SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 3, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1113

CA 11-02485

PRESENT: FAHEY, J.P., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

LENEL SYSTEMS INTERNATIONAL, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD TODD SMITH, DEFENDANT-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 22, 2011. The order, among other things, denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking rescission of three incentive stock option agreements (Option Agreements) that grant defendant options to purchase shares of plaintiff's common stock. The terms of the Option Agreements provide that, "[i]n consideration of the grant of [the options]," defendant agrees that he shall not "directly or indirectly, as an . . . employee . . . , conduct business in competition in any way" with plaintiff or its products while employed by plaintiff and for a period of time after his employment with plaintiff ends (noncompete provision). Plaintiff alleges in its amended complaint that defendant became employed by a competing corporation within three weeks of resigning from his position with plaintiff.

In a prior appeal, we concluded that Supreme Court properly denied plaintiff's prediscovery motion for summary judgment rescinding the Option Agreements. We further concluded that the court properly denied defendant's cross motion for summary judgment dismissing the complaint and for summary judgment on his counterclaim, which sought dividends and an order directing plaintiff to issue "the outstanding stock certificates to him." We concluded that neither party was entitled to summary judgment inasmuch as there were triable issues of fact whether defendant breached the Option Agreements and, if he did, whether the breach was so substantial that it defeated the object of the parties in making the contracts (*Lenel Sys. Intl., Inc. v Smith*,

34 AD3d 1284, 1285).

The parties thereafter conducted discovery and, as relevant to this appeal, defendant moved for summary judgment seeking, inter alia, dismissal of the amended complaint, which seeks rescission of the Option Agreements, and for judgment on several of his counterclaims, i.e., for payment of money and liquidated damages. The court denied the motion, and we now affirm.

Rescission is an equitable remedy (*see Singh v Carrington*, 18 AD3d 855, 857), which "rests on the equitable principle that a person shall not be allowed to enrich himself [or herself] unjustly at the expense of another" (*Miller v Schloss*, 218 NY 400, 407). The effect of rescission "is to declare [a] contract void from its inception and to put or restore the parties to status quo" (*Cusack v American Defense Sys., Inc.*, 86 AD3d 586, 588). As a general rule, rescission of a contract is permitted where there is a breach of contract that is " 'material and willful, or, i[f] not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' " *(RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654, quoting *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284).

Here, we conclude, as we did in the earlier appeal (*Lenel Sys. Intl., Inc.*, 34 AD3d at 1285), that there are triable issues of fact whether defendant breached the Option Agreements by accepting employment with an allegedly competing business and, if so, whether such breach "substantially defeats" the purpose of those agreements (*Eldridge v Shaw*, 99 AD3d 1224, 1225 [internal quotation marks omitted]; *see WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617). The Option Agreements provide that "[plaintiff] considers it desirable and in its best interest that [defendant] be given an inducement to acquire a further proprietary interest in [plaintiff], and an added incentive to advance the interests of [plaintiff]" by providing defendant with certain stock options. Plaintiff's general counsel and director of business development testified at his deposition that a key purpose of the noncompete provision is to encourage employees to remain with the company for an extended period of time and to ensure that the employees' interests are "aligned with that of the company . . . by them owning a piece of the company." Indeed, plaintiff's stock option plan states that its purpose is to "encourage stock ownership by directors and selected officers and employees of [plaintiff] . . . to increase their proprietary interest in the success of [plaintiff] and to encourage them to remain in the service or employ of [plaintiff]." If an employee chooses to terminate his or her employment with plaintiff in order to work for a competing entity, that choice would no doubt frustrate, if not defeat, the purpose of the Option Agreements.

Defendant contends that rescission is unavailable to plaintiff because the noncompete provision is unreasonable and thus unenforceable as a matter of law. We reject that contention. Although defendant correctly cites the well-settled proposition that "noncompete clauses in employment contracts are not favored and will

only be enforced to the extent reasonable and necessary to protect valid business interests" (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 620; *see Post v Merrill Lynch, Pierce, Fenner & Smith*, 48 NY2d 84, 86-87, *rearg denied* 48 NY2d 975), there is an equally well-settled exception to that general principle "where an employer conditions receipt of postemployment benefits upon compliance with a restrictive covenant" (*Morris*, 7 NY3d at 620-621; *see Lucente v International Bus. Mach. Corp.*, 310 F3d 243, 254). Under the "employee choice doctrine," if an employee "is given the choice of preserving his [or her] rights under his [or her] contract by refraining from competition or risking forfeiture of such rights by exercising his [or her] right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living" (*Morris*, 7 NY3d at 621; *see Kristt v Whelan*, 4 AD2d 195, 199, *affd* 5 NY2d 807). Where the doctrine applies, "a restrictive covenant will be enforceable without regard to reasonableness" so long as an employee voluntarily left his or her employment (*Morris*, 7 NY3d at 621; *see Post*, 48 NY2d at 89; *see also Lucente*, 310 F3d at 254; *International Bus. Mach. Corp. v Martson*, 37 F Supp 2d 613, 619-620).

Here, defendant agreed to the posttermination noncompete provision in exchange for the receipt of additional incentive compensation, i.e., stock options (*see generally International Bus. Mach. Corp.*, 37 F Supp 2d at 617). Upon entering into the Option Agreements, defendant agreed to refrain from competing with plaintiff while employed by plaintiff and for a period of two years after his termination from employment. Defendant specifically acknowledged and agreed that the noncompete provision was "reasonable and will not operate to deprive [him] of his means of support or livelihood and that [he] has received fair and adequate consideration therefor." The Option Agreements did not bar defendant from seeking or accepting other employment (*see Kristt*, 4 AD2d at 199). Rather, upon defendant's decision to leave plaintiff's employ, he had "the choice of preserving his rights under the [Option Agreements] by refraining from competition with [plaintiff] or risking forfeiture of such rights by exercising his right to compete with [plaintiff]" (*id.*; *see Morris*, 7 NY3d at 622). Contrary to the contention of defendant, the absence of an explicit forfeiture-for-competition clause in the Option Agreements does not prevent plaintiff from seeking rescission of the stock options under the circumstances of this case. Here, defendant's promise not to compete with plaintiff during his employment and for a period of time thereafter was the sole consideration for the Option Agreements. It therefore follows that, if defendant chose to compete with plaintiff in violation of the only material condition of the agreements, defendant would give up his right to the stock options promised in exchange (*see generally York v Actmedia, Inc.*, 1990 WL 41760, *1). Thus, defendant "ma[de] an informed choice between forfeiting his [stock options] or retaining the benefit by avoiding competitive employment" (*Morris*, 7 NY3d at 621).

All concur except CARNI and WHALEN, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent. Plaintiff contends that rescission of the three incentive stock option agreements (Option Agreements) that grant defendant

options to purchase shares of plaintiff's common stock is justified based on failure of consideration. The relevant consideration language in the Option Agreements is as follows: "In consideration of the grant of this option, [defendant] agrees that while employed by [plaintiff], and for a period of two years after termination of employment for any reason, . . . [defendant] shall not directly or indirectly . . . conduct business in competition in any way" with plaintiff (hereafter, restrictive covenant). That language appears to set forth two separate forms of consideration for the stock options, i.e., defendant's agreement to abide by the restrictive covenant while employed by plaintiff and for two years after termination of employment. It is undisputed that, while employed, defendant adhered to the restrictive covenant for approximately six years, thereby providing plaintiff with part of the consideration. It is not unusual for companies to ensure that their employees are devoting all of their time and energy to them and not pursuing competing opportunities by consulting or other means. Courts have held that where there is not a total failure of payment, a breach is not so substantial to permit rescission (*see Septembertide Pub, B.V. v Stein and Day, Inc.*, 884 F2d 675, 678-679). Here, because defendant gave partial consideration by complying with the restrictive covenant while employed by plaintiff, rescission of the Option Agreements is not permitted. It should be noted that plaintiff could have elected to pursue damages based upon defendant's competition post-employment but did not do so.

We would therefore modify the order by granting that part of defendant's motion for summary judgment dismissing the amended complaint and on his first, second, third and fourth counterclaims. However, defendant is not entitled to summary judgment on his 10th through 12th counterclaims.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

1117

CA 12-00678

PRESENT: FAHEY, J.P., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

MICHAEL MCCARTER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM WOODS, DEFENDANT-APPELLANT-RESPONDENT.

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, UTICA (NICOLE C. PELLETIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 9, 2012. The order, inter alia, denied that part of the motion of defendant seeking to preclude plaintiff from offering certain medical evidence at trial.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of defendant's motion concerning "speaking authorizations" from plaintiff's educators and by granting plaintiff's cross motion to that extent and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order that, inter alia, denied that part of his motion seeking to preclude plaintiff from offering certain medical evidence at trial based on plaintiff's failure to disclose medical reports of his examining physician prior to the examination of plaintiff by defendant's examining physician. Contrary to defendant's contention, Supreme Court properly denied that part of his motion. " 'Absent an abuse of discretion, we will not disturb the court's control of the discovery process' " (*Marable v Hughes*, 38 AD3d 1344, 1345; *see Hann v Black*, 96 AD3d 1503, 1504; *MS Partnership v Wal-Mart Stores*, 273 AD2d 858, 858).

Turning to plaintiff's cross appeal, we note that plaintiff contends that the court abused its discretion in conditionally granting that part of defendant's motion to preclude plaintiff from presenting evidence at trial concerning his mental or physical condition unless plaintiff provided defendant with speaking authorizations for plaintiff's medical providers and educators. Plaintiff further contends that the court erred in denying his cross motion for a protective order with respect to the speaking authorizations and for costs incurred because of the allegedly

improper cancellation by defendant's attorney of scheduled depositions of plaintiff and his mother. We reject plaintiff's contention with respect to speaking authorizations for his medical providers. In *Arons v Jutkowitz* (9 NY3d 393, 409-411), the Court of Appeals provided the framework for conducting discovery with regard to nonparty healthcare providers, which includes the use of speaking authorizations. *Arons*, however, does not authorize defendant to obtain speaking authorizations for plaintiff's educators. We decline to extend *Arons* to require production of speaking authorizations to anyone other than nonparty healthcare providers. The *Arons* decision is narrow in scope and provides a framework as to how parties must procedurally comply with the Health Insurance Portability and Accountability Act of 1996 (Pub L 104-191, 110 US Stat 1936) when attempting to speak with an adverse party's treating physician. Defendant made no showing that the discovery devices available under the CPLR and the Uniform Rules for the New York State Trial Courts were inadequate to obtain the necessary discovery. Thus, we agree with plaintiff that the court abused its discretion in granting that part of defendant's motion with respect to speaking authorizations for plaintiff's educators and in denying defendant's cross motion to that extent. We therefore modify the order accordingly.

Finally, contrary to plaintiff's contention, the court did not abuse its discretion in denying his cross motion to the extent that it sought reimbursement for the costs related to the rescheduled depositions of plaintiff and his mother (*see Hilley v Sanabria*, 12 AD3d 1188, 1189).

All concur except PERADOTTO and MARTOCHE, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part because we disagree with the majority that Supreme Court abused its discretion in conditionally granting that part of defendant's motion seeking to preclude plaintiff from presenting evidence at trial concerning his mental or physical condition unless plaintiff provided defendant with speaking authorizations for plaintiff's educational providers, and in denying plaintiff's cross motion to that extent. We would therefore affirm the order in its entirety.

Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead-based paint while residing in a rental property owned by defendant. In his second amended bill of particulars, plaintiff alleged that his injuries include, inter alia, diminished cognitive function and intelligence, impaired academic achievement, disability that severely limits his educational attainment, decreased educational opportunities, and "serious impairment in school functioning." During the course of discovery, defendant sought the names and addresses of plaintiff's witnesses, including "[a]ll witnesses in connection with any issues concerning damages." In response thereto, plaintiff identified over 190 potential witnesses, including numerous employees of the Lee County School District and the Rochester City School District where plaintiff attended school (hereafter, educational providers). Defendant thereafter served plaintiff with "speaking authorizations"

for each of the potential witnesses identified by plaintiff, including the educational providers. When plaintiff refused to sign the authorizations, defendant moved to preclude plaintiff from presenting evidence at trial concerning his mental or physical condition unless he provided defendant with the requested authorizations, and plaintiff cross-moved for a protective order relative to the speaking authorizations.

Contrary to the conclusion of the majority, we conclude that the court did not abuse its discretion in granting that part of defendant's motion for a conditional order of preclusion based on plaintiff's failure to provide defendant with the requested authorizations for his educational providers. " '[I]t is well settled that a trial court has broad discretionary power in controlling discovery and disclosure, and only a clear abuse of discretion will prompt appellate action' " (*Cochran v Cayuga Med. Ctr. At Ithaca*, 90 AD3d 1227, 1227). With respect to the scope of discovery, CPLR 3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]; *see Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954). Although so-called "speaking authorizations" are not specifically identified as a disclosure device in article 31 of the CPLR or part 202 of the Uniform Rules for the New York State Trial Courts, the Court of Appeals has written that "there are no statutes and no rules expressly authorizing–or forbidding–ex parte discussions with *any* nonparty, . . . [and a]ttorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation. [CPLR a]rticle 31 does not 'close[] off' these 'avenues of informal discovery,' and relegate litigants to the costlier and more cumbersome formal discovery devices" (*Arons v Jutkowitz*, 9 NY3d 393, 409, quoting *Niesig v Team I*, 76 NY2d 363, 372). The Court of Appeals further wrote, "Our decisions plainly permit informal discovery, and the Legislature has not directed to the contrary. Absent such legislative direction, we decline to limit the scope of such discovery" (*id.* at 409 n 1).

We see no reason why nonparty educators should be less available than nonparty treating physicians under the principles articulated by the Court of Appeals in *Arons* (*see id.* at 408-409). As the court noted in this case, while the number of authorizations defendant seeks is significant, it was *plaintiff* who provided the names to defendant in response to defendant's demand for that information, and defendant would bear the burden of contacting each named individual to determine whether he or she has relevant information. We therefore conclude that the court properly granted that part of defendant's motion concerning speaking authorizations from plaintiff's educational providers and denied plaintiff's cross motion to that extent.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

1277/12

CA 11-01710

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

JUDY T. READER, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT W. READER, V AND MATTHEW D. READER, AS ADMINISTRATORS OF THE ESTATE OF ROBERT W. READER, ALSO KNOWN AS ROBERT W. READER, IV, DECEASED, DEFENDANTS-APPELLANTS.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Philip A. Litteer, R.), entered November 20, 2010 in a divorce action. The appeal was held by this Court by order entered January 31, 2012, decision was reserved and the matter was remitted to Supreme Court, Ontario County for further proceedings (91 AD3d 1332).

Now, upon the stipulation signed by plaintiff on October 1, 2012, and by defendants on October 10, 2012, and filed in the Ontario County Clerk’s Office on October 18, 2012,

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

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

1367

KA 09-00932

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROOSEVELT COLLINS, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 27, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, grand larceny in the fourth degree and petit larceny (four counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), defendant contends that Supreme Court erred in refusing to suppress statements he made at a police station. Specifically, defendant contends that the statements should have been suppressed because he was de facto arrested without probable cause and because the statements were coerced based, inter alia, on the length of the interrogation. We reject those contentions.

We agree with defendant that the actions of the officers at the time they took him into custody amounted to an arrest (*see People v Leon*, 23 AD3d 1110, 1111-1112, *lv denied* 6 NY3d 755; *see generally People v Brnja*, 50 NY2d 366, 372). Contrary to defendant's further contention, however, the police had " 'information to support a reasonable belief that an offense has been . . . committed' by" defendant (*People v Shulman*, 6 NY3d 1, 25, *cert denied* 547 US 1043, quoting *People v Bigelow*, 66 NY2d 417, 423), and thus had probable cause to arrest him.

With respect to defendant's contention that his statements were coerced, we note at the outset that, although this Court recently affirmed a judgment of conviction resulting from a 49-hour police interrogation on the ground that there was a pronounced break in the

interrogation that dissipated any taint, we nevertheless wrote that "the length of the interrogation was unparalleled and should in no way be condoned" (*People v Guilford*, 96 AD3d 1375, 1376-1377). Here, although the length of the interrogation exceeded 60 hours, the suppression court properly suppressed as involuntary all of the statements defendant made after he had been in custody for 15 hours. Contrary to defendant's contention, however, his statements made during the first 15 hours of interrogation were not involuntary due to police coercion. "To determine voluntariness, courts review all of the surrounding circumstances to see whether the defendant's will has been overborne" (*People v Mateo*, 2 NY3d 383, 413, *cert denied* 542 US 946), and that 15-hour length of time does not by itself render the statements involuntary (*see People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961; *People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892; *People v Whorley*, 286 AD2d 858, 858-859, *lv denied* 97 NY2d 689; *see generally People v Tarsia*, 50 NY2d 1, 12-13). In view of the totality of the circumstances surrounding the statements made during the 15-hour period, e.g., that defendant was given short breaks, food, drinks, cigarettes and bathroom breaks during that period of interrogation, we conclude that those statements were not rendered involuntary by reason of any alleged coercion by the police (*see People v Kirk*, 96 AD3d 1354, 1357, *lv denied* 20 NY3d 1012; *People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851; *People v Sylvester*, 15 AD3d 934, 935, *lv denied* 4 NY3d 836).

Contrary to defendant's further contention, 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). Defendant's guilt "was established by a compelling chain of circumstantial evidence" establishing all of the elements of the crimes of which he was convicted (*People v Brown*, 92 AD3d 1216, 1217, *lv denied* 18 NY3d 992).

Defendant further contends that the court abused its discretion in refusing to sanction the People for their untimely disclosure of a videotape. Contrary to the People's contention, the record establishes that this issue is preserved for our review; the court "was aware of, and expressly decided, the [issue] raised on appeal" (*People v Hawkins*, 11 NY3d 484, 493). Defendant failed to establish, however, that he was surprised or prejudiced by the late disclosure, and thus the court did not abuse its discretion in concluding that no sanction was warranted (*see generally People v Jenkins*, 98 NY2d 280, 284; *People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916).

We also reject defendant's contention that the court abused its discretion in refusing to impose a sanction for the "consumption," during DNA testing, of hair found at the crime scene (*see generally People v Kelly*, 62 NY2d 516, 520-521; *People v Scott*, 235 AD2d 317, *lv denied* 90 NY2d 943). In the absence of a showing of bad faith on the part of the police, the "failure to preserve potentially useful evidence does not constitute a denial of due process of law" (*Arizona v Youngblood*, 488 US 51, 58, *reh denied* 488 US 1051; *see People v*

Winchell, 250 AD2d 942, 943, *lv denied* 92 NY2d 931; *People v Callendar*, 207 AD2d 900, 900-901, *lv denied* 84 NY2d 1029). Here, the People established that the samples were necessarily destroyed as part of routine testing procedures, and thus the court did not abuse its discretion in denying defendant's request for a sanction.

Finally, we conclude that the sentence of life without parole for the murder conviction is not unduly harsh or severe (*see People v Ojo*, 43 AD3d 1367, 1368, *lv denied* 10 NY3d 769, *reconsideration denied* 11 NY3d 792; *cf. People v Owens*, 78 AD3d 1509, *lv denied* 16 NY3d 834).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

43

KA 10-02443

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO RODRIGUEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORENZO RODRIGUEZ, DEFENDANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered August 26, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

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

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

116

CAF 11-02363

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF K'QUAMERE R. AND SYRIA W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LATASHA B., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

JEFFREY M. HARRINGTON, ATTORNEY FOR THE CHILDREN, WEST SENECA, FOR K'QUAMERE R. AND SYRIA W.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered April 13, 2011 pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject children to petitioner.

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

Memorandum: On appeal from an order that, inter alia, terminated her parental rights with respect to the subject children on the ground of mental illness (*see* Social Services Law § 384–b [4] [c]), respondent mother contends that Family Court erred in denying her request for an adjournment to present psychological evidence pursuant to Social Services Law § 384-b (6) (e). We reject that contention. The record establishes that the court had already adjourned the proceedings for three months to permit the mother to call her own expert, and she failed to do so within that time. Also, the mother did not demonstrate that the testimony of her expert would be material and favorable to her (*see generally Matter of Kaseem J.*, 52 AD3d 1321, 1322). Consequently, the court "providently exercised its discretion in denying [the mother's] request for an adjournment" (*Matter of Alexander James R.*, 48 AD3d 820, 821; *see generally Matter of Anthony M.*, 63 NY2d 270, 283-284).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

179

KA 12-01632

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK ARENA, DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (MICHAEL P. SCHIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 1, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree, robbery in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in first degree (Penal Law § 160.15 [3]), robbery in the second degree (§ 160.10 [1]), assault in the second degree (§ 120.05 [6]), and burglary in the first degree (§ 140.30 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that Supreme Court erred in refusing to allow him to call a defense witness at trial. We therefore reverse the judgment of conviction and grant defendant a new trial.

Defendant and his codefendant were charged with beating the victim and forcibly stealing property from him. Those crimes were committed on May 2, 2010. According to the People, defendant's motive was to retaliate against the victim for informing the police, in an anonymous 911 call on April 18, 2010, that defendant was growing marihuana in his house. Prior to trial, the court granted the People's motion to admit *Molineux* evidence to that effect (*see People v Molineux*, 168 NY 264, 293-294). During the prosecutor's opening statement, she referred repeatedly to defendant's alleged motive for revenge, and evidence of that motive was admitted on the People's

direct case. After the People rested, defense counsel sought to call a witness (hereafter, proposed witness) who was on the witness list submitted to the court by defendant prior to voir dire. The prosecutor asked for an offer of proof, asserting that the anticipated testimony of the proposed witness was "tangential to the issues here." In response, defense counsel stated that the proposed witness intended to testify that on April 18, 2010 — the same day on which defendant was arrested on the marihuana charge — defendant accused the proposed witness of being the informant but did not assault or threaten him. The court precluded the proposed witness from taking the stand, ruling that his proposed testimony was "not relevant to the issues presented to this jury, namely what, if anything, occurred on May 2, 2010," when defendant allegedly assaulted and robbed the victim. Defense counsel objected to the court's ruling and, after defendant testified and called several other witnesses, the jury rendered a guilty verdict on all counts.

It is well settled that "a defendant's 'right to present his own witnesses to establish a defense . . . is a fundamental element of due process of law' " (*People v Williams*, 81 NY2d 303, 312, quoting *Washington v Texas*, 388 US 14, 19). In fact, "[f]ew rights are more fundamental than that of an accused to present witnesses in his [or her] own defense" (*Chambers v Mississippi*, 410 US 284, 302). Thus, the testimony of a defense witness should not be prospectively excluded unless the offer of such proof is palpably in bad faith (*see People v Gilliam*, 37 NY2d 722, *revg on dissenting op of Hopkins, J.*, 45 AD2d 744, 745; *People v Wilkerson*, 294 AD2d 298, 299, *lv denied* 98 NY2d 772). Instead, courts upon proper objection should "rule on the admissibility of the evidence offered" (*Gilliam*, 45 AD2d at 745).

Here, the People do not suggest that the testimony of the proposed witness was offered in bad faith, and the court did not make such a finding at trial. Indeed, there is no basis in the record for concluding that the offer of proof was palpably in bad faith. The court therefore should have allowed the proposed witness to testify, whereupon the prosecutor could object to any testimony she deemed inadmissible or improper.

In any event, contrary to the People's contention and the court's determination, the proposed testimony was not inadmissible on relevancy grounds. As a general rule, "[e]vidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence" (*People v Scarola*, 71 NY2d 769, 777). The proposed testimony was relevant to the issue of motive, as posited by the People. Having allowed the People to admit *Molineux* evidence regarding defendant's motive for revenge against the victim, the court should not have prohibited defendant from calling a witness whose testimony, if believed, may have tended to make the People's theory of motive less probable than it would be without the proffered testimony (*see generally id.*).

Finally, the People contend in the alternative that the court's ruling was proper because the proposed testimony constituted

inadmissible hearsay. Even if we were to agree with that contention, which we do not, we could not affirm the judgment on that basis because the court did not preclude the proposed witness from testifying on hearsay grounds and our review is limited to the ground relied upon by the court (*see People v Concepcion*, 17 NY3d 192, 194-195; *People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 93 NY2d 849).

All concur except SCUDDER, P.J., and MARTOCHE, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we cannot agree with the majority that Supreme Court committed reversible error in refusing to allow defendant to call a defense witness whose testimony was, according to defendant, relevant on the issue of motive. While we recognize the constitutional right of a defendant to present a defense, including presenting his or her own witnesses (*see People v Williams*, 81 NY2d 303, 312), a defendant does not have an unfettered right to offer testimony that is incompetent, privileged or otherwise inadmissible under the rules of evidence (*see People v Hayes*, 17 NY3d 46, 53, *cert denied* ___ US ___, 132 S Ct 844). The mere invocation of the right to offer testimony cannot automatically and invariably outweigh countervailing public interests (*see Taylor v Illinois*, 484 US 400, 414-415, *reh denied* 485 US 983). Such interests include whether the probative value of the evidence "is outweighed by the danger that its admission would confuse the main issue and mislead the jury" (*People v McKinley*, 72 AD2d 470, 474; *see People v Harris*, 209 NY 70, 82). Here, the court concluded that the testimony would not be relevant to the issues at trial. We agree with that conclusion. The proffered testimony that defendant contacted another person suspected of giving information to the police about him two weeks before the incident in question and did not assault that person is not relevant to the issue whether defendant assaulted the victim in this case. Indeed, in our view the connection of the proffered testimony to the alleged assault was "neither apparent nor logical on its face" (*Williams*, 81 NY2d at 315). We further conclude that the witness' proffered testimony was "not highly relevant and exculpatory" (*People v Cummings*, 191 AD2d 1012, 1013) but, rather, it was " 'too . . . remote[] or conjectural to have any legitimate influence in determining the fact[s] in issue' " (*People v Barnes*, 109 AD2d 179, 184). Thus, in our view, the court did not err in refusing to allow defendant's proposed witness to testify.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

211

CA 12-01174

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

DAVID BABIACK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONTARIO EXTERIORS, INC. AND THE CRESCENT ON EAST AVENUE, INC., DEFENDANTS-APPELLANTS.

ONTARIO EXTERIORS, INC., THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

WILLIAMSTOWN CONSTRUCTION COMPANY, INC., DOING BUSINESS AS SUPERIOR CONSTRUCTION CO., INC. AND/OR DOING BUSINESS AS SUPERIOR INSULATION, THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT, AND THE CRESCENT ON EAST AVENUE, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANT-APPELLANT ONTARIO EXTERIORS, INC. AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT THE CRESCENT ON EAST AVENUE, INC. AND THIRD-PARTY DEFENDANT-RESPONDENT.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

MOSEY PERSICO, LLP, BUFFALO (SHANNON M. HENEGHAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 27, 2012. The order, inter alia, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) against defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1) against defendant Ontario Exteriors, Inc. and granting in part the

motion of that defendant and dismissing the Labor Law § 240 (1) cause of action against it, and by granting in part the cross motion of third-party defendant Williamstown Construction Company, Inc., doing business as Superior Construction Co., Inc. and/or doing business as Superior Insulation, and dismissing the third-party complaint against it and as modified the order is affirmed without costs.

Memorandum: Defendant-third-party plaintiff, Ontario Exteriors, Inc. (Ontario), and defendant-third-party defendant, The Crescent on East Avenue, Inc. (Crescent), appeal and third-party defendant Williamstown Construction Company, Inc., doing business as Superior Construction Co., Inc. and/or doing business as Superior Insulation (Williamstown), cross-appeals from an order that, inter alia, granted plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1) against defendants, granted Crescent's motion for summary judgment seeking contractual indemnification from Ontario and Williamstown, and denied that part of Ontario's motion for summary judgment seeking "common law/contractual" indemnification from Williamstown. Crescent owns property improved by condominiums, and plaintiff, an employee of Williamstown, was injured when he fell through a skylight opening in the roof while he was installing insulation in roof rafters at the condominium complex owned by Crescent.

Supreme Court properly granted that part of plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1) against Crescent. Plaintiff's fall through a skylight opening is the very type of elevation-related accident encompassed by the statute (*see Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264, 265; *see also Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052-1053). We agree with Ontario, however, that it is not liable under section 240 (1). Ontario established as a matter of law both that it did not coordinate and supervise the project (*see Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428), and that it was not an agent of the owner to which the owner delegated the power to supervise and control plaintiff's work (*see Rowland v Wilmorite, Inc.*, 68 AD3d 1770), and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order accordingly.

We further conclude that the court properly denied that part of Crescent's cross motion for summary judgment dismissing the Labor Law § 241 (6) cause of action against it. That cause of action is premised on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), which concerns hazardous openings. Crescent failed to meet its initial burden of establishing that it did not violate the regulation, that the regulation was not applicable to the facts of this case, or that the violation was not a proximate cause of the accident (*see Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349).

The court also properly denied those parts of Ontario's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it. Labor Law § 200 and common-law negligence impose liability on a defendant that, inter alia,

created a dangerous condition at the work site (*see Sullivan v RGS Energy Group, Inc.*, 78 AD3d 1503, 1503), and Ontario failed to meet its initial burden of establishing that it did not create the dangerous condition, i.e., the unguarded skylight opening through which plaintiff fell (*see Verel v Ferguson Elec. Constr. Co., Inc*., 41 AD3d 1154, 1156). We reject Ontario's further contention that it owed no duty to plaintiff because its contract was with Crescent, the property owner (*see Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652, 654; *cf. Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138).

We further conclude that the court properly granted Crescent's motion for summary judgment seeking contractual indemnification from Ontario and Williamstown. Crescent secured indemnity agreements from those parties, and the agreements do not violate General Obligations Law § 5-322.1 because they do not purport to indemnify Crescent for its own acts of negligence (*see Brooks v Judlau Contr. Inc*., 11 NY3d 204, 208-210). We reject the contentions of Ontario and Williamstown that the court was required to make a finding that Crescent was not negligent in order to conclude that Crescent was entitled to contractual indemnification. The court's conclusion is of course conditional, depending on the extent to which Crescent's negligence, if any, is determined to have contributed to the accident (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783-784).

Finally, we conclude that the court properly denied that part of Ontario's motion for summary judgment seeking contractual and common-law indemnification from Williamstown but erred in denying that part of Williamstown's cross motion for summary judgment dismissing the third-party complaint against it. We therefore further modify the order accordingly. With respect to contractual indemnification, we note that the indemnification agreement between Ontario and Williamstown applies to "The Crescent III 1496 East Ave. Rochester, NY," but the accident here took place at 1488 East Avenue and thus by its own terms the indemnification agreement is inapplicable. Even if the words "Crescent III" could be construed to apply to the entire condominium complex, thus rendering that phrase ambiguous, the agreement must be strictly construed against Ontario, which drafted it (*see Steuben Contr. v Griffith Oil Co.*, 283 AD2d 1008, 1008-1009). We conclude that Ontario is not entitled to common-law indemnification from Williamstown because it created the dangerous condition that caused plaintiff's injuries (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

228

KA 09-00276

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE A. BENTON, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 7, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Defendant's contention that prosecutorial misconduct during voir dire warrants reversal of the judgment has not been preserved for our review (*see People v Pritchett*, 248 AD2d 967, 968, *lv denied* 92 NY2d 929). In any event, we conclude that the prosecutor did not engage in misconduct by attempting to obtain unequivocal assurances from prospective jurors that they would be able to convict defendant solely on the basis of the testimony of an 11-year-old eyewitness if that testimony credibly established the elements of the crime beyond a reasonable doubt (*see People v Calabria*, 3 NY3d 80, 82; *see also People v White*, 213 AD2d 507, 508, *lv denied* 86 NY2d 742). Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct during summation. Defendant's contention with respect to several of the prosecutor's allegedly improper comments is unpreserved for our review inasmuch as defendant failed to object to those comments (*see People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965; *People v Freeman*, 78 AD3d 1505, 1505, *lv denied* 15 NY3d 952), and we decline to exercise our power to review his contention with respect to those comments as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention with respect to the remaining allegedly improper comments made by the prosecutor during summation. The prosecutor's references to defendant's trial strategy as "smoking mirrors [sic]" do " 'not constitute such a pervasive pattern of misconduct that reversal is

warranted' " (*People v Goncalves*, 239 AD2d 923, 923, *lv denied* 91 NY2d 873). Additionally, although the People correctly concede that the prosecutor's reference to an unindicted accomplice during summation was improper, defendant's prompt objection and County Court's curative instruction dispelled any prejudice (*see People v Smith*, 195 AD2d 951, 951, *lv denied* 82 NY2d 727). The prosecutor's comment alluding to defendant's failure to call a certain witness on his behalf did not constitute an impermissible effort to shift the burden of proof inasmuch as defendant elected to present a defense (*see People v Tankleff*, 84 NY2d 992, 994; *People v Rivera*, 292 AD2d 549, 549, *lv denied* 98 NY2d 654). In any event, we note that " 'the court clearly and unequivocally instructed the jury that the burden of proof on all issues [with respect to the crimes charged] remained with the prosecution' " (*People v Matthews*, 27 AD3d 1115, 1116).

We reject defendant's further contention that the court abused its discretion in allowing testimony that the eyewitness did not identify the perpetrator from a large group of photographs that were assembled based upon her initial description of the perpetrator. Where " 'the reliability of an eyewitness identification is at issue,' " negative identification evidence establishing that a witness did not identify a suspect as the perpetrator is admissible because it " 'can tend to prove that the eyewitness possessed the ability to distinguish the particular features of the perpetrator' " (*People v Wilder*, 93 NY2d 352, 357, quoting *People v Bolden*, 58 NY2d 741, 744 [Gabrielli, J., concurring]). Here, the People demonstrated that there were some similarities between the features of the persons in the photographs shown to the eyewitness and the features of defendant, i.e., they were the same race and gender as defendant. Thus, the People established the relevancy of the negative identification evidence, and the court did not abuse its discretion in concluding that the probative value of the evidence outweighed any prejudicial effect (*see id.* at 357-358).

Lastly, with respect to defendant's contention that he was denied effective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01809

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

ANTHONY SEYMOUR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA INSULATIONS, INC., ET AL., DEFENDANTS, BEAZER EAST, INC., DOMTAR CORPORATION AND HONEYWELL INTERNATIONAL, INC., DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS S. D'ANTONIO OF COUNSEL), PHILLIPS LYTLE LLP, BUFFALO, AND GOLDBERG SEGALLA LLP, FOR DEFENDANTS-APPELLANTS.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (John P. Lane, J.H.O.), entered August 13, 2012. The order denied a motion for severance made by defendant Beazer East, Inc., individually and on behalf of, inter alia, defendants Domtar Corporation and Honeywell International, Inc.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to coal tar pitch fumes and asbestos while employed as a laborer in the carbon electrode industry. In the complaint, plaintiff separated the defendants into two groups: the coal tar pitch industry defendants, which included defendants Beazer East, Inc. (Beazer), Domtar Corporation (Domtar), and Honeywell International, Inc. (Honeywell) (collectively, appellants), and the asbestos industry defendants. Plaintiff alleged in the complaint that products manufactured and sold by appellants exposed him to coal tar pitch fumes, which caused him to contract bladder cancer. Plaintiff further alleged that products manufactured and sold by the asbestos industry defendants exposed him to asbestos, which caused injuries related thereto. Appellants appeal from an order denying their motion for severance of all claims and causes of action against them pursuant to CPLR 603. We affirm.

"The determination of whether to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking the severance" (*Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606, 608; *see Caruana v Padmanabha*, 77 AD3d 1307, 1307; *see generally Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 460). The burden is on the party seeking the severance to show that "a joint trial would result in substantial prejudice" (*Global Imports Outlet, Inc. v Signature Group, LLC*, 85 AD3d 662, 662). Severance is appropriate where "individual issues predominate, concerning particular circumstances applicable to each [defendant] . . . [and there] is the possibility of confusion for the jury" (*Gittino v LCA Vision*, 301 AD2d 847, 847-848 [internal quotation marks omitted]; *see Soule v Norton*, 299 AD2d 827, 828). Here, although appellants contended that a joint trial might result in juror confusion and would be inappropriate because plaintiff's alleged injuries with respect to his exposure to coal tar pitch fumes and to asbestos were distinct, they did not satisfy their burden of establishing that a joint trial would result in substantial prejudice. Thus, we perceive no reason to disturb Supreme Court's exercise of discretion in denying the motion. Appellants' contention that severance was warranted because they would be prejudiced by the procedures relating to asbestos cases was raised for the first time in their reply papers and was therefore not properly before the court (*see Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600; *DiPizio v DiPizio*, 81 AD3d 1369, 1370). Finally, appellants' contention that, without severance, they will be denied the opportunity to seek removal of their action to federal court is raised for the first time on appeal and thus is not properly before us (*see McGrath v Town of Irondequoit*, 100 AD3d 1518, 1519; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01303

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

INEZ BIELECKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BIELECKI, DEFENDANT-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLY BAUM, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered October 5, 2011. The order granted the motion of plaintiff for a money judgment against defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in part and directing that defendant pay plaintiff her share of any pension payment defendant received on or after October 21, 2004, and as modified the order is affirmed without costs.

Memorandum: In this post-matrimonial proceeding, defendant appeals from an order that granted plaintiff's motion seeking a money judgment for sums allegedly due to plaintiff as her share of defendant's pension benefits. The judgment of divorce, entered in 1985, provided that plaintiff was entitled to her *Majauskas* share of defendant's pension "when said defendant starts to obtain his pension." Defendant began receiving pension benefits in March 1991. Plaintiff, however, was unaware that defendant was receiving such benefits and she did not begin to receive her share until October 2005, when she obtained a qualified domestic relations order (QDRO). By notice of motion filed October 21, 2010, plaintiff sought her share of pension benefits received by defendant from the date of his retirement in March 1991 until October 2005, when plaintiff began prospectively receiving her share of such benefits pursuant to the QDRO.

Supreme Court erred in granting plaintiff's motion in its entirety. Plaintiff's claim with respect to defendant's pension benefits is subject to the six-year statute of limitations set forth in CPLR 213 (1) (*see Tauber v Lebow*, 65 NY2d 596, 598; *Patricia A.M. v Eugene W.M.*, 24 Misc 3d 1012, 1015; *see also Woronoff v Woronoff*, 70

AD3d 933, 934, *lv denied* 14 NY3d 713). The statute began to run when defendant began receiving his pension in March 1991 (*see Duhamel v Duhamel*, 188 Misc 2d 754, 756, *affd* 4 AD3d 739; *Patricia A.M.*, 24 Misc 3d at 1015; *see also Bayen v Bayen*, 81 AD3d 865, 866). Because defendant's obligation to pay plaintiff her share of the pension was ongoing, the statute began to run anew with each missed payment (*see Patricia A.M.*, 24 Misc 3d at 1015-1016; *see generally Medalie v Jacobson*, 120 AD2d 652). Thus, plaintiff's claim is timely to the extent that it seeks payments missed within six years prior to her motion filed on October 21, 2010. To the extent that plaintiff sought her share of pension payments made more than six years prior to October 21, 2010, however, plaintiff's claim is untimely. We therefore modify the order accordingly. Finally, we reject plaintiff's contention that defendant is equitably estopped from raising the statute of limitations as a defense inasmuch as defendant made no affirmative misrepresentation to her, and his silence or failure to disclose the date on which he began receiving his pension benefits is insufficient to invoke the doctrine of equitable estoppel (*see generally Doe v Holy See [State of Vatican City]*, 17 AD3d 793, 795, *lv denied* 6 NY3d 707).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01869

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

RG & RH, INC. AND LG & WH, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SCHMIDT'S AUTO BODY & GLASS, INC.,
DEFENDANT-APPELLANT.

SCHMIDT'S AUTO BODY & GLASS, INC., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

RUSSELL HANNY, RICHARD GREENAWALT, AUTO
COLLISION & GLASS, INC., RICHARD R. GREENAWALT,
AND JUANITA GREENAWALT-SLOBE, THIRD-PARTY
DEFENDANTS-RESPONDENTS.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS AND THIRD-PARTY DEFENDANTS-RESPONDENTS RUSSELL HANNY AND RICHARD GREENAWALT.

HARRIS BEACH PLLC, NIAGARA FALLS (PATRICK J. BERRIGAN OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS AUTO COLLISION & GLASS, INC., RICHARD R. GREENAWALT AND JUANITA GREENAWALT-SLOBE.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 4, 2012. The order denied defendant-third-party plaintiff's motion for an injunction during the pendency of the underlying action.

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

Memorandum: Defendant-third-party plaintiff (defendant) appeals from an order denying its motion for a preliminary injunction prohibiting third-party defendants Auto Collision & Glass, Inc., Richard R. Greenawalt and Juanita Greenawalt-Slobe from engaging in any business activity that is similar to or in direct competition with defendant's business activity within a five-mile radius of 2200 Military Road in Niagara Falls during the pendency of this action.

"Preliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 736; *see Peterson v Corbin*, 275 AD2d 35, 37, *appeal dismissed* 95 NY2d 919). It is well settled that a party seeking a preliminary injunction "must establish, by clear and convincing evidence . . . , three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216, quoting *Doe v Axelrod*, 73 NY2d 748, 750; *see J.A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406). Moreover, "[a] motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC*, 69 AD3d at 216 [internal quotation marks omitted]; *see Axelrod*, 73 NY2d at 750). Here, we conclude that the court did not abuse its discretion in denying defendant's motion for a preliminary injunction (*see generally Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1695; *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

286

CA 12-00920

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF EMMANUEL PATTERSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, AND MALCOLM R. CULLY,
SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY,
RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

EMMANUEL PATTERSON, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 5, 2012 in a proceeding pursuant to CPLR article 78. The judgment vacated respondents' denial of parole release and remitted for a hearing de novo.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to vacate the determination of the New York State Division of Parole (Board) denying his release to parole supervision. Respondents appeal from a judgment granting the petition and directing a de novo hearing before a different panel. We reverse the judgment and dismiss the petition.

"It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259-i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838, 839; *see generally Matter of King v New York State Div. of Parole*, 83 NY2d 788, 790-791). The Board is "not required to give equal weight to each of the statutory factors" but, rather, may "place[] greater emphasis on the severity of the crimes than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815; *see Matter of Huntley v Evans*, 77 AD3d 945, 947). Where parole is denied, the inmate must be

informed in writing of "the factors and reasons for such denial of parole" (§ 259-i [2] [a] [i]). "Judicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety' " (*Matter of Silmon v Travis*, 95 NY2d 470, 476; *see Matter of Johnson v Dennison*, 48 AD3d 1082, 1083; *Matter of Gaston v Berbary*, 16 AD3d 1158, 1159).

Here, we conclude upon our review of the hearing transcript and the Board's written decision that the Board considered the required statutory factors and adequately set forth its reasons for denying petitioner's application for release (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778, *rearg denied* 11 NY3d 885; *Matter of Galbreith v New York State Bd. of Parole*, 58 AD3d 731, 732; *Matter of Romer v Dennison*, 24 AD3d 866, 868, *lv denied* 6 NY3d 706). We further conclude that the Board's determination does not exhibit " 'irrationality bordering on impropriety' " (*Silmon*, 95 NY2d at 476).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

287

CA 12-01011

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND WHALEN, JJ.

IN THE MATTER OF ECOGEN WIND LLC AND ECOGEN TRANSMISSION CORP., PETITIONERS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF ITALY TOWN BOARD, CONSISTING OF MARGARET DUNN, IN HER CAPACITY AS ITALY TOWN SUPERVISOR AND MEMBER OF TOWN BOARD, AND AMANDA GORTON, TIMOTHY KINTON, CHARLES KREUZER, MALCOLM IAN MACKENZIE, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF TOWN BOARD, TOWN OF ITALY, RESPONDENTS-APPELLANTS-RESPONDENTS, ET AL., RESPONDENTS, AND FINGER LAKES PRESERVATION ASSOCIATION, INTERVENOR-RESPONDENT.

GARY A. ABRAHAM, ALLEGANY, FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated Decision and Order on Reserved Issues) of the Supreme Court, Yates County (John J. Ark, J.), entered June 11, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted in part the application of petitioners for a special use permit to construct and operate a wind energy facility in respondent Town of Italy.

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

Memorandum: In this CPLR article 78 proceeding, respondents-appellants appeal and petitioners cross-appeal from an order entered February 24, 2012 that, inter alia, granted in part petitioners' application for a special use permit to construct and operate a wind energy facility in respondent Town of Italy, New York, and reserved decision on certain issues. Thereafter, Supreme Court decided the reserved issues in a judgment (denominated Decision and Order on Reserved Issues), which we deem to be the final judgment. Where, as here, the prior order is subsumed within the final judgment, the appeal is properly taken from the judgment (*see Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567). Nevertheless, we exercise our discretion to treat the notices of appeal and cross

appeal as valid, and we deem the appeal and cross appeal as taken from the judgment (*see Hughes v Nussbaumer, Clarke & Velzy,* 140 AD2d 988, 988; *see also* CPLR 5520 [c]).

We affirm the judgment for reasons stated in the decision and order at Supreme Court entered February 24, 2012.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

290

CA 12-00789

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

WILLIAM J. THYGESEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN HOLMES, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., DAVID HUMBERT, INDIVIDUALLY AND IN HIS CAPACITY AS FIRE CHIEF OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., DANIEL STROZYK, INDIVIDUALLY AND IN HIS CAPACITY AS INVESTIGATOR FOR NEW YORK STATE DIVISION OF STATE POLICE AND NEW YORK STATE DIVISION OF STATE POLICE, DEFENDANTS-RESPONDENTS.

HOGAN WILLIG, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (ELIZABETH A. CORDELLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN HOLMES, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC. AND DAVID HUMBERT, INDIVIDUALLY AND IN HIS CAPACITY AS FIRE CHIEF OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 25, 2012. The order granted in part the motion to dismiss of defendants North Bailey Volunteer Fire Company, Inc., Warren Holmes and David Humbert.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking dismissal of the first and third causes of action against defendants North Bailey Volunteer Fire Company, Inc., Warren Holmes and David Humbert and reinstating those causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former member of defendant North Bailey Volunteer Fire Company, Inc. (Fire Company), commenced this action alleging, inter alia, that defendants discriminated against him and violated his privacy and civil rights when they expelled him from membership in the Fire Company. Plaintiff also commenced a CPLR article 78 proceeding challenging the Fire Company's determination to expel him, and we confirmed that determination and dismissed the

petition (*Matter of Thygesen v North Bailey Volunteer Fire Co., Inc.*, 100 AD3d 1416). In the instant action, North Bailey Volunteer Fire Company, Inc., Warren Holmes and David Humbert (defendants) moved to dismiss the complaint against them pursuant to CPLR 3211 alleging, inter alia, that plaintiff had never served a notice of claim as required by General Municipal Law § 50-e and that plaintiff was not an employee of the Fire Company. Supreme Court granted the motion in part, dismissing the first, third, fifth and sixth causes of action against defendants. Plaintiff now appeals.

Plaintiff contends that General Municipal Law § 50-e does not apply to the instant action because the Town of Amherst (Town) is not a named defendant, and the Fire Company is a not-for-profit corporation (*see* N-PCL 1402 [e] [1]), not a municipality or a fire district. We reject that contention. Pursuant to Town Law § 170, a town is authorized to establish a fire district, fire alarm district or fire protection district for the benefit of the town residents (*see Cuddy v Town of Amsterdam*, 62 AD2d 119, 120; *see also Miller v Savage*, 237 AD2d 695, 696). A fire district is a separate legal entity whose members are employees of the fire district, not of any political subdivision (*see* § 174 [7]; *Nelson v Garcia*, 152 AD2d 22, 25). In contrast, "a fire protection district is simply a geographic area, with no independent corporate status, for which the town board is responsible for providing for the furnishing of fire protection" (1981 Ops St Comp No. 81-1; *see* § 184; *Miller*, 237 AD2d at 696; *Nelson*, 152 AD2d at 24-25). Members of the fire departments or companies established within a fire protection district "are deemed officers, employees, or appointees of the town[,] and the town is liable for any negligence on the part of such members" (*Nelson*, 152 AD2d at 24*; see* General Municipal Law §§ 50-a [1]; 50-b [1]; 205-b; Town Law § 184 [1]; N-PCL 1402 [e] [1]; *Miller*, 237 AD2d at 696; *Miller v Morania Oil of Long Is., O.C.P.*, 194 AD2d 770, 771).

It is undisputed that, in 1958, the Town established the North Bailey Fire Co., Inc., Fire Protection District No. 18 (Fire Protection District). The Town, acting on behalf of the Fire Protection District, contracted with the Fire Company for fire protection services within the Fire Protection District. Where an action is commenced against an officer, appointee or employee of a public corporation such as the Town of Amherst, "service of the notice of claim upon the public corporation shall be required . . . if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law" (General Municipal Law § 50-e [1] [b]), and that is the case here.

Having determined that General Municipal Law § 50-e is implicated by this action, we now address its application to the four causes of action dismissed by the court. We conclude that the court erred in granting those parts of the motion with respect to the first and third causes of action, alleging violations of the Human Rights Law (Executive Law § 296 *et seq.*), and properly granted those parts of the motion with respect to the fifth and sixth causes of action, alleging defamation. We therefore modify the order accordingly.

It is well settled that the notice of claim requirements of General Municipal Law § 50-e do not apply to discrimination causes of action under the Human Rights Law inasmuch as those causes of action are not "founded upon tort" (General Municipal Law § 50-e [1] [a]; *see Mills v County of Monroe*, 89 AD2d 776, 776, *affd* 59 NY2d 307, *cert denied* 464 US 1018; *Margerum v City of Buffalo*, 63 AD3d 1574, 1580; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 816; *Picciano v Nassau County Civ. Serv. Commn.*, 290 AD2d 164, 170; *Sebastian v New York City Health & Hosps. Corp.*, 221 AD2d 294, 294-295). Thus, based on the limited issues raised by the parties (*cf.* County Law § 52; Town Law § 67 [1], [2]; *Scopelliti v Town of New Castle*, 210 AD2d 308, 309), we conclude that defendants were not entitled to dismissal of the first and third causes of action based on plaintiff's failure to serve a notice of claim.

We reach a different conclusion with respect to the fifth and sixth causes of action, however, which are "founded upon tort" (General Municipal Law § 50-e [1]). The fifth cause of action alleges the tort of defamation against defendants Warren Holmes and David Humbert, and the sixth cause of action alleges the tort of defamation against Humbert. Both Holmes and Humbert were sued individually and in their capacity as members of the Fire Company. Inasmuch as the Town would be obligated to indemnify both men (*see Miller*, 237 AD2d at 696; *Nelson*, 152 AD2d at 24), the Town was entitled to a notice of claim pursuant to General Municipal Law § 50-e (1), and plaintiff's failure to serve that notice of claim is fatal to the fifth and sixth causes of action.

Defendants also sought dismissal of the first and third causes of action against them, alleging violations of the Human Rights Law, on the ground that plaintiff could not be deemed an employee covered by that statute. "It is well settled that the federal standards under title VII of the Civil Rights Act of 1964 are applied to determine whether recovery is warranted under the Human Rights Law" (*VanDeWater v Canandaigua Natl. Bank*, 70 AD3d 1434, 1435, citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3). The question before us on this appeal is whether plaintiff may invoke the protections of the Human Rights Law, i.e., whether he was an "employee" of defendants. " '[T]he question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received direct or indirect remuneration from the alleged employer' " (*York v Association of Bar of City of N.Y.*, 286 F3d 122, 125-126, *cert denied* 537 US 1089, *reh denied* 537 US 1228, quoting *Pietras v Board of Fire Commrs. of Farmingville Fire Dist.*, 180 F3d 468, 473). Pursuant to the decision of the Second Circuit in *York*, "the following factors [are] indicative of 'financial benefit': salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing" (*id.* at 126). The benefits received "must meet a minimum level of 'significance,' or substantiality, in order to find an employment relationship in the absence of more traditional compensation" (*id.*). In accord with the federal decisions, "a non-salaried volunteer firefighter's employment status under Title VII is a fact question when that firefighter is entitled to *significant*

benefits" (*Pietras*, 180 F3d at 473 [emphasis added]).

The record establishes that plaintiff received $440 per month as a result of the Service Award Program. While defendants contend that such amount represents a retirement benefit, not remuneration, there is a split of authority on the question whether such a benefit raises a triable issue of fact on the issue of employment (*compare E.E.O.C. v Incorporated Vil. of Val. Stream*, 535 F Supp 2d 323, 328-329, *with Keller v Niskayuna Consol. Fire Dist. 1*, 51 F Supp 2d 223, 231-232). Plaintiff identified additional benefits he received, including death benefits, eyeglass coverage and hearing aid coverage, as well as benefits he was afforded pursuant to General Municipal Law § 208-b, which include a death benefit payable to, inter alia, the spouse or dependent children of a regular member of a fire department. "Because compensation is not defined by statute or case law, . . . [the determination whether those benefits received constituted compensation could not] be found as a matter of law. The . . . court must leave to a factfinder the ultimate conclusion whether the benefits represent indirect but significant remuneration as [plaintiff] contends or inconsequential incidents of an otherwise gratuitous relationship as [defendants contend]" (*Haavistola v Community Fire Co. of Rising Sun, Inc.*, 6 F3d 211, 221-222; *see Pietras*, 180 F3d at 473; *E.E.O.C.*, 535 F Supp 2d at 328-329). We thus conclude that the court erred in determining as a matter of law that the benefits plaintiff received were insufficient to constitute compensation and that plaintiff therefore was not defendants' employee as a matter of law.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

307

CA 12-01718

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

TARA TIWARI AND GANGA TIWARI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JEFFREY M. TYO AND MED INN CENTERS OF AMERICA LLC, DOING BUSINESS AS DOUBLE TREE CLUB HOTEL, DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY 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, Erie County (Joseph R. Glownia, J.), entered April 24, 2012. The order granted the motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking a determination that defendants' negligence was the sole proximate cause of the accident and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Tara Tiwari (plaintiff) when a vehicle operated by defendant Jeffrey M. Tyo backed into him. According to plaintiff's deposition testimony, he was walking on a sidewalk approaching the Double Tree Club hotel when he noticed two individuals walking toward him in the opposite direction using the same sidewalk. Plaintiff left the sidewalk and walked onto the adjacent hotel driveway. Tyo struck plaintiff when he was backing up the hotel courtesy van in the driveway. We conclude that Supreme Court erred in granting plaintiffs' motion for partial summary judgment on liability in its entirety, and instead should have denied that part of the motion with respect to the issue of proximate cause. We therefore modify the order accordingly. Although the court properly granted plaintiffs' motion insofar as it sought partial summary judgment on the issue of defendants' negligence, we conclude that plaintiffs failed to establish in support of their motion that defendants' negligence was the sole proximate cause of the accident, i.e., that there was no comparative negligence on the part of plaintiff (*see DeBrine v VanHarken*, 83 AD3d 1437, 1438; *Leahey v Fitzgerald*, 1 AD3d 924, 926;

cf. Limardi v McLeod, 100 AD3d 1375, 1375-1376). With respect to the issue of serious injury, we note that, in support of their motion, plaintiffs submitted the affirmation of plaintiff's physician who based his conclusion that plaintiff sustained a serious injury on his review of plaintiff's MRI films, and we conclude that the expert's affirmation sets forth objective evidence of a serious injury (*see generally Nitti v Clerrico*, 98 NY2d 345, 358). Contrary to defendants' contention, it was not necessary for the physician to attach the MRI reports or films to his affirmation because he indicated that he reviewed the actual MRI films upon which he relied to form his opinion (*cf. id.*; *Sherlock v Smith*, 273 AD2d 95, 95).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

309

CA 12-01766

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
ONTARIO COUNTY AND ONTARIO COUNTY SHERIFF,
PETITIONERS-APPELLANTS,

AND MEMORANDUM AND ORDER

ONTARIO COUNTY SHERIFF'S UNIT 7850-01,
CSEA, LOCAL 1000, AFSCME, AFL-CIO,
RESPONDENT-RESPONDENT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (WENDY R. WELCH OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD, LLP, ROCHESTER (ROBERT G. MCCARTHY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered June 22, 2012 in a proceeding pursuant to CPLR article 75. The order denied the petition to stay arbitration and granted respondent's cross motion to compel arbitration.

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

Memorandum: Petitioners commenced this proceeding to stay arbitration (*see* CPLR 7503 [b]), and respondent "cross-moved" to compel arbitration with respect to grievances allegedly involving a provision of the parties' collective bargaining agreement (CBA) (*see* CPLR 7503 [a]). Pursuant to the CBA, disputes over the meaning or application of that agreement were required to be submitted first through a grievance process, but could thereafter be submitted to arbitration if the employee was "not satisfied" with the result obtained through that process. Respondent filed grievances on behalf of two correction officers whose request for a shift exchange was denied. Respondent asserted that the denial "[v]iolated or [i]nvolved" section 3.11 of the CBA, which provides that "time exchanged between employees shall not be done if it results in a requirement . . . that overtime be paid," and respondent requested that the shift exchanges be allowed. The grievances also involved the application of a Shift Swapping Policy, which was not contained in the CBA, between respondent and petitioner Ontario County that outlined the specific procedures an employee must follow when exchanging a shift with a fellow employee. The Shift Swapping Policy states with

respect to shift swapping on holidays that the person working the holiday receives the holiday pay "[t]o be consistent with contract language." The grievances were denied, and respondent informed petitioners of its intent to seek arbitration. As noted, petitioners filed a petition to stay arbitration, and respondent "cross-moved" to compel arbitration. Supreme Court denied the petition and granted the cross motion, and we affirm.

"A grievance may be submitted to arbitration only where the parties agree to arbitrate that kind of dispute, and where it is lawful for them to do so" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278; *see Matter of Bd. of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-142). Here, the parties do not challenge the lawfulness of arbitrating the instant dispute and, instead, petitioners contend that there is no valid agreement to arbitrate the grievances at issue inasmuch as the CBA did not contemplate shift exchanges. We reject that contention.

In determining whether the parties agreed to arbitrate the dispute at issue, "[o]ur review . . . is limited to the language of the grievance and the demand for arbitration, as well as to the reasonable inferences that may be drawn therefrom" (*Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, *lv denied* 14 NY3d 712). "Where, as here, there is a broad arbitration clause and a 'reasonable relationship' between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court 'should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them' " (*Matter of Van Scoy [Holder]*, 265 AD2d 806, 807-808, quoting *Matter of Bd. of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Matter of Town of Cheektowaga [Cheektowaga Police Club, Inc.]*, 59 AD3d 993, 994). We therefore conclude that the court properly determined that the parties agreed to arbitrate the instant dispute. In light of our determination, we do not address petitioners' remaining contentions.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

310

CA 12-01725

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DAVID T. ROMILLY, INDIVIDUALLY AND AS ASSIGNEE OF A DEM ENTERTAINMENT, INC., A DEM ENTERTAINMENT AND DANNY E. MITCHELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RMF PRODUCTIONS, LLC, ANDRE LANGSTON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 15, 2011. The order, insofar as appealed from, granted in part the motion of defendants-respondents for summary judgment.

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

Memorandum: Plaintiff, individually and as assignee of A DEM Entertainment, Inc., A DEM Entertainment (A DEM) and Danny E. Mitchell, commenced this action seeking damages for, inter alia, the alleged breach of agreements between A DEM and defendant RMF Productions, LLC (RMF). Pursuant to an agreement dated September 8, 2008, A DEM agreed to make a capital contribution to fund the expenses of a concert by hip-hop artist “Lil’ Wayne” that was scheduled to be held at a venue in Rochester on October 25, 2008 (original agreement). In return for its investment, A DEM was to receive a share of the profits from that concert, if any. The plans for the concert thereafter changed from a single-night performance by Lil’ Wayne to a two-day event on October 25 and 26, 2008, at which other artists were also to perform. Lil’ Wayne was to be the “headline act” on the second day. Pursuant to an agreement between A DEM and RMF dated October 2, 2008, A DEM agreed to make an additional capital contribution (amended agreement). It is undisputed that Lil’ Wayne

failed to appear on October 26 and, pursuant to an agreement between the Attorney General, RMF and the venue, refunds were issued upon request to persons who purchased tickets for the concert on that date. Defendants-respondents (hereafter, defendants) have not made any payments pursuant to the original agreement or the amended agreement (collectively, agreement).

Plaintiff commenced this action alleging causes of action for breach of contract, fraudulent inducement, unjust enrichment and monies had and received. Defendants moved for summary judgment dismissing the complaint against them. Supreme Court granted those parts of the motion for summary judgment dismissing the causes of action for breach of contract, unjust enrichment and monies had and received, and otherwise denied the motion.

The court erred in granting that part of defendants' motion seeking summary judgment dismissing the breach of contract cause of action, and we therefore modify the order accordingly. First, we agree with plaintiff that the agreement is ambiguous with respect to whether A DEM and RMF intended to treat A DEM's capital contribution as a single investment covering the two-day event, or whether they intended that the contribution be divided and treated as separate investments in the October 25 concert and the October 26 concert. The agreement is reasonably susceptible of more than one interpretation, and defendants failed to meet their "burden of establishing that the construction [they] favor[] is the only construction which can fairly be placed thereon" (*Kibler v Gillard Constr., Inc*., 53 AD3d 1040, 1042 [internal quotation marks omitted]). "Because the determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, the issue is one of fact for the trier of fact and cannot be resolved as a matter of law" (*Morales v Asarese Matters Community Ctr*. [appeal No. 2], 103 AD3d 1262, 1264 [internal quotation marks omitted]). Further, even if we were to accept their interpretation of the contract, we conclude that defendants failed to meet their burden of establishing that RMF fulfilled its obligations to A DEM under the agreement. The "Two Day Concert Accounting" and supporting documentation submitted by defendants, which purport to show that the two-day event lost money, are not in admissible form (*see Republic W. Ins. Co. v RCR Bldrs.*, 268 AD2d 574, 575); indeed, defendants do not even identify who prepared the accounting.

Finally, plaintiff does not raise any issues in his appellate brief with respect to the order insofar as it granted those parts of defendants' motion seeking summary judgment dismissing the causes of action for unjust enrichment and money had and received. We therefore deem any such issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

311

CA 12-01354

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

TRAHWEN, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MING 99 CENT CITY #7, INC., DOING BUSINESS AS 99 CENT CITY, DONGXIA JIANG, LIZHONG LIU, SI MING HUANG AND SUI ZHEN NI, DEFENDANTS-APPELLANTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 3, 2012. The order, among other things, adjudged that defendants are liable to plaintiff for breach of lease.

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

Memorandum: Plaintiff, the owner of a retail shopping center, commenced this action seeking damages arising from the alleged breach of a commercial lease agreement for rental space within the shopping center. The lease was personally guaranteed by the individual defendants. In their answer, defendants alleged that they were fraudulently induced to enter into the lease by plaintiff's predecessor in interest, BG New Hartford, LLC (BG), and they sought damages "suffered as a result of the fraudulent inducement to enter into the lease." Supreme Court granted in part plaintiff's motion for summary judgment by granting plaintiff partial summary judgment on liability and dismissing "any and all affirmative defenses and counterclaims" of defendants. We affirm.

Plaintiff established its entitlement to judgment as a matter of law based on defendants' breach of the lease, and defendants failed to raise an issue of fact with respect to plaintiff's alleged fraudulent inducement, which appears to be asserted both as an affirmative defense and as a counterclaim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In order to establish plaintiff's alleged fraudulent inducement, defendants were required to establish the existence of "a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually

relies, consequently sustaining a detriment" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275; *see Wright v Selle*, 27 AD3d 1065, 1067).

Here, defendants' allegations of fraudulent inducement are based upon the alleged representation of BG that the retail space adjacent to the location rented by defendant Ming 99 Cent City #7, Inc., doing business as 99 Cent City (99 Cent City), within the New Hartford Consumer Square Shopping Center had been "leased to others" when, in fact, the adjacent space was vacant. Defendants further alleged that, if the adjacent space had been occupied, there would have been increased pedestrian and vehicular traffic in that section of the shopping center, which would have resulted in "an acceptable economic environment" for 99 Cent City. The record, however, is devoid of evidence that a tenant occupying adjacent space would have produced an increase in customers or sales at 99 Cent City. Defendants' verified answer, their verified bill of particulars, and the affidavit of defendant Dongxia Jiang, the only documents relied upon by defendants in opposition to plaintiff's motion, contain nothing more than speculation and conclusory assertions that BG's representation, even if untrue, resulted in a detriment to defendants. Such conclusory and speculative assertions are insufficient to defeat a motion for summary judgment (*see Elmer v Kratzer*, 249 AD2d 899, 901, *appeal dismissed* 92 NY2d 921; *see also Dolansky v Frisillo*, 92 AD3d 1286, 1288).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

313

CA 12-01548

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

ANDREW NAVETTA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONONDAGA GALLERIES LIMITED LIABILITY COMPANY
AND FLAUM MANAGEMENT COMPANY, INC.,
DEFENDANTS-APPELLANTS.

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (AMANDA KURYLUK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (KEITH YOUNG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 17, 2011. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the amended complaint to the extent that the amended complaint, as amplified by the bill of particulars and supplemental bill of particulars, alleges that defendants had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on a wet floor in a building owned and operated by defendants. Defendants moved for summary judgment dismissing the amended complaint, and Supreme Court denied the motion. Defendants appeal.

" 'In seeking summary judgment dismissing the [amended] complaint, defendant[s] had the initial burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415). We note at the outset that plaintiff did not assert that defendants created the allegedly dangerous condition, i.e., the wet floor on which plaintiff fell, and thus the only issue before the court was whether defendants had actual or constructive notice thereof (*see generally Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1377). Consequently, the issue whether defendants created the relevant condition was not before the court, and the court therefore erred in determining in its bench decision that there is a question of

fact on that issue.

Regarding the issue of actual notice, we agree with defendants that the court erred in denying the motion with respect to the claim that defendants had actual notice of the allegedly dangerous condition, and we therefore modify the order accordingly. To establish that they did not have actual notice of the allegedly dangerous condition, defendants were required to show that they did not receive any complaints concerning the area where plaintiff fell and were unaware of any water or other substance in that location prior to plaintiff's accident (*see Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857). Here, defendants submitted the affidavit of the leasing director and general manager of the building in which plaintiff fell (general manager), wherein he averred that no leak or spill was reported to him on the morning of the accident, and that neither he nor any other employees at the building observed such a leak or spill during an inspection of the premises that morning. Defendants therefore met their initial burden on the issue of actual notice, and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to defendants' contention, however, we conclude that the court properly denied the motion with respect to the claim that defendants had constructive notice of the allegedly dangerous condition. Defendants failed to meet their initial burden on that issue inasmuch as their submissions raise issues of fact whether the wet floor "was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendants] to discover and remedy it" (*King*, 81 AD3d at 1415; *see Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089-1090, *lv dismissed* 5 NY3d 746*; see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *Zuckerman*, 49 NY2d at 562). The fact that plaintiff did not notice water on the floor before he fell does not establish defendants' entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent (*see Gwitt v Denny's, Inc.*, 92 AD3d 1231, 1232; *see also King*, 81 AD3d at 1415; *Russo*, 12 AD3d at 1089). Indeed, defendants raised a question of fact with respect to that issue by submitting plaintiff's deposition testimony in which he stated that he observed water on the floor after he fell, as well as the general manager's deposition testimony in which he stated that, after plaintiff's fall, he observed a puddle of water that was 10 inches in diameter on the floor in proximity to the area where plaintiff fell (*see Gwitt*, 92 AD3d at 1232). Moreover, inasmuch as defendants failed to submit evidence with respect to the specific time when the area where plaintiff fell was last inspected, there is an issue of fact whether the defect in question existed for a sufficient length of time prior to plaintiff's fall to permit defendants to discover and remedy it (*cf. Quinn*, 15 AD3d at 857-858).

Even assuming, arguendo, that defendants established as a matter of law that they did not have constructive notice of the particular

condition at issue here, we conclude that, based on defendants' own submissions, "an inference could be drawn that defendant[s] had actual knowledge of a recurrent dangerous condition and therefore could be charged with constructive notice of each specific reoccurrence of the condition" (*Chrisler v Spencer*, 31 AD3d 1124, 1125; *see Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761; *see generally Zuckerman*, 49 NY2d at 562). Although defendants submitted the affidavit of the general manager in which he averred that there were no recurrent leaks around the time of plaintiff's fall because the roof in the area where plaintiff fell had been replaced before the accident, that statement conflicts with the deposition testimony provided by the general manager that he did not remember when the roof was replaced. "[T]he conflict between [that] deposition testimony and . . . affidavit raises a question of credibility to be resolved at trial" (*Gwitt*, 92 AD3d at 1232). Inasmuch as the burden never shifted to plaintiff to raise a triable issue of fact regarding the issue of constructive notice, we do not address defendants' remaining contentions concerning the sufficiency of plaintiff's opposing papers (*see Dengler v Posnick*, 83 AD3d 1385, 1386-1387).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

314

CA 11-02578

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

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

V MEMORANDUM AND ORDER

NORMAN CALHOUN, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (CRAIG P. SCHLANGER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James C. Tormey, J.), entered September 1, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied respondent's motion to dismiss the petition.

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

Memorandum: In a proceeding pursuant to Mental Hygiene Law article 10, respondent appeals from an order denying his motion to dismiss the petition alleging that he is a dangerous sex offender requiring civil management. On October 4, 2004, respondent pleaded guilty in Jefferson County to charges of criminal sexual act in the first degree (Penal Law § 130.50 [3]) and possessing an obscene sexual performance by a child (§ 263.11). He was sentenced to a determinate term of incarceration of five years followed by a period of five years of postrelease supervision for the criminal sexual act conviction and to a concurrent indeterminate term of incarceration of 1⅓ to 4 years for the possessing an obscene sexual performance conviction. Respondent was released to postrelease supervision on June 17, 2009, but on September 23, 2009 he was arrested for and charged with violating the conditions of his release by, inter alia, possessing child pornography, and was returned to custody. While awaiting a hearing on that alleged violation, respondent was charged by federal authorities with receiving and possessing child pornography, and he pleaded guilty to those charges on April 26, 2010. He was sentenced in federal court to a 264-month term of incarceration and was thereafter returned to state custody. Upon his return, the Division of Parole revoked his postrelease supervision and imposed a time assessment of 18 months, resulting in a scheduled release date from

state custody of March 23, 2011.

On March 21, 2011, in anticipation of respondent's scheduled release, petitioner commenced this Mental Hygiene Law article 10 proceeding seeking to have respondent adjudged a sex offender in need of civil management. Respondent moved to dismiss the petition for, inter alia, lack of subject matter jurisdiction; specifically, respondent asserted that Supreme Court does not have subject matter jurisdiction to hear an article 10 proceeding in 2013 when he will not be subject to release from federal custody for at least another 19 years. The court denied respondent's motion, finding that article 10 is implicated whenever an individual is subject to release from state custody and that it is immaterial whether he or she may immediately be placed into custody in another jurisdiction. We disagree.

Pursuant to Mental Hygiene Law § 10.05 (b), "[w]hen it appears to an agency [that is responsible for supervising or releasing a person (*see* § 10.03 [a])] that a person who may be a detained sex offender is nearing an anticipated release from confinement, the agency shall give notice of that fact to the attorney general and to the commissioner of mental health." "Release" is defined as "release, conditional release or discharge from confinement, from community supervision by the department of corrections and community supervision, or from an order of observation, commitment, recommitment or retention" (§ 10.03 [m]). Neither article 10 nor its legislative history address whether the term "release" is limited to a release from state custody or whether it encompasses a release from custody in all jurisdictions.

It is well settled that a court is without subject matter jurisdiction "when it lacks the competence to adjudicate a particular kind of controversy in the first place. As the Court of Appeals has observed, '[t]he question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it' " (*Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 243, quoting *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718). Moreover, subject matter jurisdiction requires that the matter before the court is ripe (*see Matter of Agoglia v Benepe*, 84 AD3d 1072, 1076). In other words, courts "may not issue judicial decisions that can have no immediate effect and may never resolve anything," and thus "an action may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur" (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [internal quotation marks omitted]). It is axiomatic that an article 10 determination issued in 2013 would have no immediate effect on a sex offender who is not to be released from federal prison until 19 to 22 years later, especially considering the well-accepted principle that a sex offender, who is at one point determined to be dangerous, may subsequently be found to no longer be dangerous—a principle recognized by article 10's allowance for *annual* reviews (*see* Mental Hygiene Law § 10.09; *State of New York v Maurice G.*, 32 Misc 3d 380, 389; *see generally Matter of State of New York v Lashaway*, 100 AD3d 1372, 1373; *People v Arroyo*, 27 Misc 3d 192, 194). While a court continues to have subject matter jurisdiction over a sex offender who has previously been determined to

be a dangerous sex offender in need of civil management (*see Lashaway*, 100 AD3d at 1373; *Maurice G.*, 32 Misc 3d at 397; *Arroyo*, 27 Misc 3d at 193-194), here petitioner is seeking an initial determination regarding respondent's status under article 10. Although the statutory language suggests that a proceeding under article 10 is appropriate when a prisoner is subject to release from state custody (*see* § 10.05 [b]), we do not interpret that language as negating the overarching principle that where, as here, the issue before the court is not ripe for review, the court lacks subject matter jurisdiction (*see generally Agoglia*, 84 AD3d at 1076). We therefore conclude that the petition must be dismissed.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

324

KA 12-01247

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

QUENTIN A. SIMS, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), dated June 5, 2012. The order granted those parts of the omnibus motion of defendant seeking to suppress certain physical evidence and oral statements.

It is hereby ORDERED that the order so appealed from is reversed on the law, those parts of the omnibus motion seeking to suppress statements and physical evidence are denied, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order that granted those parts of defendant's omnibus motion seeking to suppress physical evidence, i.e., a handgun, and defendant's oral statements to the police. We agree with the People that County Court erred in granting those parts of defendant's motion. The arresting officer did not violate defendant's rights when he approached him and asked for identification. According to the testimony presented by the People at the suppression hearing, the arresting officer and his partner were driving down the street in their marked patrol vehicle when defendant emerged from an alleyway riding a bicycle. The arresting officer testified that defendant continued to stare at him as defendant rode alongside the patrol vehicle for about 10 to 15 feet. Defendant was staring at the arresting officer when he "rode the bicycle into a porch" of a residence and "fell." Defendant then "ran up on the porch." At that point, the arresting officer was justified in asking defendant if he lived at the residence and, when defendant replied that he did not, in asking defendant for identification. Indeed, "[t]he testimony at the suppression hearing establishes that the police officer[] had an objective, credible reason for initially approaching defendant and requesting information about him" (*People v Hill*, 302 AD2d 958, 959, *lv denied* 100 NY2d 539; *see People v Bracy*,

91 AD3d 1296, 1297; *see generally People v Hollman*, 79 NY2d 181, 190-192).

We further conclude that the evidence presented at the suppression hearing establishes that the arresting officer had reasonable suspicion to believe that defendant posed a threat to his safety at the time he grabbed defendant's hand. According to the officer's testimony, defendant placed his hand in his pocket at least three times in spite of the arresting officer's requests that he not do so. Moreover, defendant placed his hand in his pocket even though he had previously told the arresting officer that he did not have any identification. According to the testimony of the arresting officer's partner, the officers were located in an area that was the "most violent project in the City of Buffalo" and was known for "guns and drugs." Based on that evidence, we conclude that the arresting officer's action in grabbing defendant's hand on the outside of his pants pocket as defendant reached inside the pocket was a "constitutionally justified intrusion designed to protect the safety of the officer[]" (*People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787; *see Bracy*, 91 AD3d at 1297-1298). The arresting officer "had a reasonable basis for fearing for his safety and was not required to 'await the glint of steel' " (*People v Stokes*, 262 AD2d 975, 976, *lv denied* 93 NY2d 1028, quoting *People v Benjamin*, 51 NY2d 267, 271).

Given that the arresting officer, upon grabbing defendant's hand, touched an object through defendant's pocket that he believed to be a small handgun, "the officer did not act unlawfully in reaching into the pocket and removing the object" (*Bracy*, 91 AD3d at 1298; *see People v Davenport*, 9 AD3d 316, 316, *lv denied* 3 NY3d 705). Finally, because the arresting officer's conduct was lawful, defendant's oral statements to the police are not subject to suppression as fruit of the poisonous tree (*see generally People v Carter*, 39 AD3d 1226, 1226-1227, *lv denied* 9 NY3d 863).

All concur except FAHEY and SCONIERS, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we conclude that County Court properly granted defendant's motion to suppress physical evidence and his oral statements to the police. We agree with the majority that the police had a legitimate reason to request information from defendant (*see People v De Bour*, 40 NY2d 210, 220). Nevertheless, the court properly determined that the police lacked the necessary justification to escalate the encounter to a level three pat down of defendant. Pursuant to *De Bour*, "level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor" (*People v Moore*, 6 NY3d 496, 498-499). Here, there was no proof that defendant had committed a crime. Moreover, there had been no radio call or other report of a crime in the vicinity preceding this encounter. Defendant had merely stared at police officers while riding his bicycle, whereupon he rode the bicycle into the steps of a porch, fell off the bicycle, jumped up, and ran up the steps. When asked for identification, defendant responded that he had none. Also, defendant placed his hand in his

pocket at least three times, contrary to a police officer's requests that he not do so. "It is . . . well settled that actions that are 'at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality' " (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844; *see People v Powell*, 246 AD2d 366, 369, *appeal dismissed* 92 NY2d 886). Here, the fact that defendant put his hand in his pocket, "absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime" (*Riddick*, 70 AD3d at 1422-1423). In addition, the fact "that this may have been a high-crime area . . . could not itself validate the search since no other objective indicia of criminality existed to supply the requisite reasonable suspicion for the forcible stop and frisk" (*Powell*, 246 AD2d at 369-370; *see Riddick*, 70 AD3d at 1423). Importantly, this Court has consistently held that "[g]reat deference is afforded the findings of the suppression court" (*People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957, citing *People v Prochilo*, 41 NY2d 759, 761; *see e.g. People v Peay*, 77 AD3d 1309, 1310, *lv denied* 15 NY3d 955; *People v Williams*, 202 AD2d 976, 976, *lv denied* 83 NY2d 916) and, affording appropriate deference to the findings of the suppression court, we conclude that an affirmance is warranted.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

354

CA 12-00655

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

MICHAEL CANTINERI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FREDERIC CARRERE, DOING BUSINESS AS HOMEWORKS BUILDERS, DEFENDANT.

CELLINO & BARNES, P.C., APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (NICHOLAS DAVIS OF COUNSEL), FOR APPELLANT.

Appeal from an order of the Supreme Court, Steuben County (Thomas M. Van Strydonck, J.), entered April 8, 2011. The order denied the motion of Cellino & Barnes, P.C., to withdraw as counsel for plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the motion to withdraw as counsel is granted, upon condition that appellant shall serve upon plaintiff and the attorney for defendant a copy of the order of this Court with notice of entry, and upon condition that appellant shall file proof of service with the Clerk of Supreme Court, Steuben County, where the action is pending, whereupon all proceedings in this action shall be stayed for 90 days to permit plaintiff to retain new counsel.

Memorandum: Supreme Court improvidently exercised its discretion in denying appellant's motion to withdraw as plaintiff's counsel (*see generally Kay v Kay*, 245 AD2d 549, 550; *Stephen Eldridge Realty Corp. v Green*, 174 AD2d 564, 566). Pursuant to rule 1.16 (c) (7) of the Rules of Professional Conduct (22 NYCRR 1200.0), "a lawyer may withdraw from representing a client when . . . the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively." Additionally, "[a]n attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client" (*Matter of William v Lewis*, 258 AD2d 974, 974). Under the specific facts and circumstances of this case, we conclude that plaintiff's conduct rendered appellant's representation of him unreasonably difficult and thus good and sufficient cause exists for appellant to withdraw from that representation. We therefore grant appellant's motion to withdraw as counsel and we stay the proceedings for 90 days to provide plaintiff

"with ample opportunity to retain new counsel" (*Stephen Eldridge Realty Corp.*, 174 AD2d at 565).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

355

CA 12-01574

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

CHRISTOPHER HAMILTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN MILLER, DAVID MILLER, JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES, DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOHN MILLER AND DAVID MILLER.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS E. REIDY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 30, 2012. The order, among other things, directed plaintiff to produce certain medical reports.

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

Memorandum: Plaintiff commenced this action seeking damages arising from his exposure to lead-based paint as a child while residing at various times in rental units owned by defendants. As amplified by his bills of particulars, plaintiff alleged that he suffered 58 injuries as a result of his exposure to lead, including neurological damage, diminished cognitive function and intelligence, emotional and psychological harm, lowered IQ, impaired educational and occupational functioning, behavioral problems, damage to his DNA, and other cognitive and developmental disabilities. Defendants Jules Musinger, Doug Musinger, and Singer Associates (Musinger defendants) moved to compel plaintiff, prior to any physical or mental examinations of plaintiff pursuant to CPLR 3121 (a), to produce any medical reports diagnosing plaintiff with the alleged injuries and causally relating those injuries to exposure to lead, and to provide an amended bill of particulars pertaining to the Musinger defendants to reflect those injuries. In the alternative, the Musinger defendants requested an order precluding proof of plaintiff's injuries if plaintiff failed to produce any such aforementioned medical reports in compliance with 22 NYCRR 202.17 (b) (1). Defendant John Miller

cross-moved for similar relief. Plaintiff opposed the motion and the cross motion, and in turn cross-moved for, inter alia, a protective order pursuant to CPLR 3103. Plaintiff also requested that Supreme Court take judicial notice of 42 USC § 4851 pursuant to CPLR 4511.

The court granted the Musinger defendants' motion and Miller's cross motion, ordering that, "in the event the plaintiff fails to produce the aforementioned [medical] report or reports, plaintiff shall be precluded from introducing any proof concerning injuries alleged to have been sustained by the plaintiff", and denied plaintiff's cross motion. We affirm.

Contrary to plaintiff's contention, we conclude that the court properly denied that part of his cross motion requesting that the court take judicial notice of 42 USC § 4851, i.e., the congressional findings concerning the Residential Lead-Based Paint Hazard Reduction Act of 1992 ([RLPHRA] 42 USC § 4851 *et seq.*). The RLPHRA requires "the disclosure of lead-based paint hazards in . . . housing which is offered for sale or lease" (42 USC § 4852d [a] [1]), and creates a private right of action in favor of purchasers or lessees who incur lead-related damages (*see* 42 USC § 4852d [b] [3]; *see generally Brown v Maple3, LLC*, 88 AD3d 224, 231-232; *Skerritt v Bach*, 23 AD3d 1080, 1081). CPLR 4511 (a) provides that "[e]very court shall take judicial notice without request of the . . . public statutes of the United States." The purpose of that provision is to "obviate the former legal requirement of proving as a fact a foreign statute or law upon which a party [is] rel[ying]" (*Pfleuger v Pfleuger*, 304 NY 148, 151). Where a statute is not relevant to a particular case, however, a court may decline to take judicial notice of it (*see Van Wert v Randall*, 100 AD3d 1079, 1081-1082; *cf. Corines v Dobson*, 135 AD2d 390, 392). This case does not involve allegations that plaintiff was a purchaser or lessee of the premises in question or that defendants violated the RLPHRA and, therefore, 42 USC § 4851 is not "a foreign statute or law upon which [plaintiff] [is] rel[ying]" (*Pfleuger*, 304 NY at 151). The court thus did not abuse its discretion in refusing to take judicial notice of that statute (*see Van Wert*, 100 AD3d at 1081-1082). Furthermore, the court was not required to take judicial notice of the factual findings contained in section 4851 inasmuch as causation is one of the disputed issues to be determined at trial (*see Robinson v Bartlett*, 95 AD3d 1531, 1536; *Sleasman v Sherwood*, 212 AD2d 868, 870; *see generally Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 621).

We reject the further contention of plaintiff that the court abused its discretion in directing him to produce medical reports diagnosing him with injuries that are causally related to his exposure to lead. " 'Absent an abuse of discretion, we will not disturb the court's control of the discovery process' . . . , and we perceive no abuse of discretion in this case" (*Marable v Hughes*, 38 AD3d 1344, 1345; *see Giles v A. Gi Yi*, ___ AD3d ___, ___ [Apr. 26, 2013]; *Nero v Kendrick*, 100 AD3d 1383, 1383-1384; *see generally* CPLR 3101 [a]; 22 NYCRR 202.17).

All concur except WHALEN, J., who concurs on constraint of *Giles v*

A. Gi Yi (___ AD3d ___ [Apr. 26, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

367

KA 11-00641

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONDULA LANE, DEFENDANT-APPELLANT.

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

RONDULA LANE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 9, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (four counts), burglary in the second degree and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]), and one count each of burglary in the second degree (§ 140.25 [2]) and sexual abuse in the first degree (§ 130.65 [1]). We reject defendant's contention that County Court erred in refusing to suppress his statements to the police. Contrary to defendant's contention, the evidence introduced at the suppression hearing fails to establish that he " 'was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements' " (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Lake*, 45 AD3d 1409, 1410, *lv denied* 10 NY3d 767). Defendant's reliance on evidence introduced at trial in support of his contention is misplaced. It is well settled that "evidence subsequently admitted [at] trial cannot be used to support [or undermine] the determination of the suppression court denying [a] motion to suppress [an] oral confession; the propriety of the denial must be judged on the evidence before the suppression court" (*People v Gonzalez*, 55 NY2d 720, 721-722, *rearg denied* 55 NY2d 1038, *cert denied* 456 US 1010; *see People v Carmona*, 82 NY2d 603, 610 n 2).

Defendant made only a general motion for a trial order of

dismissal at the close of the People's case, and thus failed to preserve for our review his contention that the evidence is legally insufficient to support the burglary conviction (*see People v Gray*, 86 NY2d 10, 19; *People v Pollard*, 70 AD3d 1403, 1404-1405, *lv denied* 14 NY3d 891). In any event, that contention is without merit. The victim testified in detail concerning that crime, and other testimony, including that of defendant, corroborated her testimony, thereby satisfying "the proof and burden requirements for every element of the crime charged" (*People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to all counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different result would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded, and there is no basis upon which to disturb the jury's credibility determinations (*see generally id.*).

We reject defendant's further contention that he was denied effective assistance of counsel. "The constitutional requirement of effective assistance of counsel will be satisfied [where, as here,] 'the evidence, the law, and the circumstances of [the] particular case, viewed *in totality and as of the time of the representation*, reveal that the attorney provided meaningful representation' " (*People v Flores*, 84 NY2d 184, 187). "[I]t is well settled that disagreement over trial strategy is not a basis for a determination of ineffective assistance of counsel" (*People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959; *see People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852; *see generally People v Benevento*, 91 NY2d 708, 712-714). Here, "[t]he alleged instances of ineffective assistance concerning defense counsel's failure to make various objections [or certain motions or requests] 'are based largely on [defendant's] hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies' " (*People v Douglas*, 60 AD3d 1377, 1377, *lv denied* 12 NY3d 914; *see People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968).

Defendant failed to preserve for our review his contention in his main and pro se supplemental briefs that he was deprived of a fair trial by prosecutorial misconduct during opening and closing statements because he failed to object to any of the alleged improprieties (*see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967; *see also People v Balls*, 69 NY2d 641, 642). In any event, assuming, arguendo, that the prosecutor's comments were improper, we conclude that they "did not cause such substantial prejudice to the defendant that he has been denied due process of law" (*People v Stabell*, 270 AD2d 894, 894, *lv denied* 95 NY2d 804 [internal quotation marks omitted]; *see People v Agostini*, 84 AD3d 1716, 1716, *lv denied* 17 NY3d 857).

Defendant failed to preserve for our review his further

contention that he was deprived of a fair trial by the introduction of certain evidence. Specifically, the record establishes that defendant moved to preclude parts of a recording that the police made of his statements on the ground that they contained evidence of uncharged crimes and, although the court denied the motion, the court gave prompt curative instructions to the jury at trial when the recording was played. Defendant did not object to the instructions that were given, nor did he object further or seek a mistrial, and he thus failed to preserve for our review his contention that he was deprived of a fair trial by the introduction of the evidence. "Under these circumstances, the curative instructions must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; *see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court erred in imposing consecutive sentences on the counts of the indictment charging him with sexual abuse and criminal sexual act. "[I]t is well settled that consecutive sentences may be imposed where[, as here,] acts of deviate sexual intercourse occur within a continuous sexual incident [inasmuch as] the material elements are distinct and require different sexual acts" (*People v Lanfair*, 18 AD3d 1032, 1033-1034, *lv denied* 5 NY3d 790; *see People v Laureano*, 87 NY2d 640, 643; *People v Ramirez*, 44 AD3d 442, 445, *lv denied* 9 NY3d 1008).

Defendant failed to preserve for our review his contention in his pro se supplemental brief that certain counts of the indictment are facially duplicitous (*see People v Becoats*, 71 AD3d 1578, 1579, *affd* 17 NY3d 643, *cert denied* ___ US ___, 132 S Ct 1970). In any event, that contention is without merit inasmuch as "[e]ach count of [the] indictment . . . charge[s] one offense only" (CPL 200.30 [1]). Furthermore, although defendant's additional contention that the indictment was rendered duplicitous by the trial testimony need not be preserved for our review (*see People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025; *People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814), that contention is also without merit. The victim's testimony and the court's charge establish that different conduct is alleged in each of the various counts (*see People v Alonzo*, 16 NY3d 267, 269), and that the incident was not a single uninterrupted crime (*cf. People v Snyder*, 100 AD3d 1367, 1367). Defendant's further contention in his pro se supplemental brief concerning the sufficiency of the evidence before the grand jury is not properly before us. It "is well established that '[t]he validity of an order denying any motion [to dismiss an indictment for legal insufficiency of the grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' " (*People v Afrika*, 79 AD3d 1678, 1679, *lv denied* 17 NY3d 791, quoting CPL 210.30 [6]; *see People v Smith*, 4 NY3d 806, 808). Here, we rejected defendant's challenge to the legal sufficiency of the evidence with respect to the burglary conviction, and defendant has not challenged the legal sufficiency of the evidence with respect to the remaining convictions (*see Smith*, 4 NY3d at 808).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions in his main and pro se supplemental briefs, and conclude that none warrants reversal or modification.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

378

CA 11-02445

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

PATRICIA CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

PATRICIA CURTO, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 8, 2011. The order denied the motion of plaintiff for recusal.

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

Memorandum: These four consolidated pro se appeals arise from an action seeking damages for, inter alia, employment discrimination. In appeal No. 1, plaintiff appeals from an order denying her motion seeking recusal or disqualification of the Supreme Court Justice assigned to conduct the trial. In appeal No. 2, she appeals from an order denying her motion for, inter alia, vacatur of the jury verdict and judgment notwithstanding the verdict or a new trial. In appeal No. 3, she appeals from a judgment, entered upon a jury verdict, dismissing the complaint. In appeal No. 4, she appeals from an order denying her motion that apparently sought, inter alia, leave to renew the motions at issue in appeal Nos. 1 and 2.

Initially, we note that the appeals from the orders in appeal Nos. 1 and 2 must be dismissed because the right to appeal from those intermediate orders terminated upon the entry of the judgment in appeal No. 3 (*see Murphy v CSX Transp., Inc*. [appeal No. 1], 78 AD3d 1543, 1543; *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435). The issues raised in appeal Nos. 1 and 2 will be considered upon the appeal from the judgment in appeal No. 3 (*see Matter of Aho*, 39 NY2d 241, 248).

With respect to the merits, plaintiff's contention that the court should have granted her motion for recusal because the court was biased against her lacks merit. " 'Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned

unless it was an abuse of discretion' " (*People v Williams*, 66 AD3d 1440, 1441, *lv dismissed* 13 NY3d 911, quoting *People v Moreno*, 70 NY2d 403, 405-406). There is no allegation of a legal disqualification, and we perceive no abuse of discretion in the denial of plaintiff's motion.

We reject plaintiff's contention that the court erred in dismissing certain causes of action at the conclusion of the trial. Plaintiff's request for punitive damages was properly dismissed by the court inasmuch as such damages are not recoverable in this employment discrimination action pursuant to Executive Law § 297 (9) (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 494, *rearg denied* 81 NY2d 835; *Harris v Chen*, 283 AD2d 976, 976; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 271, *appeal dismissed* 93 NY2d 919, *lv denied* 94 NY2d 753). With respect to plaintiff's gender-based unequal pay claim, she was required to establish that she is a member of a protected class, that she was paid less in such position than others similarly situated, and that her receipt of lower wages occurred under circumstances giving rise to an inference of sex discrimination (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 629). Assuming, arguendo, that plaintiff's evidence that the wages of two other employees exceeded hers by two dollars per hour was sufficient to meet the first prong of that standard, we conclude that the evidence in the record establishes that those employees were more experienced than plaintiff when they were hired, and thus she failed to meet the third prong (*see Kent v Papert Cos.*, 309 AD2d 234, 244-245; *cf. Matter of Classic Coach v Mercado*, 280 AD2d 164, 170, *lv denied* 97 NY2d 601). Consequently, the court did not err in dismissing that claim before submitting the case to the jury.

Contrary to plaintiff's further contention, the court did not err in denying her motion to set aside the jury's verdict of no cause of action as against the weight of the evidence. Plaintiff failed to establish that " 'the evidence so preponderated in [her] favor . . . that the verdict could not have been reached on any fair interpretation of the evidence' " (*Todd v PLSIII, LLC--We Care*, 87 AD3d 1376, 1377; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Insofar as we are able to do so based on the record before us, we have considered plaintiff's remaining contentions, including those concerning the court's pretrial rulings, trial rulings, and the verdict, and we conclude that they are without merit.

Finally, with respect to the motion at issue in appeal No. 4, the record does not contain sufficient information to enable us to determine whether the court properly denied that motion seeking, inter alia, leave to renew, and plaintiff, " 'as the appellant, . . . must suffer the consequences' of submitting an incomplete record" (*Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

379

CA 11-02446

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

PATRICIA CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PATRICIA CURTO, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 8, 2011. The order denied the motion of plaintiff to set aside a jury verdict.

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

Same Memorandum as in *Curto v Zittel's Dairy Farm* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

380

CA 11-02447

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

PATRICIA CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

PATRICIA CURTO, PLAINTIFF-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered March 8, 2011. The judgment dismissed plaintiff's causes of action upon a jury verdict of no cause of action.

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

Same Memorandum as in *Curto v Zittel's Dairy Farm* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

381

CA 12-00244

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

PATRICIA CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZITTEL'S DAIRY FARM, JOHN ZITTEL, SANDY ZITTEL, THOMAS DEXTER AND JEFFREY GASPER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

PATRICIA CURTO, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered July 11, 2011. The order, among other things, denied the motion of plaintiff for, inter alia, leave to renew two prior motions.

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

Same Memorandum as in *Curto v Zittel's Dairy Farm* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

382

CA 12-01329

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

CARL D. MULLIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WASTE MANAGEMENT OF NEW YORK, LLC,
DEFENDANT-RESPONDENT.

WASTE MANAGEMENT OF NEW YORK, LLC,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

RICCELLI ENTERPRISES, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JAMES P. MCELHENY OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered April 17, 2012. The order, among other things, granted in part third-party plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff, an employee of third-party defendant, Riccelli Enterprises, Inc. (Riccelli), commenced this action seeking damages for injuries he sustained when he fell from a ladder while adjusting a tarp on Riccelli's trailer. The accident occurred at the Kingston facility of defendant-third-party plaintiff, Waste Management of New York, LLC (Waste Management). Pursuant to an agreement between Riccelli and Waste Management, Riccelli was required to name Waste Management and Waste Management, Inc. (Waste, Inc.) as additional insureds on various insurance policies, including workers' compensation, commercial general liability (CGL), and automobile liability policies.

Supreme Court properly granted that part of Waste Management's motion seeking partial summary judgment on its breach of contract cause of action against Riccelli based on Riccelli's failure to name

Waste Management as an additional insured on the required insurance policies (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652). Riccelli failed to respond to Waste Management's demand to produce the various insurance policies showing that Waste Management was a named insured and, indeed, as noted by the court, Riccelli admitted in response to Waste Management's motion that it failed to name Waste Management as an additional insured.

Moreover, the court did not abuse its discretion in denying Riccelli's motion seeking leave to submit new evidence while the court's decision was pending on the original motions. In determining this issue, we note that the motion was analogous to one for leave to renew, and we therefore apply the analysis applicable to such motions (*see generally Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627-1628). Riccelli failed to establish that the purported new evidence was not in existence or not available at the time of Waste Management's motion, and, in fact, the insurance policies were all in existence well before Waste Management's motion. The court also properly concluded that Riccelli failed to establish a reasonable justification for its failure to present the evidence in opposition to Waste Management's motion (*see generally id.* at 1628). In any event, the court properly concluded that the new information would not have resulted in a different determination (*see generally id.*). The CGL policy shows that Waste, Inc. was named as an additional insured, but Waste Management was not. In its September 18, 2008 letter to Riccelli, the CGL insurer specifically noted that Waste Management was not added as an additional insured until after the accident. In addition, while Riccelli correctly notes that its automobile insurer initially offered to defend Waste Management, that insurer subsequently issued a disclaimer letter on the ground that Waste Management was not added as an additional insured on the policy until after the accident.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

383

CA 12-01606

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

JOHN O. VANDERHOEF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN DOE, ET AL., DEFENDANTS,
FREDERICK PARSONS, III AND JANET CALLAHAN
FELDT, DEFENDANTS-RESPONDENTS.

DAVID G. WALLACE, P.C., BATH (DAVID G. WALLACE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SAYLES & EVANS, ELMIRA (CONRAD R. WOLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT FREDERICK PARSONS, III.

YORIO, FERRATELLA & BOWES, PAINTED POST (CHRISTOPHER J. FERRATELLA OF COUNSEL), FOR DEFENDANT-RESPONDENT JANET CALLAHAN FELDT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered April 17, 2012. The order, inter alia, granted the cross motions of Frederick Parsons, III and Janet Callahan Feldt for summary judgment.

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

Memorandum: Plaintiff appeals from an order that granted the cross motions of Frederick Parsons, III and Janet Callahan Feldt (defendants) for summary judgment in this forfeiture action. Pursuant to an oil and gas royalty sale in 1932, plaintiff's predecessors in interest assigned to Robert O. Hayt, Leon J. Callahan, and H.W. Baldwin a total of half of all oil and gas royalties arising from a plot of land in Steuben County. Specifically, the agreement required that a $150 down payment be made at the time of the agreement and, when the land began to produce a set amount of oil or gas, Hayt, Callahan, and Baldwin, or their heirs and assigns, were required to pay a set price per acre to plaintiff's predecessor in interest in order to preserve their rights to royalties. Parsons is Baldwin's successor in interest, Feldt is Callahan's successor in interest and Hayt's successors in interest are unknown. The three original grantees (grantees) died well before 2006 and, in September 2006, the land began producing the requisite amount to trigger the additional payment provision. In January 2007, plaintiff gave notice to the heirs and assigns of the grantees that their rights pursuant to the 1932 agreement were forfeited for failure to make the additional

payment. Plaintiff commenced this action in December 2008 seeking a forfeiture of all royalties due to the heirs and assigns of the grantees, and subsequently moved for summary judgment on the complaint. Defendants each cross-moved for summary judgment, seeking payment of royalties. The court granted the cross motions, determining that defendants are entitled to specified percentages of the royalties being held in escrow. We affirm.

" 'There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of a defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture' " (*J. N. A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 397). Thus, equitable relief will not "ordinarily be given where the breach is of a condition precedent" (*Noyes v Anderson*, 124 NY 175, 179), while "[e]quitable relief is usually available to prevent the harsh consequences of declaring a forfeiture for breach of a condition subsequent where it is out of proportion to the loss to the person seeking to enforce the forfeiture" (55 NY Jur 2d, Equity § 60). Here, the right to gas and oil royalties vested in the heirs and assigns of the grantees at the moment the land began producing gas or oil at a certain rate, and the additional payment constituted a condition subsequent because "the condition in question was to be performed after the right granted had vested in the grantee[s]" (*Munro v Syracuse, Lake Shore & N. R.R. Co.*, 200 NY 224, 231).

In determining whether equity should intervene to avoid forfeiture in this case involving the breach of a condition subsequent, we note the well-established principle that "equity abhors forfeitures" (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 577, *rearg denied* 47 NY2d 801; *see O & W Lines v Saint John*, 20 NY2d 17, 23; *Morgan v Herzog*, 301 NY 127, 137). Further, " 'a court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent caused by unavoidable accident, [or] by fraud, surprise or ignorance' " (*Whiteside v North Am. Acc. Ins. Co. of Chicago*, 200 NY 320, 324; *see Matter of A.D.W. Realty Corp. v Dee-Dee Café Corp.*, 54 Misc 2d 130, 132). Here, defendants were unaware of their royalty rights until years after plaintiff gave the notice of forfeiture and commenced this action, and thus this is a situation in which equity should intervene to avoid forfeiture. Morever, the additional payment that would be due to plaintiff under the agreement ($410) is grossly disproportionate to the amount in royalties that plaintiff seeks to have declared forfeited (approximately $121,000), and equity generally intervenes where the forfeited amount is out of proportion to the loss to the person seeking to enforce the forfeiture (*see generally Fifty States Mgt. Corp.*, 46 NY2d at 577; 55 NY Jur 2d, Equity § 60).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

384

CA 11-02111

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF TYRONE DAVIS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (William D. Walsh, A.J.), entered August 12, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order continued petitioner's commitment to a secure treatment facility.

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

Memorandum: In March 2010 Supreme Court, Bronx County, determined that petitioner was a dangerous sex offender in need of civil confinement (*see* Mental Hygiene Law § 10.07 [f]). He is currently confined at the Central New York Psychiatric Center in Oneida County. Pursuant to Mental Hygiene Law § 10.09 (a), in early 2011 the Commissioner of respondent New York State Office of Mental Health (OMH) provided petitioner with an annual written notice of the right to petition the court for discharge, which included a waiver option. Petitioner checked the box indicating that he did not wish to waive his right to petition for discharge. A psychiatric examiner for OMH attempted to interview petitioner, but he refused to meet with her. The expert issued a written evaluation, and the Commissioner determined based on the report that petitioner was still a dangerous sex offender in need of confinement. The annual notice and waiver form, the Commissioner's written determination, and the expert's report were forwarded to Supreme Court, Oneida County. The court appointed an independent psychiatric examiner chosen by petitioner's counsel, but petitioner refused to meet with him as well. That expert indicated that he was unable to prepare a report without having a personal examination. On the day scheduled for the annual review

hearing, petitioner did not appear. The court confirmed with petitioner's counsel that petitioner was waiving the right to a hearing, and the court thereafter issued an order finding that petitioner is a dangerous sex offender in need of confinement.

Petitioner first contends that the court erred in denying his motion for a change of venue to New York County. Contrary to respondents' contention, petitioner's appeal from the final order brings up for review the nonfinal order denying the motion for a change of venue because it "necessarily affects" the final order (CPLR 5501 [a] [1]; *see Matter of Aho*, 39 NY2d 241, 248; *Paul v Cooper* [appeal No. 2], 100 AD3d 1550, 1552).

We agree with respondents, however, that the motion was properly denied because the court did not have the authority to change venue in this proceeding seeking discharge under Mental Hygiene Law § 10.09. Section 10.09 does not include any provision for a change of venue, but section 10.08, which sets forth procedures for article 10 proceedings, provides as follows: "At *any hearing or trial* pursuant to the provisions of this article, the court may change venue *of the trial* to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the respondent" (§ 10.08 [e] [emphasis added]). Petitioner contends that venue may be changed for any hearing or trial in an article 10 proceeding, whereas respondents contend that venue may be changed only for a trial. We agree with respondents. The statute is not ambiguous, and it "clearly and distinctly" shows the legislative intent (McKinney's Cons Laws of NY, Book 1, Statutes § 76; *see* § 94). The legislature made a distinction between the terms "hearing" and "trial" in the first phrase of the statute, but only included "trial" when discussing a change of venue. The legislature's omission of the term "hearing" when discussing a change of venue does not render the statute ambiguous but, rather, such omission establishes the legislature's intent to restrict a change of venue to trials only.

Petitioner next contends that the court erred in finding that he waived his right to an annual review hearing. Petitioner contends that, while he waived his right to be present at the hearing, he did not waive his right to the hearing itself. Mental Hygiene Law § 10.09 (d) provides, in relevant part, that the court shall hold an evidentiary hearing as to the retention of the offender if it appears from the submissions under section 10.09 (c) "that the [offender] has petitioned, or has not affirmatively waived the right to petition, for discharge . . . ." Section 10.09 (c) lists the materials that the Commissioner forwards to the court, including the notice and waiver form. Here, as noted earlier, petitioner indicated on the annual notice with waiver form that he did not wish to waive his right to petition for discharge. On the date scheduled for the hearing, however, petitioner did not appear, prompting the court to ask petitioner's counsel, "[H]e didn't want to come *and he doesn't want his hearing*?" (emphasis added). Counsel responded, "Right." Section 10.09 (d) specifically contemplates that an offender may waive the right to petition for discharge, and we conclude that, through

counsel, petitioner waived that right.

We reject petitioner's contention that he received ineffective assistance of counsel. "[B]ecause [a sex offender] is subject to civil confinement, the standard for determining whether effective assistance of counsel was provided in criminal matters is applicable here" (*Matter of State of New York v Carter*, 100 AD3d 1438, 1439). Based on our review of the record, we conclude that petitioner received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

385

CA 11-02112

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF TYRONE DAVIS,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (William D. Walsh, A.J.), entered September 13, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of petitioner for a change of venue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248; *see also* CPLR 5501 [a] [1]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

386

CA 11-02113

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF TYRONE DAVIS,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (William D. Walsh, A.J.), entered October 13, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order corrected the CYNPC consecutive number contained in the order entered August 12, 2011.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

389

KA 11-00313

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALONZO MADISON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 10, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from separate judgments each convicting him upon a nonjury verdict of criminal contempt in the second degree (Penal Law § 215.50 [3]). In appeal No. 3, defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the third degree (§ 120.00 [1]) and harassment in the second degree (§ 240.26 [1]). With respect to all three appeals, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support his conviction. At the close of the People's case, defendant moved to dismiss the assault count, but did not raise the specific grounds advanced on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Beard*, 100 AD3d 1508, 1509), and he failed to make any motion regarding the criminal contempt or harassment counts (*see People v Prescott*, 286 AD2d 898, 898, *lv denied* 97 NY2d 686). Further, defendant did not renew his motion for a trial order of dismissal after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Youngs*, 101 AD3d 1589, 1590). In any event, we conclude that "viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which [Supreme Court] 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]).

We reject defendant's contention in all three appeals that

counsel was ineffective because he failed to object to leading questions, to the introduction of prejudicial photographs, or to hearsay testimony, and because he permitted the introduction of uncertified medical records. Contrary to defendant's contention, the medical records were in fact certified and the photographs of the victim's injuries were properly admitted in evidence because they were relevant to the physical injury element of the assault count, corroborated the victim's testimony, and illustrated the medical records (*see People v Dogan*, 170 AD2d 955, 955, *lv denied* 78 NY2d 965; *see also People v Pobliner*, 32 NY2d 356, 369, *rearg denied*, 33 NY2d 657, *cert denied* 416 US 905; *People v Brakefield*, 156 AD2d 1004, *lv denied* 75 NY2d 917). With respect to defense counsel's failure to object to leading questions or to hearsay testimony, defendant did not "meet his burden of establishing the absence of any legitimate explanations for" that failure (*People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867; *see People v Benevento*, 91 NY2d 708, 712-713), particularly in the context of this nonjury trial (*see generally People v Howard*, 101 AD3d 1749, 1750-1751; *People v Kolon*, 37 AD3d 340, 342, *lv denied* 8 NY3d 947; *People v Stephens*, 254 AD2d 105, 105, *lv denied* 93 NY2d 879).

Contrary to the further contention of defendant in all three appeals, the People did not violate *Brady* or CPL article 240 with respect to the disclosure of certain telephone records. The telephone records do not fall within any of the enumerated categories of property to which a defendant is entitled pursuant to CPL 240.20 (1) and, in any event, the People provided those records to defendant prior to trial, and defense counsel utilized them in cross-examining the victim. Thus, defendant "failed to establish that he suffered any actual prejudice from the late disclosure" (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Further, contrary to defendant's apparent contention, the People had no duty to obtain the subscriber information on defendant's behalf (*see People v Hayes*, 17 NY3d 46, 51-52, *cert denied* ___ US___, 132 S Ct 844).

We agree with defendant's contention in appeal Nos. 1 and 2, however, that the court should have granted that part of his CPL 330.30 motion seeking to set aside the verdict with respect to the criminal contempt convictions, and that he is entitled to a new trial on those counts. To set aside a verdict pursuant to CPL 330.30 (3), a defendant must prove that "there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and, (6) which does not merely impeach or contradict the record evidence" (*People v Wainwright*, 285 AD2d 358, 360; *see People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950; *People v McCullough*, 275 AD2d 1018, 1019, *lv denied* 95 NY2d 936).

Here, the newly discovered evidence consists of subscriber information for two prepaid cell phone numbers, and call records from another telephone number. Those telephone numbers are material because they appear in the victim's telephone records at the times that defendant allegedly called her in violation of the orders of

protection. The victim testified at trial that she did not recognize two of the telephone numbers in her telephone records during the relevant times. After the trial, defendant determined that the numbers both belonged to the victim's close friend, who had also accused defendant of harassment. Other incoming telephone numbers that appeared in the victim's telephone records during the times that defendant allegedly called her belonged to the victim's son and another alleged friend of the victim. We conclude that the evidence that the purported telephone calls from defendant were actually made from numbers registered to individuals associated with the victim "create[d] 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 Barreras*, 92 AD2d 871, 871; *People v Ramos*, 166 Misc 2d 515, 522-523, *affd* 232 AD2d 583). The evidence is not cumulative and, contrary to the contention of the People, does not "merely impeach or contradict the record evidence" (*Wainwright*, 285 AD2d at 360; *cf. People v White*, 272 AD2d 872, 872-873, *lv denied* 95 NY2d 859). Rather, the evidence suggests that the victim's testimony, which is the only evidence supporting the criminal contempt convictions, may have been fabricated or, at the very least, mistaken.

The question thus becomes whether defendant could have discovered the material earlier in the exercise of reasonable diligence (*see* CPL 330.30 [3]; *see generally People v Robertson*, 302 AD2d 956, 958, *lv denied* 100 NY2d 542). Although defense counsel clearly could have subpoenaed subscriber information or telephone records prior to trial, we conclude that his ability to do so was frustrated by the People's refusal to specify the precise times of the alleged phone calls received by the victim and the numbers from which or to which defendant allegedly called, and by their delay in turning over the victim's telephone records from the dates in question. The victim's telephone records reflect a myriad of incoming and outgoing calls from various numbers on the dates at issue and, without any specificity as to the numbers alleged to have been used by defendant or the times he allegedly called the victim, defendant would have had to engage in a "fishing expedition" by subpoenaing the subscriber information and call records for multiple numbers. It was only during the course of the trial that defendant learned the times of the offending calls and the telephone numbers from which he allegedly called the victim, at which point it was too late to subpoena the relevant records. We thus agree with defendant that the newly discovered evidence was not available to him prior to trial (*see Ramos*, 166 Misc 2d at 519-523; *cf. People v Matthew*, 274 AD2d 485, 485-486). We therefore reverse the judgments in appeal Nos. 1 and 2, and order a new trial on those counts.

Contrary to the contention of defendant in appeal No. 3, however, we see no basis to disturb his conviction of assault in the third degree and harassment in the second degree inasmuch as the newly discovered evidence does not relate to those counts. Although the newly discovered evidence raises questions about the victim's veracity, her testimony concerning the assault incident was credited by the court, defendant admitted that he was involved in a confrontation with the victim on that date, and the victim's version

of events was corroborated by contemporaneous medical records and photographs of her injuries.

Finally, there is no merit to defendant's contention that the court should have convicted him of harassment in the second degree instead of assault in the third degree. It is well established that harassment in the second degree is not a lesser included offense of assault in the third degree (*see People v Moyer*, 27 NY2d 252, 253-254; *see generally People v Hayes*, 43 AD2d 99, 102, *affd* 35 NY2d 907, *rearg denied* 37 NY2d 937; *People v Sipley*, 209 AD2d 864, 865-866, *lv denied* 84 NY2d 1038).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

390

KA 11-00881

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALONZO MADISON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 10, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Same Memorandum as in *People v Madison* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

391

KA 11-00882

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALONZO MADISON, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 10, 2011. The judgment convicted defendant, upon a nonjury verdict, of assault in the third degree and harassment in the second degree.

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

Same Memorandum as in *People v Madison* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

398

CAF 12-01044

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF DESTINY V.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

LYNETTE V., RESPONDENT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DESTINY V.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 21, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order, inter alia, terminating her parental rights with respect to the subject child on the ground of mental illness. The mother was pregnant with the subject child when her vehicle was struck by a pickup truck. As a result of the accident, the mother sustained a traumatic brain injury, which caused her to have diminished cognitive abilities. She subsequently gave birth to the child, who was placed in foster care with the child's maternal grandparents almost immediately after birth. Contrary to the mother's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4][c]; *see* § 384-b [6] [a]; *Matter of Darius B. [Theresa B.]*, 90 AD3d 1510, 1510; *Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285, *lv denied* 17 NY3d 703; *Matter of Chance Jahmel B.*, 187 Misc 2d 626, 629-631). Indeed, petitioner presented clear and convincing evidence establishing that the mother is presently suffering from a mental illness, which is defined as a mental disease or mental condition that "is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment

to such an extent that if such child were placed in . . . the custody of [the mother], the child would be in danger of becoming a neglected child" (Social Services Law § 384-b [6] [a]). Petitioner submitted unrefuted expert testimony that, as a result of her injuries, the mother suffers from a mental condition that renders her unable to care for the child because the mother is functioning at the level of an eight year old. Petitioner's expert also testified that respondent's thinking, decision making, problem solving, judgment and emotional process will not improve due to her injuries.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

410

KA 10-02355

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIL L. ADAMS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 29, 2010. The appeal was held by this Court by order entered June 15, 2012, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (96 AD3d 1588). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted to be preceded by a new hearing on defendant's motion to suppress identification testimony.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). We previously held the case, reserved decision, and remitted the matter to Supreme Court to determine whether testimony concerning the pretrial identification by the robbery victim from a photo array should be suppressed as the fruit of an illegal detention or arrest (*People v Adams*, 96 AD3d 1588, 1589). Upon remittal, the court concluded that the victim's pretrial identification should be suppressed as the fruit of an illegal detention or arrest. Inasmuch as the identification of defendant by the victim was critical to the prosecution and there was no evidence at the suppression hearing to permit a determination whether the in-court identification had an independent source, defendant is "entitled to a new trial to be preceded by a hearing as to whether there was an independent basis for the identification testimony of the [robbery victim]" (*People v Fletcher*, 115 AD2d 293, 294-295; *see People v Coates*, 74 NY2d 244, 250; *People v Dodt*, 61 NY2d 408, 417).

Contrary to defendant's contention, he is not entitled to dismissal of the indictment (*see Dodt*, 61 NY2d at 418). Defendant

failed to preserve for our review his further contention that certain other evidence should have been suppressed as the alleged fruit of his illegal detention or arrest (*see generally People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we do not address the People's contention that the court's determination upon remittal was erroneous and that the conviction should be affirmed. "CPL 470.15 (1) limits our jurisdiction to a determination of any question of law or issue of fact involving error which may have adversely affected the appellant. Since we are reviewing a judgment on the defendant's appeal, and the issue of whether the [identification testimony was the fruit of an illegal detention or arrest] was not decided adversely to him, we are jurisdictionally barred from considering that issue" (*People v Harris*, 93 AD3d 58, 66, *affd* 20 NY3d 912; *see People v Concepcion*, 17 NY3d 192, 195).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

413

KA 11-01177

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIARRA HILL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 2, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of robbery in the third degree (Penal Law § 160.05), defendant contends that Supreme Court should have dismissed the indictment on constitutional speedy trial grounds (*see People v Taranovich*, 37 NY2d 442, 444-445). We reject that contention. The 15-month delay between the time of defendant's arrest and the time of his plea was not unreasonable (*see People v Manuel*, 39 AD3d 1185, 1186, *lv denied* 9 NY3d 878; *People v Morobel*, 273 AD2d 871, 871, *lv denied* 95 NY2d 906). In any event, much of the delay occurred because defendant, who had been transferred from jail to the psychiatric ward of a local hospital, had to be evaluated by psychiatrists to determine whether he was competent to proceed, and he refused to cooperate with the psychiatrists for several months. Defendant also refused to take prescribed medication, thus making communication with his attorney difficult if not impossible. Further delay was occasioned by the fact that the court, at defendant's request, assigned a new attorney to represent him. Although defendant was in custody for much of the time, the charge was serious in nature; defendant threatened in writing to kill a bank teller if she did not promptly comply with his request to hand over money. The court, in concluding that defendant's constitutional speedy trial rights were not violated, properly weighed the relevant factors set forth by the Court of Appeals in *Taranovich* (37 NY2d at 445).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

422

CA 12-02021

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

M&T BANK, PLAINTIFF-RESPONDENT,

V ORDER

HR STAFFING SOLUTIONS, INC., ET AL., DEFENDANTS,
AND V. MICHAEL PRENCIPE, ALSO KNOWN AS VINCENT M.
PRENCIPE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GETMAN & BIRYLA, LLP, BUFFALO (PATRICK A. MAKIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 27, 2011. The order granted the motion of plaintiff for summary judgment and awarded plaintiff money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

423

CA 12-02025

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

M&T BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HR STAFFING SOLUTIONS, INC., ET AL., DEFENDANTS,
AND V. MICHAEL PRENCIPE, ALSO KNOWN AS VINCENT M.
PRENCIPE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GETMAN & BIRYLA, LLP, BUFFALO (PATRICK A. MAKIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 27, 2011. The judgment awarded plaintiff money damages against defendant V. Michael Prencipe, also known as Vincent M. Prencipe.

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

Memorandum: Plaintiff made a $150,000 loan to defendant HR Staffing Solutions, Inc. (HRS) that was guaranteed by defendants S. Graham Atkinson, also known as Shaner G. Atkinson, and V. Michael Prencipe, also known as Vincent M. Prencipe (defendant). The loan was evidenced by a Business Access Line of Credit Note, which was dated January 5, 2007 and was executed by Atkinson in his capacity as President of HRS. The loan was secured by a General Security Agreement, which was signed by both Atkinson and defendant on February 28, 2002. When HRS defaulted on the loan, plaintiff commenced this action against HRS, Atkinson and defendant. HRS and Atkinson failed to answer the complaint, and plaintiff obtained a default judgment against them.

In his answer, defendant denied signing the guaranty and contended that, at the time he executed the document at issue, Atkinson had provided him with only a signature page, telling him that it was “the signature page to permit [HRS] to obtain a bank card.” Defendant thus contended that the guaranty was invalid and unenforceable. Although defendant sent plaintiff a notice to depose plaintiff’s “agents and/or employees,” plaintiff moved for summary judgment against defendant before those depositions could be conducted. Supreme Court properly granted the motion.

Contrary to defendant's contention, the motion was not premature. "Defendant failed to demonstrate that facts essential to oppose the motion were in plaintiff's exclusive knowledge and possession and could be obtained by discovery" (*Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854; *see* CPLR 3212 [f]; *Rowland v Wilmorite, Inc.*, 68 AD3d 1770, 1770-1771; *Brummer v Barnes Firm, P.C.*, 56 AD3d 1177, 1179). It is well settled that the "[m]ere hope that somehow the [defendant] will uncover evidence that will prove a [defense] provides no basis pursuant to CPLR 3212 (f) for postponing a determination of a summary judgment motion" (*Wright v Shapiro*, 16 AD3d 1042, 1043 [internal quotation marks omitted]; *see Rowland*, 68 AD3d at 1771; *Brummer*, 56 AD3d at 1179).

Even assuming, arguendo, that Atkinson failed to provide defendant with two out of the three pages of the guaranty and that Atkinson misrepresented the nature of the document to defendant, we nevertheless conclude that plaintiff is entitled to summary judgment against defendant. "Under long accepted principles one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents" (*Da Silva v Musso*, 53 NY2d 543, 550; *see Manufacturers & Traders Trust Co. v S.W.U. Assoc.*, 105 AD2d 1118, 1119; *cf. Martin v Citibank, N.A.*, 64 AD3d 477, 477-478).

While defendant contends that Atkinson, who was defendant's business partner in HRS, was acting as an agent of plaintiff when he sought to procure defendant's signature on the guaranty, defendant provides no evidence to support that conclusory assertion (*see Koreska v United Cargo Corp.*, 23 AD2d 37, 41; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In any event, even assuming, arguendo, that defendant's contention is true, we conclude plaintiff nevertheless would be entitled to summary judgment because "defendant's duty to make inquiry and to read and understand the . . . guaranty [was not] diminished merely because [he] was provided with only a signature page before executing the agreement" (*Hotel 71 Mezz Lender LLC v Falor*, 64 AD3d 430, 430). Our conclusion is further buttressed by the fact that the single page that defendant admits signing specifically states that it is a guaranty making defendant personally liable for the "Borrower's" obligations. The words guaranty and guarantor appear 25 times on that single page and, further, the following statement appears in bold, capital letters just below his signature: "For purposes of this agreement 'obligations' is not limited to presently existing indebtedness, liabilities and obligations." In our view, the alleged misrepresentation made by Atkinson, even if he were acting as plaintiff's agent, conflicted with the unambiguous terms of the document defendant admits receiving and signing and is thus "insufficient to raise a triable issue of fact as to whether [defendant] intended to bind himself . . . or was fraudulently induced to sign the . . . document[]" (*HSBC Bank USA, N.A. v Laniado*, 72 AD3d 645, 645-646; *see North Fork Bank v ABC Merchant Servs., Inc.*, 49 AD3d 701, 701-702; *Chemical Bank v Masters*, 176 AD2d 591, 591-592; *Chase Lincoln First Bank v Mark Homes*, 170 AD2d 995, 995-996).

Defendant's reliance on *Martin* (64 AD3d at 477-478) is misplaced. In that case the plaintiff was not aware that pages were missing from the document given to him by the defendant's employee, and the only

evidence of the clause the bank sought to enforce was on the missing page. Here, however, defendant was aware that he had not been given the entire document and chose to rely, to his detriment, on the alleged representations of his business partner despite the clear and unambiguous language to the contrary on the page he did, in fact, receive. As we stated in *Manufacturers & Traders Trust Co.* (105 AD2d at 1119), " '[i]f the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him' (*Pimpinello v Swift & Co.*, 253 NY 159, 162-163)."

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

424

CA 12-01336

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF ANGEL ALEXIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS AND DONNA OWENS, CITY
ADMINISTRATOR, RESPONDENTS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (E. JOSEPH GIROUX, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered March 29, 2012 in a CPLR article 78 proceeding. The judgment granted the petition and directed the reinstatement of petitioner to employment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating her employment with the City of Niagara Falls (City) based on her failure to comply with the City's residency requirement, which requires City employees to reside in the City. We agree with respondents that Supreme Court erred in granting the petition.

As the Court of Appeals wrote in *Matter of Beck-Nichols v Bianco* (___ NY3d ___, ___ [Feb. 19, 2013]), which involved the Niagara Falls City School District's residency requirement, "the proper standard for judicial review in these cases is whether the . . . determination was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803 [3]). This standard is, of course, an extremely deferential one: The courts cannot interfere [with an administrative tribunal's exercise of discretion] unless there is *no rational basis* for [its] exercise . . . or the action complained of is arbitrary and capricious, [a test which] chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is *without foundation in fact*" (internal quotation marks omitted). We conclude that the City's determination that petitioner failed to maintain "residency" in the City as that term is defined by Local Law No. 7

(1984) (hereafter, Local Law No. 7) was neither "arbitrary and capricious [n]or an abuse of discretion," based upon the documentary and testimonial evidence before it (*id.* at ___; *see* CPLR 7803 [3]; *Matter of Adrian v Board of Educ. of City Sch. Dist. of City of Niagara Falls*, 92 AD3d 1272, 1272, *affd sub nom. Beck-Nichols*, ___ NY3d ___).

Local Law No. 7 requires City employees to establish and maintain residency within the City throughout the term of their employment (*see* Local Law No. 7 § 3). As amended, the law defines "residency" as "the *actual principal place of residence* of an individual, where he or she normally sleeps; normally maintains personal and household effects; the place listed as an address on voter registration; and the place listed as his or her address for driver's license and motor vehicle registration, if any" (Local Law No. 7 § 2 [emphasis added]). That definition is akin to, if not synonymous with, the legal concept of "domicile," i.e., "living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250; *see Beck-Nichols*, ___ NY3d at ___).

We conclude that the evidence presented to respondents was sufficient to establish that petitioner's "actual principal place of residence" was in the Town of Niagara (Niagara), outside the City limits (Local Law No. 7 § 2; *see Adrian*, 92 AD3d at 1272-1273). Petitioner and her husband bought the Niagara residence in August 2004, at the same time that they allegedly separated and petitioner moved to a City address. An investigative report indicated that petitioner resided at the Niagara residence, the address of the Niagara residence is listed on petitioner's joint tax return with her husband, and petitioner's signature appeared on a recent mortgage application for the Niagara residence. Further, petitioner's husband and children reside at the Niagara residence, and the children attend school in the Niagara-Wheatfield School District (*see Beck-Nichols*, ___ NY3d at ___). In addition, a surveillance company observed petitioner on multiple occasions driving to work from the Niagara residence early in the morning and driving from work to the Niagara residence at the end of the work day, whereupon she would retrieve the mail and park in the garage.

Although petitioner testified that she resided at the City address and that address is listed on various documents, including voter registration records and her driver's license, we conclude that such "evidence was not so overwhelming as to support the court's determination granting the petition" (*Adrian*, 92 AD3d at 1273). Rather, under the "extremely deferential standard" of review applicable to this case (*Beck-Nichols*, ___ NY3d at ___), we conclude that the City's determination that petitioner principally resides outside the City is not "*without foundation in fact*" (*id.* at ___ [internal quotation marks omitted]), and thus that the City "rationally concluded that [petitioner] did not comply with the residency policy" (*id.* at ___; *see generally Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 194, *cert denied* 454 US 1125).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

426

CA 12-02056

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF ANONYMOUS, PETITIONER-APPELLANT.
---------- MEMORANDUM AND ORDER
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE,
RESPONDENT-RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (JULIA GREEN SEWRUK OF COUNSEL), FOR PETITIONER-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered May 2, 2012. The order denied the amended petition for an order authorizing a name change.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, and the matter is remitted to Supreme Court, Monroe County, for a hearing in accordance with the following Memorandum: Petitioner, a parolee, appeals from an order denying petitioner's amended petition, which requested an order authorizing a name change. The order denied the amended petition with leave to renew upon the submission of psychological and medical proof and upon completion of petitioner's parole supervision. Upon reviewing such a petition, if Supreme Court "is satisfied . . . that the petition is true, and that there is no reasonable objection to the change of name proposed, . . . the court *shall* make an order authorizing the petitioner to assume the name proposed" (Civil Rights Law § 63 [emphasis added]; *see Matter of Golden*, 56 AD3d 1109, 1110). Given the limited power to review such petitions, "courts ordinarily grant such petitions by adults unless there is a demonstrable reason not to do so" (*Matter of Washington*, 216 AD2d 781, 782). Inasmuch as the petition and amended petition contained inconsistent information regarding the proposed name that petitioner allegedly had been using for the past 10 years such that it was unclear on the face of the amended petition that the allegations therein were true (*see* § 63; *cf. Matter of Powell*, 95 AD3d 1631, 1632), we conclude that petitioner was not entitled to an order summarily granting the amended petition (*see* CPLR 409). In addition, because petitioner raised an issue of fact as to the reasonableness of respondent's objection to the requested name change, the court erred in summarily denying the amended petition, and instead should have conducted a hearing (*see generally Matter of Eberhardt*, 83 AD3d 116, 121-122; *Washington*, 216 AD2d at 782).

Finally, we agree with petitioner that the court erred in requiring him to provide psychological and medical proof in support of the amended petition; such proof is irrelevant when the petitioner seeks only to assume a different name, "not a declaration of a gender 'change[] from male to female' " (*Powell*, 95 AD3d at 1632). Here, petitioner has not requested a declaration regarding gender, but by the amended petition has asked the court "only to sanction legally petitioner's desire for a change of name, after satisfying itself that petitioner has no fraudulent purpose for doing so and that no other person's rights are interfered with thereby" (*Matter of Guido*, 1 Misc 3d 825, 828). As the court in *Guido* wrote, "[t]he law does not distinguish between masculine and feminine names, which are a matter of social tradition. Some names are traditionally associated with one gender; some with the other; some with either. And . . . the gender association of some names has changed over time. Apart from the prevention of fraud or interference with the rights of others, there is no reason—and no legal basis—for the courts to appoint themselves the guardians of orthodoxy in such matters" (*id.*; *see Powell*, 95 AD3d at 1632). With respect to the further condition imposed by the court upon renewal, concerning parole supervision, the parties agree that petitioner satisfied that condition. We therefore reverse the order, reinstate the amended petition and remit the matter to Supreme Court for a hearing consistent with our decision (*see generally Eberhardt*, 83 AD3d at 118).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

433

TP 12-02130

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF JAYSON BULMAHN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS.

STAMM LAW FIRM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frederick J. Marshall, J.], entered August 30, 2012) to review a determination of respondents. The determination ordered that respondent New York State Department of Health was entitled to recover Medicaid overpayments from petitioner.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the amended petition is granted, and the matter is remitted to respondent New York State Office of Medicaid Inspector General for further proceedings not inconsistent with the following Memorandum: Petitioner, the owner of Niagara Pharmacy (Pharmacy), commenced this proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) following a fair hearing insofar as it affirmed in part the determination of respondent New York State Office of Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to the Pharmacy from 2005 through 2008. Specifically, with the exception of one claim that was withdrawn and another that was reversed, the ALJ affirmed the OMIG's determination that respondent New York State Department of Health (DOH) was entitled to recover Medicaid overpayments from petitioner, based on an extrapolation method used by OMIG to calculate the total amount of overpayments.

Contrary to petitioner's contention, Supreme Court properly transferred the proceeding to this Court pursuant to CPLR 7804 (g) inasmuch as the challenged determination was "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" (CPLR 7803 [4]; *cf. Matter of Krajkowski v Bianco*, 85 AD3d 1577,

1578, *lv denied* 17 NY3d 712; *Matter of Save the Pine Bush v Planning Bd. of City of Albany*, 83 AD2d 741, 741). "Thus, regardless of the terms used by petitioner [in the petition], a substantial evidence issue has been raised, necessitating transfer to this [C]ourt" (*Matter of Segrue v City of Schenectady*, 132 AD2d 270, 274; *see Matter of Re/Max All-Pro Realty v New York State Dept. of State, Div. of Licensing Servs.*, 292 AD2d 831, 831, *lv denied* 98 NY2d 606).

We agree with respondents that substantial evidence supports the ALJ's determination that the challenged payments were not authorized by the Medicaid Management Information System Provider Manual for Pharmacies inasmuch as the claims submitted by the Pharmacy did not comply with various regulations and generally accepted practices (*see* 18 NYCRR 519.18 [d]). We thus conclude that the DOH was authorized to seek recoupment "of the amount determined to have been overpaid" (18 NYCRR 518.1 [b]). We further conclude, however, that the determination concerning the amount that was overpaid was " 'irrational and unreasonable' " (*Matter of Marzec v DeBuono*, 95 NY2d 262, 266, *rearg denied* 96 NY2d 731; *see Matter of Gignac v Paterson*, 70 AD3d 1310, 1311, *lv denied* 14 NY3d 714).

With respect to medical assistance programs like Medicaid and Medicare, it is well established that federal and state auditors may use an extrapolation method to calculate overpayments where, as here, the number of claims is "voluminous" (CMS [formerly HCFA] Ruling 86-1 [Feb. 20, 1986]; *see generally* 18 NYCRR 519.18 [g]; *Chaves County Home Health Serv. v Sullivan*, 931 F2d 914, 916-922, *cert denied* 502 US 1091). Pursuant to the New York regulations, "[a]n extrapolation based upon an audit utilizing a statistical sampling method certified as valid will be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate determination of the total overpayments made or penalty to be imposed. The appellant may submit expert testimony challenging the extrapolation by the [agency] or an actual accounting of all claims paid in rebuttal to the [agency's] proof" (18 NYCRR 519.18 [g]). Here, in our view, petitioner submitted expert testimony rebutting the presumption that the extrapolation method used by respondents' expert resulted in an accurate determination of the total overpayments.

There is no dispute that the OMIG did not consider an amount the DOH underpaid the Pharmacy when extrapolating the amount of overpayments to be recouped. The ALJ, in affirming the OMIG's extrapolation methodology, also did not consider the underpayment and gave no credit to the testimony of petitioner's expert that the failure to consider the underpayment resulted in an inaccurate determination of the amount the DOH had overpaid the Pharmacy. Indeed, the ALJ stated that the OMIG "is not charged with auditing to detect and correct underpayments to providers. Providers are entitled to and [are] able to review their own Medicaid claims for accuracy, have their own avenues of redress for underpayments, and have the responsibility to pursue them." It thus does not appear from the record that the ALJ recognized that it is permissible for auditors to consider underpayments when extrapolating the amount that has been overpaid to a provider. The Centers for Medicare & Medicaid Services, formerly known as the Health Care

Financing Administration, has set forth in detail the method for extrapolating overpayments made by medical assistance programs in the Medicare Program Integrity Manual (MPIM). The MPIM specifically provides that "[i]n simple random or systematic sampling the total overpayment in the frame may be estimated by calculating the mean overpayment, *net of underpayment*, in the sample and multiplying it by the number of units in the frame" (§ 8.4.5.1 [emphasis added]; *see* § 3.1 [A]). We thus conclude that the ALJ's failure to exercise any discretion in determining whether to consider the undisputed underpayment in the extrapolation calculation was irrational and unreasonable. Even assuming, arguendo, that the OMIG and the ALJ exercised their discretion and declined to consider the significant underpayment uncovered in the audit, we conclude that such a determination would also be irrational and unreasonable inasmuch as the extrapolated overpayment would not constitute "an accurate determination of the total overpayments made" (18 NYCRR 519.18 [g]). We therefore annul the determination, grant the amended petition and remit the matter to the OMIG for further proceedings not inconsistent with this Court's decision.

In view of our determination, we do not address petitioner's remaining contentions.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

434

KA 08-02049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. CAMPBELL, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Steuben County Court (Joseph W. Latham, J.), entered July 1, 2008. The appeal was held by this Court by order entered February 10, 2011, decision was reserved and the matter was remitted to Steuben County Court, for further proceedings (81 AD3d 1251). The proceedings were held and completed.

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

Memorandum: We previously held this case and remitted the matter to County Court for a hearing on defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him upon his plea of guilty on the seventh day of trial of, inter alia, two counts of murder in the second degree under Penal Law § 125.25 (1) and (3) (*People v Campbell*, 81 AD3d 1251). Defendant contended that he was denied effective assistance of counsel by both trial counsel and the attorney who represented him on his motion to withdraw the plea (motion counsel). We directed the court on remittal to conduct a hearing to determine whether defendant's trial counsel knew of potentially exculpatory evidence, i.e., letters from an inmate to the District Attorney alleging that he had information about the crime, and whether trial counsel related the contents of those letters to defendant. Motion counsel admitted that he did not see the letters in defendant's file and did not use that information as a basis to support the motion to withdraw the plea.

Following the hearing, the court credited the testimony of trial counsel that the prosecutor had provided him with copies of the letters, that he discussed the letters with defendant on three occasions, and that he and defendant determined that they had no exculpatory value. The court also credited the prosecutor's testimony

that the subject of the letters was raised by defendant in a conference during jury selection between the prosecutor, defendant and trial counsel. The prosecutor testified that trial counsel stated to defendant during the conference, which was requested by defendant, that they both knew that the letters were "bulls---t." The prosecutor further testified that the author of the letters refused to speak with law enforcement officials without the promise of a benefit. The court refused to credit defendant's testimony that he did not know about the letters until after he was sentenced, when his file was provided to him by motion counsel. We will not disturb the court's determination that defendant knew about the letters before he pleaded guilty, which is supported by the record and is entitled to deference (*see People v Lard*, 71 AD3d 1468, 1469, *lv denied* 14 NY3d 885, *reconsideration denied* 15 NY3d 771; *People v Smith*, 16 AD3d 1081, 1082, *lv denied* 4 NY3d 891).

Based upon the evidence adduced at the hearing and the court's credibility determinations, we conclude that defendant was not denied effective assistance of counsel either by trial counsel or by motion counsel. Defendant failed to establish that trial counsel's failure to conduct a further investigation into the reliability of the information contained in the letters or to use the letters in his defense lacked a strategic basis (*see People v Benevento*, 91 NY2d 708, 712). Further, defendant received an advantageous plea agreement on the last day of the People's case, and "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Inasmuch as the evidence at the hearing supports the court's determination that defendant knew about the letters before he pleaded guilty, we conclude that the failure of the motion attorney to use the letters in further support of the motion to withdraw the plea, which was based upon allegations that trial counsel coerced him into pleading guilty, did not deprive him of meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's contention, the court did not abuse its discretion in refusing to recuse itself from conducting the hearing on remittal. The court's determination that it could be impartial was solely a matter of discretion, and there is no basis on this record to determine that the court abused its discretion (*see People v Moreno*, 70 NY2d 403, 405-406; *People v Votra*, 104 AD3d 1160, ___; *People v Bedell*, 84 AD3d 1733, 1733, *lv denied* 17 NY3d 857).

Although defendant preserved for our review his contention that the court erred in refusing to remove his wrist shackles during the hearing on remittal, he failed to preserve for our review his further contention that the court erred in failing to articulate a finding of necessity that he remain in leg irons (*see generally People v Robinson*, 49 AD3d 1269, 1270, *lv denied* 10 NY3d 869), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Even assuming, arguendo, that defendant correctly contends that he had the right to be free of wrist shackles in this postconviction hearing (*cf. People v Best*, 19 NY3d 739, 743), we nevertheless conclude that the court's error in failing to articulate a finding of necessity to free only one of defendant's

wrists from the shackles is harmless beyond a reasonable doubt because the error
" 'did not contribute to the [decision] obtained' " (*People v Clyde*, 18 NY3d 145, 153, quoting *Deck v Missouri*, 544 US 622, 635).

We reject defendant's contention that the trial prosecutor was disqualified from testifying at the hearing based on the advocate-witness rule inasmuch as that prosecutor did not represent the People at the hearing (*see generally People v Paperno*, 54 NY2d 294, 299-300). Defendant failed to demonstrate a " 'substantial likelihood that prejudice resulted' " from the trial prosecutor's participation in a prehearing conference wherein the District Attorney, who represented the People at the hearing, opposed defendant's request for an adjournment (*see People v Shoga*, 89 AD3d 1225, 1230-1231, *lv denied* 18 NY3d 886). Finally, defendant did not seek the appointment of a special prosecutor and thus failed to preserve for our review his contention that the court erred in failing to appoint one (*cf. id.* at 1230).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

436

KA 12-00251

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY RAWLINSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered December 16, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). To the extent that defendant contends that Supreme Court improperly assessed 15 points for his history of drug or alcohol abuse as recommended in the risk assessment instrument (RAI) prepared by the Board of Examiners of Sex Offenders, we reject that contention (*see People v Zimmerman*, 101 AD3d 1677, 1678). Even assuming, arguendo, that the court erred in assessing 15 points with respect to that risk factor, we note that defendant would nevertheless have been assessed 110 points under the RAI, which is still a presumptive level three risk. Contrary to his further contention, we conclude that defendant failed to establish his entitlement to a downward departure from the presumptive risk level inasmuch as he failed to present the requisite clear and convincing evidence of special circumstances to warrant such a departure (*see People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

440

KA 10-00813

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK J. DAVIS, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETTIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 18, 2009. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon a jury verdict of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]; *People v Davis*, 91 AD3d 1273). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., that County Court erred when it allegedly failed to comply with CPL 310.30 in regard to court exhibit #4 (*People v Davis*, 96 AD3d 1512), and we vacated our prior order. We now consider the appeal de novo.

Contrary to the contention of defendant, the court complied with CPL 310.30 in regard to court exhibit #4. The supplemental transcript that was submitted by the People with their brief establishes that the court provided meaningful notice to the parties of the contents of the jury note and provided a meaningful response thereto (*see generally People v Kadarko*, 14 NY3d 426, 429; *People v O'Rama*, 78 NY2d 270, 276-277). We reject defendant's contention that we should not rely upon the supplemental transcript because it was not part of the original record on appeal. The supplemental transcript was certified by the court reporter as being an accurate transcript from the final day of the trial, and was "recertified" by her with respect to court exhibit #4 and the colloquy relating thereto, "which was inadvertently omitted from the original transcript." The parties stipulated that

transcripts of the jury trial would be submitted to this Court, and the supplemental transcript thus falls within that stipulation. Moreover, according to our rules, "[i]n a criminal matter, the failure of the parties or their attorneys to list in the stipulation to the record on appeal any transcript, exhibit or other document that constituted a part of the underlying prosecution shall not preclude the [C]ourt from considering such transcript, exhibit or other document in determining the appeal" (22 NYCRR 1000.4 [a] [1] [iii]). We may therefore consider the supplemental transcript attached to the People's brief pursuant to that rule.

Defendant failed to preserve for our review his contention that the court violated CPL 270.15 (2) in conducting the jury selection (*see generally People v Hayes*, 71 AD3d 1477, 1477, *lv denied* 15 NY3d 751; *People v Dickens*, 48 AD3d 1034, 1034, *lv denied* 10 NY3d 958), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to preserve for our review the contention regarding the court's alleged violation of CPL 270.15 (2) (*see People v Madera*, 103 AD3d 1197, 1200). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that the court erred in denying his motion in limine concerning the People's alleged spoliation of evidence, i.e., a whiskey bottle and a prescription bottle of hydrocodone. We reject that contention. A police officer observed a one-half to three-quarter full whiskey bottle in the center of the front seat of defendant's vehicle when he was pulled over, and the officer left the whiskey bottle in the vehicle without touching it. After defendant was arrested, the officer found a prescription medication bottle containing hydrocodone on defendant's person, which was returned to him. Inasmuch as the police never lost or destroyed any evidence, there was no spoliation (*see generally People v Haupt*, 71 NY2d 929, 931).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

462

KA 10-00663

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVAN BURROUGHS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered March 27, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of robbery in the first degree (Penal Law § 160.15 [2]) and robbery in the second degree (§ 160.10 [1]). We agree with defendant that his factual allocution "negate[d] an essential element of the crime" of robbery in the first degree (*People v Lopez*, 71 NY2d 662, 666), inasmuch as defendant stated that the weapon used was a "fake." As the People correctly conceded at oral argument, County Court failed to clarify whether defendant or an accomplice was in fact "armed with a deadly weapon" (§ 160.15 [2]). "[A]t a minimum the record of the . . . plea proceedings must reflect . . . that defendant's responses to the court's subsequent questions removed the doubt about defendant's guilt" of the crime of robbery in the first degree (*People v Ocasio*, 265 AD2d 675, 678). Thus, we vacate his plea of guilty with respect to robbery in the first degree. Additionally, we note that defendant pleaded guilty to both counts of robbery with the understanding that he would be sentenced to concurrent determinate terms of imprisonment of five years. Inasmuch as he was induced to plead guilty based on the promise of concurrent sentences, we also vacate the plea with respect to robbery in the second degree, thereby vacating the plea in its entirety (*see People v Rosa*, 30 AD3d 905, 908, *lv denied* 7 NY3d 851; *cf. People v Hinckley*,

50 AD3d 1466, 1467, *lv denied* 10 NY3d 959).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

464

KA 11-00773

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD HALL, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LAURIE M. BECKERINK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 4, 2010. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree, assault in the second degree and aggravated criminal contempt.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, kidnapping in the first degree (Penal Law § 135.25 [2] [a] [intent to inflict physical injury]) and assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, County Court properly refused to suppress the statements that he made to the Sheriff's Deputy who transported him back to New York after he was apprehended in Ohio. The court properly determined that those statements were admissible because they were not " 'provoked, induced [or] encouraged by police conduct or interrogation' . . . , but were made voluntarily and spontaneously in the course of a dialogue initiated and continued by defendant" (*People v Johnson*, 277 AD2d 702, 706, *lv denied* 96 NY2d 831; *see generally People v Gonzales*, 75 NY2d 938, 939, *cert denied* 498 US 833).

Defendant failed to object to the stenographer's alleged failure to transcribe the proceedings during brief pauses in the jury selection process, and thus he failed to preserve for our review his contention that he was improperly absent from the courtroom during those pauses (*see People v Vasquez*, 89 NY2d 521, 534, *cert denied sub nom. Cordero v Lalor*, 522 US 846; *People v Jacobs*, 298 AD2d 954, 955, *lv denied* 99 NY2d 559). In any event, the record establishes that defendant was in fact in the courtroom during the brief pauses.

Contrary to defendant's further contention, the court did not

abuse its discretion in admitting in evidence photographs portraying the victim's injuries (*see generally People v Stevens*, 76 NY2d 833, 835). "The general rule is that photographs of the [victim's injuries] are admissible if[, inter alia,] they tend . . . to illustrate or elucidate other relevant evidence" (*People v Pobliner*, 32 NY2d 356, 369, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905) and, here, the photographs were probative with respect to, among other things, the physical injury element of assault in the second degree (*see generally People v Davis*, 39 AD3d 1241, 1242, *lv denied* 9 NY3d 864; *People v Butera*, 23 AD3d 1066, 1068, *lv denied* 6 NY3d 774, 832).

Defendant's general motion for a trial order of dismissal is insufficient to preserve for our review his contention that the verdict is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. Contrary to defendant's further contention, 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).

Defendant's contention that he was denied effective assistance of counsel based on the failure of defense counsel to object to the alleged inadequacy of the presentence report "is raised for the first time in his reply brief and therefore is not properly before us" (*People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929). In any event, that contention is without merit inasmuch as "defendant had every opportunity to advise County Court of any mitigating factors during sentencing" (*People v Singh*, 16 AD3d 974, 978, *lv denied* 5 NY3d 769). In addition, with respect to the remaining grounds raised in support of defendant's contention that he was denied effective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on two remarks made by the prosecutor during summation (*see People v Dillon*, 38 AD3d 1211, 1211; *People v Black*, 38 AD3d 1283, 1286, *lv denied* 8 NY3d 982). In any event, that contention is without merit. The two isolated remarks did not exceed the "broad bounds of rhetorical comment" permitted on summation (*People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975 [internal quotation marks omitted]; *see People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854). Furthermore, the remarks were not so egregious or improper as to deny defendant a fair trial (*see People v Dexter*, 259 AD2d 952, 954, *affd* 94 NY2d 847; *Black*, 38 AD3d at 1286).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and we conclude that they are

without merit.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

469

CAF 12-00300

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF DAVID BONNELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY J. RODGERS, RESPONDENT-APPELLANT.

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

KEVIN M. REEDY, BUFFALO, FOR PETITIONER-RESPONDENT.

PETER P. VASILION, ATTORNEY FOR THE CHILD, WILLIAMSVILLE, FOR JORDAN D.R.-B.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered January 27, 2012. The order, among other things, awarded primary physical custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, granted in part the amended petition by awarding petitioner father primary physical custody of the parties' child and visitation to the mother. The mother contends that Family Court abused its discretion in denying her motion to change venue from Erie County to Chautauqua County. We reject that contention. At the time the father commenced this proceeding in Erie County, he and the child resided in that jurisdiction. The mother contends that a change of venue was required for the convenience of material witnesses, but in support of her motion she failed to identify a single witness who would be inconvenienced by proceeding in Erie County. We therefore conclude that the mother failed to demonstrate "good cause" for transferring this proceeding to Chautauqua County (Family Ct Act § 174; *see Rochester Drug Coop., Inc. v Marcott Pharmacy N. Corp.*, 15 AD3d 899, 899; *cf. Seguin v Landfried*, 96 AD3d 1433, 1433; *Matter of Arcuri v Osuna*, 41 AD3d 841, 841-842).

Contrary to the mother's further contention, this proceeding involves an initial determination with respect to custody of the child. Therefore, " '[a]lthough the parties' informal [custody] arrangement is a factor to be considered, [the father] is not required to prove a substantial change in circumstances in order to warrant a

modification thereof' " (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *see Matter of Bruce BB. v Debra CC.*, 307 AD2d 408, 409). We further conclude that, contrary to the mother's contention, the court properly determined that it was in the best interests of the child that the parties share joint custody of the child with primary physical custody with the father. The court's custody determination following a hearing is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Thillman*, 85 AD3d at 1625). Here, the court's written decision establishes that the court engaged in a " 'careful weighing of [the] appropriate factors' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1422), and the court's determination has a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110, 1110; *Matter of Thayer v Ennis*, 292 AD2d 824, 825).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

476

CA 12-01638

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

CAROL A. CARNEVALE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELIZABETH WENDE BREAST CARE, LLC, THE ELIZABETH WENDE BREAST CLINIC, PATRICIA SOMERVILLE, M.D. AND POSY SEIFERT, D.O., DEFENDANTS-RESPONDENTS.

FOLEY AND FOLEY, PALMYRA (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, CANANDAIGUA (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered December 22, 2011. The judgment awarded costs and disbursements to defendants following a jury verdict in favor of defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for defendants' alleged medical malpractice in failing to make a timely diagnosis of her breast cancer. Following a trial the jury found that defendants were not negligent in their care and treatment of plaintiff, and Supreme Court denied plaintiff's posttrial motion to set aside the verdict. We note at the outset that, although plaintiff appealed from the order denying her posttrial motion to set aside the verdict rather than from the judgment in which that order was subsumed, "we exercise our discretion to treat plaintiff[']s] notice of appeal as valid and deem the appeal as taken from the judgment" (*Campopiano v Volcko* [appeal No. 2], 61 AD3d 1343, 1344). Plaintiff contends that a juror affidavit establishes that certain jurors were biased against her and thus that she was denied a fair trial. We reject that contention. Here, "[i]n the absence of exceptional circumstances" (*Lopez v Kenmore-Tonawanda Sch. Dist.*, 275 AD3d 894, 897), " 'the use of [juror] affidavits for the purpose of exploring the deliberative process of the jury and impeaching its verdict is patently improper' " (*Best v Swan Group L.P.*, 81 AD3d 1344, 1344; *see Pawlaczyk v Jones*, 26 AD3d 822, 823, *lv denied* 7 NY3d 701).

Contrary to plaintiff's further contention, the court did not

commit reversible error by allowing plaintiff's treating physician to testify as to her opinion concerning the merits of plaintiff's action. We conclude that the error did not "affect[] the result" of this action and therefore is harmless (*Palmer v Wright & Kremers*, 62 AD2d 1170, 1170; *see Cook v Oswego County*, 90 AD3d 1674, 1675).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

479

CA 12-02074

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

RANDALL J. LYONS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEITH A. ZEMAN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 15, 2012. The order, insofar as appealed from, denied the cross motion of defendant-appellant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained while he was a passenger in a vehicle that was rear-ended by a vehicle operated by Keith A. Zeman (defendant). We conclude that Supreme Court properly denied defendant's cross motion for summary judgment dismissing the amended complaint and all cross claims against him.

"A rear-end collision with a vehicle that is stopped or is in the process of stopping 'creates a prima facie case of liability with respect to the [driver] of the rearmost vehicle, thereby requiring that [driver] to rebut the inference of negligence by providing a nonnegligent explanation for the collision' " (*Rosario v Swiatkowski*, 101 AD3d 1609, 1609; *see Roll v Gavitt*, 77 AD3d 1412, 1413). We agree with plaintiff that defendant failed to establish as a matter of law that the accident was the result of unanticipated brake failure, a nonnegligent explanation alleged by defendant in support of his cross motion (*see Baldwin v Wilkins*, 11 AD3d 917, 918). "Where, as here, . . . defendant[] intend[s] 'to lay the blame for the accident on brake failure, it [is] incumbent upon [him] to show that the problem with the brakes was unanticipated, and that [he] had exercised reasonable care to keep them in good working order' " (*Suitor v Boivin*, 219 AD2d 799, 800; *see Hubert v Tripaldi*, 307 AD2d 692, 694; *Schuster v Amboy Bus Co.*, 267 AD2d 448, 448-449). Defendant's own deposition testimony

suggested that he refused a recent recommendation to have his brake lines fully replaced. Moreover, there are issues of fact whether the allegedly faulty brake repair performed two months before the accident was the sole proximate cause of the accident, as contended by defendant.

Contrary to defendant's further contention, he failed to meet his burden of establishing a nonnegligent explanation for the accident based on the emergency doctrine. The doctrine " 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . , provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174; *see Lifson v City of Syracuse*, 17 NY3d 492, 497). "The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Dalton v Lucas*, 96 AD3d 1648, 1649; *see Patterson v Central N.Y. Regional Transp. Auth. [CNYRTA]*, 94 AD3d 1565, 1566, *lv denied* 19 NY3d 815; *Williams v City of New York*, 88 AD3d 989, 990). Here, even assuming, arguendo, that defendant established the existence of an emergency arising from the failure of his brakes, we conclude that there is an issue of fact whether his actions in response to that emergency were reasonable (*see generally Dalton*, 96 AD3d at 1649-1650; *Heye v Smith*, 30 AD3d 991, 992).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

482

KA 11-01247

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINNIE B. WEATHER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JEREMY D. ALEXANDER, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 3, 2010. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [former (i)]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of DWI as a class E felony (*see* §§ 1192 [3]; 1193 [1] [c] [i] [A]).

At the time defendant entered his plea in appeal No. 1, he had been promised a sentence of incarceration of five months, to run concurrently with a sentence imposed in Madison County (first plea agreement). During his plea colloquy, defendant agreed to waive his right to appeal and was informed that, if he failed to appear for sentencing or was rearrested before sentencing, County Court (Balzano, A.J.) would no longer be bound by the sentencing promise. Before sentencing, defendant was arrested for the charge of DWI in appeal No. 2, and he failed to appear for sentencing in appeal No. 1.

At the next appearance, the court (Balzano, A.J.), the prosecutor and defense counsel entered into another agreement pursuant to which defendant would enter a plea to DWI in appeal No. 2, and the court would direct that the sentences in appeal Nos. 1 and 2 run concurrently with each other and with the sentence imposed in Madison County (second plea agreement). Defendant agreed to enter into the second plea agreement, but the matter was adjourned to enable the

prosecutor to prepare a superior court information in appeal No. 2.

In the interim, the cases were transferred to County Court (Donalty, J.). When defendant appeared for sentencing in appeal No. 1 and to enter a plea and for sentencing in appeal No. 2, the court informed defendant that it was "not going along with [the second plea agreement]." The court stated that, if defendant pleaded guilty to DWI in appeal No. 2, the court would order the sentences in appeal Nos. 1 and 2 to run concurrently with each other but consecutively to the sentence imposed in Madison County (third plea agreement). Although defendant objected, he ultimately entered a plea in appeal No. 2 and agreed to waive his right to appeal. The court thereafter sentenced defendant in accordance with the third plea agreement.

While defendant does not contend that his waivers of the right to appeal are constitutionally defective or that they should not be enforced (*see generally People v Callahan*, 80 NY2d 273, 285; *People v Williams*, 191 AD2d 1039, 1040), he contends that they do not encompass the issues raised by him on appeal. Defendant contends that his challenge to the sentences survives the waivers of the right to appeal because he is challenging the legality of the sentences, i.e., "the legality of the sentence[s] on [their] face, or . . . the power of the court to impose [them]" (*Callahan*, 80 NY2d at 281; *see People v Campbell*, 97 NY2d 532, 535). We reject that contention. The sentences at issue on this appeal are legal on their face and, inasmuch as "[t]he court . . . retains discretion in fixing an appropriate sentence up until the time of the sentencing" (*People v Schultz*, 73 NY2d 757, 758; *see People v Sierra*, 85 AD3d 1659, 1659, *lv denied* 17 NY3d 905), the court had "the power . . . to impose" the sentences (*Callahan*, 80 NY2d at 281). Defendant's challenge therefore addresses not the legality of the sentences but, rather, the adequacy of the procedures leading up to sentencing (*see Callahan*, 80 NY2d at 281).

While we agree with defendant that the waiver of the right to appeal in appeal No. 1 does not preclude his contention that the court (Donalty, J.) erred in failing to abide by the second plea agreement (*see People v Fomby*, 42 AD3d 894, 895; *People v Stevens*, 41 AD3d 1030, 1031; *People v Vancise*, 302 AD2d 864, 864), we conclude that the waiver of the right to appeal in appeal No. 2 precludes defendant's similar contention in that appeal. At the time defendant waived his right to appeal in appeal No. 2, he was aware of the terms of the third plea agreement and had consented to be sentenced in accordance with that agreement. The waiver of the right to appeal in appeal No. 2 thus encompasses defendant's challenge to the sentence because all of the actions being challenged on appeal occurred before defendant entered his plea and waived his right to appeal. "In view of defendant's acceptance of the [third] plea agreement and express waiver of his right to appeal, he may not now challenge" the court's refusal to adhere to the terms of the second plea agreement (*People v Malone*, 203 AD2d 622, 623, *lv denied* 84 NY2d 829).

Because we conclude that the waiver of the right to appeal in appeal No. 1 does not preclude our review of the merits of defendant's

contention in that appeal, we now address the merits of that contention. Defendant contends in appeal No. 1 that he is entitled to specific performance of the second plea agreement. " 'The remedy of specific performance in the context of plea agreements applies where a defendant has been placed in a no-return position in reliance on the plea agreement . . . , such that specific performance is warranted as a matter of essential fairness' " (*Sierra*, 85 AD3d at 1659; *see generally People v McConnell*, 49 NY2d 340, 348-349). Inasmuch as neither the prosecution nor the defense had taken any action on the second plea agreement between the time of the second plea agreement and the appearance before Judge Donalty, defendant was not placed in a " 'no-return position' " in reliance on the second plea agreement and is thus not entitled to specific performance of that agreement (*Sierra*, 85 AD3d at 1659).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

483

KA 11-01248

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINNIE B. WEATHER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JEREMY D. ALEXANDER, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 3, 2010. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Same Memorandum as in *People v Weather* ([appeal No. 1] ___ AD3d ___ [May 3, 2013]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

488

KA 12-00534

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM PURDY, DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

ADAM PURDY, DEFENDANT-APPELLANT PRO SE.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 25, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the second degree and criminal possession of stolen property in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of burglary in the second degree and grand larceny in the second degree, granting the omnibus motion insofar as it sought to suppress the statements made by defendant and the physical evidence seized from his vehicle and vacating the sentence imposed for criminal possession of stolen property in the second degree, and as modified the judgment is affirmed, a new trial is granted on counts one and two of the indictment, and the matter is remitted to Wayne County Court for resentencing on count three of the indictment.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the second degree (§ 155.40 [1]) and criminal possession of stolen property (CPSP) in the second degree (§ 165.52). We reject defendant's contention in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court erred in denying that part of his omnibus motion seeking suppression of the

physical evidence that was seized from his vehicle and the statements he made to New York State Police Investigators, inasmuch as the People failed to meet their "burden of going forward to show the legality of the police conduct in the first instance" (*People v Di Stefano*, 38 NY2d 640, 652; *see People v Riddick*, 70 AD3d 1421, 1423, *lv denied* 14 NY3d 844).

At the suppression hearing, the People presented testimony from two investigators who came into contact with defendant after he had been taken into custody. Only one of those investigators testified to any events that occurred before defendant was taken into custody. That investigator testified that he was involved in the investigation of a residential burglary and that, as a result of his investigation and his interviews with witnesses and other suspects, he was "actively looking for [defendant]." Despite the fact that, "[a]s a general rule, hearsay is admissible at a suppression hearing" (*People v Edwards*, 95 NY2d 486, 491; *see* CPL 710.60 [4]; *United States v Raddatz*, 447 US 667, 679, *reh denied* 448 US 916; *People v Brink*, 31 AD3d 1139, 1140, *lv denied* 7 NY3d 865), here the People failed to present any testimony at the suppression hearing concerning what the investigator had actually learned from his investigation and interviews, i.e., what evidence established that defendant was potentially involved in the crimes. Inasmuch as there is no dispute that defendant was in custody, the People were required to establish that the investigators who took defendant into custody had, at the very least, "a reasonable suspicion that [defendant] ha[d] committed, [was] committing or [was] about to commit a felony or misdemeanor" (*People v De Bour*, 40 NY2d 210, 223; *see* CPL 140.50 [1]). Even assuming, arguendo, that it was established at trial that the investigators had the requisite reasonable suspicion to forcibly detain defendant, we note that our review of a "court's suppression ruling is 'limited to the evidence presented at the suppression hearing' " (*People v Colligan*, 52 AD3d 1209, 1210; *see People v Jennings*, 295 AD2d 1000, 1000, *lv denied* 99 NY2d 536).

Because the People failed to present evidence at the suppression hearing establishing the legality of the police conduct, defendant's purported consent to the search of his vehicle was involuntary and all evidence seized from the vehicle as a result of that consent should have been suppressed (*see People v Packer*, 49 AD3d 184, 187-189, *affd* 10 NY3d 915; *People v Banks*, 85 NY2d 558, 563, *cert denied* 516 US 868; *see generally People v Gonzalez*, 39 NY2d 122, 128). Additionally, defendant's statements to the police must be suppressed as fruit of the poisonous tree (*see People v Garcia*, 85 AD3d 28, 34, *mod on other grounds* 20 NY3d 317; *People v Cady*, 103 AD3d 1155, 1157; *People v Beckett*, 88 AD3d 898, 900; *Riddick*, 70 AD3d at 1424).

The People contend that any error in the suppression ruling is harmless. We agree with the People only in part. Where, as here, the error is constitutional in nature, the People must establish "that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237). With respect to the burglary and grand larceny counts, we conclude

that the error is not harmless. Aside from defendant's statements, there was no direct evidence that defendant participated in the burglary and larceny. An accomplice who became involved after the burglary was committed testified only that, on the morning of the burglary, defendant borrowed a "dolly," and that, later that afternoon, defendant and another person arrived at the accomplice's house with a 500-pound safe. At that point, the three men acted together to break open the safe and split the proceeds. Because the admissible evidence of guilt on the burglary and grand larceny charges is not overwhelming, we conclude that there is a reasonable possibility that the error in admitting the evidence seized from defendant's vehicle and defendant's statements to the police may have contributed to defendant's conviction. We therefore modify the judgment by reversing those parts convicting defendant of burglary in the second degree and grand larceny in the second degree and granting the omnibus motion insofar as it sought to suppress the statements made by defendant and the physical evidence seized from his vehicle, and we grant a new trial on those counts.

We reach a different conclusion, however, with respect to the count of CPSP. The admissible evidence at trial established that defendant worked with two other men to open the safe and take possession of the $405,000 contained therein. Most of that money was in the form of bills in the amounts of $10 and $20. That same day, defendant was captured on security video in the act of buying two safes, one of which was taken by defendant's mother to his aunt's house. Defendant's aunt surrendered that safe to the police and, when that safe was opened, it contained over $79,000. Furthermore, within days of the burglary, defendant, accompanied on one occasion by his mother, purchased two separate vehicles in cash, using only bills in the amount of $20. The evidence of guilt is overwhelming, and there is no reasonable possibility that the erroneous admission of defendant's statement and the evidence taken from his vehicle contributed to his conviction of CPSP in the second degree (*see id.*).

The People correctly concede that the certificate of conviction incorrectly states that defendant was sentenced as a persistent violent felony offender and that it should be corrected. While the People contended that the sentence should remain as imposed, we conclude that the sentence for CPSP in the second degree, the only conviction remaining, must be vacated. The sentencing transcript establishes that, although the court found defendant to be a persistent felony offender (*see* Penal Law § 70.10 [1]), it declined to sentence him as such (*see* § 70.10 [2]). The sentence of an indeterminate term of incarceration of 5 to 10 years imposed on the conviction of CPSP in the second degree, a class C nonviolent felony, is only legal, however, if the court sentenced defendant as a second felony offender (*see* §§ 70.00 [2] [c]; [3] [b]; 70.06 [3] [c]; [4] [b]). At no time did the court state that it was sentencing defendant as a second felony offender. We therefore further modify the judgment by vacating the sentence imposed for CPSP in the second degree, and we

remit the matter to County Court for resentencing on that count.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

491

CAF 12-00732

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ALEXANDER M.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL A.M., SR., RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, FOR ALEXANDER M.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 9, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent father appeals from an order adjudicating his son a permanently neglected child, terminating the father's parental rights, and granting guardianship and custody rights to petitioner. The father stipulated to the finding of permanent neglect but contends that a suspended judgment would have been in the child's best interests. We reject that contention. The evidence supports Family Court's determination that termination of the father's parental rights is in the best interests of the child (*see Matter of Moniea C.*, 9 AD3d 888, 888), and that the father's negligible progress in addressing his chronic substance abuse "was not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Maryline A.*, 22 AD3d 227, 228).

The challenge by petitioner to the posttermination visitation provision of the order is not properly before us in the absence of a cross appeal by petitioner (*see Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1276).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

492

CAF 12-00306

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF JENNIFER S. DAVIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT P. DRIGGS, III, RESPONDENT-APPELLANT.

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

OAK ORCHARD LEGAL SERVICES A DIVISION OF NEIGHBORHOOD LEGAL SERVICES, INC., BATAVIA (JOHN M. ZONITCH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 7, 2012 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, confirmed the determination of the Support Magistrate that respondent willfully failed to obey a court order.

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

Memorandum: Respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully disobeyed an order to pay child support. We agree with Family Court that the father failed to present "some competent, credible evidence of his inability to make the required payments" and thus failed to rebut the presumption of a willful violation (*Matter of Powers v Powers*, 86 NY2d 63, 70). We reject the father's contention that he was deprived of effective assistance of counsel based on his attorney's failure to present evidence in admissible form rebutting the presumption. Viewed in its totality, the representation received by the father was meaningful, and we note that he did not suffer any actual prejudice as a result of the claimed deficiency (*see Matter of Kemp v Kemp*, 19 AD3d 748, 751, *lv denied* 5 NY3d 707). Although the father's attorney had difficulty before the Support Magistrate in introducing admissible evidence regarding the father's alleged disability and, indeed, none of the medical records introduced by the father's attorney was admitted in evidence by the Support Magistrate, the record establishes that the court itself considered those documents and admitted them in evidence during its consideration of the penalty to be imposed.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

495

CA 12-00931

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

JAMES S. DAVIS, ROBERT C. BOSSERT, JR., CHARLES D. BEAVER, DAVID A. RODKEY, ALBERT E. WEISSER AND JOHN W. HUPP, PLAINTIFFS-APPELLANTS,

V ORDER

THOMAS T. WISKUP, SR., THOMAS T. WISKUP, JR., LAURA STANISZEWSKI, ROBERT C. WISKUP AND POTTER LUMBER COMPANY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

MACDONALD, ILLIG, JONES & BRITTON LLP, ERIE, PENNSYLVANIA (GREGORY P. ZIMMERMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BACKHAUS & SIMON, P.C., OLEAN (ROBERT J. SIMON OF COUNSEL), FOR DEFENDANT-RESPONDENT POTTER LUMBER COMPANY, INC.

Appeal from an order of the Supreme Court, Cattaraugus County (Gerald J. Whalen, J.), entered March 8, 2012. The order denied the motion of plaintiffs for summary judgment and granted in part the cross motion of defendant Potter Lumber Company, Inc. for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

496

CA 12-00933

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

JAMES S. DAVIS, ROBERT C. BOSSERT, JR., CHARLES D. BEAVER, DAVID A. RODKEY, ALBERT E. WEISSER AND JOHN W. HUPP, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THOMAS T. WISKUP, SR., THOMAS T. WISKUP, JR., LAURA STANISZEWSKI, ROBERT C. WISKUP AND POTTER LUMBER COMPANY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

MACDONALD, ILLIG, JONES & BRITTON LLP, ERIE, PENNSYLVANIA (GREGORY P. ZIMMERMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BACKHAUS & SIMON, P.C., OLEAN (ROBERT J. SIMON OF COUNSEL), FOR DEFENDANT-RESPONDENT POTTER LUMBER COMPANY, INC.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Gerald J. Whalen, J.), entered April 24, 2012. The judgment dismissed the complaint and adjudged that defendant Potter Lumber Company, Inc. is entitled to a prescriptive easement over a certain portion of Bushey Road, Hinsdale.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated on the law without costs and the matter is remitted to Supreme Court, Cattaraugus County, for further proceedings in accordance with the following Memorandum: In this action pursuant to RPAPL article 15, plaintiffs appeal from a judgment that denied their motion for summary judgment seeking a determination that a certain roadway in the Town of Hinsdale (Town) has been abandoned as a public road and granted the cross motion of defendant Potter Lumber Company, Inc. (Potter Lumber) for summary judgment seeking a determination that it has a prescriptive easement over the roadway. Although the pleadings sharply place in issue the question whether the subject roadway has been abandoned as a town highway, the Town has not been made a party to this action. We therefore vacate the judgment and remit the matter to Supreme Court for further proceedings with the directive that the Town be joined as a defendant "in order to accord complete relief between the parties" (*DeMato v Mallin*, 68 AD3d 711, 712).

We note in any event that the court erred in determining that Potter Lumber had acquired a prescriptive easement over a portion of the road that the court determined was a "prescriptive highway." A

highway by prescription is a public road (*see* Highway Law § 189; *see also People v County of Westchester*, 282 NY 224, 228; *De Haan v Broad Hollow Estates*, 3 AD2d 848, 848), and a public highway created by prescription is not subject to adverse possession (*see Burbank v Fay*, 65 NY 57, 69; *Litwin v Town of Huntington*, 208 AD2d 905, 906, *lv dismissed* 86 NY2d 777).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

497

CA 12-01914

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

JAMES PANZARELLA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAREN PANZARELLA, DEFENDANT-APPELLANT.

HOGAN WILLIG PLLC, AMHERST (STEVEN G. WISEMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF RICHARD C. SLISZ, BUFFALO (RICHARD C. SLISZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 12, 2012. The order granted the cross motion of plaintiff to vacate the provisions of the parties' Stipulation of Settlement providing for child support.

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

Memorandum: Supreme Court properly granted plaintiff's cross motion seeking to vacate the provisions of the parties' Stipulation of Settlement (stipulation) concerning plaintiff's child support obligations on the ground that the stipulation failed to comply with Domestic Relations Law § 240 (1-b) (h). The stipulation "failed to include recitals stating that the parties were aware that following the [Child Support Standards Act] guidelines would result in the presumptively correct amount of support; . . . failed to set forth the presumptively correct amount of support that would have been fixed pursuant to the guidelines; and . . . failed to articulate the reason the parties chose to deviate from the guidelines. Consequently, [the stipulation] was invalid and unenforceable" (*Warnecke v Warnecke*, 12 AD3d 502, 503-504; *see Bushlow v Bushlow*, 89 AD3d 663, 664; *Jefferson v Jefferson*, 21 AD3d 879, 880-881).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

498

CA 12-02137

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

SAMUEL TOMAINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS MAROTTA, JR., DEFENDANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RYON D. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 13, 2012. The order, among other things, denied plaintiff's motion 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 alleging that he sustained injuries as a result of exposure to lead paint in a house owned by defendant. Following trial, the jury concluded that defendant was negligent, but that his negligence was not a substantial factor in causing injury to plaintiff. Supreme Court properly denied plaintiff's motion to set aside the verdict as inconsistent. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent . . . only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski v Mordino*, 4 AD3d 782, 783 [internal quotation marks omitted]; *see Ellis v Borzilleri*, 41 AD3d 1170, 1170-1171). Here, defendant's expert testified that plaintiff was not damaged at all by his exposure to lead paint. The fact that the jury found that defendant was negligent but that his negligence was not a substantial factor in causing plaintiff's injuries thus is not logically impossible (*see Cunningham v Anderson*, 85 AD3d 1370, 1373-1375, *lv dismissed in part and denied in part* 17 NY3d 948). The jury was entitled to conclude that any effects of lead poisoning only minimally affected plaintiff and that any injuries sustained by him could have been caused by other factors (*see id.* at 1375).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

501

CA 12-02093

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE BANK OF CASTILE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

B. BEARDSLEY MANAGEMENT AND ENTERPRISES, INC.
AND MICHAEL J. VOGT, DEFENDANTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (DAVID H. EALY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered January 31, 2012. The judgment awarded plaintiff a deficiency judgment.

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

Memorandum: Plaintiff issued commercial loans to defendant B. Beardsley Management and Enterprises, Inc. (Beardsley), which were guaranteed by defendant Michael J. Vogt. After plaintiff commenced this action seeking damages for, inter alia, breach of contract, the parties entered into a stipulation and order (stipulation). The stipulation provided that, in the event that defendants defaulted on their obligations with respect to the loans issued to Beardsley, plaintiff could proceed with this action for a money judgment, which would involve the sale of assets. Pursuant to the stipulation, defendants did not waive any defense they had to the commercial reasonableness of the sale of the assets. After defendants defaulted on their obligations under the loans, plaintiff proceeded with a public auction of the assets and thereafter moved for summary judgment seeking a deficiency judgment. Supreme Court granted the motion, and we affirm.

Contrary to defendants' contention, plaintiff met its burden of establishing the commercial reasonableness of the sale of the assets pursuant to UCC 9-610 (b), and defendants failed to raise a triable issue of fact (*see GMAC v Jones*, 89 AD3d 985, 986; *HSBC Bank USA v Economy Steel*, 298 AD2d 958, 958-959). "A disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition;

or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (UCC 9-627 [b] [2]). We reject defendants' contention that the auctioneer commissions were commercially unreasonable. In support of the motion, plaintiff submitted the affidavit of an expert who was aware that the auctioneer hired by plaintiff collected a commission of 10%, plus a buyer's premium of 12%, and stated that buyer's premiums were the norm at auctions, and typically ranged from 12% to 18%. He concluded that the buyer's premium in this auction was within industry standards. In opposition to the motion, defendants submitted affidavits in which their experts stated that they "do[] not typically" or "only rarely" charge a buyer's premium when conducting similar auctions, but they never stated that the buyer's premium here was commercially unreasonable.

Contrary to defendants' further contention, the motion was not premature. Defendants "failed to establish 'that facts essential to justify opposition [to the motion] may exist but cannot then be stated' " (*Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1135, quoting CPLR 3212 [f]). We have considered defendants' remaining contention and conclude that it is without merit.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

502

CA 12-01967

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
BOARD OF EDUCATION OF THOUSAND ISLANDS
CENTRAL SCHOOL DISTRICT,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

THOUSAND ISLANDS EDUCATION ASSOCIATION,
RESPONDENT-APPELLANT,
AND AMERICAN ARBITRATION ASSOCIATION,
RESPONDENT.

RICHARD E. CASAGRANDE, LATHAM (PAUL D. CLAYTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 30, 2011 in a proceeding pursuant to CPLR article 75. The order granted the petition and permanently stayed the arbitration demanded by respondent-appellant.

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

Memorandum: Petitioner, Board of Education of Thousand Islands Central School District (TICSD), commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration. Contrary to the contention of respondent Thousand Islands Education Association (TIEA), Supreme Court properly granted the petition. In September 2006, Lonnie Shippe was hired as a probationary teacher at TICSD. At the end of the three-year probationary period, Shippe was notified that he would not be recommended for tenure by the Superintendent. In lieu of termination, on April 1, 2009, TICSD, Shippe and TIEA entered into a *Juul* agreement, which extended the probationary period for one year (*see Matter of Juul v Board of Educ. of Hempstead School Dist. No.1, Hempstead*, 76 AD2d 837, 838, *affd for reasons stated* 55 NY2d 648, 649). At the expiration of that agreement, the parties entered into a second *Juul* agreement that extended Shippe's probationary period for a fifth year and, as relevant herein, TIEA in exchange "waive[d] any right it may have to pursue a grievance under the collective bargaining agreement [CBA] between the TIEA and the Superintendent relative to the deferral of the Superintendent's tenure

recommendation, [or] the termination of [Shippe's] employment." Near the end of his fifth probationary year, Shippe was informed by the Superintendent that he would not be recommended for tenure and that his appointment as a probationary teacher with TICSD would end on a specified date. TIEA filed a grievance on behalf of Shippe contesting his termination under various provisions of the CBA, and the grievance was denied by TICSD. TIEA then served a demand for arbitration, whereupon TICSD brought this proceeding seeking a permanent stay of the arbitration. The court, agreeing with TICSD that a valid agreement to arbitrate this particular dispute no longer existed, granted the petition. We affirm.

Here, there is no dispute that the arbitration claim with respect to the subject matter at issue is authorized under the Taylor Law (Civil Service Law art 14) (*see Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-138). Thus, in accordance with the applicable two-step inquiry (*see id.*), it must next be determined whether "such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration" (*Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509, 513). It is undisputed that, absent the *Juul* agreement, Shippe's termination would be subject to the grievance and arbitration procedures contained in the CBA. However, contrary to TIEA's contention, we conclude that the *Juul* agreement clearly manifested an intent to exclude the subject matter of Shippe's termination, including the just cause, teacher improvement and code of ethics grounds advanced by TIEA, from the provisions of the CBA relating to grievances and arbitration (*see Matter of Campbell [State of New York]*, 37 AD3d 993, 994-995; *see generally Matter of Marshall v Pittsford Cent. Sch. Dist.*, 100 AD3d 1498, 1500, *lv denied* 20 NY3d 859).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

503

CA 12-01355

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF CHARLES MEIER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION LEWISTON PORTER CENTRAL
SCHOOL DISTRICT, RESPONDENT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZYANI OF COUNSEL), FOR RESPONDENT-APPELLANT.

WATSON BENNETT COLLIGAN & SCHECHTER, LLP, BUFFALO (CAROLYN NUGENT GORCZYNSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered March 21, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Respondent appeals from a judgment granting the petition in this CPLR article 78 proceeding. Supreme Court determined that the resignation of petitioner, a tenured teacher formerly employed by respondent, "was involuntarily submitted as a result of fraud, coercion and duress" and directed his reinstatement with back pay and benefits. We agree with respondent that the court erred in granting relief to petitioner based solely on the papers before it. "A resignation under coercion or duress is not a voluntary act and may be nullified" (*Matter of Mangee [Mamorella]*, 239 AD2d 892, 892; *see Matter of Gould v Board of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 NY2d 446, 451). However, "it has consistently been held that a threat to do that which one has the legal right to do does not constitute duress" (*Matter of Rychlick v Coughlin*, 99 AD2d 863, 864, *affd for reasons stated* 63 NY2d 643; *see Matter of Hopkins v Governale*, 222 AD2d 435, 436). Thus, " '[a] person's resignation may not be considered to be obtained under duress unless the employer threatened to take action which it had no right to take' " (*Hopkins*, 222 AD2d at 436). Moreover, although "in appropriate circumstances . . . a tenured teacher may, as part of a stipulation in settlement of a disciplinary proceeding brought against him [or her], waive his or her continued right to the protections afforded by section 3020-a of the Education Law" (*Matter of Abramovich*

v Board of Educ. of Cent. Sch. Dist. No. 1 of Towns of Brookhaven & Smithtown, 46 NY2d 450, 452, *rearg denied* 46 NY2d 1076, *cert denied* 444 US 845), it is also the case that such settlements must be voluntarily and knowingly made and may not be " 'lightly, inadvertently, inadvisedly or improvidently' entered into" (*id*. at 456). We conclude on this record that the court should have conducted a trial pursuant to CPLR 7804 (h) "to resolve the factual issue raised by the pleadings and affidavits concerning petitioner's allegations of duress, and to make appropriate findings of fact before proceeding any further" (*Matter of Cacchioli v Hoberman*, 31 NY2d 287, 291). We therefore reverse the judgment and remit the matter to Supreme Court for that purpose.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

504

KA 09-02626

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL TOPOLSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 10, 2009. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated.

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 felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]). Contrary to defendant's contention, we conclude that his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Pratt*, 77 AD3d 1337, 1337, *lv denied* 15 NY3d 955). Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered because he failed to recite the underlying facts of the crime to which he pleaded guilty and, upon questioning by the court, he could not recall how much he had to drink on the date of the crime. Defendant's contention is actually a challenge to the factual sufficiency of the plea allocution, and thus that challenge and his challenge to the severity of the sentence are encompassed by the valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 256; *People v Lococo*, 92 NY2d 825, 827; *People v Walton*, 101 AD3d 1792, 1792; *People v Grant*, 96 AD3d 1697, 1697, *lv denied* 19 NY3d 997).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

506

KA 11-02188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. BARBER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (TYSON BLUE OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a resentence of the Ontario County Court (Stephen D. Aronson, A.J.), rendered August 19, 2011. Defendant was resentenced upon his conviction of robbery in the third degree.

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

Memorandum: Defendant was convicted, upon his plea of guilty, of robbery in the third degree (Penal Law § 160.05), and he appeals from a resentence with respect to that conviction. We note at the outset that defendant's release to parole supervision does not render moot his contention that the sentence is unduly harsh or severe because he "remains under the control of the Parole Board until his sentence has terminated" (*People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801 [internal quotation marks omitted]; *see People v Rowell*, 5 AD3d 1073, 1074, *lv denied* 2 NY3d 806). We nevertheless reject defendant's contention with respect to the severity of the sentence. Because County Court imposed the minimum sentence authorized for a class D felony committed by a second felony offender (*see* Penal Law §§ 70.06 [3] [d], [4] [b]; 160.05), there is no basis for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Fiorello*, 97 AD3d 763, 763; *People v Agha*, 239 AD2d 930, 931, *lv denied* 90 NY2d 854). Defendant's further contention that the court erred in failing to hold a hearing pursuant to CPL 420.40 to determine whether his obligation to pay the mandatory surcharge should be deferred until his release is rendered academic by his release to parole supervision.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

507

KA 11-01503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMARIO COTTO, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RYAN D. HAGGERTY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 7, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation inasmuch as he did not object to any of the alleged improprieties (*see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967; *People v Smith*, 90 AD3d 1565, 1567, *lv denied* 18 NY3d 998; *People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965). In any event, defendant's contention is without merit. Some of the prosecutor's allegedly improper comments were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915), and the remaining alleged instances of misconduct were not so egregious as to deprive defendant of a fair trial (*see People v Pringle*, 71 AD3d 1450, 1451, *lv denied* 15 NY3d 777; *People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859). Notably, two of the instances of alleged prosecutorial misconduct cited by defendant relate solely to the count of which he was acquitted. Finally, the sentence imposed is not unduly harsh or severe.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

510

KA 10-01775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELVIN SPEARS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 31, 2009. The judgment convicted defendant, upon his plea of guilty, of sexual abuse 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 sexual abuse in the second degree (Penal Law § 130.60 [2]). We agree with defendant that Supreme Court's "single reference to [the] right to appeal is insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857 [internal quotation marks omitted]). Contrary to defendant's contention, the court did not abuse its discretion in denying his request for an adjournment at sentencing (*see generally People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956; *People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Additionally, defendant failed to preserve for our review his contention that the plea colloquy was factually insufficient inasmuch as he failed to move to withdraw his plea of guilty or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v Streeter*, 23 AD3d 1113, 1114, *lv denied* 6 NY3d 759). The narrow exception to the preservation rule does not apply here (*see Lopez*, 71 NY2d at 666), and in any event defendant's contention lacks merit (*see id.* at 666 n 2; *People v Scott*, 15 AD3d 883, 884, *lv denied* 4 NY3d 856).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

531

CA 12-02124

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

NANCY BURKHART, SISTER AND LEGAL GUARDIAN FOR
BRIAN BURKHART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PEOPLE, INC., ELISA SMITH, KATELYNNE COLEMAN,
AMY MAZURKIEWICZ, DEFENDANTS-RESPONDENTS,
LUCIAN VISONE AND LAKEFRONT CONSTRUCTION, INC.,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (MICHAEL T. HAGELIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT, FOR PLAINTIFF-RESPONDENT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered February 2, 2012. The order denied the motion of defendants Lucian Visone and Lakefront Construction, Inc., for summary judgment on the issue of negligence.

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

Memorandum: Plaintiff commenced this action on behalf of her brother seeking damages for injuries he sustained when he was struck by a vehicle operated by defendant Lucian Visone and owned by defendant Lakefront Construction, Inc. (Lakefront). Visone and Lakefront appeal from an order denying their motion for partial summary judgment on the issue of Visone's negligence. We affirm. Visone and Lakefront failed to submit evidence sufficient to establish, prima facie, that the alleged negligence of the other defendants or of plaintiff's brother "was the sole proximate cause of the accident, that [Visone] kept a proper lookout, and that [Visone's] alleged negligence, if any, did not contribute to the happening of the accident" (*Topalis v Zwolski*, 76 AD3d 524, 525; *see Sauter v Calabretta*, 90 AD3d 1702, 1704). Visone and Lakefront failed to establish in support of their motion that plaintiff's brother "suddenly 'darted out . . . directly into the path of the . . . vehicle' " (*St. Andrew v O'Brien*, 45 AD3d 1024, 1027-1028, *lv denied and dismissed* 10 NY3d 929) or that Visone complied with his "duty to see that which through the proper use of his senses he should have seen" (*Lupowitz v Fogarty*, 295 AD2d 576, 576; *see Rost v Stolzman*, 81 AD3d 1401, 1402;

Hyatt v Messana, 67 AD3d 1400, 1402). Visone and Lakefront thus failed to meet their initial burden on their motion (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01635

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
COLLEEN S. HOGAN, NOW KNOWN AS COLLEEN S.
WALTERS, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

NATIONWIDE PROPERTY & CASUALTY INSURANCE
COMPANY, RESPONDENT-RESPONDENT.

COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICES OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 30, 2012 in a proceeding pursuant to CPLR article 75. The order denied petitioner's application to vacate the arbitration award.

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

Memorandum: We conclude, for reasons stated in the decision at Supreme Court, that the court properly determined that petitioner was not entitled to vacatur of the arbitration award. We note, however, that the court erred in failing to confirm the award pursuant to CPLR 7511 (e), and we therefore modify the order accordingly.

Entered: May 3, 2013

Frances E. Cafarell
Clerk of the Court