SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 1, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 08-01806

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

EASTON TELECOM SERVICES, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLOBAL CROSSING BANDWIDTH, INC. AND
DAVEL COMMUNICATIONS, INC.,
DEFENDANTS-RESPONDENTS.

(AND A THIRD-PARTY ACTION.)

VANDEUSEN & WAGNER, LLC, CLEVELAND, OHIO, UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL J. SHORTLEY, III, ROCHESTER, FOR DEFENDANT-RESPONDENT GLOBAL CROSSING BANDWIDTH, INC.

HAHN LOESER & PARKS LLP, CLEVELAND, OHIO (ARTHUR M. KAUFMAN, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVEL COMMUNICATIONS, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 29, 2008. The order and judgment, inter alia, granted the cross motion of defendant Global Crossing Bandwidth, Inc. for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the cross motion with the exception of that part seeking summary judgment dismissing those claims against defendant Global Crossing Bandwidth, Inc. based on invoices with due dates before October 8, 2005 and reinstating the amended complaint with the exception of those claims against that defendant and reinstating the third-party complaint and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendant Global Crossing Bandwidth, Inc. (Global Crossing), the successor in interest of Frontier Communications International, Inc. (Frontier), breached its contract with plaintiff by paying a portion of payphone surcharges to defendant Davel Communications, Inc. (Davel) and in turn seeking reimbursement from plaintiff for those surcharges paid to Davel. Plaintiff moved for summary judgment on the amended complaint against both defendants, and Global Crossing cross-moved “for Summary Judgment, and for such other

and further relief [as Supreme] Court deems just and proper." By the order and judgment on appeal, the court denied plaintiff's motion, granted the "motion" of Global Crossing insofar as it sought summary judgment dismissing the amended complaint against it and granted Global Crossing's counterclaims against plaintiff. In addition, the court dismissed as moot the "motion" of Global Crossing against Davel and Global Crossing's third-party complaint against Davel. We note at the outset that, although plaintiff took an appeal from a prior order determining the motion and cross motion rather than from the subsequent order and judgment in which that order was subsumed, we exercise our discretion to treat plaintiff's notice of appeal as valid and deem the appeal as taken from the order and judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5520 [c]).

The record establishes that in 1995, Frontier, a telecommunications carrier, contracted to provide service to plaintiff, a telecommunications reseller. Pursuant to that agreement, Frontier was not required to consider any notice of a billing discrepancy received more than 60 days after the due date on the relevant invoice. Plaintiff then contracted to resell the service to Davel.

By a "Concurrence Memorandum" (Memorandum) between plaintiff and Global Crossing in April 2004, those parties agreed that specified toll-free calls made from the payphones of plaintiff's customers, including Davel, would be exempt from a mandate of the Federal Communications Commission requiring surcharges to be collected on toll-free calls made from payphones. The Memorandum provided that plaintiff was required to provide Global Crossing with a list of telephone numbers for which it sought exemption from the surcharge and that those telephone numbers would be assigned to a specific association code. Global Crossing collected a surcharge on various toll-free telephone calls made from Davel's payphones between May and December 2005 because, although plaintiff submitted the telephone numbers for which it requested exemption, they were never assigned to the proper association code. Global Crossing then paid a large portion of the collected surcharge to Davel and sent invoices to plaintiff seeking reimbursement of the surcharge paid to Davel.

We conclude that the court erred in granting those parts of the cross motion of Global Crossing for summary judgment dismissing the amended complaint against it in its entirety and granting Global Crossing's counterclaims against plaintiff, based on its determination that plaintiff failed to comply with the terms of the Memorandum. Upon our review of the record, we conclude that there are issues of fact whether plaintiff erroneously placed Davel's telephone numbers on an improper association code or whether the actions of Global Crossing may have caused the error (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, we note that, by its own submissions on its cross motion, Global Crossing raised issues of fact that render summary judgment dismissing the amended complaint against it in its entirety inappropriate and judgment on Global Crossing's counterclaims against plaintiff inappropriate. In any event, even assuming, arguendo, that the court properly determined that Global Crossing met

its initial burden, we conclude that plaintiff presented evidence raising triable issues of fact with respect to all but those claims based on invoices with due dates before October 8, 2005 (*see generally id.*). We agree with Global Crossing that the court properly granted that part of its cross motion for summary judgment dismissing the amended complaint to the extent that it asserts claims based on allegedly improper charges on invoices with due dates before October 8, 2005, i.e., 60 days before the billing dispute was filed by plaintiff, in accordance with the 1995 agreement between plaintiff and Frontier. We reject the contention of plaintiff that the 1995 agreement does not apply to its claims to collect improper surcharges. We note that the language of the 1995 agreement is unambiguous and, indeed, the record contains evidence that plaintiff's employees admitted that they were required to review all invoices in a timely manner and to raise any dispute with respect to invoices within 60 days of their receipt.

We note in addition that plaintiff contends that the court erred in denying that part of its motion for summary judgment against Davel based on an oral agreement between plaintiff and Davel that exempted Davel from collecting the surcharge from Global Crossing. Even assuming, arguendo, that plaintiff met its initial burden, we conclude that the deposition testimony of Davel's employees raises issues of fact with respect to the existence and terms of an agreement to waive the collection and payment of surcharges (*see generally id.*).

We therefore modify the order and judgment by denying Global Crossing's cross motion with the exception of that part seeking summary judgment dismissing those claims against Global Crossing based on invoices with due dates before October 8, 2005 and reinstating the amended complaint with the exception of those claims against Global Crossing and reinstating the third-party complaint.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 07-01921

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON ANDREWS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (John S. Balzano, A.J.), rendered May 3, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and sentencing him to an indeterminate term of incarceration of one to three years. Defendant entered that plea on October 29, 2003 with the understanding that he would be permitted to enter the Utica Drug Court program (Drug Court program). County Court advised defendant that, in the event that he successfully completed the Drug Court program, he would be allowed to "re-enter [his] plea of guilty to a misdemeanor" and would not be sentenced to a term of incarceration. The court further advised defendant that, in the event that he did not successfully complete the Drug Court program, he was "going to state prison for one to three years." On October 30, 2003, the following day, defendant executed the Utica Drug Court Participation Agreement (Participation Agreement). Pursuant to the terms of the Participation Agreement, "by entering Utica Drug Court, [defendant] agree[d] to participate for a period of time not to exceed thirty-six months." Defendant further agreed to abstain from the use of drugs, and he agreed that persistent positive drug tests and new arrests were among the circumstances that could cause him to be terminated from the Drug Court program. In addition, defendant agreed that, if he did "not successfully complete the Utica Drug Court [program], [he would] receive a sentence of **1 to 3 years in state prison**." Following his entry into the Drug Court program, defendant was twice arrested for additional crimes and was convicted of those crimes, and he admitted

that he relapsed into drug use on several occasions. Defendant was terminated from the Drug Court program on February 28, 2007 and, following a termination hearing conducted pursuant to the terms of the Participation Agreement, he was sentenced on May 3, 2007 to an indeterminate term of incarceration of one to three years.

Defendant contends that the court lacked authority to sentence him because the Participation Agreement had expired on October 30, 2006, four months before his termination from the Drug Court program and over six months before sentencing. As a preliminary matter, we note that the challenge of defendant to the legality of his sentence survives his waiver of the right to appeal at the plea proceeding (*see People v Carpenter*, 19 AD3d 730, 731, *lv denied* 5 NY3d 804). We conclude, however, that the court properly sentenced defendant based upon the undisputed fact that he did not successfully complete the Drug Court program (*see People v Woods*, 192 Misc 2d 590, 592; *see generally People v Avery*, 85 NY2d 503, 507). Defendant's agreement "to participate [in the Drug Court program] for a period of time not to exceed thirty-six months" did not impose a time limitation upon the deferral of sentencing or otherwise deprive the court of authority to sentence defendant pursuant to the terms of the plea agreement (*see generally People v Roberts*, 38 AD3d 1014). In addition, we note that, despite his criminal convictions and relapses, defendant was permitted to remain in the Drug Court program, both at his request and for his benefit. Neither the plea agreement nor the Participation Agreement limited the court's authority to defer sentencing in order to provide defendant with the opportunity to complete the Drug Court program successfully and avoid serving a term of incarceration (*see generally Woods*, 192 Misc 2d at 592).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-01655

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

IN THE MATTER OF BARKER CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION OF BARKER CENTRAL SCHOOL DISTRICT, AND LOUIS J. MEAD, INDIVIDUALLY AND AS BOARD PRESIDENT OF BOARD OF EDUCATION OF BARKER CENTRAL SCHOOL DISTRICT,
PETITIONERS/PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AES SOMERSET, LLC, AES EASTERN ENERGY, L.P., AES NY, L.L.C., AES CORPORATION, COUNTY OF NIAGARA, TOWN OF SOMERSET,
RESPONDENTS/DEFENDANTS-RESPONDENTS,
ET AL., RESPONDENTS/DEFENDANTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF TOWN OF SOMERSET AND DUDLEY E. CHAFFEE, RICHARD N. RAY, JR., RANDALL J. WAYNER, AND APRIL C. GOW, AS MEMBERS OF THE SOMERSET TOWN BOARD AND IN THEIR INDIVIDUAL CAPACITIES,
PETITIONERS-APPELLANTS,

V

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, HENRY M. SLOMA, CHAIRPERSON, NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AES SOMERSET, LLC, AND AES EASTERN ENERGY, L.P.,
RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)

(AND ANOTHER PROCEEDING.)

PUSATERI & FITZGERALD LLP, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR PETITIONERS/PLAINTIFFS-APPELLANTS.

ANDREWS, PUSATERI, BRANDT, SHOEMAKER & ROBERSON, P.C., LOCKPORT (ROBERT S. ROBERSON OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR RESPONDENT/DEFENDANT-RESPONDENT NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY AND RESPONDENTS-RESPONDENTS NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY AND HENRY M. SLOMA, CHAIRPERSON, NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS AES SOMERSET, LLC, AES EASTERN ENERGY, L.P., AES NY, L.L.C., AND AES CORPORATION AND RESPONDENTS-RESPONDENTS AES SOMERSET, LLC AND AES EASTERN ENERGY, L.P.

JAMES R. SANDNER, LATHAM (JAMES D. BILIK OF COUNSEL), FOR NEW YORK STATE UNITED TEACHERS, BARKER TEACHERS UNION, AND BARKER CENTRAL SCHOOL SUPPORT STAFF, AMICI CURIAE.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 14, 2007. The judgment, insofar as appealed from, dismissed the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2 and dismissed the Real Property Tax Law article 7 proceedings commenced by respondent/defendant and respondent AES Somerset, LLC with respect to the Somerset Generating Station.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2 are granted, the final resolution of the Niagara County Industrial Development Agency dated October 27, 2006 and the resulting agreements are annulled and the Real Property Tax Law article 7 proceedings commenced by respondent/defendant and respondent AES Somerset, LLC with respect to the Somerset Generating Station are reinstated.

Memorandum: In proceeding No. 1, petitioners/plaintiffs (collectively, District petitioners) appeal from a judgment dismissing their petition/complaint seeking to annul the determination of respondent/defendant Niagara County Industrial Development Agency (NCIDA) granting tax abatement relief in the form of a payment in lieu of taxes (PILOT) agreement and lease/leaseback agreements to respondents/defendants AES Somerset, LLC, AES Eastern Energy, L.P., AES NY, L.L.C., and AES Corporation (collectively, AES respondents) with respect to their electrical generating station in Somerset, New York (Somerset Generating Station). In proceeding No. 2, petitioners (collectively, Town petitioners) appeal from the same judgment, which dismissed their petition seeking the same relief as that sought by the District petitioners. We note at the outset that a declaratory judgment action is not an appropriate procedural vehicle for challenging NCIDA's administrative determination, and thus the proceeding/declaratory judgment action in proceeding No. 1 is properly only a proceeding pursuant to CPLR article 78 (*see Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333).

We conclude that Supreme Court erred in dismissing the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2. The relief sought therein was judicial review of NCIDA's final resolution dated October 27, 2006, issued following a hearing, pursuant to which NCIDA determined that financial assistance in the form of a PILOT agreement and lease/leaseback agreements was warranted for the Somerset Generating Station. The record establishes, however,

that the AES respondents presented no financial statements to NCIDA from which NCIDA could determine whether financial assistance to the Somerset Generating Station was necessary. While one NCIDA board member reviewed the financial statements contained on the Internet website of the AES respondents, he informed the remainder of the board only that the AES respondents were financially stable and capable of ensuring a long-term PILOT agreement. The financial information contained on the website in any event related only to one of the AES respondents, i.e., the parent company, and did not specify that it concerned the Somerset Generating Station. The AES respondents also failed to present any evidence supporting the conclusion that the benefits of the PILOT agreement and lease/leaseback agreements outweighed the costs of that tax abatement relief. There was no evidence supporting the conclusion of NCIDA that the agreement of the AES respondents, pursuant to which AES Somerset, LLC agreed to discontinue the tax certiorari proceedings it commenced with respect to the Somerset Generating Station in exchange for the PILOT agreement, would make up for the loss of tax revenue resulting from the PILOT agreement. There also was no evidence supporting the court's calculations with respect to the cost of the litigation in the event that AES Somerset, LLC prevailed in those tax certiorari proceedings. In addition, there was no evidence presented to establish that a deviation from NCIDA's Uniform Tax Exemption Policy was warranted. We therefore conclude that NCIDA's determination that the tax abatement relief in the form of the PILOT agreement and lease/leaseback agreements was warranted for the Somerset Generating Station is not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181).

We further agree with the District petitioners and the Town petitioners that sections 1.3 and 1.4 of the PILOT agreement are invalid. Although section 1.3 of the agreement apportions PILOT payments between the taxing jurisdictions based upon tax rates, General Municipal Law § 858 (15) requires that such apportionment be based upon the amount of taxes that the taxing jurisdictions would have received but for the PILOT agreement, unless the affected tax jurisdictions agree otherwise. Section 1.4 of the agreement improperly authorizes NCIDA to determine the assessed value of any future additions made to the Somerset Generating Station.

We therefore conclude that the court should have granted the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2, thereby annulling the final resolution of NCIDA with respect to the PILOT agreement and the lease/leaseback agreements, and the court erred in dismissing the Real Property Tax Law article 7 proceedings filed by AES Somerset, LLC with respect to the Somerset Generating Station.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

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

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CAF 07-01110

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF GIOVANNI K., MARCUS K., AND TIFFANY K.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DAWN K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, FOR GIOVANNI K. AND TIFFANY K.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 4, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent with respect to Tiffany K. and suspended judgment with respect to Giovanni K.

It is hereby ORDERED that said appeal from the order insofar as it concerned Giovanni K. is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In appeal No. 1, respondent mother appeals from an order terminating her parental rights with respect to her daughter, Tiffany K., and suspending judgment with respect to her son Giovanni K., who were found to be neglected children. Although the mother also purports to challenge the termination of her parental rights with respect to a second son, this Court previously dismissed the appeal insofar as it concerned him by order dated December 2, 2008 based on the fact that he attained the age of 18 (*see generally Matter of Anthony M.*, 56 AD3d 1124, *lv denied* 12 NY3d 702). In addition, the mother's appeals from the order in appeal No. 1 insofar as it concerned Giovanni and from the order in appeal No. 2 must be dismissed as moot. With respect to appeal No. 1, we take judicial notice of the fact that Family Court has since revoked the suspended judgment and terminated the mother's parental rights with respect to Giovanni (*see generally Matter of Khatibi v Weill*, 8 AD3d 485), and that order thus supersedes the order in appeal No. 1 (*see generally Matter of Bradley J.*, 23 AD3d 799; *Matter of Melody B.*, 234 AD2d 1005, *lv dismissed* 90 NY2d 888). With respect to appeal No. 2, the mother

contends that the court abused its discretion in denying her motion pursuant to Family Court Act § 255 to transfer supervision of the case with respect to Giovanni to another county. That appeal also is moot and must be dismissed based on the termination of the mother's parental rights with respect to him.

The remaining contention of the mother in appeal No. 1 is that the court erred in finding that Tiffany is a permanently neglected child and in terminating the mother's parental rights with respect to her. We reject that contention. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and Tiffany by providing "services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the mother's] care" (*Matter of Kayte M.*, 201 AD2d 835, 835, *lv denied* 83 NY2d 757; *see* Social Services Law § 384-b [7] [a]; *Matter of Ja-Nathan F.*, 309 AD2d 1152), and that the mother failed substantially and continuously to plan for the future of the child although physically and financially able to do so (*see* § 384-b [7] [a]). Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return (*see Matter of Nathaniel T.*, 67 NY2d 838, 840-842; *Ja-Nathan F.*, 309 AD2d 1152; *Matter of Rebecca D.*, 222 AD2d 1092).

Finally, the mother contends in appeal No. 3 that the court erred in finding that petitioner made reasonable efforts to reunite the family in connection with a permanency hearing conducted in January 2007. Appeal No. 3 also must be dismissed as moot, both because the order issued following that hearing has expired by its own terms (*see Matter of Sasha M.*, 43 AD3d 1401), and because the order was superseded by an order entered in August 2008 following a permanency hearing, from which the mother did not take an appeal (*see Matter of Jolyssa EE.*, 28 AD3d 824).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

198

CAF 07-01248

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF GIOVANNI K.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAWN K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, FOR GIOVANNI K.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 23, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, denied respondent's motion seeking to transfer supervision of the case to another county.

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

Same Memorandum as in *Matter of Giovanni K.* ([appeal No. 1] ___ AD3d ___ [May 1, 2009]).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

199

CAF 07-01407

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF MARCUS K., TIFFANY K., AND GIOVANNI K.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAWN K., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, FOR TIFFANY K. AND GIOVANNI K.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered June 11, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, continued the placement of Tiffany K. and Giovanni K.

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

Same Memorandum as in *Matter of Giovanni K.* ([appeal No. 1] ___ AD3d ___ [May 1, 2009]).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

320

CA 08-01823

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF THE ESTATE OF ELIZABETH O. VELIE, DECEASED.

---------- ORDER

EDWARD C. VELIE, JR., PETITIONER-RESPONDENT;

CHRISTINE B. WILCOX, JOHN WILCOX, AND ELIZABETH WILCOX, RESPONDENTS-APPELLANTS. (APPEAL NO. 1.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR RESPONDENT-APPELLANT CHRISTINE B. WILCOX.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR RESPONDENTS-APPELLANTS JOHN WILCOX AND ELIZABETH WILCOX.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (ROBERT J. FELDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a decree of the Surrogate's Court, Niagara County (Peter L. Broderick, Sr., S.), entered October 25, 2007. The decree, insofar as appealed from, restrained certain accounts and directed the filing of an accounting by respondent Christine B. Wilcox.

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

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

321

CA 08-01824

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF THE ESTATE OF ELIZABETH O. VELIE, DECEASED.

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

EDWARD C. VELIE, JR.,
PETITIONER-RESPONDENT-APPELLANT;

CHRISTINE B. WILCOX, JOHN WILCOX, AND ELIZABETH WILCOX,
RESPONDENTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT CHRISTINE B. WILCOX.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS JOHN WILCOX AND ELIZABETH WILCOX.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (ROBERT J. FELDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Surrogate's Court, Niagara County (Peter L. Broderick, Sr., S.), entered December 4, 2007. The order, among other things, granted in part those parts of petitioner's motion seeking summary judgment.

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

Memorandum: Petitioner commenced this proceeding pursuant to SCPA 2103 seeking discovery and delivery of certain assets that allegedly belonged to the estate of petitioner's mother (decedent). Respondent Christine B. Wilcox (decedent's daughter) contends on appeal that Surrogate's Court erred in granting that part of petitioner's motion seeking summary judgment with respect to an investment account. We agree, and we therefore modify the order accordingly. Even assuming, arguendo, that petitioner is correct in "conceding" that the presumption set forth in Banking Law § 675 (b), i.e., that the parties to a joint account intended to create a joint tenancy, applies to the account in question, we conclude that petitioner failed to meet his burden of rebutting that presumption. Petitioner failed to establish that the account was created for

convenience only (*see Matter of Friedman*, 104 AD2d 366, 367, *affd* 64 NY2d 743; *Matter of Richichi*, 38 AD3d 558, 559; *Matter of Camarda*, 63 AD2d 837, 838), or that the account was created as the result of fraud, undue influence, or decedent's lack of capacity (*see Matter of Kleinberg v Heller*, 38 NY2d 836, 840; *Matter of Stalter*, 270 AD2d 594, 595-596, *lv denied* 95 NY2d 760).

We also agree with decedent's daughter on appeal that the Surrogate erred in denying her request for a jury trial, and we therefore further modify the order accordingly. When an issue of title "is reached in a proceeding instituted by the estate fiduciary for discovery under SCPA 2103 and 2104, either party is entitled to a jury trial" (*Matter of Schneier*, 74 AD2d 22, 26). We conclude that the Surrogate erred in determining that the request for a jury trial was untimely. Although decedent's daughter did not request a jury trial in her answer to the petition, she did so in her answer to the amended petition (*see generally id.* at 27-28). We have considered the remaining contentions of respondents on appeal and conclude that they are without merit.

Contrary to the contention of petitioner on his cross appeal, the Surrogate properly denied that part of his motion seeking summary judgment with respect to withdrawals by decedent's daughter from an M&T checking account. Although petitioner is correct that the power of attorney granted to decedent's daughter did not include the power to make gifts, the bank account was a joint account and thus the presumption set forth in Banking Law § 675 applies. As with the investment account, petitioner failed to rebut that presumption as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Petitioner further contends on his cross appeal that the Surrogate erred in denying that part of his motion seeking a default judgment based on respondents' alleged failure to answer the amended petition in a timely manner. We reject that contention. Pursuant to SCPA 2104 (1), the petitioner may examine the respondent with respect to the allegations of the petition and, "[i]f it appears thereon that an issue of title to any property as defined in [SCPA] 103 or the proceeds or value thereof is raised, if he [or she] has not theretofore done so, the respondent shall be directed to serve and file an answer accordingly" (*id.*). Here, when the Surrogate issued the amended scheduling letter after permitting petitioner to file the amended petition, he did not direct respondents to file answers to the amended petition. Thus, respondents were not required to do so.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

344

TP 08-02050

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF HEATH FARABELL, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF MACEDON, RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR PETITIONER.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI 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, Wayne County [John J. Ark, J.], entered June 3, 2008) to annul a determination of respondent. The determination terminated petitioner's employment.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner guilty of charge one and as modified the determination is confirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination terminating his employment as a police officer for respondent following a hearing conducted pursuant to Civil Service Law § 75. Petitioner was terminated based on three charges: charge one, alleging that he was unable to serve as a police officer pursuant to Town Law § 151; charge two, alleging that he had intentionally given false answers on his application for employment as a police officer; and charge three, alleging that he had failed to document his overtime properly.

Supreme Court issued a "DECISION and ORDER" in which it concluded that the determination on charge one was erroneous as a matter of law and that the determination on charge three should be sustained. The court then transferred to this Court the issue whether the determination on charge two is supported by substantial evidence. Respondent filed a notice of appeal and moved, inter alia, to consolidate its appeal with the transferred proceeding. We dismissed that part of the motion seeking consolidation as "unnecessary." Contrary to petitioner's contention, our order deciding respondent's motion does not preclude respondent from challenging the court's determination with respect to charge one. "Because resolution of the

issues with respect to [charges one and three] would not have 'terminate[d] the proceeding' within the meaning of CPLR 7804 (g) . . ., Supreme Court erred in deciding [those issues]" (*Matter of Pieczonka v Jewett*, 273 AD2d 842, 842). Inasmuch as the matter is now before us, however, we may decide the issues de novo.

We agree with petitioner with respect to charge one that Town Law § 151 does not disqualify him from serving as a police officer in New York State, and we therefore modify the determination accordingly. Town Law § 151, inter alia, precludes individuals with felony convictions from serving as police officers in New York State. In 1995 petitioner entered a plea nolo contendere with adjudication withheld in Florida to a charge of dealing in stolen property, which is a felony (*see* Fla Stat Ann, tit 46, § 812.019 [1]). It is undisputed, however, that such a plea does not constitute a conviction under Florida law (*see Montgomery v State*, 897 So 2d 1282, 1287 [Fla]; *Garron v State*, 528 So 2d 353, 360 [Fla]). Thus, respondent mistakenly relies on the Full Faith and Credit Clause of the US Constitution in contending that we treat the Florida plea as a felony conviction. In accordance with the Full Faith and Credit Clause of the US Constitution (US Const, art IV, § 1), "a judgment of a state court should have the same credit, validity, ***and effect***, in every other court of the United States, which it had in the state where it was pronounced" (*Boudreaux v State of La., Dept. of Transp.*, 49 AD3d 238, 240-241, *affd* 11 NY3d 321 [internal quotation marks omitted]). Here, petitioner was not "convicted" of a felony in Florida, nor does Town Law § 151 contain any language prohibiting an individual with the functional equivalent of a felony conviction from serving as a police officer.

Respondent also mistakenly relies on the Full Faith and Credit Clause in contending that, because Florida would prohibit petitioner from serving as a police officer based on his plea, New York should also prohibit him from serving as a police officer. In enacting Town Law § 151, New York has established its own statutory scheme to determine what events disqualify an individual from serving as a police officer in New York State. Although Florida would disqualify petitioner based on his plea, we cannot agree with respondent that the Full Faith and Credit Clause requires New York to do the same. While this Court of course respects the will of the Florida Legislature, the New York Legislature has spoken on this issue and, under New York law, petitioner's plea does not automatically disqualify petitioner from serving as a police officer (*see id.*).

We reject the contention of petitioner, however, that the determination with respect to charges two and three is erroneous as a matter of law. Petitioner contends that respondent failed to make an informed decision based upon an independent appraisal because the determination was issued immediately following the submission of the Hearing Officer's report. There is nothing in the record to support that contention and, "in the absence of a 'clear' revelation that the administrative body 'made no independent appraisal and reached no independent conclusion,' its decision will not be disturbed" (*Matter*

of Taub v Pirnie, 3 NY2d 188, 195; *see Matter of New York Pub. Interest Research Group Straphangers Campaign v Metropolitan Transp. Auth.*, 309 AD2d 127, 139, *lv denied* 100 NY2d 513). We reject petitioner's further contention that the Hearing Officer relied upon misconduct outside the scope of the charges (*see Matter of Finigan v Lent*, 189 AD2d 935, 939, *appeal dismissed* 81 NY2d 1067, *lv denied* 82 NY2d 657; *cf. Matter of Ahsaf v Nyquist*, 37 NY2d 182, 185-186). "[A] review of the Hearing Officer's decision reveals that any references made to uncharged conduct were necessary to refute petitioner's attempts to explain [petitioner's] behavior" (*Matter of Rounds v Town of Vestal*, 15 AD3d 819, 822).

Petitioner further contends that the Hearing Officer improperly relied upon evidence outside the record. We reject that contention. In his Findings and Recommendation, the Hearing Officer cited "the transcript of the interview of Richard Meade (E-17)." That transcript was in fact exhibit E-16 and was admitted in evidence, while exhibit E-17 was the sworn statement of Richard Meade but was not admitted in evidence. It is "reasonable to conclude that [such error] was . . . typographical," and we consider it harmless (*Matter of S. & J. Pharmacies v Axelrod*, 91 AD2d 1131, 1133). We reject petitioner's contention that the Hearing Officer erred in admitting in evidence a hearsay statement from a Florida witness (*see* Civil Service Law § 75 [2]; *Matter of Hoffman v Village of Sidney*, 252 AD2d 844, 845; *see generally Matter of Gray v Adduci*, 73 NY2d 741, 742). Contrary to the contention of petitioner, he was not denied a fair hearing based on his inability to confront and cross-examine the Florida witness inasmuch as he was free to subpoena that witness (*see Matter of Radoff v Board of Educ. of City of N.Y.*, 99 AD2d 840, 841, *affd* 64 NY2d 90; *Matter of Schloer v Commissioner of Dept. of Motor Vehs.*, 110 AD2d 1010, *lv denied* 65 NY2d 606). Also contrary to petitioner's contention, the Hearing Officer properly admitted in evidence exhibits E-13 and E-16. Those documents were relevant to refute petitioner's testimony.

Petitioner further contends that charge three was "fatally vague" because it did not adequately inform him of the misconduct alleged or the dates and times of the alleged misconduct. We conclude that petitioner waived that contention by failing to request greater specificity or additional time in which to prepare a defense either before or during the hearing (*see Matter of Thomas v County of Westchester*, 181 AD2d 900; *see also Matter of Multari v Town of Stony Point*, 99 AD2d 838, 839). In any event, we conclude that charge three was sufficiently specific to apprise petitioner of the charges against him and to enable him "to adequately prepare a defense" (*Rounds*, 15 AD3d at 822; *see Matter of Block v Ambach*, 73 NY2d 323, 333; *Matter of Auxier v Town of Laurens*, 23 AD3d 912, 913).

Finally, we have reviewed the evidence adduced at the Civil Service Law § 75 hearing and conclude that there is substantial evidence to support the determination with respect to charges two and three (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443; *300*

Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

357

CA 08-00283

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF BRIAN YAEGER AND BRUCE YAEGER,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF LOCKPORT PLANNING BOARD, TOWN OF LOCKPORT
ZONING BOARD OF APPEALS, AND MCDONALD'S USA, LLC,
RESPONDENTS-RESPONDENTS.

DAVID J. SEEGER, BUFFALO, FOR PETITIONERS-APPELLANTS.

HOPKINS, GARAS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR RESPONDENT-RESPONDENT MCDONALD'S USA, LLC.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 4, 2007. The judgment granted respondents' motion and dismissed the CPLR article 78 petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determinations of respondents Town of Lockport Planning Board (Planning Board) and Town of Lockport Zoning Board of Appeals (ZBA) granting various applications of respondent McDonald's USA, LLC (McDonald's) with respect to the construction of a restaurant. In moving to dismiss the petition, McDonald's contended, inter alia, that petitioners failed to name the owners of the property in question as necessary parties and that the statute of limitations with respect to them had expired. The Planning Board and the ZBA joined in the motion to dismiss. Supreme Court granted the motion and dismissed the petition "after due consideration of CPLR 1001 (b) . . . ." We note at the outset that we reject the contention of McDonald's that the appeal is moot because it has already built the restaurant and opened it for business. Although petitioners did not seek injunctive relief to prevent the construction of the building (*see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-173), they sought relief in the form of building "modifications that do not require demolition of the restaurant."

We agree with petitioners that the court erred in granting the motion to dismiss. At the time of the motion, the property owners were necessary parties pursuant to CPLR 1001 (a), and thus their joinder was required (*see generally Matter of Southwest Ogden Neighborhood Assn. v Town of Ogden Planning Bd.*, 43 AD3d 1374, *lv denied* 9 NY3d 818; *Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d 682; *Matter of Artrip v Incorporated Vil. of Piermont*, 267 AD2d 457). The expiration of the statute of limitations, however, is not the equivalent of a jurisdictional defect (*see Windy Ridge Farm v Assessor of the Town of Shandaken*, 11 NY3d 725, 726-727) and, pursuant to CPLR 1001 (b), "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." Because the property owners were subject to the jurisdiction of the court, the court should have "summoned" the property owners (*id.*; *see Windy Ridge Farm*, 11 NY3d at 727; *Matter of Alexy v Otte*, 58 AD3d 967). We conclude, however, that the property owners are no longer necessary parties because they have since conveyed their interest in the property to McDonald's.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

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

451

CA 08-02142

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

GARRY WICKS, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

TRIGEN-SYRACUSE ENERGY CORPORATION,
DEFENDANT-APPELLANT.

WALSH & WILKINS, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 20, 2007 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and denied in part the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion and by granting that part of the cross motion for summary judgment dismissing the Labor Law § 240 (1) claim and dismissing that claim and as modified the order is affirmed without costs.

Opinion by CENTRA, J.:

I

The primary issue on this appeal is whether plaintiff was engaged in "cleaning" under Labor Law § 240 (1) at the time of the accident. We conclude that he was not and thus that Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and in denying that part of defendant's cross motion for summary judgment dismissing that claim.

II

At the time of the accident, plaintiff was working at an alternative fuel processing facility owned by defendant. The paper that was processed to produce alternative fuel was first shredded in the processing facility and then burned in the generating facility.

Plaintiff was working in the "bag house" of the processing facility, which was in effect a giant vacuum that collected paper dust particles from the facility. The bag house contained hoppers to collect the dust particles, and the particles would then fall onto an auger that pushed them into a "push bin." Those particles would then be sent to the generating facility to be burned. Between one and five times during a 12-hour shift, the hoppers would become bound with dust particles and would need to be unclogged. To do so, workers such as plaintiff would then climb a ladder, straddle the auger, open the door to the bag house, and push the dust down the hoppers with a broom handle. As plaintiff was descending the ladder after unclogging the hoppers on the date of the accident, he fell five feet to the ground.

III

Plaintiff commenced this action asserting a cause of action for common-law negligence as well as a cause of action for violations of the Labor Law. Plaintiff moved for partial summary judgment on the Labor Law § 240 (1) claim, alleging that he was "cleaning" at the time of the accident and "was provided with an inappropriate ladder to perform his work." Defendant cross-moved for summary judgment dismissing the complaint and, with respect to the Labor Law § 240 (1) claim, it alleged that plaintiff was engaged in routine maintenance at the time of the accident, which is not an enumerated activity under the statute. With respect to the common-law negligence cause of action and Labor Law § 200 claim, defendant alleged that it did not have the authority to and did not actually direct or control plaintiff's work. Defendant contends on appeal that the court erred in granting the motion and in denying that part of its cross motion with respect to the common-law negligence cause of action and section 200 and section 240 (1) claims.

IV

Addressing first the Labor Law § 240 (1) claim, we note that section 240 (1) protects employees engaged "in the erection, demolition, repairing, altering, painting, *cleaning* or pointing of a building or structure" (emphasis added). The only issue raised by the parties with respect to that claim is whether the court erred in concluding that plaintiff was engaged in "cleaning" and not routine maintenance at the time of the accident. In our view, plaintiff was not engaged in cleaning.

Our analysis of this issue begins with our decision in *Farmer v Central Hudson Gas & Elec. Corp.* (299 AD2d 856, *amended on rearg* 302 AD2d 1017, *lv denied* 100 NY2d 501). In that case, the plaintiff was injured when he fell from a ladder while preparing to vacuum fly ash from hoppers at the defendant's plant (*see id.* at 857). When the plaintiff opened the door to the hopper, fly ash spewed out, causing him to fall from the ladder (*see id.*). We concluded that the plaintiff could not recover pursuant to Labor Law § 240 (1) because he "was engaged in routine maintenance in a non-construction, non-renovation context when he was injured" (*id.*). In *Broggy v*

Rockefeller Group, Inc. (8 NY3d 675), the Court of Appeals subsequently concluded that a worker engaged in "cleaning" under Labor Law § 240 (1) was expressly afforded protection whether or not the activity of cleaning was incidental to any other enumerated activity (*see id.* at 680). Thus, a worker who was cleaning within the meaning of the statute could recover even if the cleaning was not "taking place as part of a construction, demolition or repair project" (*id.* at 681).

Defendant contends that this case is on "all fours" with the *Farmer* case, and plaintiff therefore cannot recover under Labor Law § 240 (1) because he was engaged in routine maintenance. However, we place no reliance on our decision in *Farmer* that the plaintiff was engaged in "routine maintenance" because it was based on an interpretation of the law that the Court of Appeals subsequently determined in *Broggy* was incorrect, i.e., that the plaintiff's work did not constitute cleaning under section 240 (1) because there was no ongoing construction or renovation.

V

We have found very few cases addressing the narrow issue raised on this appeal, i.e., whether the activity that plaintiff was performing at the time of the accident constitutes cleaning pursuant to Labor Law § 240 (1). The Court in *Broggy* had no need to analyze that issue because it was undisputed in that case that the plaintiff worker, who was performing commercial window washing, was in fact cleaning (*see Broggy*, 8 NY3d at 677, 680-681; *see also Stanley v Carrier Corp.*, 303 AD2d 1022). In *Smith v Shell Oil Co.* (85 NY2d 1000, 1002), the Court concluded that the plaintiff's work in changing a light bulb was "maintenance of a sort different from 'painting, cleaning or pointing,' the only types of maintenance provided for in [section 240 (1)]." Thus, all cleaning, painting and pointing would constitute maintenance, but not all maintenance would constitute cleaning. We must therefore determine whether plaintiff was engaged in cleaning or whether he was engaged in maintenance of a different sort.

We recognize that Labor Law § 240 (1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers (*see Panek v County of Albany*, 99 NY2d 452, 457; *Martinez v City of New York*, 93 NY2d 322, 325-326). We conclude, however, that plaintiff's activity was "not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240" (*Brown v Christopher St. Owners Corp.*, 87 NY2d 938, 939, *rearg denied* 88 NY2d 875). "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury' " (*Panek*, 99 NY2d at 457). "Cleaning" is not defined in Labor Law § 240 (1). The Third Department has relied on a dictionary definition of cleaning as "the 'rid[ding] of dirt, impurities, or *extraneous material*' " (*Vernum v Zilka*, 241 AD2d 885, 885-886, quoting Webster's Ninth New Collegiate Dictionary 247 [1988]; *see Chapman v International Bus. Machs. Corp.*, 253 AD2d 123, 126), and we agree that such a definition is appropriate.

We note that we do not consider the words used by the parties in describing plaintiff's work to be dispositive in determining whether the work constituted cleaning, although they are factors to consider. The record contains descriptions of plaintiff's work as cleaning, unplugging, unclogging, and clearing the hoppers. We conclude, however, that plaintiff's work did not entail the removal of any dirt or extraneous material. Rather, the hoppers had become jammed with dust particles from the paper shredding process, and plaintiff was merely clearing the jam by pushing the particles around so that they would fall to the bottom of the hoppers and onto the auger. The particles were collected at the bottom of the auger and sent to the generating facility to be burned. Inasmuch as the paper dust particles constituted fuel, just as the shredded paper in the processing facility constituted fuel, they cannot be considered dirt or extraneous material. Further, in unplugging the hoppers, plaintiff was not removing the dust particles but, rather, was keeping the particles in the hoppers and essentially stirring them around.

Moreover, the work that plaintiff was performing was integral to the functioning of the bag house inasmuch as the hoppers, as previously noted, needed to be cleared of dust between one and five times per 12-hour shift. The accumulation of dust was a consequence of the normal operation of the hoppers. Plaintiff did not clean the hoppers. Instead, he maintained the operation of the vacuum system. We therefore conclude that plaintiff was not engaged in cleaning within the meaning of Labor Law § 240 (1), but rather was engaged in maintenance of a different sort.

VI

We further conclude, however, that the court properly denied the cross motion with respect to the common-law negligence cause of action and Labor Law § 200 claim. Defendant failed to meet its initial burden of establishing that it did not direct or supervise the injury-producing work or that it did not have actual or constructive notice of the allegedly dangerous condition and, in any event, plaintiff raised a triable issue of fact in opposition to those parts of the cross motion (*see Shaheen v Hueber-Breuer Constr. Co.*, 4 AD3d 761, 763; *cf. Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397).

VII

Accordingly, we conclude that the order should be modified by denying plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and by granting that part of defendant's cross motion for summary judgment dismissing that claim and dismissing that claim.

SCUDDER, P.J., SMITH and PINE, JJ., concur with CENTRA, J.; FAHEY, J., dissents in part and votes to affirm in the following Opinion: I respectfully dissent in part. I agree with the majority both that we should place no reliance on our decision in *Farmer v Central Hudson Gas & Elec. Corp.* (299 AD2d 856, *amended on rearg* 302 AD2d 1017, *lv denied* 100 NY2d 501; *cf. Broggy v Rockefeller Group, Inc.*, 8 NY3d 675,

680), and that we should adopt the dictionary definition of cleaning as "the 'rid[ding] of dirt, impurities, or *extraneous material*' " (*Vernum v Zilka*, 241 AD2d 885, 885-886, quoting Webster's Ninth New Collegiate Dictionary 247 [1988]; *see Chapman v International Bus. Machs. Corp.*, 253 AD2d 123, 126). I cannot agree with the majority, however, that the Labor Law § 240 (1) claim should be dismissed, and I instead agree with Supreme Court that plaintiff is entitled to partial summary judgment on liability with respect to that claim.

The Court of Appeals both guides and constrains our analysis of the issue whether plaintiff's injury-producing work constituted "cleaning" within the meaning of Labor Law § 240 (1). We are required to construe that statute " 'as liberally as may be' " necessary to accomplish its protective intent (*Panek v County of Albany*, 99 NY2d 452, 457), and we must carefully consider " 'what type of work the plaintiff was performing at the time of injury' " in determining whether he may recover thereunder (*id.*).

Here, plaintiff sustained injuries while cleaning dust out of an auger that was part of a machine designed to remove such particles from the processing facility environment. At their depositions, plaintiff, his coworker, defendant's operations manager and defendant's plant manager each characterized the injury-producing work as the *cleaning* of the "bag house." That activity is no different from others that have been determined to constitute "cleaning" within the meaning of Labor Law § 240 (1), including clearing snow and ice from a roof (*see Nephew v Barcomb*, 260 AD2d 821, 822-823); dusting a mini-ledge and bulkhead in a mall (*see Vasey v Pyramid Co. of Buffalo*, 258 AD2d 906); power-washing a canopy or awning (*see Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98; *Ekere v Airmont Indus. Park*, 249 AD2d 104); removing dirt from ducts and a roof-top exhaust system (*see Kapovic v 450 Lexington Venture*, 280 AD2d 321, 322; *Bataraga v Burdick*, 261 AD2d 106); and washing commercial interior windows (*see Swiderska v New York Univ.*, 10 NY3d 792; *Stanley v Carrier Corp.*, 303 AD2d 1022).

Accordingly, I would affirm the order.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

475

CAF 07-02050

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF DAVONTAE D., CELIA D.C., SAMUEL D., KNOWLEDGE O.D., AND MARKELL D.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

CELIA D., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

LORENZO NAPOLITANO, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF COUNSEL), FOR PETITIONER-RESPONDENT.

ANTHONY LEAVY, LAW GUARDIAN, ROCHESTER, FOR DAVONTAE D., CELIA D.C., SAMUEL D., KNOWLEDGE O.D., AND MARKELL D.

Appeal from an order of the Family Court, Monroe County (Marilyn L. O'Connor, J.), entered September 6, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her five children pursuant to Social Services Law § 384-b based upon a finding that she had permanently neglected them. We conclude that Family Court abused its discretion in entering the order upon the mother's default after granting the motion of the mother's attorney to withdraw as counsel without notice to the mother (*see* CPLR 321 [b] [2]; Family Ct Act § 165 [b]; *Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116; *Matter of Michael W.*, 239 AD2d 865). "Because the purported withdrawal of counsel in this case was ineffective, the order entered by Family Court was improperly entered as a default order and appeal therefrom is not precluded" (*Matter of Tierra C.*, 227 AD2d 994, 995; *see Matter of Kwasi S.*, 221 AD2d 1029). We therefore reverse the order and remit the matter to Family Court for reassignment of counsel and a new hearing on the petition.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

484

KA 07-01253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALDO A. DIAZ, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

ALDO A. DIAZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 16, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to the contentions of defendant, we conclude that his waiver of the right to appeal is valid (*see People v Lopez*, 6 NY3d 248, 256), and thus that waiver encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737). Although the further contention of defendant that his plea was not knowingly, voluntarily and intelligently entered survives his waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he failed to move to withdraw his plea or to vacate the judgment of conviction (*see People v Neal*, 56 AD3d 1211). In any event, that contention lacks merit.

We have considered the contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

524

KA 06-02426

PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTINO BUCCINA, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (three counts) and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of rape in the first degree (Penal Law § 130.35 [1]) and one count of conspiracy in the fourth degree (§ 105.10 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the further contention of defendant, County Court did not abuse its discretion in refusing to sever his trial from that of his codefendants. The evidence against defendant and his codefendants was essentially identical, and the respective defenses were not in irreconcilable conflict (*see generally People v Mahboubian*, 74 NY2d 174, 183-185).

Defendant failed to preserve for our review his contention that he was denied his right to a fair trial when the court denied his motion to subpoena the psychiatric records of an accomplice who testified against him. In any event, the record belies the contention of defendant that he made such a motion and the record establishes that he in fact cross-examined the accomplice concerning the accomplice's psychiatric condition and medications. Contrary to defendant's further contention, the court did not abuse its discretion in permitting the People's expert to testify with respect to rape trauma syndrome. Such testimony "may be admitted to explain behavior

of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387; *see also People v Hryckewicz*, 221 AD2d 990, *lv denied* 88 NY2d 849).

We conclude that the court properly refused to dismiss the indictment for lack of geographical jurisdiction (*see* CPL 20.40). The People met their burden of establishing by a preponderance of the evidence that defendant and his accomplices conspired to rape the victim in Onondaga County (*see* CPL 20.40 [1] [b]; *see generally People v Giordano*, 87 NY2d 441, 446), and they also established that the rape occurred in a private vehicle during the course of a trip extending through multiple counties, including Onondaga County (*see* CPL 20.40 [4] [g]; *People v Curtis*, 286 AD2d 901, *lv denied* 97 NY2d 728).

We reject the further contention of defendant that he was denied his right to testify before the grand jury and thus that the court erred in denying his motion to dismiss the indictment on that ground. The record establishes that defendant refused to testify before the grand jury after he was informed that, pursuant to the policy of the jail where he was confined, he would not be allowed to change into street clothes before being transported to the grand jury. Inasmuch as defendant chose not to testify before the grand jury, it cannot be said that he was denied his statutory right to do so (*see* CPL 190.50 [5]). Further, to the extent that the policy of refusing to allow defendant to testify before the grand jury in street clothes relates to the integrity of the grand jury proceeding (*see* CPL 210.35 [5]), we note that, by his own conduct in refusing to testify, defendant has rendered it impossible for us to determine on the record before us whether such a policy "fail[ed] to conform to the requirements of article [190] to such degree that the integrity [of the grand jury proceeding was] impaired and prejudice to the defendant may [have] result[ed]" (CPL 210.35 [5]).

Entered: May 1, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

529

CA 08-02145

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF ELLEN REESE, MAXIMILLIAN G. TRESMOND, DAVID A. COLLINS, AND MICHAEL T. QUIGLEY, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, COMMISSIONER OF HEALTH OF STATE OF NEW YORK, RESPONDENT, BOARD OF TRUSTEES OF "UNIFIED GOVERNANCE STRUCTURE" JOINING ERIE COUNTY MEDICAL CENTER AND KALEIDA HEALTH SYSTEMS, AND WESTERN NEW YORK HEALTH SYSTEM, INC., RESPONDENTS-APPELLANTS.

GARFUNKEL, WILD & TRAVIS, P.C., GREAT NECK (LEONARD M. ROSENBERG OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

PETER A. REESE, BUFFALO, FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 15, 2008 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of attorneys' fees and costs and as modified the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to comply with the provisions of the Open Meetings Law ([OML] Public Officers Law art 7) and the Freedom of Information Law ([FOIL] Public Officers Law art 6). Contrary to the contention of respondents-appellants (hereafter, respondents), Supreme Court properly determined that they are public bodies within the meaning of the OML and thus are subject thereto. "[A] realistic appraisal of [the] functional relationship [of respondents] to affected parties and constituencies" establishes that respondent Western New York Health System, Inc. (WNYHS) performs a quintessentially governmental function, as did respondent Board of Trustees before it, by overseeing the merger and consolidation of services of the Erie County Medical Center Corporation (ECMCC), a public benefit corporation, with a privately owned entity (*Matter of Smith v City Univ. of N.Y.*, 92 NY2d 707, 713, *rearg denied* 93 NY2d 889; *see Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522, 528-529).

Indeed, the record establishes that WNYHS has final decision-making authority to carry out that function, including control of the public funding received by ECMCC (*see Matter of Holden v Board of Trustees of Cornell Univ.*, 80 AD2d 378, 380-381). Thus, respondents cannot be deemed to be mere advisory bodies exempt from the OML's requirements (*see Smith*, 92 NY2d at 713; *see generally Matter of Syracuse United Neighbors v City of Syracuse*, 80 AD2d 984, 984-985). We further conclude that the court properly determined that WNYHS will be considered a public body subject to the OML's requirements until the merger of ECMCC and the privately owned "Kaleida hospitals" is completed and ECMCC is no longer a public benefit corporation. Further, as respondents correctly concede, it necessarily follows that they are also public agencies for the purposes of FOIL (*see* Public Officers Law § 86 [3]; *see generally Matter of Wm. J. Kline & Sons v County of Hamilton*, 235 AD2d 44, 45-46).

We agree with respondents, however, that the court abused its discretion in awarding attorneys' fees and costs pursuant to the OML and FOIL, and we therefore modify the judgment accordingly. Respondents did not engage in "a persistent pattern of deliberate violations of the [OML]" (*Matter of Goetschius v Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552, 554; *see also* Public Officers Law § 107 [2]; *Matter of Gordon v Village of Monticello*, 87 NY2d 124, 128; *Matter of Canandaigua Messenger v Wharmby*, 292 AD2d 835), and they had a "reasonable basis for denying access" to the documents requested pursuant to FOIL (§ 89 [4] [c] [i]; *see Canandaigua Messenger*, 292 AD2d 835).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

541

KA 07-02654

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH GRAY, DEFENDANT-APPELLANT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH GRAY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 10, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Defendant moved to withdraw his plea on the ground that it was not knowingly, voluntarily, and intelligently entered. According to defendant, he pleaded guilty based on a mutual mistake. Indeed, the record establishes that Supreme Court erroneously assured defendant that he would retain the right to appeal with respect to the propriety of the court's refusal to dismiss the indictment based on the denial of defendant's right to testify before the grand jury pursuant to CPL 190.50 (5), and defendant relied on that erroneous assertion. We thus agree with defendant that the court abused its discretion in denying his motion because, in fact, the contention of defendant that he was denied his right to testify before the grand jury was forfeited by the plea (*see People v Winchester*, 38 AD3d 1336, 1337, *lv denied* 9 NY3d 853; *see generally People v Kyser*, 56 AD3d 1216, *lv denied* 11 NY3d 926; *People v Robertson*, 255 AD2d 968, *lv denied* 92 NY2d 1053). We therefore reverse the judgment, grant defendant's motion, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment (*see generally People v Di Raffaele*, 55 NY2d 234, 241).

In light of our determination, we do not reach the remaining contentions of defendant in his main and pro se supplemental briefs.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

542

KA 06-00214

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY E. BECOATS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Donald J. Mark, J.), rendered May 23, 2002. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

551

CA 08-01815

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF LODGE HOTEL, INC.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ERWIN PLANNING BOARD,
RESPONDENT-APPELLANT-RESPONDENT.

DAVIDSON & O'MARA, P.C., ELMIRA (PAMELA DOYLE GEE OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (KARL S. ESSLER OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered July 23, 2008 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition.

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

Memorandum: Respondent appeals from a judgment granting the petition seeking to annul its determination denying petitioner's application for site plan approval for the construction of a Tractor Supply store in a B-2 Office/Commercial District and remitting the matter to respondent for approval of the site plan. We affirm. Contrary to the contention of respondent, the determination denying petitioner's application was "illegal, arbitrary and capricious, and irrational on the record before it" (*Matter of Southside Academy Charter School v City of Syracuse* [appeal No. 2], 32 AD3d 1295, 1296; *see generally Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, *lv denied* 5 NY3d 713; *Matter of McKennett v Hines*, 289 AD2d 246, 247).

We agree with petitioner that respondent erred in denying its application on the ground that the site plan includes impermissible sidewalk retail pursuant to the Town of Erwin Zoning Law (Zoning Law). Although "sidewalk retail" is prohibited in the B-2 Office/Commercial District (*see* Zoning Law § 130-89 [D]), that term is not defined in the Zoning Law (*see* § 130-5 [B]), and we conclude that the term "sidewalk retail" is ambiguous. "Although a planning board's interpretation of a zoning ordinance is generally entitled to great deference . . ., there is a 'well-established but countervailing

precept that zoning restrictions . . . must be strictly construed against the municipality [that] enacted and seeks to enforce them, and that any ambiguity in the language employed must be resolved in favor of the property owner' " (*Matter of Francis Dev. & Mgt. Co. v Town of Clarence*, 306 AD2d 880, 881).

We further conclude that there is no basis in the record to support respondent's denial of the site plan application on the ground that certain outdoor storage and display areas constituted a "building" in excess of the size permitted in the B-2 Office/Commercial District. Those areas were neither roofed nor intended for shelter and thus do not constitute buildings within the meaning of the Zoning Law (*see* § 130-5 [B]; *see generally Southside Academy Charter School*, 32 AD3d at 1296). In addition, respondent's denial of the site plan application on the ground that those areas would create an appearance inconsistent with the surrounding area was irrational inasmuch as the landscaping incorporated in the site plan screens the alleged objectionable features from public view (*see generally Matter of Exxon Corp. v Gallelli*, 192 AD2d 706). To the extent that respondent's denial of the site plan application was based on the ground that the proposed store was a nonconforming use under the Zoning Law, we note that respondent was bound by the use variance previously granted by the Town of Erwin Zoning Board for the construction of the store (*see Matter of Gershowitz v Planning Bd. of Town of Brookhaven*, 52 NY2d 763, 765; *Matter of Jamil v Village of Scarsdale Planning Bd.*, 24 AD3d 552, 554). We reject respondent's alternative contention that Supreme Court erred in remitting the matter to respondent for approval of the site plan rather than for the purpose of permitting additional conditions to be included in the site plan (*see Matter of Viscio v Town of Guilderland Planning Bd.*, 138 AD2d 795, 798).

Finally, we reject the contention of petitioner on its cross appeal that respondent's denial of the site plan application was frivolous (*see* 22 NYCRR 130-1.1 [c] [1]), and we thus conclude that the court did not abuse its discretion in denying petitioner's request for sanctions (*see generally Navin v Mosquera*, 30 AD3d 883, 883-884).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

563

KA 08-00097

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARA GRAVINO, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered September 14, 2007. The judgment convicted defendant, upon her plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of rape in the third degree (Penal Law § 130.25 [2]). County Court did not abuse its discretion in denying defendant's pro se oral motion to withdraw the plea (*see People v McNally*, 59 AD3d 959). "[D]efendant's specifications of ineffective assistance concern matters outside the record and thus must be raised by way of a CPL article 440 motion" (*People v Hilken*, 6 AD3d 1109, 1110, *lv denied* 3 NY3d 641). Contrary to the contention of defendant, her lack of awareness prior to sentencing that she would be required to register as a sex offender did not affect the voluntariness of her plea (*see People v Smith*, 37 AD3d 1141, 1142, *lv denied* 9 NY3d 851, 926). Contrary to defendant's further contention, the record of the *Huntley* hearing supports the court's determination that the statement of defendant to the police was voluntarily made after she waived her *Miranda* rights (*see People v Stanton*, 43 AD3d 1299, *lv denied* 9 NY3d 993). Finally, the sentence is not unduly harsh or severe.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

591

CA 08-02415

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

DELORES JAMES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS C. STEINMILLER, DEFENDANT-APPELLANT.

GOLDBERG & SEGALLA LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 18, 2008 in a personal injury action. 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 to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant either created or had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell on a substance near the driveway on defendant's property during a garage sale. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant either created or had actual notice of the allegedly dangerous condition, and we therefore modify the order accordingly. We further conclude, however, that the court properly denied defendant's motion to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition. Although defendant submitted evidence establishing that he had no knowledge of the substance and that it could not be identified, even by plaintiff, defendant "cannot establish [his] entitlement to summary judgment . . . by noting alleged gaps in plaintiff['s] proof" (*Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407; *see Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980). Thus, defendant failed to meet his initial burden with respect to constructive notice, i.e., he failed to establish that the substance had not been on his property "for a sufficient length of

time to permit [him] to discover and remedy the condition" (*Mancini v Quality Mkts.*, 256 AD2d 1177, 1178; *see Johnson v Panera, LLC*, 59 AD3d 1118).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

621

KA 07-02581

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME PERRY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered September 4, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20) and criminal possession of stolen property in the fifth degree (§ 165.40). Defendant failed to preserve for our review his contention that County Court erred in admitting at trial the testimony of a police officer that bolstered the identifications of defendant by the victim and a witness (*see People v Cala*, 50 AD3d 1581, *lv denied* 10 NY3d 957; *People v Mattis*, 46 AD3d 929, 931). In any event, that contention is without merit inasmuch as the testimony provided a narrative of the events that led to defendant's arrest (*see People v Mendoza*, 35 AD3d 507, *lv denied* 8 NY3d 987; *People v Smalls*, 293 AD2d 500, 501, *lv denied* 98 NY2d 681). We reject the further contention of defendant that he was denied the right to effective assistance of counsel based on the failure of defense counsel to object to the officer's testimony and to renew his motion for a trial order of dismissal. As noted, the officer's testimony was properly admitted in evidence, and we further note that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The "failure to make [an objection or] a motion . . . that has little or no chance of success" does not constitute ineffective assistance of counsel (*People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945 [internal quotation marks omitted]). Viewing defense counsel's representation as a whole, we conclude that defendant received effective assistance of counsel (*see generally People v*

Baldi, 54 NY2d 137, 147).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

622

KA 07-00534

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAOSHA R. HENDRIX, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, J.), rendered December 19, 2006. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We agree with defendant that her waiver of the right to appeal is invalid inasmuch as the record fails to "establish that [she] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Cain*, 29 AD3d 1157; *People v Popson*, 28 AD3d 870). The further contention of defendant that her plea was not voluntarily entered because she provided only monosyllabic responses to County Court's questions is actually a challenge to the factual sufficiency of the plea allocution (*see People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932). Although that contention is not encompassed by the invalid waiver of the right to appeal, defendant failed to preserve that contention for our review (*see People v Lopez*, 71 NY2d 662, 665; *People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861). In any event, that contention lacks merit. "The unequivocal affirmative responses of defendant to [the c]ourt's questions established all of the essential elements of" the crime to which she pleaded guilty (*People v Ramos*, 56 AD3d 1180, 1181, *lv denied* 12 NY3d 761; *see People v Harris*, 51 AD3d 1335, *lv denied* 11 NY3d 789).

Contrary to the further contention of defendant, the court did not abuse its discretion in enhancing the sentence without conducting

a hearing to determine the validity of her arrest during the time between the plea and the sentencing hearing. Defendant did not deny that she committed the crime for which she was arrested or otherwise challenge the validity of the arrest (*see People v Huggins*, 45 AD3d 1380, *lv denied* 9 NY3d 1006; *People v Wilson*, 257 AD2d 674, *lv denied* 93 NY2d 981; *see generally People v Outley*, 80 NY2d 702, 713).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

624

KAH 08-00319

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KAWASKI DICKERSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID UNGER, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered December 10, 2007 in a proceeding pursuant to CPLR article 70. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: On appeal from a judgment dismissing his petition for a writ of habeas corpus, petitioner correctly concedes that the appeal is moot because he has been released from incarceration. We reject his contention that the issues raised herein fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). The issue whether the Department of Correctional Services (DOCS) was entitled to ignore a sentencing recommendation and deny petitioner admission to a shock incarceration program is neither a novel issue nor one that will evade review (*see generally id.*). In any event, we note that it is well established that DOCS has broad discretion to evaluate applicants for shock incarceration (*see* Correction Law § 867 [2], [5]; *Matter of Gomez v Obot*, 170 AD2d 1036, *lv denied* 78 NY2d 856), and that neither the People nor the sentencing court have the authority to grant admission into the program (*see People v Vanguilder*, 32 AD3d 1110, *lv denied* 7 NY3d 904; *People v Taylor*, 284 AD2d 573, *lv denied* 96 NY2d 925; *see also* § 866 [2]; § 867 [2]). The further issue whether petitioner was fully informed of the consequences of his plea is also neither novel nor likely to evade review (*see e.g. People v Morbillo*,

56 AD3d 694; *People v Minter*, 42 AD3d 914; *see generally Hearst Corp.*, 50 NY2d at 714-715).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

645

KA 04-00880

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESUS M. GONZALEZ, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JESUS M. GONZALEZ, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered February 26, 2004. The judgment convicted defendant, upon a nonjury verdict, of attempted sodomy in the first degree, attempted sodomy in the second degree, attempted sexual abuse in the first degree and attempted endangering the welfare of a vulnerable elderly person in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, attempted sodomy in the first degree (Penal Law § 110.00, former § 130.50 [2]), attempted sodomy in the second degree (§ 110.00, former § 130.45 [2]) and attempted sexual abuse in the first degree (§§ 110.00, 130.65 [2]). The conviction arises out of defendant's conduct as a resident aide at a residential facility for persons with dementia and Alzheimer's disease. Defendant contends that the evidence is legally insufficient to support the conviction of attempted sodomy in the first and second degrees and attempted sexual abuse in the first degree because there was no evidence of the victim's physical helplessness or defendant's intent to commit sodomy. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention is without merit. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that the victim was " '[p]hysically helpless' " (§ 130.00 [7]; *see* former § 130.50 [2]; § 130.65 [2]), i.e., that she had advanced Alzheimer's disease and was "physically

unable to communicate unwillingness to an act" (§ 130.00 [7]; *see People v Green*, 298 AD2d 143, 144, *lv denied* 99 NY2d 559). The evidence is also legally sufficient with respect to defendant's intent to commit sodomy. A resident aide supervisor who unlocked the victim's door and observed defendant with the victim provided explicit testimony concerning defendant's sexual acts with the victim, thus establishing that defendant "engage[d] in conduct which tend[ed] to effect the commission" of the crimes (§ 110.00; *see also People v Garayua*, 268 AD2d 283, *lv denied* 95 NY2d 796). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to the contention of defendant, Supreme Court properly allowed several witnesses to testify with respect to prior incidents in which he was found in the presence of patients with his pants undone. Defendant had told the police that his pants had fallen down in the presence of the victim when the button on his pants "suddenly broke," and the evidence of the prior incidents was thus relevant to establish the absence of mistake or accident, as well as intent (*see People v Brown*, 57 AD3d 1461, 1463; *see generally People v Allweiss*, 48 NY2d 40, 46-47; *People v Molineux*, 168 NY 264, 293-294). We reject the further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal inasmuch as that motion would have been unsuccessful (*see People v Forsythe*, 59 AD3d 1121, 1123-1124). Contrary to the contention of defendant in his pro se supplemental brief, defense counsel's failure to call certain witnesses was a matter of strategy and also did not constitute ineffective assistance of counsel (*see People v Botting*, 8 AD3d 1064, 1066, *lv denied* 3 NY3d 671; *People v Hernandez*, 295 AD2d 989, *lv denied* 98 NY2d 711; *People v Brooks*, 283 AD2d 367, *lv denied* 96 NY2d 916). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe. We have examined the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

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

657

KA 06-01233

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. CAMPBELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered March 24, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two counts), burglary in the first degree (two counts) and grand larceny in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). We agree with defendant that his waiver of the right to appeal is invalid because neither the written plea agreement nor the plea colloquy established that defendant understood the distinction between the right to appeal and the trial rights he forfeited by pleading guilty (*see People v Moyett*, 7 NY3d 892, 893; *People v Williams*, 59 AD3d 339, 341; *People v Elcine*, 43 AD3d 1176, 1177). The further contention of defendant that he was denied effective assistance of counsel therefore survives the invalid waiver of the right to appeal (*see People v D'Agostino*, 55 AD3d 353, *lv denied* 11 NY3d 924; *People v Stokely*, 49 AD3d 966, 968), and it survives the plea to the extent that defendant contends that the plea was infected by the alleged ineffective assistance of counsel (*see People v Gimenez*, 59 AD3d 1088). We nevertheless conclude that defendant's contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). To the extent that defendant contends that defense counsel was ineffective because he coerced defendant into pleading guilty, that contention is belied by defendant's statement during the plea colloquy that the plea was not the result of any threats, pressure or coercion (*see People v McKoy*, 60 AD3d 1374; *People v Singletary*, 51 AD3d 1334, *lv denied* 11 NY3d 741; *People v Gedin*, 46 AD3d 701, *lv denied* 10 NY3d 840). Further, defendant failed to " 'demonstrate the absence of strategic or other legitimate

explanations' " for defense counsel's failure to pursue an extreme emotional disturbance defense and to request a mental competency examination (*People v Benevento*, 91 NY2d 708, 712). In any event, the record does not support an extreme emotional disturbance defense, nor does it support the need for a mental competency examination.

We further conclude that County Court did not abuse its discretion in denying defendant's motion to withdraw the plea on the ground of coercion without conducting a hearing inasmuch as the record is devoid of "a genuine question of fact as to the plea's voluntariness" (*Singletary*, 51 AD3d at 1334; *see Gedin*, 46 AD3d 701).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

658

KA 08-02069

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL DAVIS, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 22, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the fourth 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 Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal mischief in the fourth degree (Penal Law § 145.00 [1]), defendant contends that Supreme Court erred in denying his request for a hearing to determine the validity of his post-plea arrest (*see People v Outley*, 80 NY2d 702). We agree. The record establishes that the court informed defendant during the plea proceeding that, in the event that he was arrested between the time of the plea and sentencing, he could be sentenced to a term of incarceration of up to one year. At the sentencing hearing, the prosecutor indicated that defendant had in fact been "rearrested" and that the case was pending in City Court. Defense counsel stated that he did not have the "lab report" or the "accusatory documents upon which [defendant] was arrested" and that the court was obligated to afford defendant the opportunity to controvert the legality or reasonableness of the arrest.

We conclude that the court erred in imposing an enhanced sentence without conducting an *Outley* hearing. Where, as here, "an issue is raised concerning the validity of the post-plea charge or there is a denial of any involvement in the underlying crime, the court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without foundation" (*Outley*, 80 NY2d at 713). The mere fact that defendant was arrested, without more, is insufficient

to justify an enhanced sentence based on a post-plea arrest (*id.*). Here, the court failed to conduct the requisite inquiry pursuant to *Outley.* We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing following an *Outley* hearing. If the court determines following the *Outley* hearing that the arrest lacked a legitimate basis, the court must impose a sentence of probation in accordance with the terms of the plea agreement or afford defendant the opportunity to withdraw his plea of guilty.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

662

KA 08-00493

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES LITTLETON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 2, 2008. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). We agree with defendant that his waiver of the right to appeal was invalid. County Court's brief reference to the waiver of the right to appeal during the plea colloquy was insufficient to establish that the waiver was a knowing and voluntary choice (*see People v Thousand*, 41 AD3d 1272, *lv denied* 9 NY3d 927; *People v Van Every*, 1 AD3d 977, 978, *lv denied* 1 NY3d 602). Although the further contention of defendant that the court erred in refusing to suppress the handgun seized from his truck and the cocaine seized from his house is therefore properly before us (*cf. People v Kemp*, 94 NY2d 831, 833), we nevertheless reject that contention.

With respect to the handgun, the evidence at the suppression hearing established that, while on routine patrol in the area of defendant's house, the police observed defendant remove the handgun from his waistband and place it in his truck. We conclude that the police thus had, at a minimum, reasonable suspicion to believe that defendant unlawfully possessed a weapon and that their "investigative detention [of defendant was not] unreasonable" (*People v Hicks*, 68 NY2d 234, 241; *see generally People v Allen*, 73 NY2d 378, 379-380). They also were justified in looking through the window of the truck (*see People v Tillery*, 60 AD3d 1203; *People v Speicher*, 244 AD2d 833, 834) and, upon observing the top of a handgun in the door pocket, they

properly seized the handgun as contraband or the instrumentality of a crime (*see People v Belton*, 55 NY2d 49, 54-55, *rearg denied* 56 NY2d 646; *People v Delarosa*, 28 AD3d 1186, *lv denied* 7 NY3d 811).

With respect to the cocaine, we reject the contention of defendant that the consent to search his house obtained from a witness was invalid. The People met their burden of establishing that the police reasonably believed that the witness had the requisite authority to consent to the search of defendant's house (*see People v Gonzalez*, 88 NY2d 289, 295; *People v Adams*, 53 NY2d 1, 9-10, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854). The evidence at the suppression hearing established that the witness exited defendant's house when she observed the police outside and that her children were inside the house. In addition, she told the police that she and the children lived with defendant in the house and that she and defendant shared the bedroom in which the cocaine was found.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

665

CA 08-02502

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

RUDOLPH V. HEROD AND ARLENE HEROD,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL C. MELE, COUNTY OF ORLEANS,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RICHARD G. BERGER, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James H. Dillon, J.), entered September 10, 2008 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants Michael C. Mele, County of Orleans, and Orleans County Sheriff's Department for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment dismissing the complaint against defendant Michael C. Mele and dismissing the complaint against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when the vehicle operated by plaintiff wife in which plaintiff husband was a passenger collided with a police vehicle operated by defendant Michael C. Mele, a Sheriff's Deputy for defendant County of Orleans (County). We conclude that Supreme Court erred in denying that part of the motion of Mele, the County, and defendant Orleans County Sheriff's Department (collectively, County defendants) for partial summary judgment dismissing the complaint against Mele, and we therefore modify the order accordingly. At the time of the collision, Mele was operating a police vehicle while responding to a dispatch call concerning a fight in progress. We thus conclude that Mele was operating an authorized emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 114-b), and thus that the reckless disregard standard of liability pursuant to Vehicle and Traffic Law § 1104 (e), rather than that of ordinary negligence, applies to his actions (*see Criscione v City of New York*, 97 NY2d 152, 157-158; *Hughes v Chiera*, 4 AD3d 872). The County defendants established as a matter of law that Mele's

conduct did not rise to the level of reckless disregard for the safety of others (*see Szczerbiak v Pilat*, 90 NY2d 553, 557), and plaintiffs failed to raise a triable issue of fact in opposition to that part of the motion (*see Salzano v Korba*, 296 AD2d 393, 394-395; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The fact that Mele was exceeding the posted speed limit at the time of the collision "certainly cannot alone constitute a predicate for liability, [inasmuch as such conduct] is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3)" (*Saarinen v Kerr*, 84 NY2d 494, 503). Even assuming, arguendo, that Mele was traveling on wet roads without having activated the lights and siren on his police vehicle and that he experienced a short-term reduction in visibility of the intersection where the collision occurred, we conclude that those factors also do not rise to the level of reckless disregard for the safety of others under the circumstances of this case. The record establishes that he had the right-of-way at the intersection, and there is no evidence of any traffic at or near that intersection other than plaintiffs' vehicle (*cf. Spalla v Village of Brockport*, 295 AD2d 900, 900-901; *Allen v Town of Amherst*, 294 AD2d 828, 829, *lv denied* 3 NY3d 609). Based on the threat to the safety of the persons involved in the fight to which Mele was responding, he was duty-bound to use all reasonable means to arrive at the scene as soon as possible (*see Saarinen*, 84 NY2d at 502-503). The risks taken by Mele in responding to the call were justified (*see Szczerbiak*, 90 NY2d at 557; *Saarinen*, 84 NY2d at 503). Finally, the conclusory assertions in the affidavit of plaintiffs' accident reconstruction expert were insufficient to raise an issue of fact to defeat that part of the motion with respect to Mele (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129; *Liccione v Gearing*, 252 AD2d 956, 957, *lv denied* 92 NY2d 818).

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court