those defendants for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendants Cami Wittmeyer, Cathy Decker, and George W. Burnett, Inc. insofar as it sought summary judgment determining that the 2019 change in beneficiaries was void as a matter of law and insofar as it sought summary judgment dismissing the cross claim of defendants Maria R. Bauer and Lawrence J. Adymy, Jr. for unjust enrichment against Wittmeyer and Decker and reinstating that cross claim, and as modified the order and judgment is affirmed without costs.

Memorandum: Interpleader plaintiff, Lincoln Life & Annuity Company of New York (Lincoln Life), issued a life insurance policy to decedent naming his daughters, defendants Cami Wittmeyer and Cathy Decker (collectively, daughters), and his wife, defendant Maria R. Bauer (wife), as beneficiaries (first designation). The wife was to

receive 22% of the policy benefits, and the daughters were each to receive 39% of the benefits. The premiums for the policy had been paid by defendant George W. Burnett, Inc. (GWB), a company formerly owned by decedent that was, at all relevant times, owned by decedent's son. In June 2019, the wife learned that the policy had lapsed or was about to lapse due to nonpayment of the premiums and that certain amounts must be paid in order to keep the policy active (encouraged amount). GWB could no longer afford to pay the premiums, and the daughters were unwilling to contribute toward the encouraged amount or any policy premiums going forward. Thus, the wife and her son, defendant Lawrence J. Adymy, Jr. (son), paid the encouraged amount and took over paying the premiums. The wife, as decedent's power of attorney, thereafter submitted a change of beneficiary form to Lincoln Life removing the daughters as beneficiaries of the policy and designating herself and her son as the primary beneficiaries, splitting the policy benefits equally (second designation). According to the wife, in changing the beneficiaries, she followed the procedure described to her by defendant Lee V. Stadler, an agent of an affiliate of Lincoln Life, defendant Lincoln Financial Advisors Corporation (Lincoln Financial). Decedent died in August 2019, after all amounts owed on the policy had been paid and the beneficiaries had been changed. The wife and son, and the daughters, each submitted a claim for the policy benefits.

Lincoln Life commenced this interpleader action to determine the competing claims of the wife and son (collectively, Bauer defendants) and the daughters to a death benefit payable pursuant to the policy. The daughters answered and asserted a cross claim against the Bauer defendants, alleging that the wife lacked the authority to change the beneficiaries under the policy because the power of attorney executed by decedent in 2013 that she submitted to Lincoln Life did not have a statutory gift rider as required under General Obligations Law § 5-1514. The daughters therefore sought a judgment determining that the second designation was void and ordering payment of policy benefits in accordance with the first designation. In their amended answer, the Bauer defendants asserted counterclaims against Lincoln Life for specific performance, breach of contract, negligence, and equitable estoppel. The Bauer defendants also asserted a cross claim for negligence against, among others, Stadler; cross claims against the daughters for unjust enrichment and interference with contractual relations; and a cross claim against GWB for breach of implied contract. The daughters and GWB then moved for, inter alia, summary judgment determining that the second designation was void and dismissing the Bauer defendants' cross claims against them. The Bauer defendants cross-moved for summary judgment determining that they were entitled to the death benefit under the policy in accordance with the second designation and dismissing the cross claim of the daughters against them. Supreme Court denied the motion, granted the cross motion, and ordered that Lincoln Life tender the death benefit to the Bauer defendants in accordance with the second designation. The daughters and GWB moved for, inter alia, leave to reargue their motion and their opposition to the cross motion. Lincoln Life, Lincoln Financial, and Stadler (collectively, Lincoln defendants) moved for summary judgment dismissing the Bauer defendants' counterclaims and

cross claims against the Lincoln defendants.

In appeal No. 1, the Bauer defendants appeal from an order and judgment that, among other things, granted leave to reargue and, upon reagument, granted the motion of the daughters and GWB for summary judgment determining that the second designation was void and dismissing the cross claims against them, and denied the Bauer defendants' cross motion.

In appeal No. 2, the Bauer defendants appeal from an order granting in part the motion of the Lincoln defendants and dismissing the Bauer defendants' counterclaims against Lincoln Life.

In appeal No. 1, we agree with the Bauer defendants that the court erred in granting that part of the motion of the daughters and GWB for summary judgment determining that the second designation is void as a matter of law, and we therefore modify the order and judgment accordingly. Initially, we reject the Bauer defendants' contention that a 2009 power of attorney is the controlling document inasmuch as the execution of the 2013 power of attorney modified the 2009 power of attorney in a manner that directly affected the wife's ability to engage in the contested action (*see generally Lopez v Fenn*, 90 AD3d 569, 573 [1st Dept 2011], *lv dismissed* 19 NY3d 1022 [2012]; *Zaubler v Picone*, 100 AD2d 620, 621 [2d Dept 1984]). However, although the 2013 power of attorney executed by decedent appointing the wife as his attorney-in-fact did not grant the wife the authority to change the beneficiaries of decedent's life insurance policy inasmuch as it lacked a statutory gifts rider (*see* General Obligations Law former § 5-1514 [1], [3], [7]; § 5-1502F [former (3)]), "exact compliance with the contractual procedure [in the policy concerning a change in beneficiaries] will be deemed waived where the insurer, faced with conflicting colorable claims to the same policy proceeds, pays the proceeds into court in an interpleader action so that the opposing claimants may litigate the matter between themselves" (*Lincoln Life & Annuity Co. of N.Y. v Caswell*, 31 AD3d 1, 5-6 [1st Dept 2006]). In such cases, "[t]he paramount factor in resolving the controversy is the intent of the insured. Mere intent, however, on the part of the insured is not enough; there must be some affirmative act or acts [on the part of the insured] to accomplish the change" (*McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436, 440 [1998] [internal quotation marks omitted]; *see Cook v Aetna Life Ins. Co.*, 166 AD2d 895, 896 [4th Dept 1990]; *Cable v Prudential Ins. Co. of Am.*, 89 AD2d 636, 636 [3d Dept 1982]). Assuming, arguendo, that the daughters and GWB met their initial burden on that part of the motion seeking a determination that the second designation is void, we conclude that the Bauer defendants raised a triable issue of fact. In opposition to the motion, the Bauer defendants submitted the wife's affidavit in which she averred that decedent was angry that the policy had been allowed to or was about to lapse and that the daughters were unwilling to contribute toward the encouraged amount or the future premiums. The wife further averred that decedent had told her that if she and the son made the payments necessary to keep the policy active, they should be designated as the beneficiaries of the death benefit. In addition to the evidence of decedent's intent to change the

beneficiaries, the wife stated that decedent affirmatively acted to accomplish that intent by signing a memo granting Lincoln Life permission to release information to Stadler, who then advised the wife how to reinstate the Policy. The wife also stated that decedent sent her as his power of attorney in his place to sign the documents necessary to institute the second designation under the mistaken belief that the 2013 power of attorney granted her such authority. Additionally, inasmuch as the Bauer defendants' own submissions raised issues of fact with respect to the validity of the second designation, we reject their further contention that the court erred in denying their cross motion for summary judgment with respect to that issue (*see generally Johnson v Pixley Dev. Corp.*, 169 AD3d 1516, 1519-1520 [4th Dept 2019]).

We agree with the Bauer defendants that the court erred in granting that part of the motion of the daughters and GWB seeking summary judgment dismissing the Bauer defendants' cross claim against the daughters for unjust enrichment, and we therefore further modify the order and judgment accordingly. "[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]). Thus, in order to sustain such a claim, the plaintiff must demonstrate that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*id.* [internal quotation marks omitted]; *see also Omar v Moore*, 196 AD3d 1182, 1183-1184 [4th Dept 2021]). "Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). " '[T]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' " (*Ahlers v Ecovation, Inc.*, 151 AD3d 1920, 1921 [4th Dept 2017]). Assuming, arguendo, that the daughters and GWB met their initial burden on the motion with respect to the unjust enrichment cross claim, we conclude that the Bauer defendants raised a triable issue of fact. The Bauer defendants established that they paid the encouraged amount in order to bring the policy up to date. The wife then paid premiums in August 2019 in order to keep the policy active. There is no dispute that the daughters—who would otherwise have each been entitled to 39% of the death benefit under the first designation—refused to contribute toward either the encouraged amount or future premium payments. As noted, according to the wife, in return for the payments made by her and her son, decedent wanted them to be the beneficiaries of the death benefit. Significantly, if the Bauer defendants had not made the requisite payments, the policy would not have been in effect at the time of decedent's death, and there would have been no death benefit on which to make a claim. Thus, if the second designation is ultimately determined to be void, the Bauer defendants have raised a triable issue of fact whether the daughters would be unjustly enriched at the Bauer defendants' expense (*see generally Friddell v Alberalla*, 176 AD2d 1213, 1213-1214 [4th Dept

1991], *lv denied* 79 NY2d 751 [1991]).

We reject the contention of the Bauer defendants, however, that the court erred in granting the motion of the daughters and GWB with respect to the cross claim against the daughters for interference with contractual relations. "In order to prevail on a cause of action for tortious interference with contractual relations, a plaintiff must establish the existence of a valid contract between plaintiff and a third party, the defendant's intentional and unjustifiable procurement of the third party's breach of the contract, the actual breach of the contract and the resulting damages" (*Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept 2005], *lv denied* 5 NY3d 709 [2005]). The Bauer defendants' claim for interference with contractual relations is based upon the daughters' allegedly intentional interference, without justification, "with the rightful payment of the death benefit under the policy to the Bauer defendants by submitting their own claims to the death benefit." However, if the court ultimately determines that the second designation is valid, Lincoln Life will pay the death benefit to the Bauer defendants and there can be no breach. Likewise, if the second designation is ultimately determined to be void, payment under the first designation would not constitute a breach. The daughters and GWB therefore established their entitlement to summary judgment dismissing the cross claim for interference with contractual relations, and the Bauer defendants failed to raise a triable issue of fact in opposition (*see Weiss v Bretton Woods Condominium II*, 203 AD3d 1100, 1101-1102 [2d Dept 2022]).

We also reject the Bauer defendants' contention that the court erred in granting the motion of the daughters and GWB with respect to the cross claim against GWB for breach of implied contract.

In appeal No. 2, we agree with the Bauer defendants that the court erred in granting the Lincoln defendants' motion with respect to the negligence counterclaim against Lincoln Life insofar as asserted by the wife. We therefore modify the order accordingly. "As a general principle, insurance brokers 'have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' " (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). However, "[a]bsent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[] or direct a client to obtain additional coverage" (*Petri Baking Prods., Inc. v Hatch Leonard Naples, Inc.*, 151 AD3d 1902, 1904 [4th Dept 2017] [internal quotation marks omitted]). However, the Court of Appeals has "identified three exceptional situations that may give rise to a special relationship, thereby creating an additional duty of advisement: (1) the agent receives compensation for consultation apart from the payment of premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*Voss*, 22 NY3d

at 735 [internal quotation marks omitted]). Here, the evidence submitted by the Lincoln defendants in support of their motion with respect to the negligence counterclaim "did not satisfy [their] initial burden of establishing the absence of a material issue of fact as to the existence of a special relationship" (*id.*). To the contrary, the evidence suggests that there was some interaction between the wife and Stadler regarding the question of what steps were required to change the beneficiary of the policy, and thereafter the wife and decedent relied upon Stadler's expertise as an agent of an affiliate of Lincoln Life to effect the same (*see generally AB Oil Servs., Ltd. v TCE Ins. Servs., Inc.*, 188 AD3d 624, 628-629 [2d Dept 2020]; *STB Invs. Corp. v Sterling & Sterling, Inc.*, 178 AD3d 413, 413 [1st Dept 2019]; *Petri Baking Prods., Inc.*, 151 AD3d at 1904-1905). In addition, issues of fact exist whether there was "a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*Voss*, 22 NY3d at 735 [internal quotation marks omitted]). Further, "[w]hether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact" (*Murphy v Kuhn*, 90 NY2d 266, 271 [1997] [internal quotation marks omitted]). The Lincoln defendants' motion with respect to the negligence counterclaim insofar as asserted by the wife therefore should have been denied " 'regardless of the sufficiency of the opposing papers' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [emphasis omitted]; *see generally Voss*, 22 NY3d at 734).

With respect to that part of the Lincoln defendants' motion seeking summary judgment dismissing the cross claims against Stadler and Lincoln Financial, we note that the court did not address that aspect of the motion, and we therefore deem it denied (*see Hastedt v Bovis Lend Lease Holdings, Inc.*, 152 AD3d 1159, 1163 [4th Dept 2017]; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]).

Finally, we have reviewed and rejected the Bauer defendants' remaining contentions in appeal No. 2.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

830

CA 22-00095

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CAMI WITTMEYER, ET AL., DEFENDANTS,
MARIA R. BAUER, LAWRENCE J. ADYMY, JR.,
DEFENDANTS-APPELLANTS,
LINCOLN FINANCIAL ADVISORS CORPORATION AND
LEE V. STADLER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRADLEY ARANT BOULT CUMMINGS, LLP, CHARLOTTE, NORTH CAROLINA (C. BAILEY KING, JR., OF THE NORTH CAROLINA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 13, 2022. The order granted the motion of plaintiff and defendants Lincoln Financial Advisors Corporation and Lee V. Stadler insofar as it sought summary judgment dismissing the counterclaims of defendants Marie R. Bauer and Lawrence J. Adymy, Jr., against plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of plaintiff and defendants Lee V. Stadler and Lincoln Financial Advisors Corporation with respect to the negligence counterclaim insofar as asserted by defendant Maria R. Bauer and reinstating that counterclaim to that extent, and as modified the order is affirmed without costs.

Same memorandum as in *Lincoln Life & Annuity Co. of N.Y. v Wittmeyer* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

851

KA 16-02105

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN B. TORRES, DEFENDANT-APPELLANT.

MICHAEL J. PULVER, NORTH SYRACUSE, 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 (William F. Kocher, J.), rendered August 24, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and endangering the welfare of a child (§ 260.10 [1]), arising from a dispute between defendant and his girlfriend during which defendant possessed an assault weapon in an apartment with five children present. We affirm.

Defendant contends in his main brief that the indictment is jurisdictionally defective with respect to the count of criminal possession of a weapon in the second degree because, while the indictment specified that the loaded firearm was an assault weapon, specifically a particular semiautomatic rifle, the indictment failed to also allege that the semiautomatic rifle did not fall into one of the exemptions from the definition of an assault weapon set forth in Penal Law § 265.00 (22) (g). We reject that contention.

"In order to determine whether a statute defining a crime contains 'an exception that must be affirmatively pleaded as an element in the accusatory instrument' or 'a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial,' [a court] must look to the language of the statute itself" (*People v Tatis*, 170 AD3d 45, 47 [1st Dept 2019], *lv denied* 33 NY3d 981 [2019], quoting *People v Santana*, 7 NY3d 234, 236 [2006]; *see People v Kohut*, 30 NY2d 183, 187 [1972]). "If the defining statute contains an exception, the [accusatory instrument] must allege that

the crime is not within the exception" (*Kohut*, 30 NY2d at 187). "Legislative intent to create an exception [that must be affirmatively pleaded] has generally been found when the language of exclusion is contained entirely within a Penal Law provision" (*Santana*, 7 NY3d at 237). Conversely, "the general rule [is] that qualifying language found outside the text of a relevant Penal Law provision is in the nature of a 'proviso' " (*People v Davis*, 13 NY3d 17, 31 [2009]) and is therefore "generally . . . a matter for the defendant to raise in defense" (*Kohut*, 30 NY2d at 187; *see Santana*, 7 NY3d at 236-237; *Tatis*, 170 AD3d at 47). Ultimately, "[t]he main goal of the interpretative rules governing exceptions and provisos is to discover the intention of the enacting body" (*Davis*, 13 NY3d at 31).

Here, the provision defining criminal possession of a weapon in the second degree, as charged in this case, provides that a person is guilty of that offense when "such person possesses any loaded firearm" except "if such possession takes place in such person's home or place of business" (Penal Law § 265.03 [3]). Beyond the "home or place of business" exception, which "is contained entirely within" that provision (*Santana*, 7 NY3d at 237), section 265.03 (3) contains no other exceptions in the language of the provision itself. Rather, the definitional provisions contained elsewhere in the Penal Law define "firearm" as including an "assault weapon" (§ 265.00 [3] [e]), which is a defined term referring to weapons with particular characteristics (*see* § 265.00 [22] [a]-[f]) but specifically exempting certain weapons with other characteristics or conditions (*see* § 265.00 [22] [g]).

The qualifying language providing exemptions from the definition of an assault weapon is thus "found outside the text of [the] relevant Penal Law provision" defining the subject offense of criminal possession of a weapon in the second degree (*Davis*, 13 NY3d at 31; *see People v Webb*, 172 AD3d 920, 920-921 [2d Dept 2019], *lv denied* 34 NY3d 939 [2019]). Inasmuch as "the exemptions in Penal Law § [265.00 (22) (g)] are found outside the particular Penal Law provisions to which they apply" (*Tatis*, 170 AD3d at 49), the exemptions from the definition of an assault weapon operate as "proviso[s] that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial" (*Santana*, 7 NY3d at 236; *see Webb*, 172 AD3d at 920-921; *cf.* Richard A. Greenberg et al., New York Criminal Law § 33:3 [4th ed 6A West's NY Prac Series, Oct. 2022 Update]). "As a matter of 'common sense and reasonable pleading' " (*Santana*, 7 NY3d at 237, quoting *People v Devinny*, 227 NY 397, 401 [1919]), we conclude that "the Legislature could not reasonably have intended the People to [plead and] negate the existence of each of the myriad" circumstances in which a weapon may have characteristics or conditions exempting it from the definition of an assault weapon in every accusatory instrument charging a relevant offense of criminal possession of a weapon in the second degree (*Davis*, 13 NY3d at 31; *see Santana*, 7 NY3d at 237). Indeed, "to require the People to plead and negate the existence of [each exemption from the assault weapon definition] would require them to go to 'intolerable lengths,' " and "[t]hese efforts would serve '[n]o useful purpose of narrowing issues or giving notice,' but would merely give rise to 'technicalitie[s that] could be

used belatedly to stifle an otherwise viable prosecution' " (*Davis*, 13 NY3d at 32; *see Kohut*, 30 NY2d at 191; *Devinny*, 227 NY at 401). We thus conclude that the indictment is not jurisdictionally defective because, contrary to defendant's assertion, the People were not required to affirmatively plead in the indictment that the semiautomatic rifle did not fall into one of the exemptions from the definition of an assault weapon set forth in Penal Law § 265.00 (22) (g) (*see Webb*, 172 AD3d at 920-921).

Next, defendant failed to preserve for our review his contention in his main brief that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second degree inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]) and he did not raise the alleged shortcoming in the evidence now asserted on appeal "at any subsequent time when [County Court] had an opportunity of effectively changing" its ruling denying that motion (CPL 470.05 [2]).

Defendant contends in his main and pro se supplemental briefs that the verdict with respect to the count of criminal possession of a weapon in the second degree is against the weight of the evidence, and further contends in his main brief that the verdict with respect to the count of endangering the welfare of a child is also against the weight of the evidence. We reject those contentions. 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 crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence,' we must afford great deference to the fact-finder's opportunity to view the witnesses, hear their testimony and observe their demeanor" (*People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]), and we conclude that the jury properly considered the issues of credibility, including the inconsistencies in the witnesses' testimony, and that there is no basis for disturbing its determinations (*see People v Tripp*, 177 AD3d 1409, 1410 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]).

Defendant failed to preserve for our review his contention in his pro se supplemental brief concerning the presentence report (*see* CPL 470.05 [2]; *People v Pedro*, 134 AD3d 1396, 1397 [4th Dept 2015]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, inasmuch as defendant failed to obtain leave to appeal from the order denying his CPL 440.10 motion, his contentions in his pro se supplemental brief concerning the denial of that motion are not properly before us (*see People v Loiz* [appeal No. 2], 175 AD3d 872, 873 [4th Dept 2019]; *People v Fuller*, 124 AD3d 1394, 1395 [4th Dept

2015], *lv denied* 25 NY3d 989 [2015]).

Entered: December 23, 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 19-01870

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL WORKS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 8, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the third 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 a guilty plea of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon a guilty plea of driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]). In appeal No. 3, defendant appeals from a judgment convicting him upon a guilty plea of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs as a class E felony (§§ 1192 [4-a]; 1193 [1] [c] [i] [A]). In appeal No. 4, defendant appeals from a judgment convicting him upon a guilty plea of aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a]).

Defendant initially contends in all four appeals that his plea was “improperly” entered because he provided only “yes” and “no” responses to questions asked of him during the plea colloquy. Defendant, however, failed to preserve that contention for our review (*see People v Pagan*, 200 AD3d 1724, 1725 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022]; *People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). In any event, defendant’s contention lacks merit (*see Pagan*, 200 AD3d at 1725; *People v Bennett*, 165 AD3d 1624, 1625 [4th Dept 2018]).

Defendant further contends in all four appeals that his constitutional right to a speedy trial was violated. We reject that contention. Preliminarily, we note that, as the People correctly concede, the waiver of defendant's right to a speedy trial under CPL 30.30 that defense counsel signed did not encompass defendant's constitutional speedy trial contention. However, defendant's contention that his constitutional right to a speedy trial was violated is unpreserved for our review because defendant failed to move to dismiss the accusatory instruments on that ground (*see People v Chinn*, 104 AD3d 1167, 1169 [4th Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v Kemp*, 270 AD2d 927, 927 [4th Dept 2000], *lv denied* 95 NY2d 836 [2000]). In any event, defendant's contention lacks merit. Upon our review of the record in light of the relevant factors (*see People v Taranovich*, 37 NY2d 442, 445 [1975]), we conclude that those factors would have compelled denial of a motion based on defendant's constitutional right to a speedy trial, and we note in particular that "there [was] a complete lack of any evidence that the defense was impaired by reason of the delay" (*People v Benjamin*, 296 AD2d 666, 667 [3d Dept 2002]; *see People v Schillawski*, 124 AD3d 1372, 1373 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]).

Defendant further contends in all four appeals that he was denied effective assistance of counsel because defense counsel waived defendant's statutory speedy trial rights and because defense counsel failed to pursue an allegedly meritorious motion on constitutional speedy trial grounds. That contention, however, does not survive defendant's guilty plea inasmuch as defendant does not contend " 'that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*People v Lucieer*, 107 AD3d 1611, 1612 [4th Dept 2013]; *see People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see also People v Speranza*, 96 AD3d 1164, 1165 [3d Dept 2012]).

We perceive no basis in the record for us to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). Finally, we have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgments.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

855

KA 19-01935

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL WORKS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 8, 2018. The judgment convicted defendant upon his plea of guilty of driving while ability impaired by drugs.

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

Same memorandum as in *People v Works* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

856

KA 19-01936

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL WORKS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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 8, 2018. The judgment convicted defendant upon his plea of guilty of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs.

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

Same memorandum as in *People v Works* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

857

KA 19-01937

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL WORKS, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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 8, 2018. The judgment convicted defendant upon his plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Same memorandum as in *People v Works* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

860

CA 21-01298

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

JENNIFER FROEBEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WESLEY FROEBEL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered September 1, 2021. The order, among other things, modified residential custody of the subject child from plaintiff to defendant.

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

Memorandum: These consolidated appeals arise from a dispute between the parties, who were divorced by a judgment entered in 2006, concerning, among other things, the education of their child. In appeal No. 1, plaintiff mother appeals from an order entered after a hearing that, inter alia, modified a custodial access agreement that was incorporated but not merged in the judgment of divorce by granting defendant father residential custody of the child, suspended the father's child support obligation set forth in an oral stipulation that was also incorporated but not merged in the judgment of divorce, and made various determinations concerning the parties' obligations under the oral stipulation to contribute to the child's college expenses. In appeal No. 2, the mother appeals from an order directing her to pay child support to the father.

At the outset, although the mother contends that Supreme Court erred in awarding the father residential custody of the child, that issue has been rendered moot inasmuch as the child is now 18 years old. We therefore dismiss appeal No. 1 insofar as it concerns custody (*see Matter of Bly v Hoffman*, 114 AD3d 1275, 1275 [4th Dept 2014]; *Matter of Dawn M.L. v Gary A.M.*, 31 AD3d 1222, 1222 [4th Dept 2006]). Contrary to the mother's further contention in appeal No. 1, the court did not err in suspending the father's child support obligation from April 9, 2021, the date of the father's amended order to show cause

seeking, inter alia, to terminate his child support obligation, until September 1, 2021, the date on which the child left for college. The father established at the hearing that the child had been living exclusively with the father since February 2021. The child's change in residence constituted a substantial change in circumstances sufficient to warrant the suspension of the father's child support obligation (*see Matter of Calderon v Almonte*, 158 AD3d 681, 681 [2d Dept 2018]; *Matter of Williams v Randall-Williams*, 95 AD3d 1135, 1136 [2d Dept 2012]).

The mother's remaining contentions in appeal No. 1 concern the court's directives with respect to the payment of the child's college expenses. Pursuant to the parties' oral stipulation, the mother and father agreed to "contribute in proportion to their incomes" at the time that "a[n] appropriate school is selected[.]" Following the hearing, the court directed in its order that the child could attend the college of her choice; that the cost of attendance shall be paid from the father's New York 529 College Savings account and that further college costs for the child's attendance shall be borne solely by the father for the 2021-2022 academic school year, i.e., her freshman year; and that it would revisit the parties' contributions to the child's college expenses at a later date, at which time it would "determine the contribution percentages of both parties to future educational costs for the child to be made pursuant to the terms of the agreements of the parties." It is the mother's position that she never agreed that the child's preferred college was "appropriate" and, thus, she is not required under the terms of the oral stipulation to contribute to the child's college expenses. Therefore, the mother contends that the court erred by effectively rewriting the parties' oral stipulation.

We conclude that the mother's challenges to those parts of the order concerning the child's college expenses by which she is aggrieved are without merit. Pursuant to the plain meaning of the parties' oral stipulation (*see Reukauf v Kraft*, 203 AD3d 1652, 1653 [4th Dept 2022]), the parties agreed to contribute to the child's college expenses in proportion to their income. The parties, however, simply disagreed whether the child's preferred college was appropriate, and they litigated that issue. The court's order directing that the child could attend the college of her choice was tantamount to a determination that the college was appropriate within the meaning of the parties' oral stipulation, and we conclude that the determination has a sufficient basis in the record. Further, with respect to that part of the order providing that the court would revisit, at a later date, the issue of college contributions "pursuant to the terms of the agreements of the parties[,]" we conclude that, contrary to the mother's contention, the order is consistent with, and not contrary to, the oral stipulation.

Addressing appeal No. 2, we agree with the mother that the court erred in modifying the parties' child support obligation by ordering her to pay child support to the father without first conducting an evidentiary hearing (*see Bishop v Bishop*, 170 AD3d 642, 644 [2d Dept

2019]; *Matter of Gross v Gross*, 7 AD3d 711, 713 [2d Dept 2004]). Although the court held a hearing with respect to numerous items of relief sought by both parties, the record establishes that the parties did not actually litigate the issue of their respective incomes. Rather, the order in appeal No. 2 was decided based on financial documents that the parties submitted after the hearing, and we agree with the mother that there are issues of fact concerning the parties' finances that are evident based upon the father's submissions. We therefore reverse the order in appeal No. 2, vacate the award of child support, and remit the matter to Supreme Court for a hearing on that part of the father's amended order to show cause regarding the recalculation of the parties' child support obligations (*see Jennings v Domagala*, 167 AD3d 1585, 1586 [4th Dept 2018]; *see generally Bishop*, 170 AD3d at 644).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

861

CA 21-01299

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

JENNIFER FROEBEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WESLEY FROEBEL, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered September 13, 2021. The order directed plaintiff to pay child support to the defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the award of child support is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same memorandum as in *Froebel v Froebel* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

862

CA 21-01171

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

IN THE MATTER OF MARGARET A. BURDICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BATH CENTRAL SCHOOL DISTRICT, BATH CENTRAL
SCHOOL DISTRICT BOARD OF EDUCATION AND
JOSEPH L. RUMSEY, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY, RESPONDENTS-RESPONDENTS.

TABNER, RYAN & KENIRY, LLP, ALBANY (WILLIAM F. RYAN, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

FERRARA FIORENZA P.C., EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered July 21, 2021. The judgment denied the motion of petitioner for summary judgment and granted the motion of respondents Bath Central School District and Bath Central School District Board of Education for summary judgment.

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

Memorandum: Petitioner, in her first cause of action, asserted pursuant to CPLR article 78, seeks to annul a determination abolishing her position as business administrator for respondent Bath Central School District (District) and outsourcing her role to nonparty Greater Southern Tier Board of Cooperative Educational Services (BOCES). Following the entry of an order granting in part respondents' motion seeking, inter alia, to dismiss certain claims asserted in the first cause of action, the District and respondent Bath Central School District Board of Education (collectively, District respondents) moved for, in effect, summary judgment dismissing that cause of action in its entirety, and petitioner moved for, in effect, summary judgment on the remaining parts of the first cause of action. Supreme Court denied petitioner's motion and granted the District respondents' motion. We affirm.

"It is well established that a public employer may abolish civil service positions for the purposes of economy or efficiency . . . , but it may not act in bad faith in doing so" (*Matter of Arnold v Erie County Med. Ctr. Corp.*, 59 AD3d 1074, 1076 [4th Dept 2009], *lv*

dismissed 12 NY3d 838 [2009] [internal quotation marks omitted]). Indeed, a public employer may not abolish positions "as a subterfuge to avoid the statutory protection afforded civil servants before they are discharged" (*id.* at 1077 [internal quotation marks omitted]; *see Matter of Hartman v Erie 1 BOCES Bd. of Educ.*, 204 AD2d 1037, 1037 [4th Dept 1994]). "A petitioner challenging the abolition of his or her position must establish that the employer in question acted in bad faith" (*Arnold*, 59 AD3d at 1077; *see Matter of Aldazabal v Carey*, 44 NY2d 787, 788 [1978]; *Matter of Hritz-Seifts v Town of Poughkeepsie*, 22 AD3d 493, 493 [2d Dept 2005]), and such a petitioner may do so by demonstrating that the position was not eliminated for bona fide reasons, that savings were not accomplished thereby, or that a replacement employee was hired (*see Matter of Ifedigbo v Buffalo Pub. Schs.*, 125 AD3d 1447, 1450 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]; *Matter of Lally v Johnson City Cent. Sch. Dist.*, 105 AD3d 1129, 1131 [3d Dept 2013]; *Arnold*, 59 AD3d at 1077). Here, petitioner alleged that the District respondents acted arbitrarily and in bad faith solely on the ground that they failed to provide any support for the purported economic reasons that were given for abolishing her position.

We conclude that the District respondents met their initial burden on their motion (*see Ifedigbo*, 125 AD3d at 1448-1450; *see also Arnold*, 59 AD3d at 1077). Their submissions established, first, that there was an economic justification for the determination to abolish petitioner's position (*see generally Aldazabal*, 44 NY2d at 788; *Ifedigbo*, 125 AD3d at 1450; *Matter of Johnston v Town of Evans*, 125 AD2d 952, 953 [4th Dept 1986], *lv dismissed* 69 NY2d 900 [1987], *lv denied* 69 NY2d 608 [1987], 70 NY2d 612 [1987]). Specifically, the District respondents established that they could realize substantial savings by eliminating their in-house business administrator and outsourcing those services to BOCES, and that those financial reasons—not petitioner's job performance—served as the sole basis for the decision to abolish petitioner's position. Thus, the District respondents established a bona fide reason for the challenged determination (*see Ifedigbo*, 125 AD3d at 1450).

Additionally, the District respondents' submissions established that sufficient savings were accomplished to justify abolishing petitioner's position and outsourcing those services to BOCES (*see Johnston*, 125 AD2d at 953). In particular, although the District respondents' submissions established that they would incur some additional costs during the first school year following the abolition of petitioner's position—i.e., the costs associated with retaining an interim business administrator until the agreement with BOCES was finalized—they also established that the savings they realized in the two subsequent school years by outsourcing business administration services to BOCES, which included partial reimbursement from New York State, was well in excess of the costs that were initially incurred by abolishing petitioner's position. We note that petitioner did not allege that the District respondents acted in bad faith by hiring a replacement employee who performed substantially the same services as she did and, therefore, the District respondents were not required to

address that issue to meet their initial burden on their motion.

In opposition to the District respondents' motion, petitioner "failed to eliminate bona fide reasons for the elimination of [her] position, [or to] show that no savings were accomplished" by the determination to abolish her position (*Ifedigbo*, 125 AD3d at 1450 [internal quotation marks omitted]; *see Matter of Mucci v City of Binghamton*, 245 AD2d 678, 679 [3d Dept 1997], *appeal dismissed* 91 NY2d 921 [1998], *lv denied* 92 NY2d 802 [1998]). We therefore conclude that the court properly granted the District respondents' motion and, for the same reasons, we conclude that the court properly denied petitioner's motion.

Petitioner's contentions that the District respondents acted in bad faith by hiring a replacement employee who performed substantially the same services as she did, and that the determination to abolish her position violated Education Law § 2510, are unpreserved for our review inasmuch as those contentions are raised for the first time on appeal (*see Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]; *Matter of Cornell v Annucci*, 173 AD3d 1760, 1761 [4th Dept 2019]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

863

CA 21-01590

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

EDISON BREGAUDIT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LORETTO HEALTH AND REHABILITATION CENTER,
DEFENDANT-APPELLANT,
AND PRO SCAPES, INC., DEFENDANT-RESPONDENT.

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

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (KELLY J. PARE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered August 3, 2021. The order, among other things, granted the motion of defendant Pro Scapes, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Pro Scapes, Inc. for summary judgment dismissing the amended complaint against it, for summary judgment dismissing the cross claim against it insofar as that cross claim seeks common-law indemnification and for summary judgment on its cross claim, and reinstating the amended complaint against it and the cross claim against it insofar as that cross claim seeks common-law indemnification, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained when he slipped and fell on ice and snow on the entrance ramp outside premises owned and operated by defendant Loretto Health and Rehabilitation Center (Loretto). As relevant here, Loretto had entered into a contract with defendant Pro Scapes, Inc. (Pro Scapes) for snow removal services at the facility.

On the date of the accident, Pro Scapes had been performing snow removal services from approximately 1:00 a.m. until 10:00 a.m. during a winter storm that began the day before. After Pro Scapes' employees left the facility, Pro Scapes received a call requesting that their workers return because they had done "an awful job." Pro Scapes sent

two employees back to Loretto, where they shoveled from 12:10 p.m. until 12:49 p.m., and then laid down two bags of deicer. Sometime thereafter, plaintiff, who was transporting a resident of the facility inside, slipped and fell on snow and ice on the sidewalk ramp in front of the building. Plaintiff injured his knee and shoulder. In his amended complaint, as amplified by his "fourth answer to the [demand for a] bill of particulars [by Pro Scapes]" (fourth supplemental bill of particulars), plaintiff alleged, inter alia, that he had slipped on ice and snow "located in an area where a pile of snow would accumulate when plowing the circle in front of the ramp." Plaintiff further alleged that the "entrance was inadequately salted," which "caused the ice and snow . . . remaining on the walk to melt and refreeze creating *additional* ice" (emphasis added).

Pro Scapes moved for summary judgment dismissing the amended complaint against it, for summary judgment dismissing Loretto's cross claim against it for common-law and contractual indemnification and contribution, and for summary judgment on its cross claim against Loretto for contractual indemnification. Loretto filed a cross motion seeking, inter alia, summary judgment dismissing Pro Scapes' cross claim. Supreme Court, inter alia, granted Pro Scapes' motion and denied Loretto's cross motion. Plaintiff and Loretto now appeal.

We agree with plaintiff and Loretto that the court erred in determining that Pro Scapes did not owe plaintiff a duty of care. "As a general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party" (*Lorquet v Timoney Tech. Inc.*, 188 AD3d 1584, 1585 [4th Dept 2020] [internal quotation marks omitted]). There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). That exception does not apply when "the breach of contract consists 'merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good' " (*id.* at 112; *see Mesler v PODD LLC*, 89 AD3d 1533, 1535 [4th Dept 2011]). Rather, "a claim that a contractor [created or] exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them" (*Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 [2d Dept 2013]; *see Church*, 99 NY2d at 112; *Baker v Buckpitt*, 99 AD3d 1097, 1100 [3d Dept 2012]; *Yery Suh v Fleet Bank, N.A.*, 16 AD3d 276, 276 [1st Dept 2005]; *see also Santos v Deanco Servs., Inc.*, 142 AD3d 137, 142 [2d Dept 2016]).

Here, plaintiff alleged in his fourth supplemental bill of particulars that Pro Scapes negligently "created, aggravated and worsened the icy condition" of the subject walkway by "[u]sing insufficient salt" for the weather conditions, which allowed the remaining ice and snow to melt and refreeze, thereby creating additional ice. Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every reasonable inference

(*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that Pro Scapes failed to meet its initial burden on its motion of establishing as a matter of law that it did not create or exacerbate the dangerous icy condition as alleged by plaintiff.

In support of its motion, Pro Scapes submitted excerpts of the deposition testimony of its president, who explained that salt and deicers function by lowering the freezing temperature of water and that additional moisture required additional deicing material in order to be effective. The president acknowledged that, although an appropriate amount of salt could initially be effective in melting the present ice and snow, if conditions added moisture to the area, the now-diluted salt could become ineffective and the water could then refreeze in place. While Pro Scapes' expert meteorologist opined that there was no thawing and refreezing cycle in the 24 hours prior to plaintiff's accident such that ice or snow on the sidewalk could have naturally melted and refrozen, the meteorologist failed to address whether snow and ice melted with deicer could have refrozen into ice on the sidewalk (*see Battaglia v MDC Concourse Ctr., LLC*, 175 AD3d 1026, 1029 [4th Dept 2019], *affd* 34 NY3d 1164 [2020]). Pro Scapes' submissions further showed that, after initially performing snow removal services throughout the morning, its workers had to return to the facility in the afternoon following Loretto's complaint that Pro Scapes had not done an adequate job. As the president emphasized during his deposition, Pro Scapes' form documenting the customer communication showed that Loretto reported that the sidewalk had not been properly cleared of snow, but Loretto did not refer to the presence of any ice. Pro Scapes returned in the afternoon between noon and 1:00 p.m. to shovel for approximately 40 minutes and then laid down two 50-pound bags of deicer over a period of 11 minutes, although the president was unable to pinpoint where exactly the deicer was spread. Plaintiff slipped on the wet and icy sidewalk ramp just before 5:00 p.m. later that day.

The evidence that Pro Scapes returned to address a complaint of remaining snow, but not the presence of ice, and then applied an amount of deicer, coupled with the president's testimony regarding the ineffectiveness of deicer when the amount thereof becomes diluted by additional moisture, which could lead to refreezing of the previously melted snow and ice, "raises a question of fact as to whether [Pro Scapes] negligently create[d] or exacerbate[d] a dangerous condition by using [inadequate] salt, [thereby] resulting in the formation of the ice on which plaintiff allegedly slipped" several hours later (*Belmonte v Guilderland Assoc., LLC*, 112 AD3d 1128, 1129 [3d Dept 2013] [internal quotation marks omitted]; *see Yery Suh*, 16 AD3d at 276). Thus, we conclude that the court should have denied that part of Pro Scapes' motion seeking summary judgment dismissing the amended complaint against it "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order accordingly.

In addition, we agree with Loretto that the court erred in granting that part of Pro Scapes' motion for summary judgment

dismissing Loretto's cross claim insofar as that cross claim seeks common-law indemnification (*see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1403-1404 [4th Dept 2018]; *Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293 [4th Dept 2010]; *cf. Grove v Cornell Univ.*, 151 AD3d 1813, 1816 [4th Dept 2017]), and that part of Pro Scapes' motion seeking summary judgment on its cross claim against Loretto for contractual indemnification (*see Mesler*, 89 AD3d at 1534). We therefore further modify the order accordingly. We have considered Loretto's remaining contentions and conclude that they are without merit.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

864

CA 21-01168

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

MICHAEL HALL AND MELISSA HALL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (GREGORY S. GAGLIONE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 11, 2021. The order denied defendant's motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment.

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

Memorandum: Plaintiffs commenced this breach of contract action alleging, inter alia, that defendant breached its insurance policy with them by refusing to provide the full amount of coverage under the policy for fire damage to their home. Plaintiffs submitted a claim for that damage prior to making any repairs, and defendant paid the actual cash value pursuant to the policy. Defendant later denied certain parts of plaintiffs' claim for replacement costs, however, on the ground that plaintiffs failed to complete certain repairs and replacements with respect to items for which defendant had paid the actual cash value. In addition, defendant asserted that plaintiffs were not entitled to replacement cost proceeds for the costs that plaintiffs incurred to partially finish their basement, which had not been partially finished prior to the fire, and to upgrade the insulation in their house. Defendant moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for summary judgment on the complaint. In appeal No. 1, defendant appeals from an order denying the motion and granting the cross motion. In appeal No. 2, defendant appeals from a subsequent order and judgment.

Initially, we note that the appeal from the order in appeal No. 1 must be dismissed inasmuch as the order in that appeal is subsumed in

the final order and judgment in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *see generally* CPLR 5501 [a] [1]). The appeal from the order and judgment brings up for review the propriety of the order in appeal No. 1 (*see* CPLR 5501 [a] [1]).

The clear and unambiguous terms of the insurance policy required defendant to pay plaintiffs the "actual cash value" of the damage to plaintiffs' house, and further provided that defendant would not pay for repair or replacement costs above the actual cash value until such repairs or replacements were complete (*see D.R. Watson Holdings, LLC v Caliber One Indem. Co.*, 15 AD3d 969, 969 [4th Dept 2005], *lv dismissed* 4 NY3d 882 [2005], *lv dismissed* 5 NY3d 842 [2005]). In addition, the policy provided that replacement cost proceeds would be limited to the cost of replacements "with material of like kind and quality and for like use."

"Replacement cost coverage inherently requires a replacement (a substitute structure for the insured) and costs (expenses incurred by the insured in obtaining the replacement); without them, the replacement cost provision becomes a mere wager" (*Harrington v Amica Mut. Ins. Co.*, 223 AD2d 222, 228 [4th Dept 1996], *lv denied* 89 NY2d 808 [1997]). Here, with respect to the coverage that plaintiffs seek, plaintiffs have not incurred costs, above the actual cash value, for repairs and replacements with material of like kind and quality and for like use and, thus, their loss is defined by the actual cash value of the damaged parts of the building (*see generally Cushing v Allstate Fire & Cas. Ins. Co.*, 173 AD3d 1819, 1820-1821 [4th Dept 2019]; *Bartholomew v Sterling Ins. Co.*, 34 AD3d 1157, 1158 [3d Dept 2006]; *Harrington*, 223 AD2d at 228). Consequently, defendant met its initial burden on the motion by establishing that it paid plaintiffs the actual cash value of the damage to the house and that plaintiffs are not entitled to recover the additional replacement or repair costs they seek, and the burden shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiffs failed to meet that burden. Furthermore, plaintiffs failed to meet their burden on the cross motion of demonstrating their entitlement to the additional payments they seek under the policy. Therefore, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

865

CA 21-01227

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

MICHAEL HALL AND MELISSA HALL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (GREGORY S. GAGLIONE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 23, 2021. The order and judgment awarded plaintiffs a money judgment against defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously vacated, the order entered August 11, 2021 is reversed on the law without costs, the cross motion is denied, the motion is granted and the complaint is dismissed.

Same memorandum as in *Hall v New York Cent. Mut. Fire Ins. Co.* ([appeal No. 1] — AD3d — [Dec. 23, 2022] [4th Dept 2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

867

CA 21-00932

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN RE-INSURANCE COMPANY, NOW KNOWN
AS MUNICH REINSURANCE AMERICA, INC.,
DEFENDANT-RESPONDENT.

HUNTON ANDREWS KURTH LLP, WASHINGTON, D.C. (SYED S. AHMAD, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND FELT EVANS, LLP, CLINTON, FOR PLAINTIFF-APPELLANT.

RUBIN, FIORELLA, FRIEDMAN & MERCANTE LLP, NEW YORK CITY (BRUCE M. FRIEDMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered June 22, 2021. The order, inter alia, granted the motion of defendant for summary judgment dismissing the complaint on the ground of collateral estoppel, granted defendant's cross motion for summary judgment dismissing plaintiff's claim for interest on allegedly late loss payments, and declined to reach defendant's motion for summary judgment dismissing plaintiff's claim for defense costs.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fifth and sixth ordering paragraphs, denying defendant's motion for summary judgment dismissing the complaint as barred by collateral estoppel, granting defendant's motion for summary judgment dismissing the complaint insofar as it asserts a claim for defense costs, denying plaintiff's cross motion for summary judgment on the issue of defense costs, denying defendant's cross motion for summary judgment dismissing the complaint insofar as it asserts a claim for interest on allegedly late loss payments and reinstating the complaint to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff issued primary and umbrella policies of insurance to nonparty Burnham Corporation (Burnham) covering, as relevant to this appeal, a period from 1977 to 1984. Plaintiff obtained from defendant reinsurance coverage for the same period related to the umbrella policies. Burnham was sued by individuals who were allegedly injured by exposure to equipment that was manufactured by Burnham and that contained asbestos (underlying actions).

Plaintiff paid defense costs and losses under the primary policies and, when it allegedly exhausted the primary policies, it began to pay claims under the umbrella policies. Plaintiff sought reimbursement from defendant for defense costs under the reinsurance policies, but defendant refused to pay, contending that plaintiff was not obligated under the umbrella policies to pay such costs and that the reinsurance contracts thus were not triggered.

Plaintiff thereafter commenced this action, asserting, inter alia, a cause of action for breach of contract. In 2016, the parties entered a settlement as to certain sums defendant allegedly owed to plaintiff under the reinsurance policies. As part of that settlement, plaintiff retained its claim to what the parties denominate loss interest, i.e., interest on the payment made under the settlement, which was allegedly untimely. Defendant moved for summary judgment dismissing the complaint on the ground of collateral estoppel and plaintiff cross-moved for summary judgment on its causes of action and dismissing defendant's counterclaims. In a separate set of motions, defendant moved for summary judgment dismissing the claim for defense costs and plaintiff cross-moved for summary judgment on the claim for defense costs and dismissing defendant's counterclaims. Lastly, plaintiff moved for partial summary judgment on the loss interest claim, and defendant cross-moved for summary judgment dismissing that claim. Plaintiff appeals from an order of Supreme Court that, inter alia, granted defendant's motion for summary judgment based on collateral estoppel, denied plaintiff's corresponding cross motion, declined to reach defendant's motion for summary judgment dismissing the claim for defense costs and plaintiff's corresponding cross motion, granted defendant's cross motion for summary judgment dismissing the loss interest claim, and denied plaintiff's corresponding motion.

As an initial matter, we agree with plaintiff that the court erred in granting defendant's motion for summary judgment dismissing the complaint as barred by collateral estoppel based on the decision in *Utica Mut. Ins. Co. v Munich Reins. Am., Inc.* (7 F4th 50 [2d Cir 2021]), and we modify the order accordingly. The issue of the interpretation of the language of an insurance policy involves a pure question of law, and "the doctrine of collateral estoppel does not preclude [plaintiff] from litigating that issue again, despite the Federal court['s] prior adverse determination on the point" (*American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]). Moreover, collateral estoppel does not apply unless the previously litigated issue was "identical to that in the subsequent action and decided after a full and fair opportunity to litigate" (*Medlock Crossing Shopping Ctr. Duluth, Ga. L.P. v Warren*, 175 AD3d 934, 936 [4th Dept 2019]), and "[t]he party seeking to invoke collateral estoppel has the burden to show the identity of the issues" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]). Inasmuch as the language at issue here differs in certain respects from that in the documents that were the subject of the prior litigation, defendant failed to meet that burden.

Nevertheless, we conclude that defendant established that its

interpretation of the umbrella policies—i.e., that those policies did not cover defense costs in the underlying actions inasmuch as those costs were covered by the primary insurance policies—is the only fair construction thereof (*see generally Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [4th Dept 1994]). We therefore further modify the order by granting defendant's motion for summary judgment dismissing the complaint with respect to defense costs and denying plaintiff's corresponding cross motion. The umbrella policies here provided that, "[w]ith respect to *any occurrence not covered by* the policies listed in the schedule of underlying insurance or any other insurance collectible by the insured, but covered by the terms and conditions of this policy (including damages wholly or partly within the amount of the retained limit), the company shall: (a) defend any suit against the insured" (emphasis added). We conclude that "the unambiguous terms of the umbrella policies establish that defendant[was] not required to reimburse plaintiff under the reinsurance contracts for the disputed defense costs related to the underlying actions" (*Utica Mut. Ins. Co. v Abeille Gen. Ins. Co.*, 206 AD3d 1666, 1669 [4th Dept 2022]).

We agree with plaintiff, however, that the court erred in granting defendant's cross motion for summary judgment dismissing the complaint insofar as it asserts a claim for loss interest. Defendant failed to "sufficiently demonstrate entitlement to judgment, as a matter of law, by tender of evidentiary proof in admissible form" (*Ritts v Gowanda Rehabilitation & Nursing Ctr.*, 201 AD3d 1341, 1342 [4th Dept 2022] [internal quotation marks omitted]). Because defendant failed to meet its initial burden on its cross motion, the burden never shifted to plaintiff, and denial of the cross 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]). We therefore further modify the order by denying defendant's cross motion and reinstating the complaint insofar as it seeks loss interest.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

869

CA 21-01432

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

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

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN L. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Robert E. Antonacci, II, J.), entered September 2, 2021. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing held pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]).

We reject petitioner's contention that Supreme Court's determination is against the weight of the evidence. Pursuant to Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). Contrary to petitioner's contention, the fact that the expert witnesses each diagnosed petitioner with different

disorders does not constitute an irreconcilable conflict that negated both diagnoses. Rather, a sex offender may suffer from multiple illnesses, not to be viewed in isolation, that work in tandem with one another to predispose the offender to commit a sex offense (*see generally Matter of State of New York v David D.*, 206 AD3d 481, 485 [1st Dept 2022]). Moreover, where experts conflict as to a specific diagnosis, a question of fact is created to be resolved by the factfinder (*see generally Matter of State of New York v Ted B.*, 174 AD3d 630, 632 [2d Dept 2019]; *Matter of State of New York v David B.*, 156 AD3d 793, 793 [2d Dept 2017], *lv denied* 31 NY3d 904 [2018]). Any disagreement between the experts regarding petitioner's diagnoses was considered by the court, and the court's finding that petitioner suffers from a mental abnormality was consistent with a "fair interpretation of the evidence" (*Matter of State of New York v Nervina*, 120 AD3d 941, 943 [4th Dept 2014], *affd* 27 NY3d 718 [2016], *cert denied* — US —, 137 S Ct 574 [2016]; *see Matter of Brandon D. v State of New York*, 195 AD3d 1478, 1479-1480 [4th Dept 2021]).

Similarly, the court's determination that petitioner is a dangerous sex offender requiring confinement is not against the weight of the evidence. Both expert witnesses opined that petitioner would have serious difficulty controlling future sexual misconduct due to his lack of engagement with treatment and his failure to acknowledge his sex crimes at all (*see Matter of Charles B. v State of New York,* 192 AD3d 1583, 1586 [4th Dept 2021], *lv denied* 37 NY3d 93 [2021]; *see also Matter of Edward T. v State of New York*, 185 AD3d 1423, 1425 [4th Dept 2020]). Indeed, petitioner did not believe that he should be considered a sex offender (*see generally Matter of Akgun v State of New York*, 148 AD3d 1613, 1614 [4th Dept 2017]). Rather, petitioner flatly denied any sexual problem and blamed his ex-wife for the brutal rape and torture she endured. Further, although petitioner has not demonstrated any overt sexual misconduct while confined, he has exhibited aggressive misbehavior that, although not of a sexual nature, is relevant to a determination with respect to his inability to control his behavior (*see Matter of Clarence H. v State of New York*, 195 AD3d 1532, 1534 [4th Dept 2021]). In addition, petitioner clearly indicated that he did not wish to be released to strict and intensive supervision and treatment and could not guarantee that he would comply with the terms and conditions that might be imposed.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

872

KA 17-01972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE M. VAZQUEZ, ALSO KNOWN AS JOSE M. VASQUEZ,
DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 29, 2017. The judgment convicted defendant upon a jury verdict of manslaughter in the second degree, aggravated unlicensed operation of a motor vehicle in the second degree and aggravated unlicensed operation of a motor vehicle 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 following a jury trial of, inter alia, manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that the verdict on the manslaughter count is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that he recklessly caused the victim's death. We reject defendant's contention and affirm.

The evidence at trial established that, shortly after midnight on the date in question, defendant and the codefendant were driving separate motor vehicles at high speeds on a street, in a residential area in Rochester, known for drag racing. Witnesses testified that they saw the vehicles going "neck and neck" down the street and dodging in and out of traffic and that the vehicles were traveling at speeds estimated at between 60 and 100 miles per hour. One witness observed the vehicles racing at high speeds northbound and southbound on the street. The victim, who was attempting to cross the street, was struck by the codefendant's vehicle while she was in or near the center of the four-lane street, and she suffered immediately fatal injuries. According to an eyewitness, the victim's body went "flying in the air like a football, higher than the light poles." An

accident reconstructionist determined that the victim landed 60 yards from the point of impact. One witness testified that the two vehicles were "almost side by side" when the victim was struck, and there were no skid marks on the street or any indication that either defendant or the codefendant braked before the collision.

A person commits manslaughter in the second degree under Penal Law § 125.15 (1) when he or she "recklessly causes the death of another person." "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05 [3]). In the context of motor vehicle accidents involving speeding, "the culpable risk-creating conduct necessary to support a finding of recklessness or criminal negligence generally requires some additional affirmative act aside from driving faster than the posted speed limit" (*People v Asaro*, 21 NY3d 677, 684 [2013] [internal quotation marks omitted]).

Here, defendant contends that the evidence fails to establish any "inculpatory driving behavior other than excessive speed," and that the People therefore failed to prove beyond a reasonable doubt that he acted recklessly. We reject that contention. There was ample evidence from which the jury could conclude that defendant was drag racing with the codefendant, who was his friend, at the time of the accident (*see generally People v Hart*, 8 AD3d 402, 404-405 [2d Dept 2004], *lv denied* 3 NY3d 740 [2004]) and that the drag racing took place at night in a residential area on a busy thoroughfare. We therefore conclude that the jury was justified in concluding beyond a reasonable doubt that defendant had the requisite mens rea of recklessness.

With respect to causation, defendant's contention is premised largely upon statements to the police from a witness who said that the victim had "darted" and "leapt" into the street moments before the accident. Defendant also notes that the victim's autopsy revealed heroin, cocaine, and fentanyl in her blood. According to defendant, neither he nor the codefendant should have reasonably foreseen that the victim would dart or leap into the street and, as a result, their conduct was not a sufficiently direct cause of the victim's death. We reject that contention. The evidence at trial included testimony that the victim took three or four strides into the street before being struck. Moreover, there is no dispute that the victim was struck at or near the center of a four-lane street and there was evidence at trial that the center of the street is approximately 20 feet from the curb. The victim was not struck immediately upon entering the street. We conclude that, regardless of the victim's pace, there was ample evidence at trial from which the jury could conclude that defendant and the codefendant could have avoided the accident had they not been driving so fast. Although the conduct of defendant and the codefendant was not the sole cause of the accident, it was "a

sufficiently direct cause of the death of [the victim] so as to warrant the imposition of criminal sanctions" (*People v Kibbe*, 35 NY2d 407, 413 [1974], *rearg denied* 37 NY2d 741 [1975]; *cf. People v Erb*, 70 AD3d 1380, 1381 [4th Dept 2010], *lv denied* 14 NY3d 840 [2010]).

In sum, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

873

KA 21-00117

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTHA JONES, DEFENDANT-APPELLANT.

DAVID R. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered October 2, 2020. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). The conviction arises from an incident in which defendant, following an argument with a neighbor, shot the neighbor in the right leg, damaging his femoral artery and ultimately causing his death.

To the extent that defendant preserved her contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see id.*; *People v Metales*, 171 AD3d 1562, 1564 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]). With respect to defendant's contention that County Court erred in denying without a hearing her motion to set aside the verdict pursuant to CPL 330.30 (1), we note, initially, that certain allegations in support of the motion concerned matters that "were outside the record and for that reason could not be considered in a CPL 330.30 (1) motion" (*People v Wolf*, 98 NY2d 105, 119 [2002]; *see People v Lewis-Bush*, 204 AD3d 1424, 1427 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]; *see generally*

People v Harris, 1 AD3d 881, 882 [4th Dept 2003], *lv denied* 2 NY3d 740 [2004]). To the extent that the motion was based upon matters appearing in the record, we conclude that the court did not err in denying the motion without a hearing (*see People v DeCapua*, 151 AD3d 1746, 1747 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

Defendant's contention that she was denied the right to confront a witness who invoked his Fifth Amendment right against self-incrimination when questioned on cross-examination about a pending criminal charge is unpreserved (*see People v Wright*, 38 AD3d 1232, 1233 [4th Dept 2007], *lv denied* 9 NY3d 853 [2007], *reconsideration denied* 9 NY3d 884 [2007]). In any event, that contention lacks merit (*see People v Arroyo*, 46 NY2d 928, 930 [1979]; *People v Dekenipp*, 105 AD3d 1346, 1348 [4th Dept 2013], *lv denied* 21 NY3d 1041 [2013]). Nor did the court err in limiting defendant's cross-examination of the medical examiner who performed the victim's autopsy. Contrary to defendant's contention, the court did not abuse its discretion in determining that a line of questioning regarding a medical diagnosis that the victim had received and medication that he had been prescribed in connection with that diagnosis was outside the scope of direct examination (*see generally People v Ennis*, 107 AD3d 1617, 1619 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]) and based on medical records that were not admitted in evidence (*see People v Laracuente*, 21 AD3d 1389, 1391 [4th Dept 2005], *lv denied* 6 NY3d 777 [2006]; *see also People v Jones*, 73 NY2d 427, 430 [1989]).

We also reject defendant's contention that she was denied effective assistance of counsel. With respect to defendant's claim that defense counsel was ineffective for failing to argue at the *Huntley* hearing that defendant invoked her right to counsel during her interrogation, the People did not introduce at trial any of the statements challenged by defendant at the *Huntley* hearing and, thus, defendant could not have been prejudiced by defense counsel's alleged failure in that respect (*see generally People v Hobot*, 84 NY2d 1021, 1024 [1995]; *People v Lewis*, 192 AD3d 1532, 1533 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]). Furthermore, defense counsel was not ineffective for failing to object to certain testimony of a firearms examiner concerning the rifle and projectile that were recovered in connection with the incident. Both items were recovered from the area of the shooting, and testimony about their provenance was relevant (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). Moreover, the testimony of the firearms examiner that he could not determine whether the projectile was fired from the rifle was, if anything, slightly favorable to defendant. It cannot be said that defense counsel was ineffective for failing to make an objection that had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Faison*, 113 AD3d 1135, 1136 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014]). To the extent that defendant contends that defense counsel was ineffective for failing to request that an adverse inference instruction concerning missing video evidence be given to the jury, defendant failed to establish that such evidence was destroyed by agents of the

government (*see* CJI2d[NY] Adverse Inference—Destroyed or Lost Evidence; *see generally People v Durant*, 26 NY3d 341, 348-350 [2015]; *People v Handy*, 20 NY3d 663, 665, 669 [2013]). Although defendant further contends that defense counsel was ineffective for failing to call defendant's father as a witness, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for that alleged deficiency (*People v Baker*, 14 NY3d 266, 270-271 [2010] [internal quotation marks omitted]; *see People v Botting*, 8 AD3d 1064, 1066 [4th Dept 2004], *lv denied* 3 NY3d 671 [2004]; *cf. People v Borcyk*, 184 AD3d 1183, 1183-1188 [4th Dept 2020]). In addition, because the court "did not erroneously instruct the jury regarding justification, defense counsel was not ineffective for failing to object to that charge" (*People v Ford*, 114 AD3d 1221, 1221 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]).

We reject defendant's contention that the sentence is unduly harsh and severe.

Finally, we have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

880

CAF 22-00159

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

IN THE MATTER OF SHANDA L. TORRES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSE L. TORRES, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered November 10, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and primary physical custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent father appeals from an order awarding sole legal and primary physical custody of the subject child to petitioner mother, with visitation to the father. The father contends that Family Court's determination to award sole legal and primary physical custody to the mother is not supported by a sound and substantial basis in the record. We reject that contention and affirm.

Preliminarily, we note that, because this proceeding involves an initial determination with respect to custody of the child, we may consider the parties' informal custody arrangement, pursuant to which the parties had joint custody of the subject child with primary residence with the father, but the mother is not required to prove a change in circumstances in order to warrant modification of that arrangement (*see Matter of DeNise v DeNise*, 129 AD3d 1539, 1539-1540 [4th Dept 2015]; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]).

"In making an initial custody determination, the court is 'required to consider the best interests of the child by reviewing such factors as maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent' " (*Matter of Gilbert v Nunez-*

Merced, 181 AD3d 1210, 1210 [4th Dept 2020], *lv denied* 35 NY3d 910, 911 [2020]; *see Matter of Athoe v Goodman*, 170 AD3d 1532, 1533 [4th Dept 2019]).

Here, contrary to the father's contention, the court's determination to award sole legal and primary physical custody to the mother has a sound and substantial basis in the record (*see Thillman*, 85 AD3d at 1625). "The court's determination following a hearing that the best interests of the child would be served by such an award is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . We will not disturb that determination inasmuch as the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]; *see Thillman*, 85 AD3d at 1625).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

881

CAF 21-00903

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

IN THE MATTER OF MICHAEL C. WELLS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAWN M. FREELAND AND JACQUELINE M. FREELAND,
RESPONDENTS-RESPONDENTS.

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

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-RESPONDENT DAWN M. FREELAND.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered June 8, 2021 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the petition seeking modification of an order of custody and visitation and as modified the order is affirmed without costs and the matter is remitted to Family Court, Seneca County, for further proceedings in accordance with the following memorandum: Petitioner father appeals from an order granting the motion of respondent Dawn M. Freeland (grandmother), made at the close of the father's case at a hearing, to dismiss his petition seeking modification of a prior stipulated order of custody and visitation, and his petition alleging that the grandmother violated that prior order. The motion was joined by respondent Jacqueline M. Freeland (mother) and the Attorney for the Children. Pursuant to the prior order, the parties share joint legal custody of the subject children, with the grandmother having primary physical custody and the mother and the father having visitation under separate visitation schedules.

Initially, we reject the father's contention that Family Court erred in granting the motion insofar as it sought to dismiss his violation petition. The court properly determined that the father failed to establish by clear and convincing evidence that the grandmother violated the terms of the prior order with respect to the father's visitation (*see generally Matter of Cooley v Roloson*, 201 AD3d 1299, 1299 [4th Dept 2022]).

With respect to the modification petition, we conclude that the court erred in requiring the father to prove that there had been a change in circumstances prior to making a determination regarding extraordinary circumstances (*see Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]; *Matter of Wolfford v Stephens*, 145 AD3d 1569, 1569 [4th Dept 2016]; *Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292 [4th Dept 1996]). "It is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Wilson v Hayward*, 128 AD3d 1475, 1476 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015] [internal quotation marks omitted]; *see Wolfford*, 145 AD3d at 1569). "The nonparent has the burden of establishing that extraordinary circumstances exist," and "it is only after a court has determined that extraordinary circumstances exist that the custody inquiry becomes 'whether there has been a change [in] circumstances [warranting further inquiry into] the best interests of the child[ren]' " (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147-1148 [4th Dept 2009]; *see Wolfford*, 145 AD3d at 1569-1570; *Wilson*, 128 AD3d at 1477). "The foregoing rule applies even if there is an existing order of custody concerning th[e] child[ren] unless there is a prior determination that extraordinary circumstances exist" (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998]). Here, "there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the [father] of [his] superior right to custody" (*Howard*, 64 AD3d at 1148). Furthermore, "the record is insufficient to enable us to make our own determination with respect to whether extraordinary circumstances exist" (*id.*).

We therefore modify the order on appeal by reinstating the modification petition, and we remit the matter to Family Court to determine, following a hearing if necessary, whether extraordinary circumstances exist (*see Wolfford*, 145 AD3d at 1570; *see also Matter of Vazquez v Velez*, 90 AD3d 1559, 1559 [4th Dept 2011]; *Howard*, 64 AD3d at 1148).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

885

CA 21-01243

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY PULVER, ALSO KNOWN AS JEFFREY W. PULVER, WENDY A. PULVER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ROBERTSON ANSCHUTZ SCHNEID CRANE & PARTNERS, PLLC, WESTBURY (JOSEPH F. BATTISTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (JAMIE ROBBINS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered June 9, 2021. The order granted the motion of defendants Jeffrey Pulver, also known as Jeffrey W. Pulver, and Wendy A. Pulver to dismiss the complaint pursuant to CPLR 3216.

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

Memorandum: In 2007, Jeffrey Pulver, also known as Jeffrey W. Pulver, and Wendy A. Pulver (defendants) executed a note secured by a mortgage on their primary residence. They ceased making payments on the note in the following year, and in 2010 plaintiff commenced this mortgage foreclosure action. Defendants filed a timely answer. In 2014, plaintiff filed a consent to change attorney form, indicating that its attorney of record would be Clarfield, Okon, Salomone & Pincus, P.L. (COSP). No further action was taken by the parties until September 2019, when defendants filed a "Demand for Resumption of Prosecution of Action and Note of Issue" pursuant to CPLR 3216 (demand). Defendants' attorney states that she sent copies of the demand via certified mail to COSP at the address listed on the consent to change attorney form; to COSP at an address listed on an item of mail that COSP had sent to defendants; and to a law firm that she believed may have merged with COSP. The mail that defendants' attorney sent to COSP at the first address was returned, but the other two items were delivered. It is undisputed that at the time the demand was filed COSP had dissolved. It is also undisputed that, although a different law firm had received the file in 2016, the new attorney did not file a notice of appearance and neither law firm

filed any paperwork that would have alerted defendants to a change in plaintiff's attorney of record.

Two months after the demand was filed, plaintiff, through the new attorney, filed a notice of pendency on the mortgaged property, and subsequently plaintiff filed a request for judicial intervention. Defendants moved to dismiss the complaint pursuant to CPLR 3216, for failure to prosecute. Supreme Court granted the motion. Plaintiff appeals and we now affirm.

Plaintiff contends that the court erred in granting the motion because defendants knew that COSP was no longer in existence and had a duty to investigate and to serve a notice on plaintiff to appoint another attorney (*see* CPLR 321 [c]). Defendants respond that CPLR 321 (b) (Change or withdrawal of attorney) governs, instead of CPLR 321 (c), because COSP withdrew. We conclude that plaintiff's contention is unpreserved for our review (*see Telmark, Inc. v Mills*, 199 AD2d 579, 580 [3d Dept 1993]). In any event, we reject the contention on the merits. Even assuming, arguendo, that CPLR 321 (c) applies where, as here, the attorney has voluntarily withdrawn as counsel (*cf. Blondell v Malone*, 91 AD2d 1201, 1201-1202 [4th Dept 1983]; *Hendry v Hilton*, 283 App Div 168, 171 [2d Dept 1953]; *see generally Matter of Cassini*, 182 AD3d 13, 46 [2d Dept 2020]), we conclude that the statute does not apply under the circumstances of this case inasmuch as plaintiff "retain[ed] new counsel at its own initiative" approximately three years before the demand was filed (*Wells Fargo Bank, N.A. v Kurian*, 197 AD3d 173, 177 [2d Dept 2021]).

Plaintiff further contends that defendants violated the stay provisions of 22 NYCRR 202.12-a (c) (7) when they filed their motion to dismiss after plaintiff filed the request for judicial intervention (*see also* CPLR 3408 [n]) and that defendants failed to establish that the demand was ever actually served because there is no affidavit of service or evidence concerning the contents of the envelopes that were sent by certified mail. Those contentions are not properly before us inasmuch as they are being raised for the first time on appeal (*see U.S. Bank N.A. v Seepersaud*, 207 AD3d 499, 501 [2d Dept 2022]; *Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209, 1210 [4th Dept 2013]).

In any event, plaintiff's contention lacks merit. Contrary to plaintiff's contention, an affidavit of service was not required because defendants' attorney provided sworn statements that she personally performed the statutory requirements for service. CPLR 3216 requires only that the written demand be "served . . . by registered or certified mail" (CPLR 3216 [b] [3]). We conclude that defendants met their burden of establishing strict compliance with CPLR 3216 (*see generally Frank L. Ciminelli Constr. Co. v City of Buffalo*, 110 AD2d 1075, 1076 [4th Dept 1985], *appeal dismissed* 65 NY2d 1053 [1985]).

Plaintiff contends that it established a justifiable excuse for its failure to respond to defendants' CPLR 3216 demand, in that

defendants did not serve the demand on plaintiff's new attorney. We reject that contention. It is well settled that an adverse party is entitled to treat a party's attorney of record as an authorized agent until the formalities of CPLR 321 (b) have been satisfied (*see Blondell*, 91 AD2d at 1202; *Hendry*, 283 App Div at 171-172). In the absence of the filing of a consent signed by the retiring attorney and party or an order of the court, "service of papers upon the attorney [of record] is service upon the party and, as to adverse parties, the authority of the attorney of record continues unabated" (*Hess v Tyszko*, 46 AD2d 980, 980 [3d Dept 1974]). Where, as here, the demand "was properly mailed to and received by [the] attorney of record," there is no justifiable excuse for a plaintiff's delay in responding to the demand (*Pavilion Park Slope Cinemas 9, LLC v Pro Century Corp.*, 186 AD3d 1389, 1390 [2d Dept 2020]; *see Kushmakova v Meadow Park Rehabilitation & Health Care Ctr., LLC*, 56 AD3d 434, 436 [2d Dept 2008]).

Although plaintiff correctly contends that courts "retain[] some discretion to deny a motion to dismiss, even when [a] plaintiff fails to comply with [a demand under CPLR 3216] and proffers an inadequate excuse for the delay" (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 504 [1997]), "this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into CPLR 3216" (*id.*). Here, given plaintiff's "persistent neglect" and its failure to notify defendants of a change in counsel for over three years after the new attorney received the file, we conclude that the court properly exercised its discretion in granting defendants' motion (*id.* at 503).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

890

KA 22-00667

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAINE GOZDZIAK, DEFENDANT-APPELLANT.

PAUL G. DELL, BUFFALO, 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 (Suzanne Maxwell Barnes, J.), rendered July 22, 2021. The judgment convicted defendant, upon a plea of guilty, of attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [4]), defendant contends that County Court erred in sentencing him as a second child sexual assault felony offender (*see* Penal Law § 70.07). Preliminarily, inasmuch as the error alleged by defendant " 'affects the legality of his sentence, the issue is reviewable irrespective of the validity of the waiver of his right to appeal' " (*People v Cruz-Ocasio*, 208 AD3d 1059, 1060 [4th Dept 2022]; *see People v Grubert*, 160 AD3d 981, 982 [2d Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]). On the merits, we agree with defendant.

"A person who stands convicted of a felony offense for a sexual assault against a child, having been subjected to a predicate felony conviction for a sexual assault against a child, must be sentenced" as a second child sexual assault felony offender in accordance with the applicable statutory provision setting an enhanced sentencing range (Penal Law § 70.07 [1]; *see People v Wragg*, 26 NY3d 403, 413-414 [2015]). The statute provides, with an exception not relevant here, that "[a] 'sexual assault against a child' means a felony offense . . . (a) the essential elements of which include the commission or attempted commission of sexual conduct, as defined in [Penal Law § 130.00 (10)], [and] (b) committed or attempted to be committed against a child less than [15] years old" (§ 70.07 [2]). Importantly,

"[f]or purposes of determining whether a person has been subjected to a predicate felony conviction under this section, the criteria set forth in [Penal Law § 70.06 (1) (b)] shall apply," except that the look-back period is longer under the second child sexual assault felony offender statute (§ 70.07 [3]). Consequently, as relevant here, a defendant has a qualifying predicate felony conviction for purposes of the second child sexual assault felony offender statute if three conditions are met: (1) the prior conviction was a felony in New York or an out-of-state offense "for which a sentence to a term of imprisonment in excess of one year . . . was authorized and is authorized in [New York] irrespective of whether such sentence was imposed" (§ 70.06 [1] [b] [i]; *see* § 70.07 [2], [3]); (2) the prior felony or felony-equivalent offense had essential elements that included the commission or attempted commission of sexual conduct as defined in Penal Law § 130.00 (10) (*see* § 70.07 [2] [a]); and (3) the prior felony or felony-equivalent offense was committed or attempted against a child less than 15 years old (*see* § 70.07 [2] [b]).

With respect to the first condition, "[a]n out-of-state felony conviction qualifies as a predicate felony under New York's sentencing statutes only if it is for a crime 'whose elements are equivalent to those of a New York felony' " (*People v Yusuf*, 19 NY3d 314, 321 [2012], quoting *People v Gonzalez*, 61 NY2d 586, 589 [1984]). "To determine whether a foreign crime is equivalent to a New York felony[,] the court must examine the elements of the foreign statute and compare them to an analogous Penal Law felony, for '[i]t is the statute upon which the indictment was drawn that necessarily defines and measures the crime' " (*Gonzalez*, 61 NY2d at 589). In other words, the court must " 'appl[y] a strict equivalency standard that examines the elements of the foreign conviction to determine whether the crime corresponds to a New York felony, usually without reference to the facts giving rise to that conviction' " (*People v Helms*, 30 NY3d 259, 263 [2017]). Thus, "[a]s a general rule, [the court's] inquiry is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" (*People v Muniz*, 74 NY2d 464, 467-468 [1989]; *see Yusuf*, 19 NY3d at 321; *People v Olah*, 300 NY 96, 98 [1949]). "In this regard, courts generally should consider only the statutes defining the relevant crimes, and may not consider the allegations contained in the accusatory instrument underlying the foreign conviction" (*People v Jurgins*, 26 NY3d 607, 613 [2015]; *see Muniz*, 74 NY2d at 467-468). "When a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a felony in New York, the foreign statute may not serve as a predicate" (*Yusuf*, 19 NY3d at 321). Nonetheless, under an exception to the general rule, a court may "go beyond the statute and scrutinize the accusatory instrument in the foreign jurisdiction where the [foreign] statute renders criminal not one act but several acts which, if committed in New York, would in some cases be felonies and in others would constitute only misdemeanors" (*Gonzalez*, 61 NY2d at 590; *see Yusuf*, 19 NY3d at 321; *Muniz*, 74 NY2d at 468). The People bear the "burden of establishing that [the] defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a felony in New York" (*People v*

Yancy, 86 NY2d 239, 247 [1995]; *see Jurgins*, 26 NY3d at 613).

Here, it is uncontroverted that defendant stands convicted of a felony offense for sexual assault against a child (*see* Penal Law § 70.07 [1], [2]) because the class C felony of attempted rape in the first degree (§§ 110.00, 130.35 [4]; *see* § 110.05 [4]) includes as an essential element the attempted commission of sexual conduct in the form of sexual intercourse (*see* § 130.00 [10]; § 70.07 [2] [a]) and he attempted to commit such conduct against a child less than 15 years old (*see* § 70.07 [2] [b]). It is also uncontroverted that defendant committed the subject prior out-of-state offense of lewd or lascivious battery in violation of Florida Statutes former § 800.04 (4) (a) against a child less than 15 years old (*see* Penal Law § 70.07 [2] [b]) when he was 18 years old or older (*see* § 70.07 [3]). The only contested issue below and on appeal is whether the prior out-of-state conviction meets that part of the definition of "a predicate felony conviction for a sexual assault against a child" (§ 70.07 [1]) requiring that the conviction be for "a felony offense . . . the essential elements of which include the commission or attempted commission of sexual conduct" as defined in Penal Law § 130.00 (10) (§ 70.07 [2] [a]).

We conclude that "the People failed to satisfy their burden of establishing that defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a felony in New York" (*Yancy*, 86 NY2d at 247). Florida Statutes former § 800.04 (4) (a) provides that a person who "[e]ngages in sexual activity with a person 12 years of age or older but less than 16 years of age" commits lewd or lascivious battery. The term "sexual activity" is defined as "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object," except for "an act done for a bona fide medical purpose" (Fla Stat former § 800.04 [1] [a]). The People failed below, and have now failed on appeal, to identify any "analogous Penal Law felony" (*Gonzalez*, 61 NY2d at 589) that corresponds with Florida Statutes former § 800.04 (4) (a) " 'without reference to the facts giving rise to that conviction' " (*Helms*, 30 NY3d at 263). The People's failure in that regard stems from the fact that the closest New York analog to lewd or lascivious battery (Fla Stat former § 800.04 [4] [a]) appears to be the crime of sexual misconduct, which is a misdemeanor (Penal Law § 130.20). In New York, "[a] person is guilty of sexual misconduct when," as relevant here, that person "engages in sexual intercourse" or "engages in oral sexual conduct or anal sexual conduct" with another person "without such person's consent" (§ 130.20 [1], [2]), and lack of consent may arise from incapacity to consent due to such other person being less than 17 years old (*see* § 130.05 [2] [b]; [3] [a]; *see generally* William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Penal Law § 130.00). " 'Sexual intercourse' has its ordinary meaning and occurs upon any penetration, however slight"; " '[o]ral sexual conduct' means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina"; and " '[a]nal sexual conduct' means conduct between persons consisting of contact between the penis and anus" (§ 130.00 [1], [2]). Thus, a

comparison between the Florida Statutes and the New York Penal Law provisions reveals that "it is possible to violate the foreign statute without engaging in conduct that is a felony in New York" (*Yusuf*, 19 NY3d at 321). For example, a male who engaged in vaginal penetration of a 15-year-old female with his penis would be guilty of lewd or lascivious battery in Florida (*see* Fla Stat former § 800.04 [1] [a]; [4] [a]), but a male who engaged in the same conduct—i.e., sexual intercourse with a 15-year-old female—could be guilty of sexual misconduct, a misdemeanor, in New York (*see* Penal Law §§ 130.00 [1]; 130.05 [2] [b]; [3] [a]; 130.20 [1]).

To the extent that the court and the People could be said to have concluded that, under the general strict equivalency standard without reference to the underlying facts, the class D felony of rape in the second degree (Penal Law § 130.30) is the analogous New York felony to the crime of lewd or lascivious battery in Florida (Fla Stat former § 800.04 [4] [a]), a review of the statutes belies that conclusion (*see generally Gonzalez*, 61 NY2d at 589). As conceivably relevant here, "[a] person is guilty of rape in the second degree when . . . being [18] years old or more, he or she engages in sexual intercourse with another person less than [15] years old" (Penal Law § 130.30 [1]). It is evident from a review of the relevant statutory elements that the felony of rape in the second degree in New York is far narrower than the crime of lewd or lascivious battery in Florida (Fla Stat former § 800.04 [4] [a]). Indeed, a conviction under Penal Law § 130.30 (1) requires proof that the defendant was 18 years old or more (the Florida statute does not set a minimum age of the offender), that the victim was less than 15 years old (the victim could be as old as 16 years old under the Florida statute), and that the defendant engaged in sexual intercourse with the victim (the Florida statute encompasses more conduct). Consequently, "a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a felony in New York" as defined by Penal Law § 130.30 (1) (*Yusuf*, 19 NY3d at 321).

Significantly, the only way in which the court and the People arrive at the conclusion that defendant's conviction of lewd or lascivious battery in Florida (Fla Stat former § 800.04 [4] [a]) constitutes the equivalent of the class D felony of rape in the second degree in New York (Penal Law § 130.30 [1]) is by resorting to the allegations contained in the accusatory instrument and the facts underlying the Florida conviction. Stated differently, although not revealed by the lewd or lascivious battery statute itself (Fla Stat former § 800.04 [4] [a]), the court and the People rely on the facts and accusatory instrument of the underlying Florida conviction in order to match the elements of rape in the second degree (Penal Law § 130.30 [1]) by establishing that defendant was 19 years old when he engaged in sexual intercourse with a 13-year-old female in Florida.

We agree with defendant that consideration of the facts and circumstances of the underlying Florida conviction is impermissible in this case (*see Jurgins*, 26 NY3d at 614-615; *Yusuf*, 19 NY3d at 321-322; *Muniz*, 74 NY2d at 470-471). "[U]nder a narrow exception to the

[general] rule, the underlying allegations must be considered when 'the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors [or no crime] if committed in New York' " (*Jurgins*, 26 NY3d at 613, quoting *Muniz*, 74 NY2d at 468). "In those circumstances, the allegations will be considered in an effort to 'isolate and identify' the crime of which the defendant was accused, by establishing 'which of those discrete, mutually exclusive acts formed the basis of the charged crime' " (*id.*, quoting *Muniz*, 74 NY2d at 468-469).

The exception does not apply here. "[T]his is not a case where . . . 'a sentencing court [may] go beyond the statute and scrutinize the accusatory instrument in the foreign jurisdiction' " on the basis that " 'the statute renders criminal not one act but several acts which, if committed in New York, would in some cases be felonies and in others would constitute only misdemeanors [or no crime]' " (*Yusuf*, 19 NY3d at 321, quoting *Gonzalez*, 61 NY2d at 590; *see Jurgins*, 26 NY3d at 614-615). Instead, the acts criminalized by Florida pursuant to the lewd or lascivious battery statute under which defendant was convicted (Fla Stat former § 800.04 [4] [a]) would constitute the misdemeanor of sexual misconduct if committed in New York (Penal Law § 130.20). In support of its assertion that the exception applies, the People have failed to identify any of the several acts rendered criminal in the Florida statute that would, if committed in New York, constitute felonies in some cases. Rather, the details that the People seek to add in order to equate defendant's prior conviction with rape in the second degree (§ 130.30 [1])—i.e., the age of defendant, the precise age of the victim being less than 15 years old, and the exact sexual conduct engaged in—constitute mere surplusage under the Florida statute (*see People v Walls*, 277 AD2d 959, 959-960 [4th Dept 2000], *lv denied* 96 NY2d 808 [2001]; *see generally Muniz*, 74 NY2d at 468). In other words, the People have failed to offer any valid reason for applying the exception and, instead, are simply attempting to impermissibly extend or enlarge the Florida crime by allegations in the accusatory instrument and the underlying facts (*see Gonzalez*, 61 NY2d at 589).

In sum, we conclude that "[b]ecause the [Florida] statute, itself, indicates that a person can be convicted of the [Florida] crime without committing an act that would qualify as a felony in New York (i.e., by [instead committing the misdemeanor of sexual misconduct]), defendant's [Florida] conviction for [lewd or lascivious battery] was not a proper basis for a predicate felony offender adjudication" (*Jurgins*, 26 NY3d at 615). The court thus erred in sentencing defendant as a second child sexual assault felony offender because the People failed to meet their burden of establishing the first condition required to conclude that defendant had been "subjected to a predicate felony conviction for sexual assault against a child" (Penal Law § 70.07 [1]), i.e., that defendant's prior conviction constituted a predicate "*felony* offense" pursuant to the criteria set forth in Penal Law § 70.06 (1) (b) (§ 70.07 [2] [emphasis added]; *see* § 70.07 [3]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for

resentencing (*see generally People v Ramos*, 19 NY3d 417, 421 [2012]). In light of our determination, we do not consider defendant's remaining contention.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

894

KA 18-01545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

XAVIER BLANDING, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered July 9, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction of driving while intoxicated, a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]) and sentencing him to an indeterminate term of imprisonment. Defendant contends that he was denied due process because Supreme Court failed to provide an adequate statement of its reasoning in revoking his sentence of probation (*see Gagnon v Scarpelli*, 411 US 778, 785-786 [1973]; *People v McCloud*, 205 AD2d 1024, 1025 [3d Dept 1994], *lv denied* 86 NY2d 738 [1995]). That contention is not preserved for our review because defendant failed to object to the sufficiency of the court's findings (*see generally* CPL 470.05 [2]) and, in any event, it lacks merit (*see People v Hare*, 124 AD3d 1148, 1149 [3d Dept 2015], *lv denied* 26 NY3d 929 [2015]). Inasmuch as defendant has completed serving the sentence imposed, his challenge to the severity of the sentence is moot (*see People v Hancarik*, 202 AD3d 1151, 1151 [3d Dept 2022]; *People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

895

KA 19-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIGUEL A. PARILLA, 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 (M. William Boller, A.J.), rendered June 22, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), arising from the discovery of drugs by the police following a traffic stop of a vehicle in which defendant was the passenger. We affirm.

Contrary to defendant's contention, Supreme Court properly refused to suppress physical evidence and statements obtained as a result of the traffic stop (*see People v Rodriguez-Rivera*, 203 AD3d 1624, 1625-1626 [4th Dept 2022], *lv denied* 39 NY3d 942 [2022]; *People v Swift*, 185 AD3d 1442, 1443 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020]; *People v Rosario*, 64 AD3d 1217, 1218 [4th Dept 2009], *lv denied* 13 NY3d 941 [2010]).

We reject defendant's contention that the court erred in ruling, pursuant to *People v Molineux* (168 NY 264 [1901]), that the People were permitted to introduce evidence of defendant's prior drug sales. The testimony concerning defendant's prior drug sales was admissible with respect to the issue of his intent to sell drugs (*see generally* Penal Law § 220.16 [1]), and we conclude that the probative value of such evidence outweighed the danger of prejudice and we also note that the court gave an appropriate limiting instruction (*see People v Kims*, 24 NY3d 422, 439 [2014]; *People v Smith*, 129 AD3d 1549, 1549 [4th Dept

2015], *lv denied* 26 NY3d 971 [2015]; *People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

Defendant further contends that the People deprived him of a fair trial by improperly introducing, without obtaining an advance ruling and in violation of *Molineux*, testimony that defendant, who was concerned about two unspecified "strikes on his record," made multiple postarrest attempts to bribe the driver of the vehicle to take responsibility for the drug charges. We reject that contention. Even assuming, arguendo, that the People should have sought an advance ruling with respect to the testimony that defendant attempted to bribe the driver to take responsibility for the drug charges (*see generally People v Ventimiglia*, 52 NY2d 350, 356, 361-362 [1981]), we conclude that defendant was not deprived of a fair trial because that testimony was plainly admissible as consciousness of guilt evidence (*see People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]; *People v Wheeler*, 159 AD3d 1138, 1142 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]; *People v Lumaj*, 298 AD2d 335, 335 [1st Dept 2002], *lv denied* 99 NY2d 616 [2003]; *see generally People v Bennett*, 79 NY2d 464, 469-470 [1992]), its probative value was not outweighed by its potential for prejudice (*see Cotton*, 184 AD3d at 1146), and the lack of an advance ruling did not cause defendant any prejudice (*see People v McLeod*, 279 AD2d 372, 372 [1st Dept 2001], *lv denied* 96 NY2d 921 [2001]; *People v Andrews*, 277 AD2d 1009, 1010 [4th Dept 2000], *lv denied* 96 NY2d 780 [2001]; *People v Pugh*, 236 AD2d 810, 812 [4th Dept 1997], *lv denied* 89 NY2d 1099 [1997]). Additionally, even assuming, arguendo, that the People should have sought an advance ruling with respect to the testimony implying that defendant had committed prior crimes and that the court erred in admitting that testimony, we conclude that any error is harmless inasmuch as "[t]he evidence of defendant's guilt is overwhelming . . . 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, 1211-1212 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support his conviction of criminal possession of a controlled substance in the third degree. Defendant's general motion for a trial order of dismissal with respect to that count was not " 'specifically directed' at the alleged" shortcomings in the evidence raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]), and defendant's legal sufficiency contention made on appeal is not otherwise preserved for our review because, contrary to defendant's assertion, that contention is not based on a pretrial legal argument that was definitively rejected by the court (*cf. People v Finch*, 23 NY3d 408, 412 [2014]). Next, even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crime of criminal possession of a controlled substance in the third degree as charged to the jury (*see People v Kancharla*, 23

NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

897

KA 22-00228

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

FLOYD HARPER, DEFENDANT-RESPONDENT.

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

ANDREW D. FISKE, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Susan M. Eagan, J.), dated February 3, 2022. The order granted that part of defendant's omnibus motion seeking to suppress physical evidence.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking suppression of physical evidence—i.e., a gun—that was recovered from the street along a route driven by defendant before a traffic stop. We affirm.

At the suppression hearing, the testifying officer (officer) stated that he observed a vehicle being driven by defendant commit several Vehicle and Traffic Law violations. While pursuing the vehicle, the officer saw it swerve over to the left side of the road and then return back to the right side of the road, but did not see the vehicle's doors open or observe anything being thrown from the vehicle. Following the traffic stop, two other officers located a gun. The officer testified that the gun was located in the area where the vehicle swerved. However, the officer also testified that he did not know specifically where the gun was found and was not one of the officers who located the gun.

The People contend that County Court should have refused to suppress the gun because defendant abandoned it before any improper police conduct allegedly occurred. We reject that contention. "It is well established that property seized as a result of . . . unlawful [police conduct] must be suppressed, unless that property was abandoned" (*People v Mueses*, 132 AD3d 1257, 1258 [4th Dept 2015]; *see People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]; *People v Jones*, 174 AD3d 1532, 1534 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]). "A defendant abandons property when he [or she]

voluntarily relinquishes possession in a 'calculated decision' in response to police conduct" (*People v Oliver*, 39 AD3d 880, 880 [2d Dept 2007], *lv dismissed* 9 NY3d 868 [2007], quoting *People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]; *see People v Rainey*, 110 AD3d 1464, 1466 [4th Dept 2013]). On the issue of abandonment, the People have the "burden to demonstrate that defendant's action in discarding the property . . . was a voluntary and intentional act constituting a waiver of the legitimate expectation of privacy" (*Ramirez-Portoreal*, 88 NY2d at 108; *see Howard*, 50 NY2d at 593; *see generally Rainey*, 110 AD3d at 1466).

Here, we conclude that the People did not meet their burden of establishing that defendant abandoned the gun (*see generally Ramirez-Portoreal*, 88 NY2d at 108; *Oliver*, 39 AD3d at 880; *People v Campbell*, 245 AD2d 191, 194 [1st Dept 1997]). "There is a presumption against the waiver of constitutional rights[, and] . . . [t]he proof supporting abandonment should 'reasonably beget the exclusive inference of . . . throwing away' " (*Howard*, 50 NY2d at 593). At the suppression hearing, the People adduced no evidence directly connecting defendant to the gun found on the street. Although, as noted, the officer testified that he saw defendant's vehicle swerve near the area where the gun was purportedly recovered, he also testified that, while following defendant's vehicle, he never saw its doors open and never saw anything ejected from inside the vehicle. In short, there was no testimony establishing that defendant actually discarded the gun from the vehicle, let alone evidence that " 'reasonably beget[s] the exclusive inference' " that defendant threw away the gun (*id.*; *cf. People v Davis*, 199 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

898

KA 19-01496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN K. COLON, DEFENDANT-APPELLANT.

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

BRYAN K. COLON, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 19, 2019. The judgment convicted defendant upon a jury verdict of burglary in the second degree (six counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences on counts one and two of the indictment run consecutively to each other and concurrently with the remaining counts and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts of burglary in the second degree (Penal Law § 140.25 [2]). The conviction arises from six home burglaries.

Defendant contends in his main and pro se supplemental briefs that the evidence is legally insufficient to support his conviction of certain counts because the testimony of his accomplices was not supported by the requisite corroborative evidence (*see* CPL 60.22 [1]). That contention is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' at [that] alleged error" (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, the contention lacks merit (*see People v Jacobs*, 195 AD3d 1434, 1435 [4th Dept 2021], *lv denied* 38 NY3d 951 [2022]; *see also People v Davis*, 28 NY3d 294, 303 [2016]). Defendant further contends in his main brief that the evidence is legally insufficient to support the conviction because there is insufficient evidence that defendant was the perpetrator of the burglaries. "Viewing the evidence in the light most favorable to the

People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant was the perpetrator of the burglaries (*People v Bleakley*, 69 NY2d 490, 495 [1987]). The trial evidence included, inter alia, the testimony of defendant's two accomplices who implicated defendant in five of the burglaries, evidence regarding defendant's rental of various vehicles used in the commission of the burglaries, cell phone tower records establishing that defendant was in the vicinity of the homes at the time of the crimes, and testimony of neighbors of the homeowners who observed defendant or the rental vehicles near or at the burglarized homes. In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further reject defendant's contention in his main brief that he was denied effective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). In particular, defense counsel was not ineffective based on his elicitation of allegedly damaging testimony in cross-examining one of defendant's accomplices and defense counsel's failure to object to testimony of the other accomplice regarding his motive to testify. Those contentions involve "simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial," and thus are insufficient to establish ineffective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Contrary to defendant's additional claim, defense counsel was not ineffective for failing to object to certain comments made by the prosecutor during summation inasmuch as the prosecutor either did not engage in misconduct or any error did not deny defendant a fair trial (*see People v Garrow*, 171 AD3d 1542, 1546 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]; *People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Moreover, defendant was not deprived of a fair trial by the cumulative effect of the errors allegedly committed by defense counsel.

We agree with defendant, however, that the aggregate sentence of imprisonment is unduly harsh and severe considering the disparity between the plea offer and the sentence of imprisonment imposed following trial (*see People v Lewis-Bush*, 204 AD3d 1424, 1427 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]; *People v Boyd*, 175 AD3d 1030, 1031-1032 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]). We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences on the first and second counts shall run consecutively to each other and concurrently with the sentences imposed on the remaining counts (*see* CPL 470.15 [6] [b]).

We have reviewed defendant's remaining contention in his pro se

supplemental brief and conclude that it lacks merit.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

903

CA 21-01578

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

RYAN BAEUMLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CONNOR J. MOSES, DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (LEONARD D. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 6, 2021. The order denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury under the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and that plaintiff sustained a serious injury to his thoracic spine and both shoulders under the permanent consequential limitation of use category, and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for injuries allegedly sustained in an automobile accident, defendant appeals from an order that denied his motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent loss of use, significant limitation of use, permanent consequential limitation of use, or 90/180-day categories. We agree with defendant that Supreme Court erred in denying the motion with respect to the permanent loss of use category (*see Booth v Carlson*, 195 AD3d 1594, 1595 [4th Dept 2021]; *Swift v New York Tr. Auth.*, 115 AD3d 507, 509 [1st Dept 2014]) and with respect to the permanent consequential limitation of use category insofar as it relates to plaintiff's thoracic spine and bilateral shoulder injuries (*see Gamblin v Nam*, 200 AD3d 1610, 1613 [4th Dept 2021]). We therefore modify the order accordingly. We reject defendant's remaining

contentions.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

904

CA 22-00652

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

ASTON B. WILLIAMS, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-RESPONDENT.

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

HODGSON RUSS LLP, BUFFALO (SARAH NAGEL MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered April 21, 2022. The order, insofar as appealed from, denied the motion of plaintiff for a preliminary injunction, granted in part the motion of defendant to dismiss the verified complaint and dismissed the verified complaint without prejudice.

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

Memorandum: Plaintiff is a licensed physician who had medical staff privileges at medical facilities owned by defendant, Kaleida Health, including Buffalo General Medical Center (Buffalo General). Plaintiff applied to defendant for, as relevant to this appeal, a medical exemption from the COVID-19 vaccine mandate for health care workers. In response, plaintiff received a letter from defendant informing him that his medical exemption was denied following review, and plaintiff's privileges at Buffalo General were subsequently suspended due to his noncompliance with the vaccine mandate. Plaintiff thereafter commenced this action and moved by order to show cause for, inter alia, injunctive relief preventing defendant from revoking his privileges at Buffalo General or deeming those privileges abandoned. Defendant moved to, among other things, dismiss the complaint with prejudice. Plaintiff appeals from an order that, inter alia, denied plaintiff's motion, granted defendant's motion in part, and dismissed the complaint without prejudice.

We reject plaintiff's contention that Supreme Court erred by denying his motion and granting defendant's motion in part. Plaintiff does not dispute that his complaint alleges a claim of improper practices under Public Health Law § 2801-b (1). Further, plaintiff states in his appellate brief that, after the court's order, he filed a complaint with the Public Health and Health Planning Counsel (PHHPC)

under the Public Health Law. This Court has held that "[a]n injunction action under Public Health Law § 2801-c is the exclusive remedy for an alleged violation of section 2801-b (1)" (*Farooq v Millard Fillmore Hosp.*, 172 AD2d 1063, 1063 [4th Dept 1991]; *see Matter of Fogel v Kaleida Health*, 175 AD3d 1102, 1103 [4th Dept 2019]). Where, as here, a physician challenges a determination to suspend or diminish that physician's professional privileges in a hospital, Public Health Law § 2801–b (2) "provides the allegedly aggrieved physician with a procedural avenue through which he [or she] can present his [or her] claim of a wrongful denial of professional privileges to the Public Health Council" (*Guibor v Manhattan Eye, Ear & Throat Hosp.*, 46 NY2d 736, 737 [1978]), which must then investigate the allegations of the complaint (*see* § 2801-b [3]). Therefore, we conclude that the court properly denied plaintiff's motion and granted defendant's motion in part, by dismissing the complaint without prejudice, on the basis that plaintiff must first pursue his remedy before the PHHPC (*see generally Fogel*, 175 AD3d at 1103; *Shapiro v Central Gen. Hosp.*, 173 AD2d 601, 603 [2d Dept 1991]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

905

CA 21-01201

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

DONALD PAPAJ, INDIVIDUALLY AND AS APPOINTED
AGENT AND ATTORNEY IN FACT ON BEHALF OF
DANA PAPAJ, A PERSON UNDER DISABILITY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, TOWN OF GRAND ISLAND,
DEFENDANTS-RESPONDENTS,
EDWARD J. KUEBLER, III, MICHELLE L. KUEBLER,
DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANTS.

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

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA T. MASTRIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF GRAND ISLAND.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 23, 2021. The order, among other things, granted the motions of defendants County of Erie, Town of Grand Island, and Michelle L. Kuebler for summary judgment dismissing the complaint and all cross claims against them.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, personal injuries sustained by his wife when a vehicle operated by defendant Edward J. Kuebler, III (Edward), left the roadway and struck her. The road is located within defendant Town of Grand Island (Town) but is owned by the defendant County of Erie (County). The County, the Town, and defendant Michelle L. Kuebler (Michelle), who is a co-lessee of the vehicle, separately moved for summary judgment dismissing the complaint and all cross claims against them. Plaintiff appeals from an order insofar as it granted that part of each of those motions seeking summary judgment dismissing the

complaint against those defendants. As relevant here, Edward and Michelle also appeal from the same order insofar as it granted that part of each of the motions of the County and the Town seeking summary judgment dismissing the cross claims of Edward and Michelle for indemnity and/or contribution against the County and Town. We affirm.

Plaintiff, Edward, and Michelle (collectively, appellants) contend that there are triable issues of fact whether the County breached its duty to maintain the road in a reasonably safe condition and that Supreme Court therefore erred in granting the County's motion. The appellants, however, fail to address all of the grounds upon which the court actually granted the County's motion. Here, the court concluded that the County established its entitlement to judgment as a matter of law by submitting evidence that it did not receive prior written notice of the allegedly dangerous or defective condition as required by Local Law No. 3 of the County of Erie (*see Brockway v County of Chautauqua*, 187 AD3d 1674, 1674 [4th Dept 2020]; *Hubbard v County of Madison*, 93 AD3d 939, 942 [3d Dept 2012], *lv denied* 19 NY3d 805 [2012]). "[B]y failing to address [a dispositive] basis for the court's decision, [appellants] 'effectively abandoned' any challenge to the granting of [the County's motion for summary judgment]" (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022]; *see Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

The appellants contend that the court erred in granting the Town's motion. Specifically, the appellants argue that, contrary to the court's conclusion that the Town did not owe a duty to plaintiff's wife because the Town did not own or maintain the road, plaintiff established that section 35-2 of the 1963 Code of the Town created a special duty to pedestrians such as plaintiff's wife (*see generally McLean v City of New York*, 12 NY3d 194, 199-200 [2009]). The appellants, however, fail to address the fact that the court "decline[d] to consider th[at] contention, because [p]laintiff failed to include § 35-2 (or any portion of the purported 1963 Town Code) in the record." Thus, the court rejected that contention on a different ground than that being challenged on appeal and affirmance is warranted based on appellants' "fail[ure] to address the basis for the court's decision" (*Walton & Willet Stone Block, LLC*, 206 AD3d at 1689; *see Haher*, 156 AD3d at 1382; *see generally Ciesinski*, 202 AD2d at 984).

We have reviewed plaintiff's remaining contention and conclude that it is without merit.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

906

CA 21-01483

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

LOUIS MUSSARI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DARNELL MURRAY AND CARLY TRILLIZIO,
DEFENDANTS-RESPONDENTS.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 22, 2021. The order and judgment granted the motion of defendants for summary judgment, dismissed the complaint and denied as moot the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the complaint, as amplified by the bill of particulars, with respect to the 90/180-day and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained in a motor vehicle accident that occurred when his vehicle was rear-ended by a vehicle operated by defendant Darnell Murray and owned by defendant Carly Trillizio. Supreme Court granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) and effectively denied as moot plaintiff's cross motion for partial summary judgment on the issue of negligence. Plaintiff now appeals.

We note at the outset that plaintiff contends on appeal only that he sustained a serious injury under the significant limitation of use and 90/180-day categories of Insurance Law § 5102 (d), and therefore he has abandoned his claim with respect to the permanent consequential limitation of use category alleged in his bill of particulars (*see Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept 2020]; *Koneski v Seppala*, 158 AD3d 1211, 1212 [4th Dept 2018]).

For a court "[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). When reviewing a motion for summary judgment, "facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and the proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant[s] bear[] the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]).

Here, we agree with plaintiff that the court erred in granting defendants' motion with respect to the claims of a serious injury under the significant limitation of use and 90/180-day categories. We therefore modify the order and judgment accordingly. In the absence of other competent medical evidence such as a report of plaintiff's treating chiropractor or the affidavit of an expert medical professional who reviewed plaintiff's medical records, we conclude on this record that defendants' near exclusive reliance on the chiropractor's handwritten notes on preprinted evaluation forms—the probative value of which is "minimal or nonexistent" here given that those notes are, as defendants concede, largely illegible (*Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987])—is insufficient to meet defendants' initial burden of establishing that plaintiff did not sustain a serious injury under the subject categories (*cf. Pina v Pruyn*, 63 AD3d 1639, 1639 [4th Dept 2009]; *Owens v Nolan*, 269 AD2d 794, 795 [4th Dept 2000]). Inasmuch as defendants failed to meet their initial burden on those parts of the motion, the burden never shifted to plaintiff, and denial of the motion in those respects was required "regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324).

We nonetheless reject plaintiff's further contention that the court should have granted his cross motion for partial summary judgment on the issue of negligence. Even assuming, arguendo, that plaintiff met his initial burden on the cross motion, we conclude that defendants raised an issue of fact by submitting evidence of a nonnegligent explanation for the accident, i.e., the sudden stop of the vehicle operated by plaintiff (*see Benz v Calder*, 158 AD3d 1297, 1297 [4th Dept 2018]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

908

CA 21-01112

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

SHANIEKA WRIGHT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEREMIAH WILSON AND BARRY WILSON,
DEFENDANTS-RESPONDENTS.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered July 13, 2021. The order, among other things, granted in part and denied in part the motion of defendants for summary judgment on the issue of serious injury and denied those parts of the cross motion of plaintiff for summary judgment on the issue of serious injury.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained in a rear-end motor vehicle collision. Plaintiff alleges that, as a result of the accident, she sustained serious injuries under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of Insurance Law § 5102 (d). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff cross-moved for partial summary judgment on, inter alia, the issue of serious injury. Supreme Court, inter alia, granted that part of defendants' motion for summary judgment dismissing plaintiff's claims under the permanent consequential limitation of use and 90/180-day categories, denied that part of defendants' motion with respect to the significant limitation of use category, and denied those parts of plaintiff's cross motion with respect to the three aforementioned categories of serious injury. Plaintiff appeals and we affirm.

We conclude that, contrary to plaintiff's contentions on appeal, the court properly denied those parts of her cross motion with respect to the three categories of serious injury in question, and properly

granted defendants' motion insofar as it sought summary judgment dismissing plaintiff's claims under the permanent consequential limitation of use and 90/180-day categories. With respect to the 90/180-day category, we conclude that defendants met their initial burden on the motion. "To qualify as a serious injury under the 90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [4th Dept 2004] [internal quotation marks omitted]; *see Licari v Elliott*, 57 NY2d 230, 236 [1982]). Here, defendants properly relied on plaintiff's deposition testimony, which established that her typical daily activities had not been significantly curtailed during the relevant time frame (*see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]; *McIntyre v Salluzzo*, 159 AD3d 1547, 1547-1548 [4th Dept 2018]; *Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]). In opposition, plaintiff did not raise an issue of fact (*see Cohen*, 197 AD3d at 950; *Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to the permanent consequential limitation of use category, a plaintiff must "submit objective proof of a permanent injury" to establish a qualifying serious injury (*McKeon v McLane Co., Inc.*, 145 AD3d 1459, 1461 [4th Dept 2016]; *see Schaubroeck v Moriarty*, 162 AD3d 1608, 1610 [4th Dept 2018]). We conclude that defendants met their initial burden on the motion with respect to that category "by submitting evidence that plaintiff sustained only . . . temporary [muscle] strain[s], rather than any significant injury to h[er] nervous system[, left shoulder] or spine, as a result of the accident" (*Williams v Jones*, 139 AD3d 1346, 1347 [4th Dept 2016]; *see Gamblin v Nam*, 200 AD3d 1610, 1613 [4th Dept 2021]). We further conclude that plaintiff failed to raise an issue of fact in opposition with respect to that category (*see generally Zuckerman*, 49 NY2d at 562; *Smith v State Farm Mut. Auto. Ins. Co.*, 176 AD3d 1608, 1609 [4th Dept 2019]).

With respect to the significant limitation of use category, "[w]hether a limitation of use . . . is significant or consequential . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002] [internal quotation marks omitted]; *see Habir v Wilczak*, 191 AD3d 1320, 1322 [4th Dept 2021]). We conclude that plaintiff did not satisfy her initial burden on the cross motion with respect to that category, inasmuch as her own submissions raise triable issues of fact whether, inter alia, she sustained merely "minor, mild or slight limitation[s] of use" with respect to her left shoulder and cervical and lumbar spine (*Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017] [internal quotation marks omitted]; *see Savilo v Denner*, 170 AD3d 1570, 1570-1571 [4th Dept 2019]; *see generally Gaddy v Eyler*, 79 NY2d 955, 957 [1992]).

We have considered plaintiff's remaining contentions and conclude

that none warrants reversal or modification of the order.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

909

CA 22-00350

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

HOI TRINH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FATHER JOSEPH THIEN NGUYEN, DEFENDANT-RESPONDENT.

HGT LAW, NEW YORK CITY (NATALIA D. WILLIAMS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (STEPHEN W. KELKENBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 20, 2021. The order, insofar as appealed from, granted the motion of defendant to dismiss the complaint with costs and attorney's fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first and second ordering paragraphs are vacated, the complaint is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action against defendant alleging causes of action for defamation and defamation per se. According to the complaint, defendant published statements on two internet websites alleging, inter alia, that plaintiff engaged in a fraudulent and criminal operation and illegally and improperly received financial gain when he served as the Executive Director of the Vietnamese Overseas Initiative for Conscience Empowerment (VOICE), an organization that assists Vietnamese refugees to emigrate. Defendant moved to dismiss the complaint pursuant to, inter alia, the then-recent amendments to the anti-strategic lawsuits against public participation (anti-SLAPP) statutes (*see* Civil Rights Law §§ 70-a, 76-a) and CPLR 3211 (a) (7) and (g) and for, among other things, attorneys' fees and costs. Defendant argued that the anti-SLAPP amendments applied retroactively to the defamation causes of action asserted by plaintiff. Supreme Court, after considering the decisions in *Coleman v Grand* (523 F Supp 3d 244, 257-259 [ED NY 2021]), *Palin v New York Times Co.* (510 F Supp 3d 21, 27 [SD NY 2020]), and *Sackler v American Broadcasting Cos., Inc.* (71 Misc 3d 693, 696-699 [Sup Ct, NY County 2021]), determined that the amendments to the anti-SLAPP law applied retroactively and therefore applied the burdens under that law (*see* CPLR 3211 [g]). In its order, the court, inter alia, granted those parts of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (7)

and (g) and seeking costs and attorneys' fees. After the court's order, the First Department held that the anti-SLAPP amendments do not apply retroactively (*see Gottwald v Sebert*, 203 AD3d 488, 488-489 [1st Dept 2022]). Plaintiff appeals from the order to the extent that it granted defendant's motion, contending that the court erred in applying the anti-SLAPP amendments retroactively. We reverse the order insofar as appealed from.

Where new legislation, "if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 370 [2020], *rearg denied* 35 NY3d 1079, 1081 [2020]; *see Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1285 [4th Dept 2022]). When the presumption is triggered, "a statute is presumed to apply only prospectively" (*Regina Metro. Co., LLC*, 35 NY3d at 370). Here, there is no real dispute that the presumption applies inasmuch as the application of the anti-SLAPP amendments in plaintiff's case would have retroactive effect. Indeed, application of those amendments would " 'impair rights [plaintiff] possessed when he [filed the action], increase [his] liability for [that] past conduct, [and] impose new duties with respect to transactions already completed' " (*id*. at 365).

We agree with plaintiff that the presumption against retroactivity is not overcome because "[n]othing in the text 'expressly or by necessary implication' requires retroactive application of the [anti-SLAPP] statute as amended . . . Nor does the legislative history support such an interpretation" (*People v Galindo*, 38 NY3d 199, 207 [2022]; *see Ruth*, 209 AD3d at 1284-1285). First, the text of the legislation does not contain an express statement requiring retroactive application (*see* L 2020, ch 250, § 4). Second, while the anti-SLAPP amendments took effect "immediately" (*id*.), that term "is equivocal in an analysis of retroactivity" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [internal quotation marks omitted]; *see Landgraf v USI Film Prods*., 511 US 244, 257 [1994]). Third, although the legislation is remedial in nature and such legislation is generally applied retroactively "to better achieve its beneficial purpose" (*Matter of OnBank & Trust Co.*, 90 NY2d 725, 730 [1997]), simply classifying a statute as remedial "does not automatically overcome the strong presumption of prospectivity" (*Majewski*, 91 NY2d at 584). Finally, the legislative history establishes that the rationale for the amendments was to better advance the purposes of speech protection for which the anti-SLAPP law was initially enacted and to remedy the courts' failure to use their discretionary powers to award costs and fees in such cases. However, the legislative history does not offer any explicit or implicit support for retroactive application (*see* 2019 New York Senate-Assembly Bill S52A, A5991A). Therefore, we conclude that "the presumption of prospective application of the [anti-SLAPP] amendments has not been defeated" (*Gottwald*, 203 AD3d at 489).

In light of our determination, we need not address plaintiff's remaining contentions on appeal. Inasmuch as the court did not

address the alternative grounds for dismissal raised in the motion pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7) insofar as based upon the pleading requirements in 3016 (a), we remit the matter to Supreme Court to consider those grounds and determine the motion anew (*see generally Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

918

CAF 21-00381

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ELIJAH F. TRETTS,
PETITIONER-APPELLANT,

V ORDER

ASHLEY M. SAWICKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

KEVIN C. CONDON, EDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 20, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

919

CAF 21-00383

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ASHLEY M. SAWICKI,
PETITIONER-RESPONDENT,

V ORDER

ELIJAH F. TRETTS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

KEVIN C. CONDON, EDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 1, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

927

CA 22-00431

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

FARID POPAL, PLAINTIFF-APPELLANT,

V ORDER

ZACHARY MARGULIS-OHNUMA, DEFENDANT-RESPONDENT.

FARID POPAL, PLAINTIFF-APPELLANT PRO SE.

GROSS SHUMAN P.C., BUFFALO (CHARLES C. SWANEKAMP OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered November 17, 2021. The order granted the motion of defendant to dismiss the complaint.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

932

TP 22-00945

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

IN THE MATTER OF WILLIE ROOTS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (MICHAEL MANUSIA OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (CHRIS LIBERATI-CONANT 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 June 20, 2022) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

935

KA 21-01628

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAQUAN SINGLETARY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JED S. HUDSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 21, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

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]) and criminal possession of a weapon in the third degree (§ 265.02 [3]). We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure of the vehicle in which he was a passenger (defendant's vehicle), and therefore County Court erred in refusing to suppress the physical evidence seized—i.e., a firearm—and defendant's subsequent statements to the police.

Here, the police officers effectively seized defendant's vehicle when they pulled into the gas station parking lot and stopped their patrol vehicle directly behind defendant's parked vehicle in such a manner as to prevent it from driving away (*see People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Jennings*, 202 AD3d 1439, 1440 [4th Dept 2022]; *People v Williams*, 177 AD3d 1312, 1312 [4th Dept 2019]; *People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]).

Furthermore, we conclude that the police did not have

" 'reasonable suspicion that defendant had committed, was committing, or was about to commit a crime' " to justify their seizure of the vehicle (*Jennings*, 202 AD3d at 1440). Police officer testimony at the suppression hearing established that, at the time the officers made the initial stop, they were responding to the sound of multiple gunshots that had originated at or near the gas station, which was known to be a high crime area. The officers also testified, however, that at no time did they visually observe the source of the gunshots, and they did not see any shots emanating from the area where defendant's vehicle was parked. The officers' attention was drawn to defendant's vehicle because, at the time they arrived on the scene, it had collided with another vehicle as it tried to leave the area. Defendant's vehicle was one of a number of vehicles and pedestrians that the police saw trying to leave the gas station due to the ongoing gunfire. Under those circumstances—i.e., where the police are unable to pinpoint the source of the gunfire, and the individuals in defendant's vehicle are not the only potential suspects present at the scene—the evidence does not provide a reasonable suspicion that the individuals in *defendant's vehicle* had committed, were committing, or were about to commit a crime (*see People v King*, 206 AD3d 1576, 1577 [4th Dept 2022]; *cf. People v Floyd*, 158 AD3d 1146, 1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Jones*, 148 AD3d 1666, 1667 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]). On the record before us, defendant's vehicle was, at most, "simply a vehicle that was in the general vicinity of the area where the shots were heard," which is insufficient to establish reasonable suspicion (*People v Fitts*, 188 AD3d 1676, 1678 [4th Dept 2020]).

In light of the foregoing, we conclude that the seizure of defendant and his vehicle was unlawful and that, as a result, the physical evidence seized by the police and the statements made by defendant to the police following the unlawful seizure should have been suppressed. Consequently, the judgment must be reversed and, "because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed" (*Suttles*, 171 AD3d at 1455 [internal quotation marks omitted]; *see Jennings*, 202 AD3d at 1440). In light of our determination, we do not address defendant's remaining contention.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

947

CA 22-00008

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

TAMARA LEIGH GUTIERREZ, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM MICHAEL GUTIERREZ, DEFENDANT-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, WILLIMASVILLE (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 8, 2021. The order directed defendant to pay maintenance to plaintiff.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

955

TP 22-01030

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

IN THE MATTER OF ALBERT WILLIAMS, 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 (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, Wyoming County [Michael M. Mohun, A.J.], entered June 27, 2022) 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: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

963

CA 22-00621

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

DANA M. MERIZZI AND MAUREEN A. RIESTER,
PLAINTIFFS-RESPONDENTS,

V ORDER

RUTH PIPHER AND DENISE CORNWELL, AS TRUSTEE OF THE
RUTH PIPHER FAMILY TRUST, DEFENDANTS-APPELLANTS.

LYNN D'ELIA TEMES & STANCZYK, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 9, 2020. The order and judgment granted in part the motion of plaintiffs for a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 14, 2022,

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

970

CA 21-01083

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

IN THE MATTER OF THE APPLICATION FOR A
RECOMMITMENT ORDER PURSUANT TO CPL 330.20
IN RELATION TO TREY A.B., DEFENDANT-APPELLANT,

ORDER

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Wyoming County Court (Michael M. Mohun, J.), entered June 24, 2021, in a proceeding pursuant to CPL 330.20. The order determined that defendant must be confined in a secure facility.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1001

KA 21-01032

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. REEDY, DEFENDANT-APPELLANT.

CRAIG M. CORDES, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 21, 2021. The judgment convicted defendant upon his plea of guilty of aggravated driving while intoxicated.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Steuben County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of aggravated driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]), defendant contends that County Court erred in refusing to suppress physical evidence and statements that he made to the police. We agree.

Specifically, defendant contends that the stop of defendant's vehicle was unlawful because the evidence before the suppression court is insufficient to establish that the arresting police officer had probable cause to believe that defendant had committed a traffic violation. At the suppression hearing, the officer testified that he stopped the vehicle after he visually estimated defendant's speed at 82 miles per hour in a 65 mph zone, and there was no testimony that the officer used a radar gun to establish defendant's speed. While it is well-settled that a qualified police officer's testimony that he or she visually estimated the speed of a defendant's vehicle may be sufficient to establish that a defendant exceeded the speed limit (*see People v Olsen*, 22 NY2d 230, 232 [1968]), here, the People failed to establish the officer's training and qualifications to support the officer's visual estimate of the speed of defendant's vehicle (*see*

generally People v Smith, 162 AD2d 999, 999 [4th Dept 1990], *lv denied* 76 NY2d 896 [1990]). Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping defendant's vehicle in the first instance, we conclude that the court erred in refusing to suppress the physical evidence and defendant's statements obtained as a result of the traffic stop. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see People v Dortch*, 186 AD3d 1114, 1116 [4th Dept 2020]).

In light of our determination, we need not reach defendant's remaining contention.

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1006

CAF 21-00777

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF PATRICK A. KOCH,
PETITIONER-RESPONDENT,

V ORDER

SARA L. GORECKI, RESPONDENT-APPELLANT.

SARK LAW & PROFESSIONAL SERVICES, LLC, HORSEHEADS (SUJATA RAMAIAH OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARBARA A. KILBRIDGE, BUFFALO, FOR PETITIONER-RESPONDENT.

SARAH L. FIFIELD, FAIRPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered April 28, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal and primary physical custody of the subject child.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1011

CA 21-01367

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

WILLIAM DALY, PLAINTIFF-RESPONDENT,

V ORDER

AJ COSTELLO GROUP, LLC, ET AL., DEFENDANTS,
ANTHONY J. COSTELLO & SON DEVELOPMENT, LLC, AND
ANTHONY J. COSTELLO & SON (JOSEPH) DEVELOPMENT, LLC,
DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER LLP, ROCHESTER (RYAN T. BIESENBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 27, 2021. The order granted the motion of plaintiff insofar as it sought summary judgment on liability against defendants Anthony J. Costello & Son Development, LLC, and Anthony J. Costello & Son (Joseph) Development, LLC.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1012

CA 22-00010

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

GARDEN VILLAGE APARTMENTS, LLC, WILLIAMSTOWNE VILLAGE, LLC, AND VILLAGES AT FAIRWAYS, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

CSC SERVICEWORKS, INC., DEFENDANT-RESPONDENT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 27, 2021. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 1, 2022,

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1026

CAF 21-01097

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF ONTARIO COUNTY SUPPORT COLLECTION UNIT, ON BEHALF OF CRYSTAL L. MEYERS, PETITIONER-RESPONDENT,

V ORDER

THOMAS C. DAVIS, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (BARRY D. MCFADDEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered July 8, 2021 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent had willfully failed to obey an order of the court.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 13 and 17, 2022,

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1027

CAF 21-01600

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF STEUBEN COUNTY COMMISSIONER OF SOCIAL SERVICES, ON BEHALF OF CRYSTAL L. MEYERS, PETITIONER-RESPONDENT,

V ORDER

THOMAS C. DAVIS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (BARRY D. MCFADDEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 3, 2021 in a proceeding pursuant to Family Court Act article 4. The amended order, inter alia, found that respondent had willfully failed to obey an order of the court.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 13 and 17, 2022,

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1035

CA 22-00383

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

SAM GOLDSTEIN, AS TRUSTEE OF THE STERN ALTMAN LIFE INSURANCE TRUST, PLAINTIFF-APPELLANT,

V ORDER

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK AND LINCOLN NATIONAL CORPORATION, DEFENDANTS-RESPONDENTS.

BARUCH S. GOTTESMAN, FRESH MEADOWS, FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (TIMOTHY N. MCMAHON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 7, 2021. The order granted defendants' motion for summary judgment and dismissed the second 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: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1049

CAF 21-01225

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

IN THE MATTER OF DAMIEN W., DONALD L.W., IV,
AND JEREMIAH M.

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

SAMANTHA N.M., RESPONDENT, AND
DONALD L.W., III, RESPONDENT-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT.

DEANA D. GATTARI, COUNTY ATTORNEY, ROME, FOR PETITIONER-RESPONDENT.

CHRISTINE S. KIESEL, SAUQUOIT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 7, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent Donald L.W., III with respect to Damien W. and Donald L.W., IV.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court

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

1051

CA 21-01637

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

CYNTHIA M. LEWANDOWSKI AND ANTHONY J. LEWANDOWSKI, PLAINTIFFS-APPELLANTS-RESPONENTS,

V ORDER

EDNA LOUISE LIQUIDATIONS, LLC, DEFENDANT-RESPONDENT, AND MYRA S. RAZIK, DEFENDANT-APPELLANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF ROBERT L. HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF DESTIN C. SANTACROSE, LLP, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 22, 2021. The order granted the motion of defendant Edna Louise Liquidations, LLC, for summary judgment, dismissed the complaint against said defendant and denied the cross motion of defendant Myra S. Razik for summary judgment.

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

Entered: December 23, 2022

Ann Dillon Flynn
Clerk of the Court