SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 26, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

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

1432

KAH 09-00943

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DERRICK MCPHERSON, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN WILLIAMS, SUPERINTENDENT, WILLARD DRUG
TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated February 2, 2009 in a habeas corpus proceeding. The judgment granted the petition and directed release of petitioner to parole supervision.

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

Memorandum: Respondent appeals from a judgment granting the petition seeking a writ of habeas corpus and directing petitioner's release to parole supervision. During the pendency of this appeal, however, petitioner's parole was violated and petitioner is presently incarcerated. This appeal therefore has been rendered moot (*see People ex rel. Maldonado v Williams*, 67 AD3d 1328), and the exception to the mootness doctrine does not apply (*cf. Lindsay v New York State Bd. of Parole*, 48 NY2d 883; *People ex rel. Frisbie v Hammock*, 112 AD2d 721).

All concur except HURLBUTT, J.P., who is not participating.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1677

CA 09-00651

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

CHRIS KEEFE BUILDERS, INC., DOING BUSINESS AS CHRIS KEEFE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS B. HAZZARD, ET AL., DEFENDANTS, AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR QUICKEN LOANS, INC., DEFENDANT-RESPONDENT.

KEENAN STONE LAW CENTRE, PC, HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered January 16, 2009 in a mechanic's lien foreclosure action. The order, among other things, denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by granting the motion for leave to renew and, upon renewal, vacating the order compelling arbitration and denying that part of the motion seeking to remove the stay of enforcement of the arbitration award and as modified the order is affirmed without costs.

Memorandum: Thomas B. Hazzard and Tracy Leigh Hazzard (Hazzard defendants) entered into two contracts with plaintiff to perform an extensive renovation project at their New York residence. Only the second of the two contracts contained an arbitration clause. When disputes arose and plaintiff was not paid, plaintiff filed a mechanic's lien against the property in the amount of $264,045.09. Meanwhile, the Hazzard defendants sought to secure financing with which to pay plaintiff. In order to secure two mortgages from defendant Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Quicken Loans, Inc., the Hazzard defendants provided a letter, purportedly written by Chris Keefe, stating that the Hazzard defendants had paid the total amount of the mechanic's lien and that Keefe would inform the Chautauqua County Clerk of that fact in order to remove the lien. Plaintiff contends that the letter was forged.

The Hazzard defendants received two mortgages, one from MERS, as

nominee for GMAC (MERS GMAC), and one from MERS, as nominee for Quicken (MERS Quicken). Plaintiff, however, never received any proceeds from those mortgages. Plaintiff thereafter commenced this action against the Hazzard defendants and MERS Quicken seeking, inter alia, judgment "decreeing" that plaintiff has a valid lien on the premises in the amount of $264,045.09. The record contains an answer from MERS Quicken as well as an amended answer from MERS GMAC, stating that it was incorrectly sued as MERS Quicken. In addition, in lieu of answering the complaint, the Hazzard defendants moved to compel arbitration based on the arbitration clause in the second contract. Although plaintiff initially opposed the motion, it eventually withdrew its opposition. Supreme Court stayed the action against MERS Quicken, and implicitly against MERS GMAC, pending the resolution of the arbitration.

Plaintiff was awarded the sum of $122,606.82 in the arbitration, but thereafter filed a first amended complaint asserting new causes of action, including fraud in the inducement of the second contract with the Hazzard defendants. In the alternative, plaintiff sought to confirm the arbitration award. The court granted plaintiff the alternative relief sought, but stayed enforcement of the arbitration award for four months to afford plaintiff the opportunity to conduct discovery on the issue of fraud in the inducement.

The Hazzard defendants failed to answer the first amended complaint, and the court thus granted plaintiff's motion for a default judgment against them. MERS GMAC then moved to vacate the stay of enforcement of the arbitration award as well as the stay of plaintiff's action against it. Plaintiff opposed that motion and moved for leave to renew its opposition to the motion of the Hazzard defendants seeking to compel arbitration and to vacate the order granting that relief. Plaintiff also moved for partial summary judgment dismissing the "affirmative defenses and counterclaims" of MERS Quicken and MERS GMAC, alleging equitable subrogation and estoppel.

In opposition to plaintiff's two motions, MERS GMAC contended that the motion for leave to renew was untimely because it was filed after the deadline for motion practice set forth in the court's scheduling order and that plaintiff had not submitted the new evidence required for such a motion (*see* CPLR 2221 [e] [2]). MERS GMAC also contended that the motion for partial summary judgment was premature but nevertheless requested that the court, sua sponte, grant MERS GMAC partial summary judgment on its equitable subrogation counterclaim.

The court denied plaintiff's motions, denied the request of MERS GMAC for partial summary judgment, and vacated all stays.

We conclude that the court improvidently exercised its discretion in denying plaintiff's motion for leave to renew as untimely. There is no dispute that the motion was filed approximately three weeks after the deadline set forth in the court's scheduling order. Plaintiff's attorney, however, denied ever having received a copy of

that scheduling order, and he further denied that the court's law clerk informed him of a final deadline for motion practice. Plaintiff's attorney also noted that bankruptcy proceedings filed by the Hazzard defendants in California had required his attention.

There is no dispute that courts have the discretion to issue appropriate sanctions for a party's failure to comply with a scheduling order (*see Matter of SDR Holdings v Town of Fort Edward*, 290 AD2d 696, 697; *see generally Kihl v Pfeffer*, 94 NY2d 118, 123). We conclude, however, that plaintiff's attorney established a "lack of awareness of the deadline" in the scheduling order and good cause for the delay in seeking leave to renew (*Town of Kinderhook v Slovak*, 47 AD3d 1093). Thus, we cannot conclude that plaintiff's failure to comply with the scheduling order in a timely manner is the result of " 'a deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay that would be deserving of the most vehement condemnation' " (*Altu v Clark*, 20 AD3d 749, 751; *see Pangea Farm, Inc. v Sack*, 51 AD3d 1352, 1354; *cf. O'Brien v Occidental Chem. Corp.* [appeal No. 3], 266 AD2d 915). "Weighed against the merits of the claim and the lack of prejudice to defendants, [any] neglect [on the part of plaintiff's attorney] is inconsequential" (*Ball v Sano*, 282 AD2d 330, 331).

Contrary to the contention of MERS GMAC, plaintiff in fact submitted new evidence in support of the motion for leave to renew. Following the court's order compelling arbitration, plaintiff filed a first amended complaint in which it alleged that the Hazzard defendants had fraudulently induced plaintiff to enter into the second contract. As previously noted, the Hazzard defendants failed to answer that complaint, and a default judgment was entered against them, in favor of plaintiff. "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71). Thus, the new evidence upon which the motion for leave to renew was based is that the Hazzard defendants are now deemed to have admitted that they fraudulently induced plaintiff to enter into the second contract, which contained the arbitration clause.

MERS GMAC further contends that any action against the Hazzard defendants was stayed as a result of the pending bankruptcy proceedings in California and thus that they cannot be held accountable for their failure to answer the first amended complaint. We reject that contention. As a general rule, "[t]he filing of a bankruptcy petition automatically stays the commencement of any action or proceeding to recover a claim against the debtor that arose before the commencement of the bankruptcy proceeding" (*Levant v National Car Rental, Inc.*, 33 AD3d 367, 368; *see* 11 USC § 362 [a] [1]; *Storini v Hortiales*, 16 AD3d 1110, 1110-1111). Here, however, the Bankruptcy Court in California expressly granted relief from the automatic stay to creditors on the New York property at issue in this case. In any event, plaintiff filed the first amended complaint after the stay was lifted (*cf. Levant*, 33 AD3d at 368). Thus, the Hazzard defendants are

accountable for their default in failing to answer that amended complaint and the de facto admissions that flow from that default.

Because the Hazzard defendants have admitted that they fraudulently induced plaintiff to enter into the contract containing the arbitration clause, the court should have granted the motion for leave to renew based on that new evidence and, upon renewal, vacated the order compelling arbitration and denied that part of the motion seeking to remove the stay of enforcement of the arbitration award. We therefore modify the order accordingly.

We agree with the court, however, that neither plaintiff nor MERS GMAC is entitled to partial summary judgment with respect to the "affirmative defenses and counterclaims" alleging equitable subrogation and estoppel, nor is MERS GMAC entitled to partial summary judgment on its equitable subrogation counterclaim. With respect to equitable subrogation, there are issues of fact whether MERS GMAC was aware of and disregarded plaintiff's existing lien (*see King v Pelkofski*, 20 NY2d 326, 333-334; *R.C.P.S. Assoc. v Karam Devs.*, 238 AD2d 492, 493). Further, with respect to estoppel, there are issues of fact whether Chris Keefe wrote the letter indicating that the lien had been satisfied and, if so, whether MERS GMAC reasonably relied on that letter to its detriment (*see generally Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 368-369).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

21

CA 09-01232

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

RLI INSURANCE COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LESLIE SMIEDALA, ET AL., DEFENDANTS,
MICHAEL J. HALE AND REGIONAL INTEGRATED
LOGISTICS, INC., DEFENDANTS-RESPONDENTS.

SCHINDEL, FARMAN, LIPSIUS, GARDNER & RABINOVICH LLP, NEW YORK CITY (DAVID BENHAIM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 25, 2009 in a declaratory judgment action. The judgment, inter alia, granted the motion of defendants Michael J. Hale and Regional Integrated Logistics, Inc. for summary judgment and declared that plaintiff is obligated to defend and indemnify them in the underlying action.

It is hereby ORDERED that the judgment so appealed from is modified on the law by denying the motion seeking summary judgment in part, vacating the declaration in part and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that plaintiff is not obligated to defend or indemnify defendant Michael J. Hale in the underlying action and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking judgment declaring that it is not obligated to defend or indemnify defendants Michael J. Hale and Regional Integrated Logistics, Inc. (Regional) in the underlying personal injury action and related third-party action under the commercial automobile insurance policy issued by plaintiff to Regional. Defendant Leslie Smiedala, the plaintiff in the underlying action, seeks damages for injuries he allegedly sustained when the vehicle in which he was a passenger collided with a vehicle driven by Hale, which he had leased from defendants-third-party plaintiffs Audi Financial Services and VW Leasing, Ltd. (Audi/VW). Hale, an employee of Regional, was driving to the bank at the time of the accident in order to make a deposit for Regional. Audi/VW commenced a third-party action against Regional seeking contribution

and/or indemnification for any liability arising from Hale's negligence under the doctrine of respondeat superior.

Supreme Court denied the initial motion of Hale and Regional seeking summary judgment declaring that plaintiff must defend and indemnify them under the policy, but thereafter granted their motion for leave to reargue and, upon granting the motion for reargument, granted the initial motion and issued the declaration sought by Hale and Regional. We conclude that the court properly granted that part of the initial motion seeking summary judgment declaring that plaintiff must defend and indemnify Regional in the underlying action. The "Notice of Occurrence/Claim" submitted to plaintiff on March 29, 2007 constituted notice of the occurrence on behalf of both Hale and Regional, and plaintiff failed to provide a legitimate excuse for its 95-day delay in disclaiming liability or denying coverage (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69). That unexcused delay is unreasonable as a matter of law, and thus plaintiff "may not disclaim liability or deny coverage in this case" with respect to Regional, regardless of whether Regional's notice of the occurrence was timely (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030, *rearg denied* 47 NY2d 951; *see First Fin. Ins. Co.*, 1 NY3d at 67).

We further conclude, however, that the court erred in granting that part of the initial motion with respect to Hale. He is an insured under the policy only if he was using, with Regional's permission, an automobile owned, hired or borrowed by Regional, and it is undisputed that the automobile was not owned or hired by Regional. Considering "the plain language of the contract as it would be understood by an average or ordinary citizen" (*Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 992), we conclude that only "an unnatural or unreasonable construction" of that provision supports an interpretation that Hale's personal vehicle was borrowed by Regional and then used by Hale with Regional's permission (*Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 987; *see Richmond Farms Dairy, LLC v National Grange Mut. Ins. Co.*, 60 AD3d 1411, 1415). Thus, given that Hale is not an insured under the policy, plaintiff was not required to disclaim liability or deny coverage in a timely manner (*see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188). We therefore modify the judgment accordingly.

PERADOTTO and GREEN, JJ., concur; CARNI, J., concurs in the result in the following Memorandum: I respectfully concur in the result. I agree with the conclusion of the majority that defendant Michael J. Hale is not an insured under the insurance policy issued by plaintiff to defendant Regional Integrated Logistics, Inc. (Regional), but my reasoning differs from that of the majority. Regardless of whether Regional owned, hired, or borrowed Hale's 2000 Audi motor vehicle, there is no dispute that Hale's vehicle was a "private passenger type auto" within the meaning of the "Who is An Insured" section of the policy. The definition of an insured under Regional's policy is contained in the "Coverage" section of the policy, and the "Exclusions" from coverage are contained in an entirely distinct section of the policy. The plain language of the coverage section of

the policy provides that "[t]he owner or anyone else from whom you hire or borrow a covered 'private passenger type auto' " is not an insured. Inasmuch as Hale was operating a "private passenger type auto," he was not an insured under the coverage section of the policy, and there is no coverage. Because there is no coverage, Regional had "no obligation to disclaim or deny" coverage (*Zappone v Home Ins. Co.*, 55 NY2d 131, 139).

SCUDDER, P.J., and GORSKI, J., dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part. In our view, this is not a case in which the policy "covers neither the person nor the vehicle involved in [the] automobile accident" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 139). At the time of the accident, defendant Michael J. Hale was using his personal vehicle to conduct business on behalf of defendant Regional Integrated Logistics, Inc. (Regional). The commercial automobile insurance policy at issue provides coverage for any automobile, regardless of ownership, subject to certain specified exceptions. In light of the broad and inclusive language of the policy, we disagree with the conclusion of the majority that a determination that Hale was borrowing a Regional vehicle at the relevant time is "an unnatural or unreasonable construction" of the policy (*Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 987). We therefore conclude that, but for the application of specified exceptions to coverage, Hale's claim falls within the policy's coverage provisions, and Regional was required to provide a timely denial of coverage based upon those specified exceptions (*see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 190; *Penn-America Group v Zoobar, Inc.*, 305 AD2d 1116, 1117-1118, *lv denied* 100 NY2d 511). Inasmuch as we agree with the majority that plaintiff failed to provide a legitimate excuse for its untimely disclaimer of liability or denial of coverage (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69; *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030, *rearg denied* 47 NY2d 951), we would affirm the judgment in its entirety.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

82

CA 09-00986

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

SARAH CORSIVO, ADMINISTRATRIX OF THE ESTATE
OF AUGUST R. CORSIVO, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M&S HOTELS, LLC, MOHAN SARAN,
DEFENDANTS-APPELLANTS,
DEC MANAGEMENT, INC., MICHAEL THOMAS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

THOMAS W. SZCZERBACKI, PLAINTIFF-RESPONDENT,

V

M&S HOTELS, LLC, HARINDER MOHAN AND MANJIT
SARAN PARTNERSHIP, DEFENDANTS-APPELLANTS,
DEC MANAGEMENT, INC., MICHAEL THOMAS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 2.)

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY M. WILKENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 16, 2009. The order, inter alia, granted that part of the motion of defendants DEC Management, Inc. and Michael Thomas to dismiss the cross claim for contractual indemnification of defendants M&S Hotels, LLC and Mohan Saran in action No. 1.

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

Memorandum: These actions alleging common-law negligence and violations of the Labor Law arise out of the partial collapse of a hotel under construction, which resulted in the death of August R. Corsivo, the plaintiff's decedent in action No. 1, and in injury to

Thomas W. Szczerbacki, the plaintiff in action No. 2. Supreme Court properly granted that part of the motion of DEC Management, Inc. (DEC) and Michael Thomas (collectively, defendant contractors) seeking dismissal of the cross claim for contractual indemnification asserted by defendant owners against them in each action, i.e., M&S Hotels, LLC and Mohan Saran in action No. 1 and M&S Hotels, LLC and Harinder Mohan and Manjit Saran Partnership in action No. 2. The court also properly denied the cross motion of defendant owners seeking leave to amend their answers in each action to include a cross claim against DEC for defense and indemnification pursuant to the indemnification provision of the construction contract between, inter alia, M&S Hotels, LLC, Mohan Saran and defendant contractors. Contrary to the contention of defendant owners, the forum selection provision of that contract unequivocally requires that all legal proceedings arising thereunder shall be litigated in Fulton County, Georgia, and we agree with the court that the cross claims arise under the contract (*see Tourtellot v Harza Architects, Engrs. & Constr. Mgrs.*, 55 AD3d 1096, 1097-1098). Further, we agree with the court's conclusion that defendant owners failed to demonstrate any basis for denying enforcement of the forum selection provision (*see Premium Risk Group v Legion Ins. Co.*, 294 AD2d 345, 346).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

102

CA 09-01411

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

UTICA LAND EQUITIES LLC, PLAINTIFF,

V ORDER

UTICA HOLDING COMPANY, DEFENDANT.

UTICA HOLDING COMPANY, COUNTERCLAIM PLAINTIFF-RESPONDENT,

V

COOLIDGE UTICA LLC, COUNTERCLAIM DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG WEPRIN FINKEL GOLDSTEIN LLP, NEW YORK CITY (MATTHEW HEARLE OF COUNSEL), FOR COUNTERCLAIM DEFENDANT-APPELLANT.

DOUGLAS H. ZAMELIS, MANLIUS, FOR COUNTERCLAIM PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered March 26, 2009. The order, inter alia, held counterclaim defendant in civil and criminal contempt.

Now, upon reading and filing the stipulation withdrawing and discontinuing appeals signed by the attorneys for the parties on March 11 and 18, 2010,

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

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

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

103.1
CA 09-00327
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

UTICA LAND EQUITIES LLC, PLAINTIFF,

V ORDER

UTICA HOLDING COMPANY, DEFENDANT.

UTICA HOLDING COMPANY, COUNTERCLAIM
PLAINTIFF-RESPONDENT,

V

COOLIDGE UTICA LLC, COUNTERCLAIM
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

GOLDBERG WEPRIN FINKEL GOLDSTEIN LLP, NEW YORK CITY (MATTHEW HEARLE OF COUNSEL), FOR COUNTERCLAIM DEFENDANT-APPELLANT.

DOUGLAS H. ZAMELIS, MANLIUS, FOR COUNTERCLAIM PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered January 5, 2009. The order, inter alia, held counterclaim defendant in civil and criminal contempt.

Now, upon reading and filing the stipulation withdrawing and discontinuing appeals signed by the attorneys for the parties on March 11 and 18, 2010,

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

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

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

103

CA 09-01412

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

UTICA LAND EQUITIES LLC, PLAINTIFF,

V ORDER

UTICA HOLDING COMPANY, DEFENDANT.

UTICA HOLDING COMPANY, COUNTERCLAIM PLAINTIFF-RESPONDENT,

V

COOLIDGE UTICA LLC, COUNTERCLAIM DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG WEPRIN FINKEL GOLDSTEIN LLP, NEW YORK CITY (MATTHEW HEARLE OF COUNSEL), FOR COUNTERCLAIM DEFENDANT-APPELLANT.

DOUGLAS H. ZAMELIS, MANLIUS, FOR COUNTERCLAIM PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 13, 2009. The judgment, inter alia, adjudged that counterclaim plaintiff recover a specified sum from counterclaim defendant as the penalty for civil contempt.

Now, upon reading and filing the stipulation withdrawing and discontinuing appeals signed by the attorneys for the parties on March 11 and 18, 2010,

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

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

107

TP 09-01715

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

IN THE MATTER OF GUY MCEACHIN, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 18, 2009) seeking, inter alia, to annul the determination of respondent finding after a Tier II hearing that petitioner violated an inmate rule.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, to annul the determination following a Tier II hearing that he violated inmate rule 118.31 (7 NYCRR 270.2 [B] [19] [ix] [tampering with an electrical device]), by tampering with a plastic hot pot that was discovered in a melted condition in his cell. Petitioner had also been charged with violating inmate rule 116.11 (7 NYCRR 270.2 [B] [17] [ii] [tampering with State or personal property without authorization]), but the Hearing Officer determined that he did not in fact violate that rule. In Supreme Court, petitioner challenged the determination finding that he violated inmate rule 118.31, and he also challenged the determination denying an unrelated grievance he had filed with the correctional facility concerning the deduction of postage from his inmate account. The court then transferred the entire proceeding to us pursuant to CPLR 7804 (g). We note at the outset that, although the court erred in transferring that part of the proceeding concerning the postage grievance to this Court inasmuch as the determination with respect to that grievance was "not made as a result of a hearing held . . . pursuant to direction by law" (*Matter of Pawlowski v Big Tree Volunteer Firemen's Co., Inc.*, 12 AD3d 1030, 1031), we nevertheless address that determination in the interest of judicial economy (*see Matter of Burgin v Keane*, 19 AD3d 1127, 1128).

We conclude that the determination that petitioner violated inmate rule 118.31 is supported by substantial evidence, i.e., the misbehavior report, the admission of petitioner that the pot was his, and the Hearing Officer's examination of the pot (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139-140). In addition, we conclude that the determination denying petitioner's postage grievance was not arbitrary and capricious or an abuse of discretion (*see generally Matter of La Rocco v Goord*, 19 AD3d 1073).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

[As amended by unreported motion dated June 11, 2010, see 2010 NY Slip Op 74251(U).]

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

158

KA 08-00527

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS GREGORY, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS GREGORY, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered February 21, 2008. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's risk level determination pursuant to the Sex Offender Registration Act is vacated.

Memorandum: On appeal from an order determining him to be a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends in his main brief and pro se supplemental brief that the classification proceeding was time-barred. We agree.

Defendant was convicted of sexual abuse in the first degree (Penal Law § 130.65 [3]) in February 1991 and he received a sentence of probation of five years, which expired in February 1996. SORA became effective in January 1996, and thus defendant was a sex offender required to register under SORA (*see* Correction Law § 168-g [2]; *Doe v Pataki*, 120 F3d 1263, *cert denied* 522 US 1122). It was not until June 13, 2007, however, that defendant was notified that he was required to register, and he was instructed to appear in Supreme Court.

We reject defendant's contention that the six-year statute of limitations in CPLR 213 applies to this SORA classification proceeding. Article 6-C of the Correction Law has its own time limits for SORA classification proceedings, and thus CPLR 213 does not apply

(*see* CPLR 213 [1]). We conclude, however, that vacatur of defendant's risk level determination is appropriate. Although Correction Law § 168-*l* (8) expressly provides that a failure by the court "to render a determination within the time period specified in [article 6-C] shall not affect the obligation of the sex offender to register," we conclude that the 11-year delay is " 'so outrageously arbitrary as to constitute [a] gross abuse of governmental authority' " (*People v Wilkes*, 53 AD3d 1073, 1074, *lv denied* 11 NY3d 710; *cf. People v Sgroi*, 22 Misc 3d 902, 905-906). We therefore reverse the order and vacate defendant's risk level determination.

Based on our determination, we see no need to address the remaining contention of defendant in his pro se supplemental brief.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

169

CA 09-01794

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

GARRY BRITTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH DIPRIMA, DEFENDANT-APPELLANT.

JAMES A. MARINO, ROCHESTER, FOR DEFENDANT-APPELLANT.

PHILIPPONE LAW OFFICES, ROCHESTER (JAMES V. PHILIPPONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Kenneth R. Fisher, J., for Matthew A. Rosenbaum, J.), entered January 28, 2009 in a breach of contract action. The judgment awarded money damages to plaintiff following a nonjury trial.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that prejudgment interest on the award of damages with respect to the property located at 412 Thornell Road shall commence March 5, 2003 and as modified the judgment is affirmed without costs.

Memorandum: In this breach of contract action, defendant appeals from a judgment in favor of plaintiff, following a nonjury trial, awarding plaintiff damages plus interest. According to Supreme Court's findings of fact, the contract in question was an oral agreement between the parties pursuant to which plaintiff loaned defendant the sum of $33,600 to enable defendant to purchase three partially constructed houses, following which defendant was to rehabilitate them, and plaintiff, a realtor, was to sell them. When the third house was sold, defendant was to pay back the loan as well as a 10% share of the profits from the sale of the houses.

We reject the contention of defendant that the court erred in denying his pretrial motion for summary judgment dismissing the complaint on the ground that the action was brought against him individually, when he allegedly had entered into the loan agreement with plaintiff in his corporate capacity. Indeed, defendant's own submissions in support of the motion raise a triable issue of fact. Defendant asserted in his supporting affidavit that he agreed to enter into the loan agreement only as president of his corporation, but the deposition testimony of plaintiff asserting that the loan was a personal loan between friends was also submitted by defendant in

support of his motion for summary judgment (*see generally Crandall v Wright Wisner Distrib. Corp.*, 66 AD3d 1515, 1516; *Matter of Kreinheder v Withiam-Leitch*, 66 AD3d 1485; *Kapcheck v United Ref. Co., Inc.*, 57 AD3d 1521). Although defendant contends in support of his motion that plaintiff did not present documentary proof that the loan was made to defendant individually, that contention is of no avail. It is well settled that defendant may not establish his entitlement to summary judgment by pointing to gaps in plaintiff's proof (*see Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529; *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980).

With respect to the bench trial, we reject defendant's contention that the court used an incorrect standard of proof in finding that plaintiff loaned the money to defendant individually, and we defer to the court's credibility determination favoring plaintiff's testimony concerning the terms of the loan (*see Sterling Inv. Servs., Inc. v 1155 NOBO Assoc., LLC*, 65 AD3d 1128, 1129-1130, *lv denied* 13 NY3d 714; *Zeltser v Sacerdote*, 52 AD3d 824, 826). We further reject defendant's contention that the award of interest was improper because the terms of the loan agreement did not include the payment of interest on the loan. The court properly awarded statutory interest pursuant to CPLR 5001 (a). The court erred, however, in providing that prejudgment interest on the award of damages with respect to the property located at 412 Thornell Road shall commence March 3, 2003. According to the record, that property was sold on March 5, 2003. We therefore modify the judgment accordingly.

Finally, the court did not err in awarding damages to plaintiff based on defendant's breach of the profit sharing provision of the contract. Although the complaint did not include a cause of action or claim for the breach of that contractual provision, the court's award of damages therefor was proper pursuant to CPLR 3017 (a), which provides in relevant part that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just" (*see State of New York v Barone*, 74 NY2d 332, 336; *Hartman v Whalen*, 68 AD2d 466, 469). Because the profit sharing provision of the loan agreement was raised in the bill of particulars and was a point of contention both during pretrial depositions and at trial, there is no "indication that the defendant [was] hindered in the preparation of his case or [that he was] prevented from taking some measure in support of his position" with respect to that provision (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801; *see Miller v Perillo*, 71 AD2d 389, 391, *appeal dismissed* 49 NY2d 1044, *lv dismissed* 51 NY2d 705, 767, 770).

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

214

CA 09-01823

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND GREEN, JJ.

RICHARD D. SEMONIAN AND MARY ANN SEMONIAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JANICE O. SEIDENBERG AND THE BUFFALO NEWS, INC.,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGAN WILLIG, LOCKPORT (NORTON T. LOWE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered June 1, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Richard D. Semonian (plaintiff) when the vehicle that he was driving was struck by a vehicle operated by defendant Janice O. Seidenberg and owned by defendant The Buffalo News, Inc. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. We conclude that defendants met their initial burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) in the instant accident but instead suffers from a "diffuse degenerative disease of his cervical spine which is causing cervical stenosis." Plaintiffs failed to raise an issue of fact to defeat the motion, particularly in view of their failure to offer a reasonable explanation for the 16-month gap in plaintiff's treatment (*see Pommells v Perez*, 4 NY3d 566, 572; *McConnell v Freeman*, 52 AD3d 1190; *McCarthy v Bellamy*, 39 AD3d 1166). We also note that plaintiff admitted that, during the 16-month period in question, he continued to work on a full-time basis, moonlighted as a security guard, and exercised regularly by lifting weights and jogging. We thus conclude

under the circumstances of this case that the court erred in denying defendants' motion.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

246

KA 08-02631

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATSY A. RAPONE, JR., DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

PATSY A. RAPONE, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Eric R. Adams, J.), rendered September 15, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the probation component of his split sentence, which also included a period of six months in jail, imposed upon his conviction of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). County Court instead sentenced defendant to a determinate term of imprisonment of 2½ years plus a two-year period of postrelease supervision. We agree with defendant that the sentence is unduly harsh and severe.

The original sentence imposed by the court required that he complete 1,000 hours of community service within two years of his release from jail. In November 2006, the community service program advised the court that it had no available placement for defendant based on his physical and mental limitations, and the court took no action at that time. In February 2008, however, a violation of probation petition was filed, alleging that defendant tested positive for cocaine and possessed a driver's license in violation of the terms and conditions of his probation. The petition did not mention defendant's failure to complete the required community service.

Defendant admitted his commission of the two violations set forth in the petition, in exchange for a sentencing promise of imprisonment of 1 to 3 years, and the court ordered an updated presentence report. When defendant again appeared in court on June 8, 2008, the court granted his request for an adjournment of sentencing to enable him to begin to comply with the community service component of the sentence. The court indicated that, if defendant established that he was working toward the community service requirement, the violation of probation petition would be "closed" without any sentence of imprisonment.

At the adjourned sentencing date, defense counsel advised the court that the community service administrator had by then received medical authorization permitting defendant to work, and that there was a community service placement available for defendant. The individual responsible for implementing that placement, however, was out of the office for a week, and defendant therefore requested a second adjournment to enable him to establish that he was complying with the community service requirement. The court denied that request, revoked the sentence of probation, and imposed the aforementioned determinate term of imprisonment and period of postrelease supervision on the ground that defendant failed to comply with the community service requirement.

Although we conclude that the court did not abuse its discretion in revoking the sentence of probation based upon defendant's admitted violations thereof, "we can [nevertheless] substitute our own discretion for that of a trial court [that] has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86; *see People v Edwards*, 37 AD3d 289, 290, *lv denied* 9 NY3d 843). Here, after defendant tested positive for cocaine, he successfully completed a substance abuse treatment program and all subsequent drug tests were negative. Defendant also attempted to implement the community service requirement, including providing the requisite medical documentation to the community service administrator, and it is undisputed on the record before us that the delay in the implementation of defendant's community service placement was not attributable to defendant.

In view of the compelling mitigating factors in this case, we modify the judgment as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

252

CA 09-00700

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

GLEN POTTER, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JAY E. POTTER LUMBER CO., INC.,
DEFENDANT-RESPONDENT,
AND JAMES LEATON AND ALAN LEATON, DOING
BUSINESS AS LEATON FARMS, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

WALSH, ROBERTS & GRACE, BUFFALO (THOMAS E. ROBERTS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 26, 2009 in a personal injury action. The judgment, inter alia, dismissed the amended complaint and the cross claim against defendant Jay E. Potter Lumber Co., Inc. following a jury trial.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while constructing a barn on property owned by defendants James Leaton and Alan Leaton, doing business as Leaton Farms (hereafter, Leaton defendants). Plaintiff's employer, R&R Precision Construction (R&R), entered into a contract with defendant Jay E. Potter Lumber Co., Inc. (Potter Lumber) to supply building materials for the project, including aluminum sheeting to construct the roof of the barn. On the date of the accident, an employee of Potter Lumber delivered a load of aluminum sheeting to the construction site on a flatbed truck. R&R used a forklift to unload the aluminum, and four R&R employees, including plaintiff, positioned themselves on the back of the forklift to act as counterweights for the load. After the forklift lifted the aluminum sheeting off of the flatbed truck, the load became unstable and the forklift tipped forward, catapulting plaintiff approximately 10 feet into the air. Plaintiff landed on the aluminum sheeting in

front of the forklift.

In appeal No. 1, plaintiff and the Leaton defendants contend that Supreme Court erred in denying their post-trial motions to set aside the jury verdict finding that Potter Lumber was negligent but that its negligence was not a substantial factor in causing the accident. The judgment in appeal No. 1, inter alia, dismissed the amended complaint and the cross claim against Potter Lumber. In appeal No. 2, the Leaton defendants contend that the court erred in granting plaintiff's motion for a directed verdict against them on liability with respect to Labor Law § 240 (1) at the close of proof.

Addressing first appeal No. 2, the Leaton defendants contend that Labor Law § 240 (1) does not apply here because plaintiff neither fell from an elevated work surface nor was struck by a falling object. We reject that contention. "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). Here, the forklift had a rated operating capacity of 1,500 pounds and proved inadequate to lift the 2,780-pound load of aluminum sheeting. As a result, the forklift operator was unable to control the descent of the load, and the forklift tipped forward, catapulting plaintiff into the air. Thus, "the harm [to plaintiff] flow[ed] directly from the application of the force of gravity" to the load of aluminum hoisted by the forklift (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604). Two experts, as well as several employees of R&R, testified at trial that R&R should have used a truss crane to unload the aluminum sheeting in a safe manner. We thus conclude that the load "fell, while being hoisted . . ., *because of* the absence or inadequacy of a safety device of the kind enumerated in [section 240 (1)]" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268; *see Bilderback v Agway Petroleum Corp.*, 185 AD2d 372, 373, *lv dismissed* 80 NY2d 971).

In appeal No. 1, we note that the Leaton defendants and plaintiff contend on appeal that the verdict with respect to the negligence of Potter Lumber was both inconsistent and against the weight of the evidence. Their contention concerning inconsistency is unpreserved for our review, however, because they failed to object to the verdict on that ground before the jury was discharged (*see Skowronski v Mordino*, 4 AD3d 782). In any event, we conclude that the verdict with respect to Potter Lumber's negligence was neither inconsistent nor against the weight of the evidence. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*id.* at 783 [internal quotation marks omitted]). Moreover, "[w]here . . . 'an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' " (*Mascia*

v Olivia, 299 AD2d 883, 883).

Here, "the jury's findings are supported by a reasonable view of the evidence and are not inconsistent as a matter of law" (*Reynolds v Burghezi*, 227 AD2d 941, 943; *see Lemberger v City of New York*, 211 AD2d 622). The jury reasonably could have found that the negligence of Potter Lumber's employee in failing to ascertain the weight of the load was not a substantial factor in causing the accident. The trial testimony established that none of R&R's employees asked the Potter Lumber employee how much the load weighed, that they did not know the load capacity of the forklift, and that they decided to use the forklift despite the fact that they knew the load would be too heavy without the four employees as counterweights. It also would have been reasonable for the jury to find that Potter Lumber's negligence in loading the aluminum sheeting in an improper manner was not a substantial factor in causing the accident because it occurred during the unloading process. We thus conclude that " 'the finding of proximate cause did not inevitably flow from the finding of culpable conduct' " (*Skowronski*, 4 AD3d at 783).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

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

253

CA 09-01852

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

GLEN POTTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAY E. POTTER LUMBER CO., INC.,
DEFENDANT-RESPONDENT,
AND JAMES LEATON AND ALAN LEATON, DOING
BUSINESS AS LEATON FARMS, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

WALSH, ROBERTS & GRACE, BUFFALO (THOMAS E. ROBERTS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 31, 2009 in a personal injury action. The judgment on liability was entered in favor of plaintiff and against defendants James Leaton and Alan Leaton, doing business as Leaton Farms, following a jury trial.

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

Same Memorandum as in *Potter v Jay E. Potter Lbr. Co., Inc.* ([appeal No. 1] ___ AD3d ___ [Mar. 26, 2010]).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

255

CA 09-01962

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

IN THE MATTER OF ELIZABETH HESS, AS PARENT
AND GUARDIAN OF JASON HESS, AN INFANT,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

WEST SENECA CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

COLLINS & BROWN, LLC, BUFFALO (LUKE A. BROWN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 11, 2009. The order, insofar as appealed from, granted that part of claimant's application seeking leave to serve a late notice of claim on respondent West Seneca Central School District.

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

Memorandum: Supreme Court did not abuse its discretion in granting that part of claimant's application seeking leave to serve a late notice of claim on West Seneca Central School District (respondent) pursuant to General Municipal Law § 50-e (5) (*see* Education Law § 3813 [2-a]). Although claimant did not offer a reasonable excuse for her failure to serve a timely notice of claim, "that failure is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]), and that is the case here. In opposition to the application, respondent "failed to demonstrate substantial prejudice[] or that the [claimant's] claim was patently without merit" (*Matter of Chambers v Nassau County Health Care Corp.*, 50 AD3d 1134, 1135). Contrary to the dissent, we are unpersuaded that this limited record supports a determination that the claim against respondent is patently meritless (*see Matter of Place v Beekmantown Cent. School Dist.*, 69 AD3d 1035, 1036-1037). Claimant seeks to commence an action against respondent on the ground that respondent breached its duty of care to her son when he was "released into a

potentially hazardous situation" (*Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 671, *rearg denied* 93 NY2d 1042; *see McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick & Fayette, Seneca County*, 179 Misc 333, 335-336, *affd* 264 App Div 943, *affd* 289 NY 800). "It would be premature, prior to the commencement of an action, for this Court to opine that no action based on the proposed notice of claim could have merit" (*Matter of Industrial Risk Insurers v City of New York*, 2003 NY Slip Op 50639[U], *8; *see Matter of Lacey v Village of Lake Placid*, 280 AD2d 863).

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent. In our view, Supreme Court abused its discretion in granting that part of claimant's application seeking leave to serve a late notice of claim on West Seneca Central School District (respondent) inasmuch as respondent demonstrated that the claim is "patently meritless" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179; *see Matter of Lo Tempio v Erie County Health Dept.*, 17 AD3d 1161).

Claimant's son, a tenth-grade student at West Seneca High School, was injured when he was struck by a vehicle while crossing the street at the intersection of Seneca and Main Streets in the Town of West Seneca. The accident occurred at 2:10 P.M., after claimant's son was dismissed from school. The proposed claim alleges that respondents were negligent in their design, maintenance and construction of the intersection and in failing to provide safety measures or to warn of the dangerous condition of the intersection. With respect to the claim against respondent, claimant also alleged that there is no crosswalk, crossing guard or traffic control device directing traffic at the intersection. Those allegations, however, are not sufficient to sustain a negligence cause of action against respondent and thus the claim against respondent is patently without merit.

It is well established that "[a] school's duty to its students is co-extensive with the school's physical custody and control over them . . ., and when a student is injured off school premises the school district cannot be held liable for the breach of a duty that generally extends only to the boundaries of the school property" (*Dalton v Memminger*, 67 AD3d 1350, 1350-1351 [internal quotation marks omitted]). In opposition to claimant's application, respondent established that the accident occurred after school hours and off school property on a public roadway that was neither owned nor controlled by respondent. Respondent further established that it was not involved with the design, construction or maintenance of the intersection or adjoining sidewalks and that it had no authority to provide traffic control devices or take other measures to control vehicular or pedestrian traffic at the intersection. Although General Municipal Law § 208-a authorizes a city, town or village to appoint "school crossing guards to aid in protecting school children going to and from school," such authority is not conferred upon a school district (*see generally Molina v Conklin*, 57 AD3d 860, 862). Likewise, the municipality that owns or controls the roads, not

respondent, is responsible for operating and maintaining traffic control devices and warning of any existing hazards on those roads (*see* Vehicle and Traffic Law § 1682; *Moshier v Phoenix Cent. School Dist.*, 199 AD2d 1019, *affd* 83 NY2d 947; *Sanchez v Lippincott*, 89 AD2d 372, 373-374).

In our view, the majority's reliance on *Ernest v Red Cr. Cent. School Dist.* (93 NY2d 664, 671, *rearg denied* 93 NY2d 1042) is misplaced. In that case, the Court of Appeals concluded that there was a triable issue of fact whether the defendant school district was negligent in releasing a second grade student "into a foreseeably hazardous setting it had a hand in creating" (*id.* at 672). The school district in *Ernest* had a longstanding policy of not releasing students who were walking home until the buses had departed. Nevertheless, the student at issue was released before buses left the area, and the student was subsequently struck by another vehicle while attempting to cross the road. The driver of that vehicle stated that his view of the student was obstructed by a bus (*id.* at 669-670). Here, by contrast, claimant failed to present any evidence that respondent created or perpetuated a hazardous situation similar to the one at issue in *Ernest* (*see Vernali v Harrison Cent. School Dist.*, 51 AD3d 782, 783-784).

We therefore would reverse the order insofar as appealed from and deny that part of claimant's application seeking leave to serve a late notice of claim on respondent.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

256

CA 09-01610

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

RICHARD SCHAEFER AND ELSIE SCHAEFER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JILL DEHAUSKI, DEFENDANT-APPELLANT.

HELMER JOHNSON MISIASZEK & KENEALY, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered March 2, 2009. The judgment, following a nonjury trial, directed defendant to remove part of the fence erected on her property.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, defendant's motion is granted in its entirety, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a determination that the fence built by defendant along the parties' property boundary constituted a private nuisance. The fence at issue is approximately four to five feet high and is situated entirely on defendant's property. We note that this case previously was before us on appeal. In appeal No. 1, we reversed the order insofar as it granted in part plaintiffs' motion for summary judgment on the complaint (*Schaefer v Dehauski*, 50 AD3d 1502) and, in appeal No. 2, we reversed the order directing defendant, following a hearing, to remove part of the fence (*Schaefer v Dehauski*, 50 AD3d 1503). Following a subsequent bench trial, Supreme Court found that defendant's placement of the fence was intentional and unreasonable (*see generally Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570, *rearg denied* 42 NY2d 1102), and it directed defendant to remove that part of the fence obstructing plaintiffs' view of the Black River.

We agree with defendant that the court erred in denying in part defendant's motion for judgment as a matter of law at the close of plaintiffs' case (*see* CPLR 4401). The sole cause of action asserted in the complaint alleged that the fence erected by defendant obstructs plaintiffs' "light, air, and view of the river." Plaintiffs failed to

allege that an express easement existed pursuant to which defendant was prohibited from obstructing plaintiffs' light, air or view of the river (*see generally Chatsworth Realty 344 v Hudson Waterfront Co. A*, 309 AD2d 567, 568), and they failed to present any evidence of such an easement at the trial. Thus, the cause of action is governed by RPAPL 843, which "grants an owner or occupant of a structure a cause of action when he or she is deprived of light or air due to the construction of an adjoining property owner's 'spite fence' " (*419 Seventh Ave. Assoc., Ltd. v Ghuneim*, 64 AD3d 746, 747). Pursuant to RPAPL 843, such a fence must exceed 10 feet in height and have been erected "to exclude the owner or occupant . . . from the enjoyment of light or air . . . ." No right of action for a private nuisance exists where the fence is "10 feet high or less[] *or* . . . was erected in good faith for the improvement of one's own property" (*419 Seventh Ave. Assoc., Ltd.*, 64 AD3d at 747 [emphasis added]). Here, the fence is less than 10 feet high, and thus defendant's motivation for building the fence is irrelevant.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

276

CA 09-01695

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

JACOB GRUBER AND LYNN GRUBER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT.

EMILIO A. COLAIACOVO, BUFFALO, FOR DEFENDANT-APPELLANT.

JACOB GRUBER, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), entered November 6, 2008 in a small claims action. The order modified a judgment of Buffalo City Court (John J. Gruber, J.), entered November 6, 2008.

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

Memorandum: Defendant appeals from an order that modified a judgment of City Court in this small claims action by awarding plaintiffs additional damages for payments made on excess water bills during the period of February 2005 to May 2006. We reject defendant's contention that plaintiffs failed to serve a timely notice of claim pursuant to General Municipal Law § 50-e. The claim accrued when the water meter was replaced by defendant on February 11, 2005. On March 29, 2005 plaintiffs mailed a letter to defendant, sworn to by plaintiff Jacob Gruber (*see* § 50-e [2]), and it is undisputed that the letter was received by defendant on March 30, 2005. That letter set forth the essential elements of a notice of claim (*see id.*; Public Authorities Law § 1067). Defendant neither returned that letter nor objected to the service of it, and we thus conclude that defendant waived any defect in the service thereof (*see* § 50-e [3] [c]).

Defendant further contends that the action is time-barred because it was not commenced within the limitations period of one year and 90 days pursuant to General Municipal Law § 50-i (1) (c). We reject that contention. Inasmuch as defendant is a public authority and not "a city, county, town, village, fire district or school district," the provisions of section 50-i (1) (c) do not apply here. Although the Public Authorities Law sets forth specific limitations periods for many other public authorities (*see* § 1342 [2]), section 1067 fails to do so with respect to defendant. We thus conclude that the three-year

limitations period pursuant to CPLR 214 (2) applies and that this action, commenced within two years and five months from the date it accrued, was timely.

We further conclude that, pursuant to the "substantial justice" standard of review applicable to small claims actions (*see* UCCA 1804), County Court properly determined that defendant's negligence in replacing the water meter was the proximate cause of plaintiffs' damages (*see generally Bierman v Consolidated Edison Co. of N.Y.*, 66 Misc 2d 237). Finally, contrary to defendant's contention, the payments made by plaintiffs pursuant to the parties' delinquent account payment agreement may be recovered inasmuch as plaintiffs executed that agreement when they were under duress based on defendant's conduct in shutting off the water supply to their home (*see generally Adrico Realty Corp. v City of New York*, 250 NY 29, 33-34).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

288

KA 07-01181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PIERRE JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 2, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). 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 that it is not void as against public policy (*see People v Muniz*, 91 NY2d 570, 573-575; *People v Kapp*, 59 AD3d 974, 974-975, *lv denied* 12 NY3d 818). The challenge by defendant to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789) and, in any event, that challenge is unpreserved for our review because defendant did not move to withdraw the plea on that ground (*see People v Lopez*, 71 NY2d 662, 665). In support of his motion to withdraw his plea at the time of sentencing, defendant contended that his plea was involuntary because it was coerced by County Court and he felt pressured into entering a plea. That contention, however, is belied by the record of the plea proceeding, and we thus reject the contention of defendant that the court abused its discretion in denying his motion to withdraw his plea. The fact that the court reminded defendant that the jury was waiting downstairs during the plea proceeding does not constitute coercion, nor does it render the plea involuntary (*see Grimes*, 53 AD3d at 1056). Indeed, in support of his motion, defendant presented no evidence of innocence, fraud, or mistake in the inducement of the plea (*see People v Thomas*, 17 AD3d 1047, *lv denied* 5 NY3d 770). The statement of defendant that he was “under a lot of stress” at the time

of the plea does not, by itself, warrant granting his motion to withdraw the plea (*see People v Robinson*, 301 AD2d 745, 746-747, *lv denied* 100 NY2d 542; *People v Merck*, 242 AD2d 792, 793, *lv denied* 91 NY2d 895).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

293

KA 08-01505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN SIMON, ALSO KNOWN AS “LUCK,”
DEFENDANT-APPELLANT.

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

STEPHEN SIMON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered June 11, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and attempted 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 after a jury trial of murder in the second degree (Penal Law § 125.25 [3]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct based on the prosecutor’s opening statement (*see People v Maclean*, 48 AD3d 1215, 1216, *lv denied* 10 NY3d 866, 11 NY3d 790), and the prosecutor’s allegedly improper cross-examination of his alibi witness (*see* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that the attempted robbery conviction is not supported by legally sufficient evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Pearson*, 26 AD3d 783, 783, *lv denied* 6 NY3d 851). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further conclude that County Court did not abuse its discretion in denying defendant's request for a missing witness charge with respect to two individuals. The People established that one of the two individuals was unavailable because she had invoked the Fifth Amendment (*see People v Savinon*, 100 NY2d 192, 198). We conclude with respect to the second individual, defendant's codefendant, that defendant failed to meet his initial burden of showing that he would be expected to provide testimony favorable to the prosecution (*see People v Macana*, 84 NY2d 173, 177; *People v Wynn*, 277 AD2d 946, *lv denied* 96 NY2d 765). Indeed, we note that he likely would have invoked the Fifth Amendment as well, in light of the fact that he moved to withdraw his plea of guilty prior to defendant's trial (*see Macana*, 84 NY2d at 177-178). We likewise conclude that the court properly exercised its discretion in admitting in evidence an autopsy photograph and two photographs of the crime scene (*see generally People v Pobliner*, 32 NY2d 356, 370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). The autopsy photograph was relevant to illustrate and corroborate the testimony of the Medical Examiner with respect to the cause of death (*see generally People v Williams*, 28 AD3d 1059, 1060, *affd* 8 NY3d 854; *People v Saulters*, 12 AD3d 1178, 1179, *lv denied* 4 NY3d 803), and the photographs of the crime scene were relevant to depict the condition of the victim and the delicatessen after the shooting, about which various witnesses had testified (*see People v Ojo*, 43 AD3d 1367, 1368, *lv denied* 10 NY3d 769, 11 NY3d 792).

Contrary to the contention of defendant in his main and pro se supplemental briefs, defense counsel's representation at trial, viewed in its entirety, was meaningful (*see generally People v Baldi*, 54 NY2d 137, 147). With respect to defendant's pro se CPL 330.30 motion, we agree with defendant that defense counsel improperly assumed a position that was directly adverse to two contentions raised by defendant in support of his motion (*see People v Kirkland*, 68 AD3d 1794; *People v Betsch*, 286 AD2d 887). We nonetheless conclude, however, that the record establishes that the court was not influenced by the statements of defense counsel in denying defendant's motion (*see People v Shegog*, 32 AD3d 1289, 1290-1291, *lv denied* 7 NY3d 929; *People v Moye*, 13 AD3d 1123, *lv denied* 4 NY3d 833). "Rather, the court denied the motion 'solely on the basis of its own recollection of the record' " (*People v Thaxton*, 309 AD2d 1255, 1256, *lv denied* 1 NY3d 581).

With respect to the merits of defendant's CPL 330.30 (3) motion, we conclude that the court properly denied the motion. Defendant failed to meet his burden of establishing that the evidence submitted in support of the motion could not have been discovered before trial by the exercise of due diligence (*see* CPL 330.30 [3]; *People v Carrier*, 270 AD2d 800, 802, *lv denied* 95 NY2d 864). In any event, defendant failed to establish that the evidence was "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 330.30 [3]; *see People v White*, 272 AD2d 872, 872-873, *lv denied* 95 NY2d 859).

We have considered the remaining contentions of defendant in his main and pro se supplemental briefs and conclude that none requires reversal.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

294

KA 09-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE LOFTIN, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 14, 2008. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]) and sexual abuse in the first degree (Penal Law § 130.65 [1]). We reject the contention of defendant that the People failed to disclose certain *Brady* material, i.e., information that there was a pending charge against the victim for petit larceny (*see generally People v Vilardi*, 76 NY2d 67, 73). The People provided defendant with the victim's prior criminal history before jury selection, and he therefore was aware of the pending charge against the victim in time to use that information effectively at trial (*see People v Comfort*, 60 AD3d 1298, 1300, *lv denied* 12 NY3d 924).

We agree with defendant, however, that County Court erred in precluding him from cross-examining the victim with respect to the petit larceny charge. According to that charge, the victim had assaulted and robbed an ex-boyfriend but subsequently reported to the police that it was the ex-boyfriend who had assaulted her. Those allegations are similar to allegations made by defendant in the instant case, and thus defendant sought to cross-examine the victim concerning that charge "in good faith and with a reasonable basis in fact" (*People v Jones*, 24 AD3d 815, 816, *lv denied* 6 NY3d 777). Although the charge against the victim was adjourned in contemplation of dismissal prior to the commencement of defendant's trial, that does not constitute a dismissal on the merits, and it therefore does not

"negate the elements of good faith and [basis in fact]" (*id.*). Under the circumstances of this case, "where the 'issue of the credibility of defendant vis-à-vis the prosecution witnesses [is] crucial,' " we cannot conclude that the court's error is harmless (*People v Ayrhart*, 101 AD2d 703, 704; *see generally People v Crimmins*, 36 NY2d 230, 237).

We further agree with defendant that the court erred in failing to conduct a *Ventimiglia* hearing with respect to his statements to police that, "in the past[,] he had tried forcing sex from women" and that "it was difficult to take sex if they didn't want to give it up." Although defendant failed to preserve his contention for our review inasmuch as he failed to object to the admission of testimony concerning those statements (*see People v Powell*, 303 AD2d 978, *lv denied* 100 NY2d 565, 1 NY3d 541), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *cf. People v Johnson*, 233 AD2d 887, *lv denied* 89 NY2d 1095). The court was required to determine whether the probative value of those statements outweighed the potential for prejudice inasmuch as those statements were not admissions related to the instant charges but, rather, they constituted evidence of prior bad acts (*see People v Robinson*, 202 AD2d 1044, *lv denied* 83 NY2d 1006). In light of the importance of the witnesses' credibility in this case, as noted above, we cannot conclude that the court's error is harmless (*see generally Crimmins*, 36 NY2d at 241-242; *People v Moore*, 59 AD3d 809, 811-813). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

295

KA 05-02596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY E. BECOATS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 11, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of murder in the second degree (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on count two of the indictment and by vacating the sentence imposed on count four of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of manslaughter in the second degree and for resentencing on the conviction of robbery in the first degree.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) and robbery in the first degree (§ 160.15 [1]). For the same reasons as those set forth in our decision in *People v Wright* (63 AD3d 1700), the appeal by defendant's codefendant, we conclude that defendant's contention that the evidence is legally insufficient to support the conviction of murder in the second degree is preserved for our review and that it has merit (*id.* at 1701-1702). We therefore modify the judgment by reducing the conviction of murder in the second degree to manslaughter in the second degree (Penal Law § 125.15 [1]) and vacating the sentence imposed on count two of the indictment (*see* CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the conviction of manslaughter in the second degree (*see* CPL 470.20 [4]).

Defendant failed to preserve for our review his contention that the evidence presented to the grand jury was legally insufficient on

the element of depraved indifference and that the prosecutor erred in charging the grand jury with respect to that element (*cf.* CPL 210.30 [6]), inasmuch as he failed to set forth those specific grounds in his general motion to dismiss the indictment (*see People v Agee*, 57 AD3d 1486, 1486-1487, *lv denied* 12 NY3d 813). Defendant also failed to preserve for our review his contention that the robbery count is duplicitous because he was charged with stealing "a BB gun and/or a pair of sneakers" and, in any event, we conclude that defendant's contention is without merit for the same reasons as those set forth in our decision in *Wright* (63 AD3d at 1702). Furthermore, as in *Wright*, the record does not reflect whether Supreme Court resentenced defendant on the robbery count after properly determining that a determinate sentence must be imposed rather than the indeterminate sentence originally imposed by the court. We therefore further modify the judgment by vacating the sentence imposed on count four of the indictment, and we direct Supreme Court upon remittal to resentence defendant on the conviction of robbery in the first degree.

We reject the contention of defendant that the court abused its discretion in refusing to grant him an adjournment to secure the attendance of a defense witness who was in federal custody, inasmuch as he failed to establish that the witness would be available to testify at a later date (*see People v Jackson*, 41 AD3d 498, 498-499, *lv denied* 9 NY3d 876; *see generally People v Foy*, 32 NY2d 473, 476-477). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

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

298

CA 09-01419

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

KEVIN E. DELONG, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-RESPONDENT.

COUNTY OF CHAUTAUQUA, THIRD-PARTY
PLAINTIFF,

V

RHONDA DELONG, THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered March 5, 2009 in a personal injury action. The order denied the motion of plaintiff to set aside the verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

299

CA 09-01421

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

KEVIN E. DELONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-RESPONDENT.

COUNTY OF CHAUTAUQUA, THIRD-PARTY PLAINTIFF,

V

RHONDA DELONG, THIRD-PARTY DEFENDANT-RESPONDENT.

(APPEAL NO. 2.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered March 11, 2009 in a personal injury action. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle in which he was a passenger skidded into a ditch on South Main Street Extension in the County of Chautauqua (defendant). According to plaintiff, defendant was negligent in, inter alia, constructing and maintaining the road and the shoulder and failing to warn of the dangerous condition of the road and the shoulder. Plaintiff appeals from a judgment entered upon a jury verdict finding that defendant was negligent but that its negligence was not a substantial factor in causing the accident. To the extent that plaintiff contends that Supreme Court erred in conflating the issues of negligence and proximate cause in its charge to the jury, we conclude that plaintiff waived that contention inasmuch as he requested a specified charge and the court gave that

charge (*see Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828, *lv denied* 96 NY2d 710). Moreover, plaintiff failed to object to the charge as given and thus failed to preserve his contention for our review (*see Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374). In any event, viewing the charge as a whole and in light of the verdict sheet and the arguments of counsel, we conclude that the charge adequately conveyed the proper legal principles to the jury (*see Nestorowich v Ricotta*, 97 NY2d 393, 400-401; *Gregory v Cortland Mem. Hosp.*, 21 AD3d 1305). Plaintiff also waived his challenge to the verdict sheet inasmuch as he consented to the use of the questions at issue (*see generally Schmidt*, 278 AD2d at 828).

Plaintiff failed to preserve for our review his contention that the verdict is inconsistent because he did not object to the verdict on that ground before the jury was discharged (*see Kunsman v Baroody*, 60 AD3d 1369; *Steginsky v Gross*, 46 AD3d 671). In any event, "the jury's findings are supported by a reasonable view of the evidence and are not inconsistent as a matter of law" (*Reynolds v Burghezi*, 227 AD2d 941, 943; *see Lemberger v City of New York*, 211 AD2d 622). Finally, we reject the contention of plaintiff that the court erred in denying his motion to set aside the verdict as against the weight of the evidence. Based on the facts of this case, " 'the evidence on the issue of causation did not so preponderate in favor of plaintiff that the jury's finding of no proximate cause could not have been reached on any fair interpretation of the evidence' " (*Sweeney v Linde*, 59 AD3d 948, 948; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

319

CAF 09-00398

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

IN THE MATTER OF THE ADOPTION OF NICOLE J.

JOSHUA A.A. AND MICHELLE J.A.,
PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

STEPHEN H.J., RESPONDENT-APPELLANT.

KRISTIN SPLAIN, CONFLICT DEFENDER, ROCHESTER (ANNEMARIE DILS OF COUNSEL), FOR RESPONDENT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered December 16, 2008 in an adoption proceeding. The order, inter alia, dispensed with the consent of respondent to the adoption of the subject child.

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 a new hearing.

Memorandum: Respondent, the biological father of the child who is the subject of this proceeding (hereafter, father), appeals from an order that dispensed with his consent to the adoption of the child and allowed the adoption of the child by petitioners to proceed without any further notice to the father. On October 14, 2008, the father was served with the petition seeking to allow petitioners to adopt the child. On December 1, 2008, the father's attorney appeared on behalf of the father for the first court appearance on the petition, and Family Court informed him that a hearing on the merits of the petition was to take place that day. The father's attorney requested an adjournment until January 12, 2009 on the ground that he was unaware that the hearing was scheduled to take place that day, but the court denied the request and went forward with the hearing.

We conclude that the court abused its discretion in denying the request of the father's attorney for an adjournment (*see generally Matter of Bobi Jo. B. v Jerry L.W.*, 45 AD3d 1382, 1383; *Matter of Jackson v Lee*, 96 AD2d 760). There is no evidence in the record that the father had notice that the hearing was scheduled to occur on December 1, 2008. Moreover, the record establishes that the proceedings were not protracted, that this was the father's first request for an adjournment and, indeed, that the court had adjourned

proceedings concerning the child's biological mother to the precise adjournment date sought by the father. Under these circumstances, we conclude that the court should have granted the request of the father's attorney for an adjournment to enable the father to prepare for the hearing (*see generally Matter of Stephen L.*, 2 AD3d 1229, 1231). We therefore reverse the order and remit the matter to Family Court for a new hearing.

In light of our determination, we do not address the father's remaining contention.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

356

KA 08-02483

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER LEWIS, DEFENDANT-APPELLANT.

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

CHRISTOPHER LEWIS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RACHEL E. PILKINGTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 3, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of robbery in the first degree (Penal Law § 160.15 [4]) and unlawful possession of marihuana (§ 221.05). Defendant contends that Supreme Court erred in denying his challenges for cause to three prospective jurors. We agree with defendant that the court erred with respect to two of the prospective jurors and thus that reversal is required.

It is well established that, when a prospective juror makes a statement or statements that "cast serious doubt on [his or her] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363), that prospective juror must be excused for cause unless he or she provides an "unequivocal assurance that [he or she] can set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614; *see People v Nicholas*, 98 NY2d 749, 750; *People v Chambers*, 97 NY2d 417, 419). While no "particular expurgatory oath or 'talismanic' words [are required,] . . . jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*Arnold*, 96 NY2d at 362).

During voir dire, one of the prospective jurors stated that, as a

result of her close association with police officers in the course of her work as a loss prevention officer, she would "probably take the word of a cop" over "the word of somebody else." When defense counsel asked that prospective juror whether she would "tend to give the——the cop the edge on who's telling the truth," she responded, "I would lean that way, yes." There is no question that those statements cast serious doubt on the prospective juror's ability to render an impartial verdict (*see Nicholas*, 98 NY2d at 751-752; *People v Givans*, 45 AD3d 1460, 1461; *People v Mateo*, 21 AD3d 1392, 1392-1393), and the prospective juror failed to provide "unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence" (*Johnson*, 94 NY2d at 614). The prior collective acknowledgment by the jury panel that the panel members would decide the case solely on what they heard and saw in the courtroom and not based upon any relationships with law enforcement "was insufficient to constitute such an unequivocal declaration" (*People v Bludson*, 97 NY2d 644, 646; *see Arnold*, 96 NY2d at 363).

With respect to the second prospective juror, the record reflects that she expressed uncertainty about her ability to be fair and impartial as a result of her close relationships with members of law enforcement. When defense counsel attempted to explore the prospective juror's apparent reservations, the court precluded any further inquiry on the matter. Although there is no question that a trial court "necessarily has broad discretion to control and restrict the scope of the *voir dire* examination" (*People v Boulware*, 29 NY2d 135, 140, *rearg denied* 29 NY2d 670, *cert denied* 405 US 995; *see People v Habte*, 35 AD3d 1199), we conclude under the circumstances of this case that the court erred in failing to permit defense counsel to conduct further questioning of the prospective juror to determine whether she could provide an "unequivocal assurance" of her ability to render a fair and impartial verdict, or to excuse the prospective juror for cause (*Arnold*, 96 NY2d at 363; *see generally Johnson*, 94 NY2d at 616).

Because defendant exhausted all of his peremptory challenges before the completion of jury selection, reversal is required (*see* CPL 270.20 [2]; *Nicholas*, 98 NY2d at 752; *Givans*, 45 AD3d at 1461). We reject the contention of defendant in his main brief that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In light of our determination, we do not address defendant's remaining contentions.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

362

CA 09-02134

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

GARY TEAGUE AND RUTH TEAGUE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AUTOMOBILE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT, PAUL BLOSER,
CAROLE BLOSER, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSE J. COOKE OF COUNSEL), FOR DEFENDANT-RESPONDENT AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 7, 2009 in a declaratory judgment action. The judgment, among other things, granted the motion of defendant Automobile Insurance Company of Hartford, Connecticut for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the complaint and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that Automobile Insurance Company of Hartford, Connecticut (defendant) is obligated to defend plaintiffs in the underlying action. Paul Bloser and Carole Bloser, defendants herein, commenced the underlying action seeking damages for injuries sustained by Paul Bloser when he slipped and fell during the course of repair work at plaintiffs' residence. Contrary to the contention of plaintiffs, we conclude that Supreme Court properly granted the motion of defendant for summary judgment declaring that it is not obligated to defend or indemnify plaintiffs in the underlying action.

It is well established that "[t]he requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage" (*White v City of New York*, 81 NY2d 955, 957). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy . . ., and the insurer need not show prejudice before it can assert the

defense of noncompliance" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). "[T]here may be circumstances that excuse a failure to give timely notice, such as where the insured has 'a good-faith belief of nonliability,' provided that belief is reasonable" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743). Specifically, "[w]hen the facts of an occurrence are such that an insured acting in good faith would not reasonably believe that liability on his [or her] part will result, notice of the occurrence given by the insured to the insurer is given 'as soon as practicable' if given promptly after the insured receives notice that a claim against him [or her] will in fact be made" (*Merchants Mut. Ins. Co. v Hoffman*, 56 NY2d 799, 801; *see D'Aloia v Travelers Ins. Co.*, 85 NY2d 825, *rearg denied* 85 NY2d 968). The insured bears the burden of establishing a reasonable excuse for his or her delay in providing notice (*see Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441; *Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp.*, 41 AD3d 44, 46).

The homeowners' insurance policy issued by defendant requires plaintiffs to notify it "as soon as practical" of an " '[o]currence,' " which is defined as "[a]n accident . . . [that] results in 'bodily injury' or 'property damage' during the policy period." Here, the record establishes that plaintiffs received notice that Paul Bloser sustained " 'bodily injury' " in the accident on their property no later than March 2004, when he sent plaintiffs a letter stating that he was "proceeding with legal action" against them "for injuries sustained when [he] fell on [their] ice-covered sidewalk steps" (*see generally D'Aloia*, 85 NY2d 825; *Merchants Mut. Ins. Co.*, 56 NY2d at 801). Plaintiffs did not, however, notify defendant of the accident and seek coverage under the homeowners' insurance policy until March 2006. That delay is unreasonable as a matter of law (*see Philadelphia Indem. Ins. Co.*, 41 AD3d at 46-47; *Lyell Party House v Travelers Indem. Co.*, 11 AD3d 972, 973), and plaintiffs failed to raise a triable issue of fact establishing a reasonable excuse for their delay (*see generally Lyell Party House*, 11 AD3d at 973).

We further conclude, however, that the court erred in dismissing the complaint in this declaratory judgment action (*see City of New York v State of New York*, 94 NY2d 577, 588 n 3), and we therefore modify the judgment by vacating the provision dismissing the complaint.

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

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

368

CA 09-01608

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

PAUL JOHNSON, KEVIN JOHNSON, AND MARION JOHNSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BAUER CORPORATION AND MCQUADE & BANNIGAN, INC.,
DEFENDANTS-RESPONDENTS.

MICHAEL A. CASTLE, HERKIMER, FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANT-RESPONDENT BAUER CORPORATION.

HANLON, VELOCE & WILKINSON, ALBANY (THOMAS J. WILKINSON OF COUNSEL), FOR DEFENDANT-RESPONDENT MCQUADE & BANNIGAN, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered March 31, 2009 in a personal injury action. The order and judgment, among other things, granted defendants' motions for summary judgment.

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

Memorandum: Plaintiffs commenced this products liability action seeking damages for injuries sustained by Paul Johnson and Kevin Johnson (hereafter, plaintiffs) in a construction accident involving an allegedly defective ladder manufactured by defendant Bauer Corporation (Bauer) and sold to plaintiffs' employer by defendant McQuade & Bannigan, Inc. (McQuade). Plaintiffs and another individual were working on a scaffold platform supported by two ladders when the ladder at issue broke and collapsed, causing plaintiffs to fall to the ground. That ladder was discarded by plaintiffs' employer prior to the commencement of this action.

We conclude that Supreme Court properly granted the motion of McQuade seeking summary judgment dismissing the complaint against it and the motion of Bauer seeking summary judgment dismissing the complaint and all cross claims against it. We note at the outset that plaintiffs addressed in their brief only the dismissal of their manufacturing defect claims, and we therefore deem abandoned any issues concerning the dismissal of their remaining claims (*see Davis v School Dist. of City of Niagara Falls*, 4 AD3d 866; *Ciesinski v Town of Aurora*, 202 AD2d 984).

Where, as here, a manufacturing defect claim must be proved circumstantially because the product is unavailable, the plaintiff "must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to [the] defendant[]" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41).

Here, defendants met their initial burdens on the motions by submitting evidence establishing that Bauer manufactured its ladders in accordance with general industry standards and that the ladder at issue failed as a result of misuse or preexisting damage (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223-224; *see also Riglioni v Chambers Ford Tractor Sales, Inc.*, 36 AD3d 785, 786; *Nichols v Agway, Inc.*, 280 AD2d 889, 890). In particular, defendants submitted evidence that the ladder collapsed because the weight of the scaffold, the workers, and the materials thereon exceeded its rated capacity. Defendants also submitted the deposition testimony of one of the other workers, who testified that the ladder was damaged prior to the accident and that it was set up at an improper angle on the date of the accident. In opposition to the motions, plaintiffs failed to present evidence excluding all other causes of the accident not attributable to defendants (*see Ramos*, 10 NY3d at 224; *Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1324-1325; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1169, *lv dismissed in part and denied in part* 11 NY3d 825).

Contrary to the further contention of plaintiffs, denial of the summary judgment motions was not required based on Bauer's failure to provide them with certain materials inasmuch as they failed to demonstrate that the materials sought would produce evidence sufficient to defeat the motions (*see* CPLR 3212 [f]; *Dunn v 726 Main & Pine*, 255 AD2d 981).

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

370

CA 09-01690

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

ROSE SANTILLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL A. THOMPSON, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (MICHAEL J. COOPER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (LAUREN YANNUZZI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 10, 2009 in a personal injury action. The order denied the motion of plaintiff to set aside the verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving collided with a vehicle driven by defendant as he exited a gas station. Following a bifurcated trial on liability, the jury found that defendant was negligent but that his negligence was not a substantial factor in causing the accident. Plaintiff thereafter moved to set aside the verdict on the grounds that the verdict was inconsistent and against the weight of the evidence. We conclude that Supreme Court properly denied the motion.

At the outset, defendant contends that we are precluded from reviewing the merits of the motion because petitioner waived her right to make such a motion by failing to do so in a timely manner. We reject that contention. The court exercised its discretion in determining the motion on the merits (*see generally Ehrman v Ehrman*, 67 AD3d 955, 956), and there is no indication in the record that the return date of the motion was adversely affected. We agree with defendant, however, that by failing to object to the alleged inconsistency of the verdict before the jury was discharged, plaintiff failed to preserve for our review her contention that the court erred in denying her motion on that ground (*see Haller v Gacioch*, 68 AD3d 1759; *Bleiberg v City of New York*, 43 AD3d 969, 971; *Skowronski v Mordino*, 4 AD3d 782).

We reject the further contention of plaintiff that the court

erred in denying her motion to set aside the verdict as against the weight of the evidence. A verdict is not against the weight of the evidence merely because the jury finds a defendant negligent but determines that his or her negligence is not a proximate cause of the accident. "The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the negligence determination" (*Ohdan v City of New York*, 268 AD2d 86, 89, *appeal dismissed* 95 NY2d 885, *lv denied* 95 NY2d 769; *see Giraldo v Rossberg*, 297 AD2d 534). A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the accident is " 'against the weight of the evidence only when [those] issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' " (*Jones v Radeker*, 32 AD3d 494, 495; *see Szymanski v Holenstein*, 15 AD3d 941; *Skowronski*, 4 AD3d 782), and that is not the case here. We conclude that the jury could reasonably find that defendant was negligent based on his failure to observe plaintiff behind another vehicle when he exited the gas station but that his negligence was not the proximate cause of the accident because plaintiff was operating her vehicle in the median of the roadway in violation of Vehicle and Traffic Law § 1126 (a) and § 1128 (d). Thus, "the evidence [did not] so preponderate[] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; *see Dunnaville v Metropolitan Tr. Auth. of City of N.Y.*, 68 AD3d 1047; *Rubino v Scherrer*, 68 AD3d 1090, 1091-1092).

Finally, plaintiff failed to preserve for our review her contention that the court erred in allowing the police investigator who responded to the accident scene to testify with respect to the position of the vehicles and the location of the debris in the road. Plaintiff did not object to that testimony at trial and raised her contention for the first time in her reply to defendant's opposing papers (*see Schissler v Athens Assoc.*, 19 AD3d 979).

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

400

KA 07-01787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENT L. RUSSELL, DEFENDANT-APPELLANT.

STEPHEN BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered August 22, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, unlawful imprisonment in the first degree and predatory sexual assault.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault (Penal Law § 130.95 [1] [b]), rape in the first degree (§ 130.35 [1]) and unlawful imprisonment in the first degree (§ 135.10), defendant contends that the conviction is not supported by legally sufficient evidence. Defendant failed to preserve that contention for our review with respect to the rape conviction (*see People v Gray*, 86 NY2d 10, 19), and we reject defendant's contention with respect to the remaining two crimes (*see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the crime of predatory sexual assault under Penal Law § 130.95 (1) (b), a defendant must, inter alia, use or threaten the immediate use of a dangerous instrument, and defendant contends that the evidence is legally insufficient to establish that he did so. We reject that contention. The victim testified that, prior to raping her, defendant held what appeared to be a knife near her neck and face. Although the victim was not certain that what she observed was a knife, she believed that whatever defendant held could be used to hurt her. With respect to the crime of unlawful imprisonment in the first degree, a defendant must "restrain[] another person under circumstances which expose the latter to a risk of serious physical injury," and the testimony concerning what the victim believed to be a knife or an item that could be used to hurt her is legally sufficient to establish that she was exposed to a risk of serious physical injury while being

restrained. We thus conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [internal quotation marks omitted]; *see People v Davila*, 37 AD3d 305, *lv denied* 9 NY3d 842).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 at 495). Defendant also contends that the verdict is repugnant inasmuch as he was acquitted of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) but was convicted of predatory sexual assault and unlawful imprisonment in the first degree. Defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As the People correctly concede, however, rape in the first degree is an inclusory concurrent count of predatory sexual assault (*see People v Scott*, 61 AD3d 1348, 1349-1350, *lv denied* 12 NY3d 920, 13 NY3d 799), and thus that part of the judgment convicting defendant of rape in the first degree must be reversed and count two of the indictment dismissed. We therefore modify the judgment accordingly.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

401

KA 09-02116

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD CARRASQUILLO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 28, 2006. The judgment convicted defendant, upon a jury verdict, of attempted arson in the first degree and conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted arson in the first degree (Penal Law §§ 110.00, 150.20) and conspiracy in the second degree (§ 105.15). Because defendant did not renew his motion for a trial order of dismissal after presenting evidence, he failed to preserve for our review his contention that the accomplice testimony was not sufficiently corroborated and that his conviction is therefore not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit. The corroboration required by CPL 60.22 (1) was provided by the testimony of the girlfriend of one of defendant's accomplices concerning a conversation between defendant and the other accomplices, evidence that defendant's vehicle was used in the crimes and the testimony of a defense witness concerning the attempted arson. "Once the statutory minimum pursuant to CPL 60.22 (1) was met, it was for the jurors to decide whether the corroborating testimony [and evidence] satisfied them that the accomplices were telling the truth" (*People v Pierce*, 303 AD2d 966, 966, *lv denied* 100 NY2d 565). "Defendant's further contention concerning the legal sufficiency of the evidence before the grand jury 'is not reviewable on appeal from an ensuing judgment based upon legally sufficient trial evidence' " (*People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818; *see* CPL 210.30 [6]). In addition, defense counsel's failure to renew the motion for a trial order of dismissal based on the alleged legal

insufficiency of the evidence did not constitute ineffective assistance of counsel because, in view of our determination that the evidence is indeed legally sufficient, defendant has not established that such a motion "would be meritorious upon appellate review" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, we conclude that Supreme Court did not improperly change its *Sandoval* ruling during the presentation of defendant's case but, rather, the court merely clarified its prior ruling (*see People v Bush*, 187 AD2d 951, *lv denied* 81 NY2d 882).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

413

CA 09-01124

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

MATTHEW CAPUANO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER INSTITUTE OF TECHNOLOGY,
DEFENDANT-RESPONDENT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (RICHARD S. TUBIOLO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered February 2, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while operating a leg press machine during a "Wellness for Life" class at defendant, Rochester Institute of Technology. We agree with plaintiff that Supreme Court erred in granting defendant's motion seeking summary judgment dismissing the complaint, and we therefore modify the order accordingly. We cannot conclude on the record before us that plaintiff was aware of the risk that a back injury could result from improper use of the leg press machine and thus that the action is barred as a matter of law based on plaintiff's primary assumption of the risk (*see generally Turcotte v Fell*, 68 NY2d 432, 438-439*; Lamey v Foley*, 188 AD2d 157, 162-165). Plaintiff testified at his deposition that, although he had some experience with a seated leg press machine prior to the accident, he had never previously used the horizontal Cybex leg press machine on which he was injured. Plaintiff was instructed to begin using that leg press machine by pressing the equivalent of his own body weight and then increasing the weight incrementally until he could perform the exercise only once or twice, and that would be his "max weight." Plaintiff's expert stated that such an instruction constituted an advanced weight lifting technique referred to as "maxing out" and that the technique requires supervision by a qualified instructor. We

conclude that there is a triable issue of fact whether plaintiff's instructor provided adequate supervision inasmuch as she had no formal background in weight training and may not have been in the weight room at the time of the accident. The extent to which plaintiff assumed the risk of injury, if any, is an issue of his culpable conduct similar to comparative negligence and thus one for the jury to resolve (*see* CPLR 1411; *Lamey*, 188 AD2d at 163; *see also* PJI 2:55).

Further, "[t]he element of risk assumed by [a] plaintiff [does] not relieve [a] defendant from the obligation of using reasonable care to guard against a risk [that] might reasonably be anticipated" (*Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 1217 [internal quotation marks omitted]; *see Havens v Kling*, 277 AD2d 1017, 1018). Here, the supervisor of plaintiff's instructor testified at her deposition that an individual's use of improper form on the leg press machine could result in hyperextension of the back and injury. Plaintiff's instructor, however, was unaware of the increased risk of injury posed by differences in weight, lack of experience and fatigue, and she was unaware of the strain that "maxing out" might place on an individual's body. Thus, there is a triable issue of fact "whether 'inadequate supervision was responsible for the accident or . . . [whether] better supervision could have prevented it' " (*Hochreiter*, 309 AD2d at 1218).

Entered: March 26, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

414

CA 08-02376

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

LORI M. HOOVER AND JESSICA BOWERS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW HOLLAND NORTH AMERICA, INC., ET AL.,
DEFENDANTS,
ALAMO GROUP (SMC) INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO SMC CORPORATION, AND ALAMO GROUP (USA) INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO SMC CORPORATION,
DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (THOMAS J. DRURY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 21, 2008 in a products liability action. The order denied the motion of defendants Alamo Group (SMC) Inc., individually and as successor in interest to SMC Corporation, and Alamo Group (USA) Inc., individually and as successor in interest to SMC Corporation, for summary judgment.

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

Memorandum: Plaintiffs commenced this products liability action seeking damages for injuries sustained by plaintiff Jessica Bowers while she was using a post-hole digger designed and manufactured by SMC Corporation (SMC). The assets of SMC were purchased by defendant Alamo Group (SMC) Inc. (Alamo SMC), a subsidiary of defendant Alamo Group (USA) Inc. (Alamo USA), pursuant to an Asset Purchase Agreement (agreement). Supreme Court properly denied the motion of Alamo SMC, individually and as successor in interest to SMC, and Alamo USA, individually and as successor in interest to SMC (collectively, Alamo defendants) seeking summary judgment dismissing the complaint against them.

"Generally, a corporation [that] acquires the assets of another is not liable for the torts of its predecessor unless: (1) it expressly or impliedly assumed the predecessor's tort liability; (2)

there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations" (*Sweatland v Park Corp*., 181 AD2d 243, 245; *see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245). Based on the record before us, it appears that only two of the four exceptions are at issue inasmuch as plaintiffs do not allege fraud and they do not dispute that the "mere continuation" exception is inapplicable because SMC survived the transaction and continues to exist as a corporation (*see Sweatland*, 181 AD2d at 245). The Alamo defendants, however, failed to meet their burden of establishing their entitlement to judgment as a matter of law with respect to the remaining exceptions (*see Meadows v Amsted Indus*., 305 AD2d 1053, 1055). The Alamo defendants' own submissions raise a triable issue of fact whether Alamo SMC expressly or impliedly assumed SMC's tort liability pursuant to the agreement and whether the transaction constituted a de facto merger (*see id.*; *Sweatland*, 181 AD2d at 245-246).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

420

KA 04-00876

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER BALKUM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered February 17, 2004. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree, burglary in the first degree, criminal possession of a weapon in the second degree and criminal impersonation in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) and burglary in the first degree (§ 140.30 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, three counts of robbery in the first degree (§ 160.15 [4]). We agree with defendant in each appeal that his waiver of the right to appeal was invalid inasmuch as the record fails to establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Williams*, 59 AD3d 339, 340, *lv denied* 12 NY3d 861; *see People v Daniels*, 68 AD3d 1711; *see generally People v Lopez*, 6 NY3d 248, 256-257). We further agree with defendant that Supreme Court failed to conduct a specific inquiry to determine whether he understood that each plea was conditioned on his withdrawal of all motions pending and decided and whether he agreed to those conditions (*cf. People v Williams*, 55 AD3d 759; *People v Toye*, 264 AD2d 401; *People v Perez*, 247 AD2d 341, *lv denied* 91 NY2d 976). We thus conclude that defendant is not precluded from contending in each appeal that the court erred in refusing to suppress certain evidence.

We nevertheless reject the contention of defendant in appeal No. 1 that the court erred in refusing to suppress evidence obtained as a

result of an allegedly unlawful seizure of his person. Contrary to defendant's contention, "at the time the police forcibly detained defendant, they had [a] reasonable suspicion . . . that he was involved in the robbery and thus were entitled to detain him for purposes of a showup identification procedure" (*People v Martinez*, 39 AD3d 1159, 1160, *lv denied* 9 NY3d 867). Within three to five minutes of the robbery, a police officer observed defendant approximately one block from the scene, and he generally matched the description provided by the victim and broadcast over the police radio. "Although defendant did not 'perfectly match' the victim's description of the suspect, 'there were enough similarities to provide the police with, at a minimum, the right to make a common-law inquiry' " (*People v Williams*, 30 AD3d 980, 981, *lv denied* 7 NY3d 852). As defendant approached the officer, the officer observed that defendant was wearing the business logo that had been described in the radio dispatches, and thus the officer had the requisite reasonable suspicion to detain defendant for a showup identification procedure (*see Martinez*, 39 AD3d at 1160; *People v Evans*, 34 AD3d 1301, 1302, *lv denied* 8 NY3d 845; *People v Casillas*, 289 AD2d 1063, 1063-1064, *lv denied* 97 NY2d 752).

We reject the contention of defendant in appeal No. 2 that the court erred in refusing to suppress his statement to the police. Contrary to the contention of defendant, we conclude that he did not unequivocally invoke his right to counsel before his custodial interrogation began.

It is well settled that, "once a defendant in custody invokes his [or her] right to counsel . . . a subsequent waiver of rights outside the presence of [defense] counsel cannot be given legal effect" (*People v Cunningham*, 49 NY2d 203, 210; *see People v Ramos*, 99 NY2d 27, 33 n 3; *People v West*, 81 NY2d 370, 373-375). Here, however, defendant did not make an unequivocal request for an attorney to represent him on the charges for which he was in custody. At the time he was taken into custody, defendant had an attorney to represent him on the unrelated charges that are at issue in appeal No. 1. At the police station, defendant mentioned to an officer that he had an appointment with his attorney that morning, and he asked that officer if he could call the attorney. The officer told defendant that he would have to wait, and defendant never mentioned the attorney again during his subsequent interviews with police investigators.

"Whether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839). In this case, when defendant mentioned his attorney, he was not being questioned and his request to call the attorney was made in the context of attending a scheduled appointment with that attorney concerning unrelated charges. Indeed, defendant's reason for calling the attorney could have been to cancel that appointment (*see People v Ramirez*, 59 AD3d 206, *lv denied* 12 NY3d 858; *see also People v*

Mitchell, 2 NY3d 272, 276; *People v Jackson*, 43 AD3d 1181, *lv denied* 9 NY3d 1006, 1007).

Contrary to the further contention of defendant in appeal No. 2, the police did not improperly capitalize on his concern for his pregnant girlfriend. " '[I]t is not an improper tactic for police to capitalize on a defendant's sense of shame or reluctance to involve his family in a pending investigation absent circumstances [that] create a substantial risk that a defendant might falsely incriminate himself' " (*People v Mateo*, 2 NY3d 383, 415-416, *cert denied* 542 US 946; *see People v Young*, 197 AD2d 874, *lv denied* 82 NY2d 854). Here, there is no evidence in the record of the suppression hearing that the police promised "not to arrest defendant's girlfriend if defendant 'talked' " (*People v Keene*, 148 AD2d 977, 978; *cf. People v Helstrom*, 50 AD2d 685, *affd* 40 NY2d 914), and there were no other circumstances creating a substantial risk that defendant would falsely incriminate himself (*see* CPL 60.45 [2] [b] [i]).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

421

KA 04-00877

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER BALKUM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered February 17, 2004. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (three counts) and grand larceny in the third degree (two counts).

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

Same Memorandum as in *People v Balkum* ([appeal No. 1] ___ AD3d ___ [Mar. 26, 2010]).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

426

KA 09-00531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK DISTAFFEN, DEFENDANT-APPELLANT.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, J.), entered January 20, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The People candidly concede that County Court violated the due process rights of defendant when it held the SORA hearing in his absence without verifying that he had received the letter notifying him of the date of the hearing and his right to be present (*see People v Gonzalez*, 69 AD3d 819; *cf. People v Ensell*, 49 AD3d 1301, *lv denied* 10 NY3d 715). We therefore reverse the order and remit the matter to County Court for a new hearing and risk level determination in compliance with Correction Law § 168-n (3).

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

432

CA 08-00678

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

IN THE MATTER OF ANTHONY MEDINA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ANTHONY MEDINA, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 6, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determinations are modified on the law and the petition is granted in part by annulling those parts of the determinations finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]) and 106.10 (7 NYCRR 270.2 [B] [7] [i]) and by vacating the recommended loss of good time for the violations of those rules and as modified the determinations are confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violations of those rules.

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition that challenged two disciplinary determinations arising from two hearings involving two misbehavior reports. We note at the outset that, because the petition raises substantial evidence issues, Supreme Court should have transferred the proceeding to this Court pursuant to CPLR 7804 (g). We therefore vacate the judgment and consider the merits of the proceeding de novo (*see Matter of Grillo v Coughlin*, 201 AD2d 905). As respondent correctly concedes, the charges in the misbehavior report dated January 9, 2007 are not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We therefore modify the determinations and grant the petition in part by annulling those parts of the determinations finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]) and 106.10 (7 NYCRR 270.2 [B] [7] [i]) and by vacating the recommended loss of good time for the violations of those rules, and we direct respondent

to expunge from petitioner's institutional record all references to the violations of those rules. We reject petitioner's contentions with respect to the second misbehavior report.

Entered: March 26, 2010

Patricia L. Morgan
Clerk of the Court