SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 27, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

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. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1299

CA 14-00373

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

NIKIA WASHINGTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF GREECE, GREECE POLICE DEPARTMENT, FORMER CHIEF OF POLICE MERRITT RAHN, POLICE OFFICER ROBERT DOWNS, LIEUTENANT STEPHEN P. WISE, ROBERT VETERE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, GREECE MALL AND WILMORITE, INC., DEFENDANTS-APPELLANTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (BRIAN P. RILEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS TOWN OF GREECE, GREECE POLICE DEPARTMENT, FORMER CHIEF OF POLICE MERRITT RAHN, POLICE OFFICER ROBERT DOWNS, AND LIEUTENANT STEPHEN P. WISE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES.

TREVETT CRISTO SALZER ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROBERT VETERE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, GREECE MALL AND WILMORITE, INC.

BROWN & HUTCHINSON, ROCHESTER (MICHAEL COBBS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), entered May 10, 2013. The order denied in part defendants' motions for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants Robert Vetere, Greece Mall, and Wilmorite, Inc., with respect to the causes of action for false arrest, false imprisonment, and malicious prosecution, and dismissing those causes of action against them, and as modified the order is affirmed without costs.

Memorandum: Defendants Town of Greece, Greece Police Department, former Chief of Police Merritt Rahn, Police Officer Robert Downs, and Lieutenant Stephen P. Wise (Greece defendants), and defendants Robert Vetere, Greece Mall, and Wilmorite, Inc. (Mall Defendants), appeal from an order which, insofar as appealed from, denied those parts of their motions for summary judgment seeking dismissal of plaintiff's causes of action alleging false arrest, false imprisonment, malicious prosecution, and assault and battery. The Greece defendants also appeal from that part of the order that denied their motion for

summary judgment seeking dismissal of the cause of action for violation of plaintiff's constitutional rights. This lawsuit stems from an altercation between plaintiff and security personnel at the Greece Mall. As a result of the altercation, plaintiff was arrested and charged with resisting arrest, assault in the third degree, disorderly conduct, and harassment in the second degree. She was acquitted of all charges following a jury trial in Town Court. Plaintiff thereafter commenced this action alleging, inter alia, tortious conduct against her on the part of defendants. The Greece defendants and the Mall defendants separately moved for summary judgment dismissing the complaint, and Supreme Court granted the motions in part, denying those parts of their motions seeking dismissal of the causes of action for false arrest, false imprisonment, malicious prosecution, and assault and battery, and denying that part of the motion of the Greece defendants seeking dismissal of the cause of action for violation of plaintiff's constitutional rights. We conclude that the court erred in denying those parts of the motion of the Mall defendants seeking dismissal of the causes of action for false arrest, false imprisonment, and malicious prosecution, and we therefore modify the order accordingly.

As a preliminary matter, we note that the causes of action for false arrest and false imprisonment are synonymous (*see Holland v City of Poughkeepsie*, 90 AD3d 841, 844-845), and our analysis treats them as such. We agree with the Mall defendants that the court erred in denying that part of their motion concerning those causes of action. In order to establish liability therefor on the part of the Mall defendants, plaintiff is required to prove, inter alia, that the Mall defendants " 'took an *active role* in the [arrest] of the plaintiff, such as giving advice and encouragement or importuning the authorities to act' " (*Lowmack v Eckerd Corp.*, 303 AD2d 998, 999 [emphasis added]; *see generally Dunn v City of Syracuse*, 83 AD2d 783, 783). Here, however, the Mall defendants met their initial burden on their motion of establishing as a matter of law that their security guard did not take the requisite "active role" in arresting plaintiff. Contrary to plaintiff's contention, the record establishes that the security guard handcuffed plaintiff only at the direction of a Town of Greece police officer (hereafter, police officer), who informed plaintiff that she was under arrest (*see generally Vernes v Phillips*, 266 NY 298, 300-301; *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132-133). Plaintiff failed to raise a triable issue of fact in opposition (*see Quigley v City of Auburn*, 267 AD2d 978, 980; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We also agree with the Mall defendants that the court erred in denying that part of their motion seeking dismissal of the cause of action for malicious prosecution. In order to hold the Mall defendants liable for that tort, plaintiff is required to prove, inter alia, "the commencement . . . of a criminal proceeding by the [Mall] defendant[s] against" her (*Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929; *see Martinez v City of Schenectady*, 97 NY2d 78, 84). To establish that element, plaintiff would have to prove that the Mall defendants "affirmatively induced the [police] officer to act," for example, by

"taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the [police] officer [was] not acting of his own volition" (*Lupski v County of Nassau*, 32 AD3d 997, 998; *see Viza v Town of Greece*, 94 AD2d 965, 966, *appeal dismissed* 64 NY2d 776). We conclude in this case, however, that the Mall defendants met their initial burden on their motion of establishing that they did not commence a criminal proceeding against plaintiff inasmuch as the security guard did not affirmatively induce the police officer to act to the point where the police officer was not acting of his own volition. Indeed, the record establishes that the police officer observed the altercation, and acted of his own volition in directing the security guard to handcuff plaintiff and in informing plaintiff that she was under arrest. Plaintiff failed to raise a triable issue of fact in opposition (*see Levy v Grandone*, 14 AD3d 660, 661; *see generally Zuckerman*, 49 NY2d at 562).

We reject the contention of the Greece defendants that the court erred in denying that part of their motion seeking dismissal of the causes of action for false arrest, false imprisonment, and malicious prosecution. Viewing the evidence in the light most favorable to plaintiff, we conclude that the Greece defendants failed to satisfy their initial burden (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *see generally Nichols v Xerox Corp.*, 72 AD3d 1501, 1502). The Greece defendants' own submissions, which included plaintiff's sworn testimony, raised a triable issue of fact whether the Greece defendants had probable cause to arrest plaintiff (*see Burgio v Ince*, 79 AD3d 1733, 1734-1735; *see also Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 529; *see generally Wilner v Village of Roslyn*, 99 AD3d 702, 704). In light of that determination, we do not reach the remaining contentions of the Greece defendants regarding the causes of action for assault and battery and violation of plaintiff's constitutional rights.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

1303

CA 14-00991

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

REGINA HONER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KELLY MCCOMB, DEFENDANT-RESPONDENT,
COUNTY OF MONROE, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (HOWARD A. STARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 20, 2014. The order, inter alia, denied in part the motion of defendant County of Monroe for summary judgment.

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

Memorandum: In this personal injury action, defendant County of Monroe (County) appeals from an order which, inter alia, denied that part of its motion for summary judgment dismissing the complaint as against it. We affirm. On May 3, 2006, a vehicle owned by defendant Kelly McComb and driven by defendant John Doe struck a parking sign located on a sidewalk adjacent to a city street. The post and attached sign detached from the base in which the post had been secured and launched into the air, striking plaintiff, a pedestrian standing on the sidewalk. The sign and post struck plaintiff in the back, causing her to sustain a catastrophic spinal injury.

Pursuant to an agreement with defendant City of Rochester (City), the County was responsible for the City's traffic engineering services, including maintenance of the parking sign that struck plaintiff. In October 1999, the County had reinstalled the parking sign, after it was reported to be "bent over," by attaching the sign to a 10-foot channel post with bolts and attaching that to a 4-foot channel base post, leaving approximately one foot of the base post visible above the ground. Once reinstalled, the parking sign remained in place until the date of the subject accident.

Plaintiff commenced this action against, inter alia, the County, alleging a single cause of action for negligence against the County.

Plaintiff alleged in her complaint, as amplified by her bill of particulars, that the County, pursuant to its agreement with the City, had a duty to exercise due care in, inter alia, using proper materials for the sign and its installation, and in placing the sign post at a proper depth in the ground and at a proper distance from the roadway, and that the County breached that duty, thereby proximately causing plaintiff's injuries.

Initially, we agree with the County that, in discussing the standard for negligence, Supreme Court erroneously cited *Kimbar v Estis* (1 NY2d 399), which makes reference to the now-abrogated doctrine of contributory negligence (*see* CPLR 1411). We conclude, however, that inasmuch as that doctrine and the modern doctrine of comparative fault are inapplicable to this case, and because the court otherwise applied the proper standard for negligence, the error is of no legal consequence.

We reject the County's contention that it does not owe a duty of care to plaintiff. "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). An exception applies where the contracting party has " 'entirely displaced the other party's duty to maintain the premises safely' " (*id*. at 140). Here, we conclude that the County's duty to plaintiff arose from its comprehensive agreement with the City inasmuch as, pursuant to that agreement, the County has entirely displaced the City in fulfilling the City's duty to be responsible for traffic signs (*see Church*, 99 NY2d at 112; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588). Specifically, the County had a duty to properly reinstall the sign in October 1999, including using proper materials, installing the sign's post at the appropriate depth in the ground on a proper base, and placing the sign at the required distance from the roadway. Moreover, that duty "extend[ed] to noncontracting individuals[, such as nearby pedestrians,] reasonably within the zone and contemplation of the intended [traffic engineering] services" encompassed by the County's agreement with the City (*Palka*, 83 NY2d at 589).

We also reject the County's contention that even assuming, arguendo, it was negligent, its negligence was not a proximate cause of plaintiff's injuries. "[I]t is well settled that there may be more than one proximate cause of [an] accident" (*Przesiek v State of New York*, 118 AD3d 1326, 1327). Although we agree with the County that it met its initial burden for summary judgment on the issue of proximate cause by submitting an expert's affidavit, we nevertheless conclude that plaintiff's own expert raised an issue of fact (*see Newton v Gross*, 213 AD2d 1074, 1074-1075). Plaintiff's expert opined in his opposing affidavit that the County improperly installed a breakaway signpost and that the accident would not have occurred but for that improper installation. Plaintiff's expert also opined that the

County's negligence in installing the sign was a substantial factor in causing plaintiff's injuries. Specifically, he opined that, had the sign been properly placed, it would not have struck plaintiff because its placement one foot above the ground created a risk that the sign would become a high-flying projectile if hit, rather than bending or projecting closer to the ground. We conclude that the court properly denied the County's motion because the submission of conflicting expert opinions "present[ed] issues of credibility to be determined by the trier of fact" (*Newton*, 213 AD2d at 1074-1075; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Finally, we reject the County's contention that the court did not address its entitlement to summary judgment against McComb on the issue of liability. The court specifically held that "[t]he County . . . [is] entitled to summary judgment in regard to McComb." McComb had stipulated to her ownership of the vehicle involved and agreed that she is liable to plaintiff as a result of Doe's negligence in operating the vehicle, i.e., for Doe's apportionment of fault. That stipulation did not purport to render McComb completely liable so as to entitle the County to summary judgment dismissing the complaint as against it (*see Sydnor v Home Depot U.S.A., Inc*., 74 AD3d 1185, 1187).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

1357

CAF 12-00745

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

IN THE MATTER OF ZORAIDA RODRIGUEZ,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LUCILLE FELDMAN AND MICHAEL FELDMAN,
RESPONDENTS-PETITIONERS-RESPONDENTS.

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered March 30, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondents-petitioners primary physical custody of the subject child.

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

Memorandum: Pursuant to a stipulated order of custody entered in 2007, petitioner-respondent grandmother and respondents-petitioners (respondents), the subject child's maternal aunt and her husband, were awarded joint legal custody of the subject child with the grandmother having primary physical custody. In 2009, respondents brought the child to their residence in Georgia and received an order of temporary custody in that state. Thereafter, the grandmother and respondents each petitioned for sole custody of the child pursuant to Family Court Act article 6 and, following a hearing, Family Court awarded respondents primary physical custody of the child.

We reject the grandmother's contention that she was denied due process based on cumulative errors by the court. Specifically, we conclude that the court properly exercised its discretion in permitting the telephonic testimony of an expert witness who resided in another state (*see* Domestic Relations Law § 75-j [2]; *Matter of Kelly v Krupa*, 63 AD3d 1395, 1396). We further conclude that the grandmother failed to preserve for our review her challenge to the medical evaluations of the child by the expert by moving to strike the expert's testimony on the grounds now asserted, and in any event, she lacks standing to object to those evaluations as violative of her own due process rights. The allegedly unauthorized evaluations implicated the child's due process rights as opposed to the due process rights of the grandmother (*see Matter of Awan v Awan*, 75 AD3d 597, 599; *Matter of Marvin Q.*, 45 AD3d 852, 853, *lv dismissed* 10 NY3d 927; *Campolongo v*

Campolongo, 2 AD3d 476, 476-477), and generally a litigant does not have standing to raise rights belonging to another (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773; *Matter of Fleischer v New York State Liq. Auth.*, 103 AD3d 581, 583, *lv denied* 21 NY3d 856). We also conclude that the grandmother's challenge to the court's temporary order of physical custody issued mid-trial was rendered moot by entry of the final order of custody (*see Matter of Ramirez v Velez*, 78 AD3d 1062, 1062-1063; *see also Matter of Kelly F. v Gregory A.F.*, 34 AD3d 1277, 1277).

The grandmother contends that the court erred in failing to find that respondents willfully violated a prior court order. We reject that contention inasmuch as, at the time of the alleged violation, the oral direction of the court had not been reduced to a written order and it is unclear on this record whether respondents were aware of the existence of the oral direction of the court at the time of the alleged violation (*cf. Matter of Dashawn G. [Diana B.]*, 117 AD3d 1526, 1527, *lv dismissed* 24 NY3d 951).

The grandmother further contends for the first time on appeal that the court erred by not analyzing this matter as a relocation case, and thus that contention is unpreserved for our review (*see Matter of York v Zullich*, 89 AD3d 1447, 1448). In any event, we conclude that her contention is without merit (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741). Contrary to the grandmother's further contention, respondents established the requisite change in circumstances to warrant an inquiry into the best interests of the child given "the changes in the child's school schedule since the entry of the prior order" (*Matter of Stilson v Stilson*, 93 AD3d 1222, 1223; *Matter of Claflin v Giamporcaro*, 75 AD3d 778, 779-780, *lv denied* 15 NY3d 710), and the extraordinarily acrimonious nature of the parties' relationship (*see Matter of Orzech v Nikiel*, 91 AD3d 1305, 1305-1306; *York*, 89 AD3d at 1448). We conclude that the court properly " 'exercise[d its] power, in the interest of justice, to sua sponte conform the petition to the evidence' " adduced at the fact-finding hearing with respect to post-petition conduct that established a significant change in circumstances (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637, *lv denied* 17 NY3d 711; *see generally Matter of Taylor R.*, 290 AD2d 830, 832).

We further conclude that the court properly determined that it was in the child's best interests to award primary physical custody to respondents (*see generally Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696). The record establishes that respondents were able to provide for the child's educational and therapeutic needs, as well as her nutritional and health needs. The record further establishes that respondents are in excellent physical health and are better able to handle the stress involved in raising a child than is the grandmother. "[A] court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*id.* at 1695 [internal quotation marks omitted]), and we perceive no basis upon which to disturb the court's order.

Finally, we note that, although it appears that several new factual developments have arisen since the entry of the order on appeal, there is no reason for us to remit the matter to Family Court for a new best interests hearing, in light of the ongoing proceedings in Family Court (*cf. Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626).

Entered: March 27, 2015

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 14-01371

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

KENNETH ZIOLKOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAN-TEK, INC., DEFENDANT-APPELLANT,
AND ZYNERGY SOLUTIONS, INC., DEFENDANT.

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

LAW OFFICE OF THOMAS C. PARES, BUFFALO (THOMAS C. PARES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 28, 2013. The order granted plaintiff's motion to quash a subpoena.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a work-related accident. Following the deposition of plaintiff's accountant, the attorney for defendant Han-Tek, Inc. (Han-Tek) issued a subpoena duces tecum directing plaintiff's accountant to produce documents relating to the operation of plaintiff's residential real estate business. Supreme Court erred in granting plaintiff's motion to quash the subpoena, and we therefore reverse the order and deny the motion. Plaintiff failed to meet his burden of establishing that "the information sought is utterly irrelevant to any proper inquiry" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [internal quotation marks omitted]; *see Kimmel v State of New York*, 76 AD3d 188, 197). To the contrary, we agree with Han-Tek that the documents sought are relevant to plaintiff's claim for lost wages (*see Picart v New York City Tr. Auth.*, 226 AD2d 165, 165-166), as well as Han-Tek's affirmative defense of failure to mitigate damages (*see generally Singh v Friedson*, 36 AD3d 605, 606, *lv dismissed* 9 NY3d 861).

We reject plaintiff's contention that the court was bound by the law of the case to quash the subpoena, based upon a prior order (Griffith, A.J.) denying the motion of defendant Zynergy Solutions, Inc., seeking to compel disclosure of the documents listed in the subpoena. The prior motion preceded the accountant's deposition,

which introduced additional evidence and raised further issues, "thereby precluding application of the law of the case doctrine" (*Matter of D'Alimonte v Kuriansky*, 144 AD2d 737, 738). In any event, the law of the case is not binding upon this Court's review of the order (*see Martin v City of Cohoes*, 37 NY2d 162, 165, *rearg denied* 37 NY2d 817; *Hey v Town of Napoli*, 265 AD2d 803, 804).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

94

CA 14-01178

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

PHILADELPHIA INDEMNITY INSURANCE COMPANY, AS SUBROGEE OF CATHOLIC CHARITIES OF THE DIOCESE OF ROCHESTER, PLAINTIFF-RESPONDENT,

V ORDER

DAVIS-ULMER SPRINKLER COMPANY, INC., DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (KEVIN J. ENGLISH OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSNER NOCERA & RAGONE, LLP, NEW YORK CITY (ELIOT L. GREENBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 4, 2014. The order denied the motion of defendant to dismiss the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 30 and February 17, 2015, and filed in the Monroe County Clerk’s Office on March 11, 2015,

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

108

CA 13-00385

PRESENT: SMITH, J.P., CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF THE ESTATE OF MAGDA CORDELL MCHALE, DECEASED.

DENISE KELLEHER, PETITIONER-RESPONDENT-RESPONDENT, EVAN MCHALE, RESPONDENT-PETITIONER-APPELLANT;

THE JOHN MCHALE AND MAGDA MCHALE ARCHIVES FOUNDATION, RESPONDENT-RESPONDENT. ORDER

CHARITABLE BENEFICIARIES, INTERESTED PARTY-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLY S. BRAUN OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM D. MALDOVAN OF COUNSEL), FOR INTERESTED PARTY-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered September 28, 2012. The order adjudged that the January 21, 2008 Instrument of Gift is valid and fully enforceable and that the property encompassed by the Instrument of Gift is not part of the Estate of Magda Cordell McHale.

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

110

CA 14-01110

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF TOWN BOARD OF TOWN OF BRIGHTON, ON BEHALF OF TOWN OF BRIGHTON, AND WEST BRIGHTON FIRE PROTECTION DISTRICT, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WEST BRIGHTON FIRE DEPARTMENT, INC., RESPONDENT-DEFENDANT-APPELLANT.

PINSKY LAW GROUP, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

HANNIGAN LAW FIRM PLLC, ALBANY (TERENCE S. HANNIGAN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered February 6, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The order, among other things, directed respondent-defendant to take all action necessary to transfer certain assets pursuant to the subject contract.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by amending the caption to substitute the Town of Brighton for the Town Board of Town of Brighton, on behalf of the Town of Brighton, and as modified the order is affirmed without costs.

Memorandum: Petitioners-plaintiffs, the Town Board of the Town of Brighton (Town Board), on behalf of the Town of Brighton (Town), and the West Brighton Fire Protection District (FPD) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, judgment declaring that respondent-defendant, West Brighton Fire Department, Inc. (WBFD), must comply with the terms of the contract entered into by the Town Board and the WBFD in July 2011 (2011 contract). The Town Board is the governing body of the FPD, which has for many years contracted annually with the WBFD to provide fire protection in the FPD. The WBFD is a volunteer fire department that is comprised of approximately 24 volunteers and supported by two paid “career” firefighters employed by the FPD and paid by the Town. Concerns with respect to the WBFD’s ability to provide reliable and effective service in the FPD led the Town to contract with the City of Rochester (City) for the City of Rochester Fire Department (RFD) to provide services in the FPD beginning in

2002.

On July 25, 2012, the Town Board, by resolution, terminated the 2011 contract with the WBFD upon determining that the RFD would provide fire protection in the WBFD service area. Moreover, on July 29, 2012, the Town notified the WBFD's current president that the 2011 contract was terminated and demanded that the WBFD "promptly take all necessary action to transfer all of its personal and financial property to the Town . . . , and transfer all of its real property to the Town['s] . . . Local Development Corporation." On the same date, the Town Board, on behalf of the Town, and the FPD commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a judgment directing the WBFD to "comply forthwith with the provisions of [the 2011 contract], including, but not limited to all of the provisions . . . relating to the transfer of real and personal property and other assets to the [p]etitioner[s]."

We note at the outset that the Town Board lacks capacity to bring this proceeding/action. As "artificial creatures of statute," governmental entities such as the Town Board "have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156; *see Matter of Graziano v County of Albany*, 3 NY3d 475, 478-479). Here, Town Law § 65 (1) provides in relevant part that "[a]ny action or special proceeding for or against a town, or for its benefit, . . . shall be in the name of the town," and that "[t]he town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its judgment may be necessary, for the benefit or protection of the town" (*see Matter of Commco, Inc. v Amelkin*, 62 NY2d 260, 264-265). Under the circumstances of this case, we exercise our power pursuant to CPLR 2001 to correct that irregularity and to amend the caption by substituting the Town for the Town Board, "on behalf of" the Town (*see Boyd v Town of N. Elba*, 28 AD3d 929, 930 n, *lv dismissed* 7 NY3d 783; *see also Schwartzberg v State of New York*, 121 Misc 2d 1095, 1098-1099, *affd* 98 AD2d 902). We therefore modify the order accordingly.

As an additional preliminary matter, we note that, although a CPLR article 78 proceeding may be brought against public or private corporations that "take on a quasi-governmental status" (Siegel, NY Prac § 558 at 989 [5th ed]; *see Matter of Gray v Canisius Coll. of Buffalo*, 76 AD2d 30, 33), such "a . . . proceeding is 'not the proper vehicle to resolve contractual rights' " (*Matter of Carlile v Waite*, 265 AD2d 889, 889; *see Kerlikowske v City of Buffalo*, 305 AD2d 997, 997). Moreover, a declaratory judgment action is also not a proper vehicle to resolve the contractual rights herein because " 'a full and adequate remedy is already provided by another well-known form of action' " (*Automated Ticket Sys. v Quinn*, 90 AD2d 738, 739, *affd* 58 NY2d 949; *see Main Evaluations v State of New York*, 296 AD2d 852, 853, *appeal dismissed and lv denied* 98 NY2d 762). Pursuant to CPLR 103

(c), however, "[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." We thus exercise our discretion under CPLR 103 (c) and convert this hybrid CPLR article 78 proceeding/declaratory judgment action to an action for specific performance (*see Matter of Felmont Natural Gas Stor. Co. v Hudacs*, 175 AD2d 565, 566-567; *Matter of Oshinsky v Nicholson*, 55 AD2d 619, 619).

We conclude on the merits that, contrary to the WBFD's contention, Supreme Court properly granted the Town's motion for summary judgment and directed the WBFD to transfer certain assets and funds pursuant to the 2011 contract, inasmuch as the Town established as a matter of law that it is entitled to specific performance. " 'Specific performance is a discretionary remedy which is an alternative to the award of damages as a means of enforcing the contract' . . . The right to specific performance is not automatic . . . The equitable remedy of specific performance is available in the court's discretion when the remedy at law is inadequate . . . Finally, . . . the party seeking equity must do equity, i.e., he must come into court with clean hands" (*Pecorella v Greater Buffalo Press*, 107 AD2d 1064, 1065). Here, the Town met its burden of proving that it "substantially performed [its] contractual obligations . . . within the time specified in the [2011 Contract, and] that [it] is ready, willing and able to perform those contractual obligations not yet performed and not waived by the [WBFD]" (*Hadcock Motors v Metzger*, 92 AD2d 1, 4-5), and the WBFD failed to raise a triable issue of fact in opposition thereto (*see Pasquarella v 1525 William St., LLC*, 120 AD3d 982, 983; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

WBFD contends that this action involves the disposition of all or substantially all of the assets of a not-for-profit corporation and, as a result, the Attorney General is a necessary party pursuant to N-PCL 510 and 511. We reject that contention inasmuch as this case does not involve a disposition of all or substantially all of the WBFD's assets, and the contract itself does not require the actual transfer of the WBFD's assets (*see* N-PCL 510 [a] [3]; N-PCL 511 [b]; *see also* New York Nonprofit Law and Practice § 9.02 [2] [b] [Matthew Bender 2012], citing Explanatory Memo of J Legis Comm to Study Revision of Corporation Laws accompanying S. 7380B and A. 8439B [Apr. 20, 1972]). Contrary to the WBFD's further contention, the Town's motion was not premature on the ground that further discovery was necessary. In opposing a summary judgment motion as premature pursuant to CPLR 3212 (f), " 'the opposing party must make an evidentiary showing supporting [the conclusion that facts essential to justify opposition may exist but cannot then be stated, and] mere speculation or conjecture [is] insufficient' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169). "The opposing party must show that the discovery sought would produce evidence sufficient to defeat the motion . . . , and that facts essential to oppose the motion were in [the movant's] exclusive knowledge and possession and could be obtained by discovery" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Ctr. for*

the Visually Impaired [appeal No. 2], 118 AD3d 1454, 1456 [internal quotation marks omitted]). On this record we conclude that the WBFD

failed to make the requisite showing (*see generally id.*).

Entered: March 27, 2015

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 14-01234

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF NEW YORK STATE NURSES ASSOCIATION, DENNIS ROBINSON, INDIVIDUALLY AND AS CHAIRPERSON OF NEW YORK STATE NURSES ASSOCIATION LOCAL BARGAINING UNIT, NATHAN SULL, INDIVIDUALLY AND AS MEMBERSHIP CHAIRPERSON OF NEW YORK STATE NURSES ASSOCIATION LOCAL BARGAINING UNIT, CHRIS REED, INDIVIDUALLY, CIVIL SERVICE EMPLOYEES ASSOCIATION INC., LOCAL 815, DENISE SYZMURA, INDIVIDUALLY AND AS PRESIDENT OF ERIE UNIT OF CSEA LOCAL 815, KEVIN KUMOR, INDIVIDUALLY AND AS EXECUTIVE VICE PRESIDENT OF ERIE UNIT OF CSEA LOCAL 815 AND BELLA MEDOLA, INDIVIDUALLY AND AS PRESIDENT OF ECMC UNIT OF CSEA LOCAL 815, PETITIONERS-PLAINTIFFS-APPELLANTS,

MEMORANDUM AND ORDER

V

ERIE COUNTY MEDICAL CENTER CORPORATION, ERIE COUNTY MEDICAL CENTER CORPORATION BOARD OF DIRECTORS AND JODY L. LOMEO, AS CHIEF EXECUTIVE OFFICER OF ERIE COUNTY MEDICAL CENTER CORPORATION, RESPONDENTS-DEFENDANTS-RESPONDENTS.

COHEN, WEISS AND SIMON LLP, NEW YORK CITY (JOSHUA J. ELLISON OF COUNSEL), AND STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MATTHEW C. VAN VESSEM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, A.J.), entered April 21, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The judgment granted the motion of respondents to dismiss the petition-complaint and dismissed the petition-complaint.

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

Memorandum: On December 11, 2013, petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action (proceeding) challenging a resolution

adopted by respondent-defendant Erie County Medical Center Corporation Board of Directors (Board) on February 26, 2013. The resolution, among other things, authorized respondent-defendant Erie County Medical Center Corporation (ECMCC) "to directly administer applicable parts of the Civil Service Law," effective immediately. In their petition-complaint (petition), petitioners alleged that the Board lacked authority to establish its own civil service system, that the Board acted in violation of Public Authorities Law and Civil Service Law and in an "ultra vires manner," and that the resolution was "affected by an error of law or was arbitrary and capricious" (CPLR 7803 [3]). Supreme Court dismissed the petition as time-barred inasmuch as petitioners commenced the proceeding more than four months after the resolution was adopted. We affirm.

Petitioners contend that their petition was timely because no injury had yet occurred at the time the petition was filed. We reject that contention. The Board's adoption of the resolution constituted a definitive position that resulted in actual concrete injury because, pursuant to the resolution, ECMCC was immediately authorized to administer civil service functions, thereby usurping the authority of Erie County to do so (*see generally Stop-The-Barge v Cahill*, 1 NY3d 218, 223).

We reject petitioners' further contention that the court should have issued a declaration that ECMCC and the Board violated Civil Service Law and Public Authorities Law. Petitioners cannot avoid dismissal of their untimely petition by casting their claim as one seeking declaratory relief (*see generally New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201; *Matter of Foley v Masiello*, 38 AD3d 1201, 1201-1202).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

135

CA 14-01253

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

ALICE ELAINE SWEETMAN,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SONJA G. SUHR, DEFENDANT-APPELLANT-RESPONDENT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

NIXON PEABODY LLP, ROCHESTER (WILLIAM D. EGGERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 6, 2013. The judgment awarded plaintiff the amount of $60,777.74.

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

Memorandum: Plaintiff commenced this action for money had and received, alleging that defendant possessed money that belonged to her. Defendant obtained the money from the Monroe County Office of Child Support Enforcement (OCSE) after the OCSE issued a property execution upon an account held jointly between plaintiff and her husband, nonparty John C. Suhr (John). John is defendant's ex-husband, and the money was used to satisfy a 1995 judgment against him for unpaid child support that was owed to defendant. It is undisputed that the bulk of the funds contained in the account were life insurance proceeds received by plaintiff upon the death of her son. Plaintiff's son had been murdered as a result of a murder-for-hire scheme orchestrated by the son's ex-wife, who is now incarcerated. Plaintiff, who has joint custody of the son's daughter, was allegedly holding those funds for the benefit of the child. Plaintiff contended, inter alia, that the funds belonged solely to her and that John's name was added to plaintiff's account for convenience purposes only. Plaintiff moved for summary judgment seeking a specified amount of money and prejudgment interest. Defendant opposed the motion and cross-moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). Defendant appeals, and plaintiff cross-appeals from a judgment awarding plaintiff approximately $60,000. The judgment was entered after Supreme Court issued an order granting plaintiff's motion but denying her demand for prejudgment interest, and implicitly denying

defendant's cross motion.

While we agree with defendant that the court erred in granting plaintiff summary judgment and therefore modify the judgment accordingly, we reject her contention that the court erred in denying her cross motion.

There is no dispute that the account in which the funds had been deposited was designated a joint account. The sole question is whether that account was a convenience account, in which case the money deposited therein would be considered "the sole property of [plaintiff]" and could not be used to satisfy a judgment against John (*Matter of Grancaric*, 91 AD3d 1104, 1105; *see* Banking Law § 678). Otherwise, if the account was a joint tenancy account with a right of survivorship or a tenancy in common account, John would be deemed to have "an ownership interest in one half of the moneys deposited therein" (*Sperrazza v Kail*, 267 AD2d 692, 693; *see* § 675; EPTL 6-2.2 [a]; *cf. Matter of Timoshevich*, 133 AD2d 1011, 1012). Defendant contends that, by placing John's name on the bank account as a joint tenant, the account is presumed to be a joint tenancy account with a right of survivorship (*see* Banking Law § 675). We reject that contention. "Although the bank account is designated as 'joint,' the account documents do not contain the necessary survivorship language, and thus the statutory presumption of a right of survivorship does not apply" (*Matter of Degnan*, 55 AD3d 1238, 1239; *see Matter of Randall*, 176 AD2d 1219, 1219; *Matter of Camarda*, 63 AD2d 837, 838).

We agree with defendant that plaintiff failed to establish as a matter of law that she intended to create a convenience account (*see* Banking Law § 678), as opposed to either a joint tenancy account with right of survivorship (*see* § 675), or a tenancy in common account (*see* EPTL 6-2.2 [a]). In support of her motion, plaintiff submitted an affidavit in which she explained that, after the death of her son, she and her son's father agreed to split the life insurance proceeds, which had been disbursed to the son's father, and to use them for the benefit of their granddaughter. Plaintiff deposited her share, $155,643.36, into her personal savings account. The only other money in that account, $11,290.63, represented plaintiff's savings. Plaintiff had sole ownership and control of that account until early 2012, when she added John's name to the account before traveling out-of-state for the trial of her son's ex-wife. Plaintiff stated that she added John's name to the account because she was "fearful for [her] own safety" and "feared the risk of additional violence against [her]." Plaintiff wanted to make sure that, if anything happened to her, "the funds [would] be available for the welfare of [her] granddaughter." Those statements seemingly establish that plaintiff "did not have a present intention to transfer an interest in the [money] to [John], despite having placed his name on the [account]" (*Hom v Hom*, 101 AD3d 816, 817; *see Matter of Friedman*, 104 AD2d 366, 367, *affd* 64 NY2d 743; *Viggiano v Viggiano*, 136 AD2d 630, 631). Moreover, John made no deposits or withdrawals to the account, which also supports plaintiff's position that the account was opened as a matter of convenience only (*see Matter of Corcoran*, 63 AD3d 93, 97; *Viggiano*, 136 AD2d at 631).

Nevertheless, we conclude that plaintiff's statements raise a triable issue of fact whether she intended John to have a right of survivorship in the joint tenancy account. Moreover, while the signature card's reference to a document stating that rights of survivorship are created when obtaining a joint bank account is insufficient to invoke the statutory presumption of Banking Law § 675 (*see Grancaric*, 91 AD3d at 1106; *Degnan*, 55 AD3d at 1239), it is a factor that may be considered when determining whether the bank account is a joint tenancy account with survivorship rights (*see Sutton v Bank of N.Y.*, 250 AD2d 447, 447).

We thus conclude that plaintiff failed to establish as a matter of law that the account was a convenience account, and thus the burden never shifted to defendant to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Although plaintiff failed to meet her initial burden of proof on the motion for summary judgment, we nevertheless conclude that the complaint states a cause of action for money had and received and that the court properly denied defendant's cross motion to dismiss the complaint (*see generally Gillon v Traina*, 70 AD3d 1443, 1444, *lv denied* 14 NY3d 711).

To the extent that plaintiff contends, as an alternative theory of affirmance, that the procedures utilized by the OCSE in executing the judgment against plaintiff's bank account were improper and denied her due process, we conclude that those contentions are not properly raised in this action against defendant for money had and received. We therefore do not address them. We likewise do not address the contention raised by plaintiff on her cross appeal inasmuch as it has been rendered moot by our determination herein.

Entered: March 27, 2015

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 14-01267

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

DANIEL CARR AND SUSAN CARR,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MCHUGH PAINTING CO., INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARK P. DONOHUE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BERNHARDI & LUKASIK LAW OFFICES, BUFFALO (DEAN P. SMITH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 27, 2014. The order, inter alia, denied the motion of defendant McHugh Painting Co., Inc. for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant McHugh Painting Co., Inc., and dismissing the Labor Law §§ 240 (1) and 241 (6) claims against it, and denying the cross motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Daniel Carr (plaintiff) while he was installing a door on a single-family residence that was under renovation. Plaintiff, a carpenter, was employed by a subcontractor retained by McHugh Painting Co., Inc. (defendant), the general contractor, which had been hired to perform exterior renovation work on the residence. The accident occurred while plaintiff and another worker were installing a door in the second-floor master bedroom of the residence. Plaintiff and the worker were standing on a raised scissor lift, which was positioned at a distance of approximately 20 to 24 inches away from the opening to the bedroom. The gap existed because there were large slate steps at ground level, which prevented the scissor lift from being positioned closer to the residence. Plaintiff and his coworker lifted the door and were maneuvering it across the gap when plaintiff felt a “twinge” or “pop” in his lower back. Supreme Court denied defendant’s motion for summary judgment dismissing the complaint, and granted plaintiffs’ cross motion insofar as it sought partial summary judgment on the issue of liability under Labor Law § 240 (1). The court also granted

that part of plaintiffs' cross motion for leave to amend their response to defendant's interrogatories to allege an additional Industrial Code violation in support of their Labor Law § 241 (6) claim.

We reject defendant's contention that the court erred in denying those parts of its motion seeking summary judgment dismissing the Labor Law § 200 claim and common-law negligence cause of action. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide employees with a safe place to work" (*Anderson v Bush Indus.*, 280 AD2d 949, 950; *see Lombardi v Stout*, 80 NY2d 290, 294; *Jock v Fien*, 80 NY2d 965, 967). The duty does not, however, "extend to 'hazards which are part of or inherent in the very work which the contractor is to perform' " (*Anderson*, 280 AD2d at 950, quoting *Gasper v Ford Motor Co.*, 13 NY2d 104, 110; *see Landahl v City of Buffalo*, 103 AD3d 1129, 1131). Here, plaintiff's accident resulted from the manner in which the work was performed, and it is undisputed that defendant had the authority to supervise and control the methods and manner of plaintiff's work, and that it in fact exercised such supervisory control (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877). Contrary to defendant's contention, we conclude that defendant failed to establish as a matter of law that the risk of injury owing to moving a heavy door across a two-foot gap while at an elevated height with the assistance of a single worker was "inherent in plaintiff's work" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505; *see Zarnoch v Luckina*, 112 AD3d 1336, 1338). We agree with defendant, however, that the court erred in denying that part of its motion and granting that part of plaintiffs' cross motion with respect to the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity' " (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916, quoting *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501; *see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911). Rather, the statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from *harm directly flowing from the application of the force of gravity to an object or person*" (*Ross*, 81 at 501; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603). Here, plaintiff injured his back while maneuvering a heavy door across a lateral gap; the door did not fall or descend even a de minimis distance owing to the application of the force of gravity upon it (*see Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 893; *cf. Runner*, 13 NY3d at 605; *Kollbeck v 417 FS Realty*, 4 AD3d 314, 314). Although "the injured plaintiff's back injury was tangentially related to the effects of gravity upon" the door he was lifting, "it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" (*Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 376; *see Hasty*, 306 AD2d at 893). We thus conclude that the hazard at issue here, i.e., lifting or carrying a heavy object across a lateral gap, even while positioned at a height, is a "routine workplace

risk[]" of a construction site and not a "pronounced risk[] arising from construction work site elevation differentials" (*Runner*, 13 NY3d at 603; *see Hasty*, 306 AD2d at 893).

We also agree with defendant that the court erred in granting that part of plaintiffs' cross motion seeking leave to amend their response to defendant's interrogatories to allege a violation of 12 NYCRR 23-9.6 (e) (1), and we therefore further modify the order accordingly. "While it is well settled that leave to amend shall be freely given in the absence of prejudice to the opponent . . . , permission to amend should be denied where the proposed amendment clearly lacks merit" (*Perrini v City of New York*, 262 AD2d 541, 542), and that is the case here. The Industrial Code regulation at issue is "factually inapplicable to the circumstances surrounding the happening of the accident and thus do[es] not support a [claim under] Labor Law § 241 (6)" (*Wilke v Communications Constr. Group*, 274 AD2d 473, 474; *see Wilson v Niagara Univ.*, 43 AD3d 1292, 1293). Inasmuch as plaintiffs' remaining claimed violations of the Industrial Code were dismissed by stipulation of the parties, we further modify the order by dismissing the Labor Law § 241 (6) claim against defendant in its entirety.

Entered: March 27, 2015

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 14-01381

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

BRIAN MURPHY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINE MURPHY, DEFENDANT-APPELLANT.

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

JACK DANZIGER, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 20, 2013 in a divorce action. The judgment, among other things, awarded defendant maintenance and child support.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 2nd, 5th, 6th, 9th, and 10th decretal paragraphs, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Defendant wife appeals from a judgment of divorce that, inter alia, distributed the marital assets and debt, and awarded her maintenance and child support from plaintiff husband. We agree with defendant that Supreme Court erred in failing to "set forth the factors it considered and the reasons for its decision" relative to the amount and duration of maintenance (Domestic Relations Law § 236 [B] [6] [b]; *see Hendershott v Hendershott*, 299 AD2d 880, 880; *Hartnett v Hartnett*, 281 AD2d 900, 901; *Zurek v Zurek*, 255 AD2d 922, 922). In its decision, the court stated only that it awarded maintenance "based upon the income the parties were earning at the commencement of the action," which is but one of the 20 factors articulated in the statute (*see* § 236 [B] [6] [a]). The court ignored numerous other relevant factors, including the length of the marriage (18 years); defendant's extended absence from the work force; her lack of education and training; her childcare responsibilities during the marriage, including for a child with special needs; and defendant's loss of health insurance upon dissolution of the marriage (*see id.*). It thus cannot be said that the court's maintenance award "reflects an appropriate balancing of [defendant]'s needs and [plaintiff]'s ability to pay" (*Torgersen v Torgersen*, 188 AD2d 1023, 1024, *lv denied* 81 NY2d 709; *cf. Salvato v Salvato*, 89 AD3d 1509, 1510, *lv denied* 18 NY3d 811; *Burns v Burns*, 70 AD3d 1501, 1503).

Moreover, we agree with defendant that there is no evidentiary

support for the court's determination that plaintiff's income at the time of commencement was $89,648, i.e., $70,648 in wages and $19,000 in disability benefits (*see Matter of Borowicz v Mancini*, 256 AD2d 713, 714). Although plaintiff asserted in his postargument submission that his 2010 adjusted gross income was $70,648, he provided no documentary support for that assertion. In addition, the court's computation of plaintiff's income failed to include the $48,000 per year he receives from his naval pension, which was in pay status at the time of commencement (*see generally Matter of Bow v Bow*, 117 AD3d 1542, 1543-1544). The court therefore understated plaintiff's income in determining his maintenance obligation (*see Weinheimer v Weinheimer*, 100 AD3d 1565, 1565-1566). Although "the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251), the record contains no competent proof of plaintiff's income such as pay stubs, financial affidavits, W-2 forms, or tax returns, thus precluding meaningful appellate review (*see Bow*, 117 AD3d at 1544; *Zurek*, 255 AD2d at 922; *Gorzalkowski v Gorzalkowski*, 190 AD2d 1067, 1067). We therefore modify the judgment by vacating the maintenance award, and we remit the matter to Supreme Court to determine plaintiff's income and the amount and duration of maintenance, setting forth the statutory factors it considered and the reasons for the award (*see Bow*, 117 AD3d at 1544; *Borowicz*, 256 AD2d at 714; *Zurek*, 255 AD2d at 922; *Gorzalkowski*, 190 AD2d at 1067).

With respect to the child support award, we agree with defendant that the court failed to make a clear custody determination with respect to the two children, thus hindering meaningful review of the award. In its decision, the court stated that the older child was living with plaintiff and that the younger child was "rotating between both houses equally." At trial, however, both parties testified that they had a "week-on week-off child custody arrangement" relative to both children. In determining child support, the court apparently accepted plaintiff's unsubstantiated assertion in his posthearing submission that the older child had moved in with him and "[would] not be returning to [defendant]'s house." With respect to the younger child, the judgment states that, "by stipulation and agreement, the parties shall share custody of [the younger child] with the [d]efendant being designated the primary residential parent for school purposes." No such "stipulation and agreement" appears in the record before us, and it is unclear whether "primary residential parent for school purposes" also means primary residential custodian for child support purposes (*cf. Johnston v Johnston*, 63 AD3d 1555, 1555). The older child is not referenced in the judgment at all. Even assuming, arguendo, that the court made an implicit custody determination, we agree with defendant that the child support calculation is flawed. The court "failed to explain its application of the 'precisely articulated, three-step method for determining child support' pursuant to the Child Support Standards Act" (CSSA) (*Hartnett*, 281 AD2d at 901, quoting *Matter of Cassano v Cassano*, 85 NY2d 649, 652; *see McLoughlin v McLoughlin*, 63 AD3d 1017, 1019). Among other things, the court failed to set forth the combined parental income or the parties' pro rata shares of the child support obligation (*see McLoughlin*, 63 AD3d

at 1019; *Hartnett*, 281 AD2d at 901), and failed to determine whether to award child support for the amount of combined parental income in excess of the statutory cap (*see* Domestic Relations Law § 240 [1-b] [c] [2], [5]; [f]; *Hartnett*, 281 AD2d at 901). Inasmuch as the record is insufficient to determine the appropriate amount of child support, we further modify the judgment by vacating the custody determination and child support award, and we direct the court on remittal to make a custody determination with respect to both children and to recalculate child support pursuant to the CSSA (*see Sonbuchner v Sonbuchner*, 96 AD3d 566, 568-569; *McLoughlin*, 63 AD3d at 1019).

Defendant further contends that the court erred in crediting plaintiff for marital debt he allegedly paid. We agree. "Domestic Relations Law § 236 (B) (1) (c) provides that outstanding financial obligations incurred during the marriage which are not solely the responsibility of the spouse who incurred them may be offset against the total marital assets to be divided. However, there must be an offer of proof that the debts constitute marital expenses" (*Feldman v Feldman*, 204 AD2d 268, 270). Here, the only reference to debt at the hearing was plaintiff's conclusory, self-serving testimony that he "paid off the combined credit card debt." Plaintiff presented no proof of any such debt or his payment thereof at the hearing, and we agree with defendant that the unauthenticated documents appended to plaintiff's posthearing submission and not received in evidence at trial are not competent proof and, therefore, should not have been relied upon by the court. Even if we were to accept those submissions as competent proof, as the court apparently did, we would conclude that the documents do not establish (1) that the debt was marital in nature; (2) the amount of the debt; or (3) that plaintiff paid the debt. We therefore conclude that the court erred in crediting plaintiff $10,000 for his alleged payment of the parties' credit card debt, and we further modify the judgment accordingly (*see Higgins v Higgins*, 50 AD3d 852, 853-854; *Dermigny v Dermigny*, 23 AD3d 429, 430-431; *Phillips v Phillips*, 249 AD2d 527, 528).

We reject the further contention of defendant that the court erred in refusing to distribute plaintiff's disability benefits from the Veterans' Administration (VA). "[B]ecause VA disability benefits are based solely upon a 'disability resulting from personal injury suffered or disease contracted in the line of duty' (38 USC § 1131) and do not represent deferred compensation (*see*, 38 USC §§ 1114, 1134), such benefits are separate property" and are "not subject to equitable distribution" (*Newman v Newman*, 248 AD2d 990, 990; *see* Domestic Relations Law § 236 [B] [1] [d] [2]; *Ward v Ward*, 101 AD2d 1006, 1007, *lv dismissed* 63 NY2d 770, 68 NY2d 805, *lv denied* 69 NY2d 603). With respect to plaintiff's naval pension, although the court awarded defendant her *Majauskas* share of those benefits, defendant contends that she is entitled to retroactive payments of those benefits from the date of commencement to the date of the judgment. That contention is without merit. The record establishes that defendant had access to the naval pension benefits and used those benefits to pay her bills during the pendency of the action (*see generally Tedesco v Tedesco*, 41 AD3d 1246, 1247).

We agree with defendant, however, that the court abused its discretion in awarding her only $2,000 in attorney's fees given that plaintiff is the monied spouse and there is no evidence in this record that defendant engaged in dilatory tactics (*see Suppa v Suppa*, 112 AD3d 1327, 1329; *Leonard v Leonard*, 109 AD3d 126, 129-130). We therefore further modify the judgment by vacating the award of attorney's fees, and we direct the court on remittal to reconsider that award in light of the financial circumstances of the parties, including the maintenance and distributive awards (*see generally DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881-882; *McCarthy v McCarthy*, 172 AD2d 1040, 1040).

Finally, we conclude that, contrary to defendant's contention, the court did not abuse its discretion in declining to require plaintiff to obtain life insurance to secure his support obligations (*see generally Bellizzi v Bellizzi*, 107 AD3d 1361, 1364).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

202

KA 14-00920

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS A. PABON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 24, 2014. The judgment convicted defendant, after a nonjury trial, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that Supreme Court erred in refusing to dismiss the indictment as time-barred. We reject that contention. Contrary to defendant's contention, the court properly applied CPL 30.10 (3) (f), which, as relevant here, tolls the statute of limitations for sexual offenses committed against a minor until the age of 18 (*see People v Quinto*, 18 NY3d 409, 413).

Contrary to the further contention of defendant, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422), and we see no reason to disturb the court's credibility determinations.

We agree with defendant that the court erred in permitting a detective to testify that defendant lied to the detective during his interview (*see People v Kozlowski*, 11 NY3d 223, 240, *rearg denied* 11

NY3d 904, *cert denied* 556 US 1282; *People v Jennings*, 33 AD3d 378, 379, *lv denied* 7 NY3d 926). We conclude, however, that "any error with respect to the admission of that testimony is harmless because, in a nonjury trial, the court is presumed to be capable of disregarding any improper or unduly prejudicial aspect of the evidence" (*People v Wise*, 46 AD3d 1397, 1399, *lv denied* 10 NY3d 872; *see People v Lomaglio*, 124 AD3d 1414, 1416; *People v Wegman*, 2 AD3d 1333, 1334-1335, *lv denied* 2 NY3d 747). Indeed, the court made it clear that it was not accepting the detective's opinion as to defendant's veracity (*see generally People v Tong Khuu*, 293 AD2d 424, 425, *lv denied* 98 NY2d 714).

We reject the further contention of defendant that the court erred in precluding him from introducing into evidence a voicemail message he allegedly received from the victim's mother in 1999. It is well established that a party "cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" (*People v Pavao*, 59 NY2d 282, 288-289; *see People v Alvino*, 71 NY2d 233, 247-248). Here, defendant sought to introduce the message for the purpose of impeaching the victim's testimony that her mother moved to Puerto Rico to get away from defendant, who allegedly was abusing her. Contrary to defendant's contention, the mother's reasons for moving to Puerto Rico and the state of her relationship with defendant were not material issues in this case and, therefore, defendant was not entitled to introduce evidence to impeach the victim's credibility on that collateral issue (*see People v Salim*, 96 AD3d 1484, 1485, *lv denied* 19 NY3d 1028; *People v Clarkson*, 78 AD3d 1573, 1574, *lv denied* 16 NY3d 829). We likewise reject defendant's contention that the court erred in denying his request for a missing witness charge with respect to the victim's mother. It is undisputed that the victim's mother was in Puerto Rico at the time of the crime at issue and that she did not learn of the sexual abuse until shortly before the abuse was reported to the authorities. Thus, her testimony was not " 'material to the trial,' " as required for a missing witness instruction (*People v Hall*, 18 NY3d 122, 131).

There is no merit to defendant's contention that the court's refusal to "sequester" certain "evidence," i.e., the court's cellphone, computer and a document that the court was allegedly viewing during the trial, deprived him of appellate review of his motion for a mistrial based upon the court's alleged misconduct (*see generally People v Moreno*, 70 NY2d 403, 405-406).

Finally, we conclude that, contrary to defendant's contention, any prosecutorial misconduct on summation did not deprive defendant of a fair trial in the context of this nonjury trial (*see People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855; *see also People v Gupton*, 281 AD2d 963, 963, *lv denied* 96 NY2d 863).

All concur except DeJoseph, J., who dissents and votes to reverse in the following memorandum: I respectfully dissent because I cannot agree with the majority's conclusion that the indictment was not time-

barred.

During the time period relevant herein, CPL 30.10 (3) (e) provided that "[a] prosecution for course of sexual conduct in the first degree as defined in [Penal Law § 130.75] . . . may be commenced within five years of the commission of the most recent act of sexual conduct." CPL 30.10 (3) (f), on the other hand, provided that, "[f]or purposes of a prosecution involving a sexual offense as defined in [Penal Law article 130] committed against a child less than eighteen years of age, . . . the period of limitation shall not begin to run until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier." The majority appears to conclude that subdivision (e) established the applicable statute of limitations for the offense of course of sexual conduct against a child in the first degree (Penal Law § 130.75), while subdivision (f) tolled the statute of limitations for all sex offenses as defined in article 130 committed against minors and, because course of sexual conduct is an article 130 offense, the subdivision (f) tolling provision must apply. I disagree.

In my view, the majority's interpretation of these two subdivisions fails to apply any true meaning to subdivision (e) and I therefore must agree with the defendant that, if CPL 30.10 (3) (f) were applicable to all article 130 offenses, CPL 30.10 (3) (e) would be rendered "superfluous and ineffective." I find no basis to interpret these statutes any differently, inasmuch as it is well recognized that general provisions of the CPL (i.e., subdivision [f]) should not override specific provisions of the CPL (i.e., subdivision [e]) (*see e.g. People v Jackson*, 87 NY2d 782, 790).

Furthermore, the majority's reliance on *People v Quinto* (18 NY3d 409) is misplaced. *Quinto* simply addresses the "triggering" event contemplated by subdivision (f) and does not discuss the interplay of the two subdivisions at issue here (*see id.* at 412). Subdivisions (e) and (f) were enacted as part of the same legislative package in 1996 (L 1996, ch 122, § 1). Subdivision (e) remained the same until 2006 when reference to, inter alia, "course of sexual conduct in the first degree" was removed from subdivision (e) and CPL 30.10 (2) (a) was amended to read that a prosecution for "course of sexual conduct against a child in the first degree as defined in [Penal Law § 130.75] may be commenced at any time" (L 2006, ch 3, § 2). In my view, if the Legislature intended the tolling provision of subdivision (f) to apply to course of sexual conduct against a child in the first degree (Penal Law § 130.75), it would not have simultaneously enacted subdivision (e), with its specific requirement of a five-year limitation period.

In view of the foregoing, I would reverse the judgment and dismiss the indictment as time barred.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

227

KA 11-00417

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARMELO ECHEVARRIA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered January 24, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree and grand larceny in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05) and two counts of grand larceny in the fourth degree (§ 155.30 [4], [5]). 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). Issues of credibility and the weight to be accorded to the evidence are primarily for the jury's determination (*see People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942), and we perceive no reason to disturb the jury's resolution of those issues in this case. Contrary to defendant's further contention, we conclude that "there is not a grave risk that an innocent [person] has been convicted" (*People v Henderson*, 275 AD2d 948, 948, *lv denied* 95 NY2d 964 [internal quotation marks omitted]).

As defendant correctly concedes, by failing to object to the jury charge, he failed to preserve for our review his contention that County Court improperly marshaled the evidence when it instructed the jury on the issue of identification (*see People v Savery*, 305 AD2d 1071, 1072, *lv denied* 100 NY2d 598). In any event, that contention is without merit (*see People v Harrison*, 19 AD3d 705, 706, *lv denied* 5 NY3d 828; *People v Brazzley*, 287 AD2d 463, 464, *lv denied* 97 NY2d

679).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

228

KA 13-01903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GORDY A. AKINPELU, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered September 13, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). At the SORA hearing, defendant's attorney informed County Court that he reviewed the risk assessment instrument with defendant and that he and defendant would "not be contesting those scores." The court thus adopted the recommendation of the Board of Examiners of Sex Offenders, which assessed 90 points against defendant, making him a presumptive level two risk. Defendant did not request a downward departure, and the court determined that he was a level two risk. Defendant now contends that he was not afforded due process at the hearing because, among other reasons, the court did not conduct a sufficient inquiry to determine whether he knowingly, intelligently and voluntarily waived his right to contest the level two risk designation. As defendant concedes, however, his contention is unpreserved for our review because he did not assert at the hearing that his due process rights were being violated (*see People v Kyle*, 64 AD3d 1177, 1178, *lv denied* 13 NY3d 709; *see also People v Costas*, 46 AD3d 475, 476, *lv denied* 10 NY3d 716; *People v Gliatta*, 27 AD3d 441, 441). In any event, "the due process protections required for a risk level classification proceeding 'are not as extensive as those required in a plenary criminal or civil trial' " (*Doe v Pataki*, 3 F Supp 2d 456, 470; *see People v Erb*, 59 AD3d 1020, 1020-1021), and defendant has cited no authority to support his contention that "a personal allocution" is

required in order to waive the right to a SORA hearing (*People v Dexter*, 21 AD3d 403, 404, *lv denied* 5 NY3d 716; *see Costas*, 46 AD3d at 476).

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

232

KA 11-01614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL R. MCCULLOUGH, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Joseph D. Valentino, J.), rendered November 3, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree and attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [4]), defendant contends that Supreme Court abused its discretion in precluding him from presenting expert testimony on the reliability of eyewitness identifications. We agree.

"Because mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, 'courts are encouraged . . . in appropriate cases' to grant defendants' motions to admit expert testimony on this subject" (*People v Santiago*, 17 NY3d 661, 669, quoting *People v Drake*, 7 NY3d 28, 31). In *People v LeGrand* (8 NY3d 449), the Court of Appeals established a two-stage inquiry for considering a motion to admit expert testimony on eyewitness identification (*see Santiago*, 17 NY3d at 669). "The first stage is deciding whether the case 'turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime' (*LeGrand*, 8 NY3d at 452). If the trial court finds itself with such a case, then it must proceed to the second stage, which involves the application of four factors. The court must decide whether the proposed 'testimony is (1)

relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror' (*id.*). If, on the other hand, sufficient evidence corroborates an eyewitness's identification of the defendant, then there is no obligation on the part of the trial court to proceed to the second stage of analysis, because testimony concerning eyewitness identifications is unnecessary" (*Santiago*, 17 NY3d at 669).

Here, the People concede that this case hinges upon the accuracy of the eyewitness's identification of defendant, and we agree with defendant that there was little or no corroborating evidence connecting him to the crime (*see LeGrand*, 8 NY3d at 452). The eyewitness testified that, on the evening of December 27, 2008, he was with the victim at the victim's barbershop when a man exited a white Chevy Malibu and asked if he could still get a haircut. The victim said yes, and the man sat down in a barber chair. Shortly thereafter, three men entered the shop. The first two men to enter were dark-skinned, and the first of the two men (hereafter, the shooter) wore a dark coat and a black winter hat. The third man to enter was lighter-skinned and taller, with a bright orange coat and matching baseball cap, and he tried to lock the door behind him. The men ordered the victim and the eyewitness to the ground, demanding money and drugs. After taking approximately $200 from the victim, the shooter fatally shot the victim, and the assailants fled. The shooter returned briefly, and the eyewitness heard a "clicking sound over his head." The shooter then left the shop and the eyewitness called 911.

Later that evening, a police officer responding to a dispatch about the robbery encountered and pursued a white Chevy Malibu with three men inside. The three men fled on foot, but the officer apprehended the driver, Willie Harvey. The officer transported Harvey back to the crime scene, where a witness who had been waiting for a bus near the barber shop when the robbery occurred identified him. A few weeks after the robbery, the police showed the eyewitness a photo array containing a photograph of defendant. The eyewitness pointed to defendant's photograph and said, "that looks a lot like the shooter," i.e., the first man to enter the shop. Two months later, the eyewitness identified defendant in a lineup as "the last guy who came into the barber shop," and he identified defendant as such at trial. Defendant was the only individual included in both the photo array and the lineup.

Contrary to the contention of the dissent, the fact that the eyewitness viewed the perpetrators at relatively close range and in well-lit conditions "does not constitute corroborating evidence of *the identification* for purposes of determining whether expert testimony regarding the accuracy of an eyewitness identification is admissible" (*People v Nazario*, 100 AD3d 783, 784, *lv denied* 20 NY3d 1063 [emphasis added]; *see Santiago*, 17 NY3d at 669). The only testimony corroborating the eyewitness's identification of defendant came from Harvey, who even the prosecutor characterized as "a liar." Harvey initially denied any knowledge of the robbery, and thereafter

identified other individuals as the perpetrators. When shown a photo array containing defendant's photograph about a month after the robbery, Harvey told the police that he did not recognize anyone. Harvey only identified defendant as one of the perpetrators minutes before he pleaded guilty to robbery in the first degree in exchange for the minimum sentence of 10 years. In addition to Harvey's dubious credibility, we note that "several factors call [his] corroborating identification[] into question" (*Santiago*, 17 NY3d at 673). Harvey had never met defendant prior to the robbery, he remained in the vehicle during the robbery, and he had limited opportunities to observe defendant that night (*cf. People v Muhammad*, 17 NY3d 532, 546; *People v Abney*, 13 NY3d 251, 269). We therefore agree with defendant that Harvey's testimony was insufficient to relieve the court of its obligation to proceed to the second stage of the *LeGrand* analysis (*see Santiago*, 17 NY3d at 673).

With respect to the second stage of the analysis, we conclude that the proposed testimony "satisfies the general criteria for the admissibility of expert proof" (*Muhammad*, 17 NY3d at 546), i.e., it is " '(1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror' " (*Santiago*, 17 NY3d at 669, quoting *LeGrand*, 8 NY3d at 452). Defendant sought to introduce expert testimony from Dr. Nancy Franklin, a psychologist, concerning various factors that affect the reliability of eyewitness identifications, including "the level of violence of the interaction [event violence], the length of time of the incident [event duration], [and] the presence of a weapon or other attention-calling object [weapon focus]." Those factors are clearly relevant to the eyewitness's identification of defendant (*see Abney*, 13 NY3d at 268). With respect to event violence and weapon focus, the eyewitness testified that one of the assailants put a gun to his head, pistol-whipped both him and the victim, and then shot the victim in the chest at close range. At least one of the other assailants also displayed a handgun. After the assailants fled, the shooter returned and the eyewitness heard a "clicking sound" over his head. The eyewitness testified that he did not know how long the robbery lasted. With respect to general acceptance in the scientific community, we "must assume on this record" that Franklin's proposed testimony is based on principles that are generally accepted in the scientific community because "defendant sought, and was denied, a *Frye* hearing on that issue" (*People v Oddone*, 22 NY3d 369, 379). Finally, we agree with defendant that Franklin is a qualified expert on eyewitness identifications (*see People v Norstrand*, 35 Misc 3d 367, 372; *Abney*, 31 Misc 3d 1231[A], *9-13, 2011 NY Slip Op 50919[U], *on remand from* 13 NY3d 251), and that the subject of her proposed testimony is beyond the ken of the average juror (*see People v Lee*, 96 NY2d 157, 162).

Because the evidence of defendant's guilt is not overwhelming, the error cannot be deemed harmless (*see Santiago*, 17 NY3d at 673-674; *Abney*, 13 NY3d at 268; *Nazario*, 100 AD3d at 785). We therefore reverse the judgment and grant defendant a new trial.

All concur except SCUDDER, P.J., and LINDLEY, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. We disagree with the conclusion of the majority that Supreme Court abused its discretion in denying defendant's motion seeking to present expert testimony on the reliability of the eyewitness identification of defendant. The court denied the motion in limine, but granted leave to renew at the close of the People's case. The court denied the motion on renewal after having the opportunity to hear the detailed testimony of the eyewitness, and to assess the credibility of defendant's accomplice and the reliability of his identification of defendant, before determining that the testimony of the accomplice provided sufficient corroboration for the eyewitness testimony (*see People v Lee*, 96 NY2d 157, 162-163).

Although "the case turns on the accuracy of [the] eyewitness identification[]" (*People v LeGrand*, 8 NY3d 449, 452), we conclude that the identification of defendant by the eyewitness was corroborated by the reliable testimony of the accomplice, and thus we disagree with the majority that an analysis of the factors in the second stage of the *LeGrand* analysis is necessary (*see generally People v Santiago*, 17 NY3d 661, 669). In any event, we respectfully disagree with the majority that expert testimony regarding the impact of "event violence," "event duration," and "weapon focus" on the reliability of eyewitness identification is generally accepted in the scientific community. Indeed, the Court of Appeals has previously concluded that a *Frye* hearing was required with respect to those precise factors (*see People v Abney*, 13 NY3d 251, 268). We also disagree with the majority's conclusion that the court's denial of the request for a *Frye* hearing constitutes a determination that the proposed testimony is based on principles that are generally accepted in the scientific community. Instead, the court denied the request for the *Frye* hearing, which was made in the alternative to the motion to admit the expert testimony, because it determined that the expert testimony was "not needed."

We agree with the court that, here, expert testimony on eyewitness recognition memory was "not needed" to assist the jury because the record establishes that the eyewitness provided very detailed testimony regarding the events, including a description of defendant and his actions, which was sufficiently corroborated by the identification of defendant by one of his accomplices. Contrary to the assertion of the majority, we do not conclude that the conditions under which the eyewitness viewed defendant *corroborate* his identification of defendant but, instead, we conclude that those conditions support the reliability of that testimony (*see generally People v Young*, 7 NY3d 40, 45). The eyewitness testified that he observed a man exit a white Chevy Malibu at the victim's barbershop on the evening of December 27, 2008 at approximately 10:00 p.m. and the man asked the victim whether he could still get a haircut. The eyewitness testified that while the man was seated in the barber chair, he was seated in another barber chair, nine feet from the door in the well-lit room, with an unobstructed view of the door. He observed three men enter the barber shop, and each of the men looked directly at the eyewitness. The third man, whom he identified as

defendant, was described by the eyewitness as "lighter than the rest of them" and "tall . . . The other two that came in were short, shorter." The eyewitness described defendant as wearing dark jeans and an orange coat with a baseball cap that matched his coat. He testified that defendant "looked at [him] before he turned to lock the door" and that the deadbolt lock did not work. Defendant's face was not concealed in any manner (*cf. Santiago*, 17 NY3d at 664; *Young*, 7 NY3d at 42). "It does not require scientific research . . . to establish that an identification is more reliable when the witness's original opportunity to observe was good" (*Young*, 7 NY3d at 45).

The eyewitness also described the other participants by the clothing they wore, their skin tone, and the order in which they entered the barber shop. He explained that the first man (hereafter the shooter) asked "where's the bud at," meaning marihuana. The eyewitness described the events as they unfolded in detail; he described what specific participants said and how the shooter shot the victim, and he testified that the shooter held a gun to his head, that the man in the barber chair produced a gun, that a third man also had a gun, that the men, including defendant, searched the barbershop for drugs, and that the man in the barber chair exited the barber shop first and the shooter exited last. Thus, we conclude that the opportunity for the eyewitness to observe defendant was not brief (*cf. Santiago*, 17 NY3d at 664), or "fleeting" (*Abney*, 13 NY3d at 257).

The court also did not abuse its discretion in determining that the eyewitness's testimony was corroborated by the testimony of defendant's accomplice, Willie Harvey (*see Abney*, 13 NY3d at 269). Harvey testified that he and his brother met his cousin and two men he did not know at his cousin's house. He observed his cousin and the two men enter a vehicle, and he and his brother drove to the barber shop in a white Chevy Malibu, which his brother exited to enter the barber shop. Harvey testified that he parked the Malibu to wait for the others. He estimated that he waited 10 to 15 minutes, based on the fact that he made two telephone calls while he waited. He observed his brother, cousin and the other two men walk towards his car and the men traveled in two cars to his cousin's house. At his cousin's house, while still seated in the driver's seat, Harvey observed the four men place marihuana and "two or three" handguns on the hood of the Malibu. Although Harvey did not know defendant personally before the night in question, the record establishes that he observed defendant before and after the crime (*see generally People v Muhammad*, 17 NY3d 532, 546). We therefore conclude that Harvey's testimony "harmonize[d] with the [eyewitness's] testimony in such a manner as to furnish the necessary connection between the defendant and the crime" (*People v Nazario*, 100 AD3d 783, 784, *lv denied* 20 NY3d 1063).

Although the majority properly notes that Harvey failed to identify defendant in a photo array, Harvey explained on redirect examination that he recognized defendant but did not identify him because he did not know at that time what part his brother played in the crimes. The majority also properly notes that Harvey was characterized by the prosecutor as "a liar." We nevertheless disagree

with the majority's conclusion that Harvey's "dubious credibility" with respect to portions of his testimony renders his identification of defendant unreliable for the purpose of providing corroborative evidence of the eyewitness identification. Instead, we conclude that the court, which observed Harvey and heard his testimony, is in the best position to determine whether the testimony with respect to Harvey's ability to identify defendant was sufficient to establish the reliability of that identification, and thus to constitute sufficient corroborating evidence of the eyewitness identification (*see generally Allen*, 13 NY3d at 269; *Lee*, 96 NY2d at 163).

"A trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification, weighing a request to introduce such expert testimony 'against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence' " (*Santiago*, 17 NY3d at 668-669, quoting *Lee*, 96 NY2d at 163). Because we conclude that the court did not abuse its sound discretion in denying the motion to present expert testimony on the reliability of the eyewitness identification (*see Lee*, 96 NY2d at 163), we would affirm the judgment.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMY VELASQUEZ, DEFENDANT-APPELLANT.

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

JIMMY VELASQUEZ, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), 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 Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered February 1, 2012. The order denied defendant's motion pursuant to CPL 440.20 to set aside his sentence.

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

Memorandum: In this postconviction proceeding, defendant appeals from an order denying his motion to set aside his sentence pursuant to CPL 440.20. The challenged sentence was imposed in 2007, after defendant pleaded guilty to attempted burglary in the second degree. On that offense, Supreme Court sentenced defendant as a persistent violent felony offender to an indeterminate term of imprisonment of 12 years to life. One of the two predicate offenses was entered in 1999. In 2010, pursuant to Penal Law § 70.85, defendant was resentenced on that predicate offense because his initial sentence did not include a term of postrelease supervision. In the instant motion, defendant asserted that, because the sentence on the 1999 judgment was vacated in 2010, it could not serve as a predicate offense in 2007 for the determination that he was a persistent violent felony offender. Supreme Court denied the motion, and we now affirm.

After we granted defendant leave to appeal herein, the Court of Appeals expressly stated that "a resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely corrects a clerical error and leaves the original sentence, along with the date of that sentence, undisturbed" (*People v Boyer*, 22 NY3d 15, 24; *see People v*

Hall, 124 AD3d 795, 796; *People v Miller*, 118 AD3d 1463, 1464, *lv denied* 24 NY3d 1003). Because defendant was lawfully sentenced on the predicate offense in question before he was convicted of the offense for which he was sentenced as a persistent violent felony offender, "it qualifies as a prior [violent] felony conviction" (*People v Wood*, 115 AD3d 613, 613, *lv denied* 22 NY3d 1204). We thus conclude that the court properly denied defendant's motion.

We have reviewed defendant's remaining contentions, including the contention set forth in his pro se supplemental brief, and conclude that they lack merit.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

240

CA 14-01129

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

MARGARITA ZULEY, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELIZABETH WENDE BREAST CARE, LLC, WENDE LOGAN-YOUNG, M.D., STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O., AND PATRICIA SOMERVILLE, M.D., DEFENDANTS-RESPONDENTS.

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

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ELIZABETH WENDE BREAST CARE, LLC, STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O. AND PATRICIA SOMERVILLE, M.D.

BOYLAN CODE LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR DEFENDANT-RESPONDENT WENDE LOGAN-YOUNG, M.D.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 24, 2014. The order and judgment granted the cross motions of defendants for summary judgment dismissing the second through fifth causes of action and determined all other pending applications moot.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying that part of the cross motion of defendants Elizabeth Wende Breast Care, LLC, Stamatia Destounis, M.D., Philip Murphy, M.D., Posy Seifert, D.O., and Patricia Somerville, M.D. with respect to the second cause of action against them and reinstating that cause of action to that extent and as modified the order and judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, to determine plaintiff's motion.

Memorandum: Plaintiff, a former employee of defendant Wende Logan-Young, M.D. (Logan-Young), and defendants Stamatia Destounis, M.D., Philip Murphy, M.D., Posy Seifert, D.O. and Patricia Somerville, M.D. (physician defendants) formed a limited liability corporation (LLC) in 2006 for the purpose of purchasing Logan-Young's medical practice. The physician defendants, however, withdrew from that LLC in September 2006 and formed defendant Elizabeth Wende Breast Care, LLC (collectively, EWBC defendants), which thereafter purchased the

practice for $500,000, plus other costs, in December 2007. Plaintiff was not in Logan-Young's employ at the time of the closing. Plaintiff commenced this action alleging, inter alia, causes of action for promissory estoppel, constructive trust and unjust enrichment. Plaintiff alleged that, since 1999, Logan-Young had been advising plaintiff that she would sell the practice to the physicians she employed and that she intended to do so by means of a "leveraged buyout" whereby she would apply a certain amount of the profits toward the eventual purchase of the practice. Plaintiff alleged that in 1999 Logan-Young informed her that she would apply $1.2 million per year toward a prospective sale price of $8.2 million. In 2004, Logan-Young's attorney discussed a purchase price of $3 million with the attorney retained by plaintiff and the physician defendants in connection with discussions of a potential purchase of the practice. Logan-Young's attorney indicated that the $3 million purchase price would be decreased by the profits from the practice pending the closing in 2006. The attorney for plaintiff and the physician defendants responded that the price violated the "core deal that was struck years ago." It appears from the record that negotiations were ongoing until the physician defendants withdrew from the LLC in September 2006. Plaintiff left Logan-Young's employ in December 2006.

We conclude that Supreme Court properly granted those parts of the respective cross motions of the EWBC defendants and Logan-Young for summary judgment dismissing the promissory estoppel cause of action against them. " 'The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise' . . . However, the doctrine of promissory estoppel is limited to cases where the promisee suffered an 'unconscionable injury' " (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 20-21; *see Chemical Bank v City of Jamestown*, 122 AD2d 530, 531, *lv denied* 68 NY2d 608). Both the EWBC defendants and Logan-Young met their initial burden by establishing, with plaintiff's deposition testimony, that neither Logan-Young nor any of the physician defendants made a clear and unambiguous promise to plaintiff that she would be part of the group that eventually purchased the practice. Although plaintiff established the basis for her understanding that she would be part of the purchase, she failed to raise an issue of fact whether the representations of the respective defendants constituted a " 'clear and unambiguous promise' " to her (*DiPizio Constr. Co., Inc. v Niagara Frontier Transp. Auth.,* 107 AD3d 1565, 1567).

We further conclude that the court properly granted those parts of the respective cross motions of the EWBC defendants and Logan-Young for summary judgment dismissing the constructive trust cause of action against them. It is well established that "a constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' " (*Sharp v Kosmalski*, 40 NY2d 119, 121). The requisite elements of such a cause of action are a fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment (*see id.*; *Plumitallo v Hudson Atl. Land Co., LLC,* 74

AD3d 1038, 1039-1040). We conclude with respect to the physician defendants that, although they had a fiduciary relationship with plaintiff as members of the LLC (*see Plumitallo*, 74 AD3d at 1040), and even assuming, arguendo, that they promised plaintiff that she would be part of the group that purchased the practice, they established that plaintiff made no transfer to them in reliance on that promise, and plaintiff failed to raise an issue of fact (*cf. Sharp*, 40 NY2d at 122; *Plumitallo*, 74 AD3d at 1040). We conclude with respect to Logan-Young that she established that she had no fiduciary relationship with plaintiff, and plaintiff failed to raise an issue of fact whether there was such a relationship between them (*cf. Sharp*, 40 NY2d at 121-122; *Plumitallo*, 74 AD3d at 1040).

We conclude, however, that the court erred in granting that part of the cross motion of the EWBC defendants for summary judgment dismissing the cause of action for unjust enrichment against them, and we therefore modify the order and judgment accordingly. As a preliminary matter, we conclude that the court erred in determining that the unjust enrichment cause of action was duplicative of the breach of contract cause of action (*cf. DiPizio Constr. Co., Inc.*, 107 AD3d at 1567). We previously affirmed an order that, inter alia, granted those parts of their motions for summary judgment dismissing the breach of contract cause of action against them based on the statute of frauds (*Zuley v Elizabeth Wende Breast Care, LLC*, 82 AD3d 1673). Inasmuch as we conclude that plaintiff's cause of action for unjust enrichment is distinguishable from the cause of action for breach of contract, dismissal of the cause of action for unjust enrichment is not required based upon the dismissal of the cause of action for breach of contract (*cf. DiPizio Constr. Co., Inc.*, 107 AD3d at 1566-1567).

"[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [internal quotation marks omitted]). Even assuming, arguendo, that the EWBC defendants met their initial burden, we conclude that plaintiff raised an issue of fact whether Logan-Young used a portion of profits earned in part from plaintiff's efforts during her employment as payment toward the eventual purchase of the practice for a price far below the fair market value. Plaintiff raised an issue of fact whether Logan-Young intended in 1999 eventually to sell the practice for $8.2 million and thus whether, by virtue of Logan-Young's annual application of a portion of the profit toward that price and plaintiff's willingness to forego raises or higher bonuses, the EWBC defendants were unjustly enriched by plaintiff's revenue-producing efforts during that time, in order that there would be a sufficient amount of profit to apply to the purchase price. Plaintiff also established that Logan-Young discussed a sale price of $8.2 million in 1999; that the sale price in 2004 was $3 million; and that the sale price was eventually reduced to $500,000, with the addition of certain other costs. Further, plaintiff established that the physician defendants were paid at the time of closing for "deferred bonuses" in an aggregate amount in excess of $3.5 million for 2006 and 2007. Thus, we conclude that

plaintiff raised an issue of fact whether the EWBC defendants were enriched at plaintiff's expense when they excluded her from the purchase of the practice and, if so, whether it is " 'against equity and good conscience' " to deny plaintiff a remedy against them (*id.*).

We nevertheless conclude that the court properly granted that part of Logan-Young's cross motion with respect to the unjust enrichment cause of action against her, inasmuch as she established that she was not unjustly enriched at plaintiff's expense, and plaintiff failed to raise an issue of fact (*see generally id.*).

Inasmuch as the court determined that the issues raised in plaintiff's motion to compel further discovery were moot in light of its determination to dismiss the complaint in its entirety and we are now reinstating the complaint in part, we remit the matter to Supreme Court to determine the motion.

Entered: March 27, 2015

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 14-01453

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

MEDLOCK CROSSING SHOPPING CENTER DULUTH, GA. LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KITCHEN & BATH STUDIO, INC., STEVE LINDSTROM AND NANCY LINDSTROM, DEFENDANTS-APPELLANTS.

LEMERY GREISLER LLC, ALBANY (PAUL A. LEVINE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BRIAN LAUDADIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a corrected order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 29, 2014 in a breach of contract action. The corrected order, inter alia, granted that part of plaintiff's motion seeking summary judgment on the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of its commercial lease agreement with defendant Kitchen & Bath Studio, Inc. (KBS) and enforcement of the lease guarantee executed by the individual defendants. Contrary to the contention of defendants, we conclude that Supreme Court properly granted that part of plaintiff's motion for summary judgment on the complaint, and awarded plaintiff damages. "When interpreting language in a commercial lease, we apply our well-established precedent concerning the construction of commercial contracts, where we have explained that when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 66, *rearg denied* 8 NY3d 867 [internal quotation marks omitted]). Thus, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement. If they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [internal quotation marks omitted]). Here, we conclude that plaintiff

established its entitlement to judgment as a matter of law based on defendants' breach of the lease and guaranty, and defendants failed to raise an issue of fact with respect to the affirmative defense of surrender and acceptance (*see Trahwen, LLC v Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1467, *lv dismissed* 21 NY3d 1066; *Barr v County Motor Car Group*, 221 AD2d 1003, 1003-1004, *lv dismissed* 88 NY2d 919; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The lease agreement obligated KBS to pay minimum rent in the amount of $5,625 per month "without any prior demand therefor," as well as "additional rent" as set forth in the lease. It is well settled that "[a] covenant to pay rent at a specified time . . . is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord" (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 578, *rearg denied* 47 NY2d 801; *see Matter of Birnbaum v Yankee Whaler*, 75 AD2d 708, 709, *affd* 51 NY2d 935). In this case, it is undisputed that KBS failed to pay the full amount of rent due under the lease from March 2009 to September 2010, and that it ceased to make any payments under the lease after September 2010. Plaintiff therefore met its burden of establishing that KBS breached a material term of the lease (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 534-535; *Fifty States Mgt. Corp.*, 46 NY2d at 575). Although we agree with defendants that there is an issue of fact whether they abandoned the leased premises, defendants breached the lease by failing to pay rent irrespective of whether they also breached the lease by abandoning the leased premises or ceasing to operate their business, as required by the lease.

Defendants further contend that plaintiff terminated the lease when it locked KBS out of the leased premises, thereby relieving KBS of the obligation to pay rent. We reject that contention. As a "general principle[,] . . . where a tenant removes from premises . . . , the conventional relationship of landlord and tenant ceases and the landlord may not recover from the tenant, *as rent*, subsequent installments thereof for which the lease provides" (*International Publs. v Matchabelli*, 260 NY 451, 453-454, *rearg denied* 261 NY 622). That principle, however, "do[es] not prevent [the] landlord and tenant from contracting as they please, even in respect to periods subsequent to . . . the termination of the relationship of landlord and tenant" (*id.* at 454; *see Hermitage Co. v Levine*, 248 NY 333, 337; *Mann v Munch Brewery*, 225 NY 189, 194) and, here, the plain language of the lease provides that KBS's obligation to pay rent survives plaintiff's reentry to the premises upon KBS's default (*see Olim Realty Corp. v Big John's Moving*, 250 AD2d 744, 744; *see also 172 Van Duzer Realty Corp.*, 24 NY3d at 534; *Fifty States Mgt. Corp.*, 46 NY2d at 579).

Finally, defendants contend that, because the court found that there is a question of fact with respect to their counterclaim for conversion, the court likewise should have found that there is a question of fact with respect to the complaint inasmuch as the counterclaim and complaint arise from the same facts and there thus may be "inconsistent judgments on the very same case." We reject that contention. "Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the

exclusion of the owner's rights' " (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex*., 87 NY2d 36, 44). "A landlord has no absolute right to retain . . . personal property belonging to a tenant. Even where a tenant is legally dispossessed, the landlord's rights extend only to the real property. [The landlord] acquires no concomitant right to use or retain the tenant's personal property" (*Glass v Wiener*, 104 AD2d 967, 968). Here, plaintiff asserts that KBS failed to remove its personal property after notice to do so, thereby abandoning any claim to the property. KBS, however, asserts that it attempted to gain access to its property, but that plaintiff failed to grant the necessary access. The parties' conflicting accounts of their conduct after the lockout presents an issue of fact on defendants' counterclaim, but is wholly irrelevant to plaintiff's breach of contract cause of action for unpaid rent (*see generally Glass*, 104 AD2d at 968-969). Thus, there is no danger of inconsistent judgments.

Entered: March 27, 2015

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 14-01497

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

JOHN H. BAUSENWEIN, III,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY ALLISON, DEFENDANT-RESPONDENT,
THOMAS J. WELSH, INDIVIDUALLY AND DOING BUSINESS AS TJW CUSTOM HOMES, INC., TJW CUSTOM HOMES, INC., AND 299 MAIN STREET EA, INC., INDIVIDUALLY AND DOING BUSINESS AS TJW CUSTOM HOMES,
DEFENDANTS-RESPONDENTS-APPELLANTS.

HOGAN WILLIG, PLLC, AMHERST (ALLISON BOZINSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 7, 2013. The order, inter alia, granted the motion of defendant Timothy Allison for summary judgment dismissing the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Thomas J. Welsh, individually and doing business as TJW Custom Homes, Inc., TJW Custom Homes, Inc. and 299 Main Street EA, Inc., individually and doing business as TJW Custom Homes, and dismissing the common-law negligence cause of action and Labor Law § 200 claim against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while working on a construction project on property owned by defendant Timothy Allison, asserting causes of action for common-law negligence and the violation of Labor Law §§ 200, 240 (1) and 241 (6). We initially conclude that Supreme Court properly granted Allison's motion for summary judgment dismissing the amended complaint against him. Labor Law §§ 240 (1) and 241 (6) exempt from liability "owners of one[-] and two-family dwellings who

contract for but do not direct or control the work" (*see Byrd v Roneker*, 90 AD3d 1648, 1649; *Pfaffenbach v Nemec*, 78 AD3d 1488, 1489), i.e., homeowners of such dwellings who do not give " 'specific direction as to how the injured plaintiff was to accomplish' " the injury-producing work (*Ledwin v Auman*, 60 AD3d 1324, 1325; *see Rosenblatt v Wagman*, 56 AD3d 1103, 1104). Here, Allison met his initial burden by establishing as a matter of law that he did not direct or supervise plaintiff's work. In support of his motion, Allison submitted, inter alia, the deposition testimony of plaintiff, who, when asked if he knew the identity of the owner of the house on which he was working, answered: "I met him once or twice, but I don't recall his name." Plaintiff further testified that Allison did not give him any direction as to how to do his work. Allison also submitted his own deposition testimony wherein he asserted that he visited the construction site occasionally "just to find out what stage they were at," and he never told any worker how to perform his or her job. Allison's testimony is consistent with that of plaintiff's employer, who testified that Allison did not supervise any of the work and did not tell any of the workers how to do their jobs.

The burden of proof thus shifted to plaintiff to raise an issue of fact whether Allison directed or controlled his work, and plaintiff failed to do so. Plaintiff relies primarily on the fact that Allison is identified in the construction contract as the general contractor, but that title is not by itself dispositive (*see McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1239). Plaintiff does not identify a single incident in which Allison supervised him or told him how to perform his work. Although Allison, based on his prior experience as a plaintiff in an unrelated Labor Law action, was aware of the need for safety devices at the work site, his actions at the construction site "were those of a 'legitimately concerned homeowner' and not those of a supervisor" (*Peck v Szwarcberg*, 122 AD3d 1216, 1219, quoting *Rosenblatt*, 56 AD3d at 1104). Moreover, because Allison did not direct or control plaintiff's work, the court also properly dismissed the Labor Law § 200 claim and common-law negligence cause of action against Allison (*see id.* at 1219-1220).

With respect to the cross appeal of the remaining defendants (collectively, 299 Main Street defendants), we conclude that the court properly denied their motion for summary judgment insofar as it sought dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them. Although 299 Main Street EA, Inc., individually and doing business as TJW Custom Homes (299 Main Street), which is owned by defendant Thomas J. Welsh, is identified in the contract with Allison as the "construction manager," not the general contractor, a construction manager "may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864; *see Campoverde v Sound Hous., LLC*, 116 AD3d 897, 897-898; *Titus v Kirst Constr., Inc.*, 43 AD3d 1324, 1325, *lv denied* 9 NY3d 817). The evidence submitted by the 299 Main Street defendants in support of their motion raised an issue of fact whether they had the ability to control plaintiff's work (*see Reed v NEA Residential, Inc.*, 64 AD3d 1148, 1149). We note that the contract between 299 Main

Street and Allison provided that 299 Main Street would be "an agent" for Allison. The contract further provided that 299 Main Street would select and schedule subcontractors, and was responsible for "[d]ay to day construction activities." We agree with the 299 Main Street defendants, however, that the court erred in denying their motion insofar as it sought dismissal of the Labor Law § 200 claim and common-law negligence cause of action against them, inasmuch as they established as a matter of law that they did not *actually* direct or control the work that brought about plaintiff's injuries, and in response plaintiff failed to raise an issue of fact (*see Peck*, 122 AD3d at 1219-1220). We therefore modify the order accordingly.

Because, as noted, there are issues of fact whether the 299 Main Street defendants acted as Allison's agent, we reject plaintiff's contention that the court erred in refusing to search the record and grant summary judgment in his favor against those defendants under Labor Law §§ 240 (1) and 241 (6). Finally, we conclude that the court properly denied that part of the 299 Main Street defendants' motion for summary judgment on their cross claim against Allison for contractual and common-law indemnification (*see generally Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

246

KA 11-00967

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANA M. HOLLEY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 9, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon 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 plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress his statements and certain evidence seized from his person when he was stopped and searched by a Rochester police officer. Specifically, defendant contends that the officer's testimony at the suppression hearing was incredible, and, thus, the court's determination that the officer had reasonable suspicion to believe that he had committed a crime is not supported by the evidence. We reject defendant's contention.

The officer testified at the suppression hearing that she heard shots fired, then observed defendant fire a handgun at a moving vehicle. She stopped defendant and recovered a semi-automatic handgun from his pocket. It is well settled that a hearing "court's credibility determination is entitled to great deference" (*People v Coleman*, 57 AD3d 1519, 1520, *lv denied* 12 NY3d 782; *see generally People v Prochilo*, 41 NY2d 759, 761), and we conclude that "[t]he police officer's testimony at the suppression hearing does not have all appearances of having been patently tailored to nullify constitutional objections . . . , and was not so inherently incredible

or improbable as to warrant disturbing the . . . court's determination of credibility" (*People v Walters*, 52 AD3d 1273, 1274, *lv denied* 11 NY3d 795 [internal quotation marks omitted]). We therefore see no basis in the record for disturbing the court's finding that the officer had reasonable suspicion to stop and search defendant, or its ultimate suppression ruling.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

250

KA 11-02600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRA MCCULLARS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE COOK 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 September 27, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [4]) and conspiracy in the fourth degree (§ 105.10 [1]), arising from his participation in a home invasion on July 14, 2010, with three other people. Contrary to defendant's contention, his statutory right to a speedy trial was not violated. The record establishes that on July 15, 2010, a felony complaint was filed against defendant, charging him with burglary in the first degree, robbery in the first degree, and criminal use of a firearm in the first degree. On July 22, 2010, defense counsel "waived the case out of Solvay [Village Court]" and, in September 2010, the People filed an indictment against the three other alleged participants, but the People refused to dismiss the felony complaint against defendant. On January 12, 2011, three days before the expiration of the six-month statutory period for the People to comply with their obligation to be ready for trial (*see* CPL 30.30 [a] [1]), the People filed a superseding indictment that charged defendant and the three other alleged participants. At that time, the People announced their readiness for trial on the record and sent defense counsel a *Kendzia* letter (*see People v Kendzia*, 64 NY2d 331, 337). On February 4, 2011, the court granted defendant's motion to dismiss the January indictment as having been obtained in violation of his right to testify before the grand jury (*see* CPL 190.50 [5]). Later that day, the People filed a superseding indictment against defendant and announced their

readiness for trial prior to entry of the order dismissing the January indictment. We conclude that the People's announcement of readiness on January 12, 2011, i.e., within six months of the commencement of the criminal action against defendant (*see* CPL 30.30 [1] [a]), "satisfie[d] their obligation to answer ready on the subsequent indictment" (*People v Marsh*, 127 AD2d 945, 947, *lv denied* 70 NY2d 650; *see People v Stone*, 265 AD2d 891, 892, *lv denied* 94 NY2d 907; *People v Jones*, 185 AD2d 655, 656, *lv denied* 81 NY2d 888; *see generally People v Farkas*, 16 NY3d 190, 193). Contrary to defendant's contention, the People's announcement of readiness for trial on January 12, 2011 was not a "sham" (*see generally Kendzia*, 64 NY2d at 337). We reject defendant's further contention that the People are chargeable with postreadiness delay for their alleged failure to provide discovery and a bill of particulars. " 'Defendant's remedies for such delays do not include dismissal under CPL 30.30' " (*People v Griffin*, 111 AD3d 1355, 1356, *lv denied* 22 NY3d 1139). We reject defendant's further contention that the People are chargeable with delay for the adjournment of an independent source hearing. The People were entitled to a reasonable time to prepare for the hearing after defense counsel provided them with a recorded interview of the People's witness who was to testify at that hearing, and the time permitted for the adjournment of that hearing was excludable (*see* CPL 30.30 [4] [a], [g]; *People v Moolenaar*, 262 AD2d 60, 60, *lv denied* 94 NY2d 826).

Contrary to defendant's contention, the evidence viewed in the light most favorable to the People is legally sufficient to support the conviction (*see People v Contes*, 60 NY2d 620, 621; *see generally People v Bleakley*, 69 NY2d 490, 495). 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 further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Indeed, based upon our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Peters*, 90 AD3d 1507, 1508, *lv denied* 18 NY3d 996; *see generally Bleakley*, 69 NY2d at 495). The sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

252

KA 11-02500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD PITCHER, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 (William D. Walsh, J.), rendered September 26, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). Initially, we agree with defendant that his waiver of the right to appeal was not valid (*see People v Trinidad-Ayala*, 114 AD3d 1229, 1229, *lv denied* 23 NY3d 1044). Defendant failed to preserve for our review, however, his challenge to the factual sufficiency of the plea colloquy (*see People v Lopez*, 71 NY2d 662, 665; *People v Spears*, 106 AD3d 1534, 1535, *affd* 24 NY3d 1057). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *Lopez* because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon his guilt (*id*. at 666; *see People v Lewandowski*, 82 AD3d 1602, 1602). In any event, even assuming, arguendo, that defendant's initial hesitation to implicate his codefendant in the crime called into question the voluntariness of defendant's plea, we conclude on the record before us that County Court fulfilled its "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*Lopez*, 71 NY2d at 666; *see People v Mitchell*, 48 AD3d 1081, 1082, *lv denied* 10 NY3d 867).

Defendant failed to move to withdraw his plea, and thus he failed to preserve for our review his further contention that his plea was coerced by the court (*see People v Carlisle*, 50 AD3d 1451, 1451, *lv denied* 10 NY3d 957). In any event, that contention is belied by the

record because, during the plea proceeding, defendant denied that he had been threatened or otherwise pressured into pleading guilty (*see People v Worthy*, 46 AD3d 1382, 1382, *lv denied* 10 NY3d 773; *People v Gradia*, 28 AD3d 1206, 1206-1207, *lv denied* 7 NY3d 756). Furthermore, the court did not coerce defendant into pleading guilty merely by informing him of the range of sentences that he faced if he proceeded to trial and was convicted (*see People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747; *People v Lando*, 61 AD3d 1389, 1389, *lv denied* 13 NY3d 746), or by commenting on the strength of the People's evidence against him (*see generally People v Hamilton*, 45 AD3d 1396, 1396, *lv denied* 10 NY3d 765; *People v Campbell*, 236 AD2d 877, 878). In addition, "the fact that defendant was required 'to accept or reject the plea offer within a short time period does not amount to coercion' " (*People v Irvine*, 42 AD3d 949, 949, *lv denied* 9 NY3d 962; *see People v Mason*, 56 AD3d 1201, 1202, *lv denied* 11 NY3d 927).

We reject the further contention of defendant that the court erred in determining that he was not entitled to receive the benefit of a favorable sentencing provision of the plea agreement, which required him to cooperate with the People in the prosecution of his codefendant. At the time of the plea, the court indicated that it would sentence defendant to a lesser sentence if he cooperated in the prosecution of his codefendant, including providing truthful testimony at his codefendant's trial, but that it would impose the maximum sentence if defendant failed to cooperate. Defendant later informed the probation officer who prepared the presentence report that he would not testify against the codefendant. Based on the information that defendant provided to the prosecutor in a meeting prior to the codefendant's trial, which varied from the testimony provided by all the other witnesses, and upon defendant's statements to the probation officer, the prosecutor determined that defendant would not provide truthful testimony and declined to call him as a witness at the codefendant's trial. Furthermore, when called as a defense witness at that trial, defendant invoked his rights under the Fifth Amendment of the United States Constitution. We agree with the People that defendant's efforts to cooperate were "of questionable value and . . . clearly less than what the People bargained for" (*People v Paige*, 266 AD2d 587, 588, *lv denied* 94 NY2d 827; *see generally People v Curdgel*, 83 NY2d 862, 864). Defendant's contention that the cooperation contemplated by the plea agreement did not require him to testify against his codefendant is belied by the record (*cf. People v Gabbidon*, 96 AD3d 1235, 1236). Consequently, "the record supports the court's determination that defendant's level of cooperation in the trial of [his codefendant] was insufficient" (*People v Crawford*, 55 AD3d 1335, 1336, *lv denied* 11 NY3d 896).

Defendant further contends that he was denied effective assistance of counsel because defense counsel did not file certain motions and was late in arriving in court at times. Defendant's contention "survives his guilty plea only to the extent that [he] contends that his plea was infected by the alleged ineffective assistance." In that context, we conclude that defendant received meaningful representation inasmuch as he received "an advantageous plea and nothing in the record casts doubt on the apparent

effectiveness of counsel" (*People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631 [internal quotation marks omitted]; *see People v Arney*, 120 AD3d 949, 950; *People v Campbell*, 106 AD3d 1507, 1508, *lv denied* 21 NY3d 1002).

As the People correctly concede, the uniform sentence and commitment sheet incorrectly recites that defendant was convicted of robbery in the first degree. The sentence and commitment must therefore be amended to correct the clerical error and to reflect that defendant was convicted of burglary in the first degree (*see generally People v Saxton*, 32 AD3d 1286, 1286-1287).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

260

CA 14-01372

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

LUKE DOUGLAS SMART, BY HIS GUARDIANS HAROLD SMART AND JOANN SMART, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

DANFORTH J. RIVET, JR., ROBERT G. DESNOYERS, INDIVIDUALLY AND DOING BUSINESS AS THE OLD MILL RESTAURANT, DEFENDANTS-APPELLANTS-RESPONDENTS, AND OSWEGO COUNTY OPPORTUNITIES, INC., DEFENDANT-RESPONDENT-APPELLANT.

SANTACROSE & FRARY, ALBANY (KEITH M. FRARY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

ROBERT E. GENANT, MEXICO, FOR PLAINTIFF-APPELLANT-RESPONDENT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered October 30, 2013. The order granted that part of the motion of defendant Oswego County Opportunities, Inc., seeking dismissal of the amended complaint and cross claims against it and denied that part of the motion seeking to recover the costs of photocopying.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and reinstating the amended complaint and cross claims against defendant Oswego County Opportunities, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff, by his parents and guardians Harold Smart and Joann Smart, commenced this action seeking damages for injuries he sustained when he was on a group outing conducted by defendant Oswego County Opportunities, Inc. (OCO). At the time of the accident, plaintiff was an adult resident of a group home operated by OCO. Plaintiff and another group home resident were on an overnight trip organized by OCO and supervised by OCO employees when they stopped for dinner at the Old Mill Restaurant, owned and operated by defendants Danforth J. Rivet, Jr., and Robert G. Desnoyers (collectively, Old Mill). Plaintiff became agitated after his meal was served, whereupon he rose from the table, walked across the restaurant, exited a side

door, and fell several feet to the parking lot below. There were no stairs connecting the parking lot and that door.

We agree with the contention of plaintiff and Old Mill on appeal that Supreme Court erred in granting that part of OCO's motion seeking summary judgment dismissing the amended complaint and cross claims against it, and we therefore modify the order accordingly. OCO had a duty to safeguard its residents, "measured by the capacity of [an individual resident] to provide for his or her own safety" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252; *see Schnorr v Emeritus Corp.*, 118 AD3d 1307, 1307). "The degree of reasonable care owed to such individuals is measured by the [resident's] physical and mental ailments as known to the [agency's] officials . . . and employees" (*Dawn VV. v State of New York*, 47 AD3d 1048, 1050 [internal quotation marks omitted]; *see generally Convey v City of Rye Sch. Dist.*, 271 AD2d 154, 159). "As with any liability in tort, the scope of [that] duty is circumscribed by those risks which are reasonably foreseeable" *(N.X.*, 97 NY2d at 253) and, "[i]n this case, the focus of the inquiry is on the foreseeability of the risk" (*Di Ponzio v Riordan*, 89 NY2d 578, 583).

OCO failed to establish as a matter of law that it was not reasonably foreseeable that plaintiff would cause injury to himself if not adequately supervised (*see generally Peevey v Burgess*, 192 AD2d 1115, 1116). In view of the evidence concerning plaintiff's behavioral problems and OCO's awareness of those problems, we conclude that there are issues of fact whether his accident was "within the class of foreseeable hazards that [OCO's] duty [to supervise] exists to prevent . . . , even though the harm may have been brought about in an unexpected way" (*Di Ponzio*, 89 NY2d at 584; *see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317, *rearg denied* 52 NY2d 784).

OCO also failed to establish as a matter of law that its alleged negligence was not a proximate cause of the accident. "[T]he issue of proximate cause may be decided as a matter of law 'where only one conclusion may be drawn from the established facts' " (*Scala v Scala*, 31 AD3d 423, 424). Here, the established facts do not demonstrate conclusively that the accident was caused solely by the allegedly dangerous condition at the restaurant (*see Przesiek v State of New York*, 118 AD3d 1326, 1327), or that the accident occurred so quickly that any lack of supervision by OCO was not a proximate cause of the accident (*cf. Convey*, 271 AD2d at 160).

Finally, contrary to the contention of OCO on cross appeal, we conclude that the court properly denied that part of OCO's motion seeking reimbursement of expenses it incurred in responding to the discovery requests of plaintiff and Old Mill (*see Gehen v Consolidated Rail Corp.*, 289 AD2d 1026, 1027).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

263

CA 14-01423

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

HOLLY M. REDMOND, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENIS M. REDMOND AND CANDACE G. REDMOND,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered April 3, 2014. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries she allegedly sustained by striking her head on the bottom of an above-ground pool after sliding head first down a water slide. Plaintiff alleges that the incident occurred shortly after 1:00 a.m., during a party that defendants hosted at their home. Defendants moved for summary judgment dismissing the complaint, contending that the doctrine of assumption of risk barred the action, and that plaintiff's actions were the sole proximate cause of her injuries. Defendants appeal from an order denying their motion. We affirm.

In its recent decisions on the subject, the Court of Appeals has "generally restricted the concept of assumption of . . . risk to particular athletic and recreative activities in recognition that such pursuits have 'enormous social value' even while they may 'involve significantly heightened risks' " (*Custodi v Town of Amherst*, 20 NY3d 83, 88, quoting *Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 395). "Consistent with this justification, each [Court of Appeals] case[] applying the doctrine involved a sporting event or recreative activity that was sponsored or otherwise supported by the defendant, or occurred in a designated athletic or recreational venue" (*id.*). The Court of Appeals has "clarified that the doctrine 'must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation' " (*id.* at 89, quoting *Trupia*, 14

NY3d at 395). Thus, the Court of Appeals has concluded that, "[a]s a general rule, application of assumption of . . . risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*id.*).

Here, we conclude that defendants failed to meet their initial burden on the motion inasmuch as their submissions failed to establish that plaintiff's injuries arose from a sporting event, an athletic or recreative activity sponsored by defendants, or an athletic or a recreational pursuit that took place at a designated venue (*see Custodi*, 20 NY3d at 89). To the contrary, plaintiff was injured in the early morning hours while engaged in what reasonably could be characterized as "horseplay" during a party (*see Wolfe v North Merrick Union Free Sch. Dist.*, 122 AD3d 620, 621-622; *see generally Trupia*, 14 NY3d at 396). Consequently, Supreme Court properly denied the motion without regard to the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

265

CA 14-01716

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

GREGORY MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WEBB OF BUFFALO, LLC,
DEFENDANT-RESPONDENT-APPELLANT,
BURKE HOMES, LLC, AND TIME WARNER CABLE, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (ASHLYN N. MAUSOLF OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT BURKE HOMES, LLC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT TIME WARNER CABLE, INC.

COHEN & LOMBARDO, P.C., BUFFALO (ERIN E. COLE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 3, 2013. The order denied the motion and cross motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a first floor windowsill of a building undergoing renovation and conversion into commercial and residential space. At the time of the accident, plaintiff was employed by a subcontractor that was hired by defendant Time Warner Cable, Inc. (Time Warner), to perform cable installation work at the building. As part of that work, plaintiff was instructed to run a ground wire from a room on the first floor to a lockbox on the exterior of the building. He was unable to locate anyone with a key to the building and therefore used a ladder to enter the room through a window. While plaintiff was completing his task inside the room, his coworkers removed the ladder. According to plaintiff, he was told that the ladder would be returned in a couple of minutes, and he decided to straddle the windowsill while he waited

for the ladder. As he sat on the windowsill, plaintiff leaned out to say something to his coworkers, lost his balance, and fell to the ground below.

Supreme Court erred in denying the motion of defendant Burke Homes, LLC, and the cross motions of defendants Webb of Buffalo, LLC, and Time Warner seeking summary judgment dismissing the complaint and cross claims against them. Defendants met their burden of establishing as a matter of law that plaintiff's conduct was the sole proximate cause of the accident, and plaintiff failed to raise a triable issue of fact (*see Nalepa v South Hill Bus. Campus, LLC*, 123 AD3d 1190, 1193; *Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471, *lv denied* 22 NY3d 862; *Capellan v King Wire Co.*, 19 AD3d 530, 532). Defendants established that there was no causal relationship between any duties owed by them to plaintiff pursuant to the Labor Law or the common law and the injuries plaintiff sustained, and that they could not reasonably have foreseen that a person in plaintiff's circumstances would not wait for the ladder inside the building (*see Mack v Altmans Stage Light. Co.*, 98 AD2d 468, 472). Before he decided to straddle the windowsill, " '[p]laintiff was not in an emergent situation. He was in a position of absolute safety, although subject to inconvenience' " (*id.*, quoting *Guida v 154 W. 14th St. Co.*, 13 AD2d 695, 696, *affd* 11 NY2d 731). Plaintiff was aware that the ladder would be returned "when he decided to put his safety at risk" by straddling the windowsill, and plaintiff's conduct thus superseded any alleged breach of duty by defendants "and terminated defendants' liability for his injuries" (*Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841; *see Misirlakis v East-Coast Entertainment Props.*, 297 AD2d 312, 312, *lv denied* 100 NY2d 637; *Mack*, 98 AD2d at 472-473).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

271

KA 11-01844

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL D. LITTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a sentence of the Monroe County Court (James J. Piampiano, J.), rendered June 23, 2011. Defendant was sentenced upon his conviction of manslaughter in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]), criminal possession of a weapon in the second degree (§ 265.03 [former 1]), and criminal possession of a weapon in the third degree (§ 265.02 [former 4]). County Court sentenced defendant to an indeterminate term of imprisonment of 20 years to life for the murder conviction, and to determinate terms of imprisonment for the weapons offenses. On a prior appeal, we modified the judgment by reducing the murder conviction to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on that count of the indictment, and we remitted the matter to County Court for sentencing on the reduced count (*People v Little*, 83 AD3d 1389). Upon remittal, the court sentenced defendant to an indeterminate term of imprisonment of 5 to 15 years for manslaughter in the second degree.

Defendant now contends that the court erred in failing to determine whether he should be adjudicated a youthful offender. We agree (*see People v Rudolph*, 21 NY3d 497, 501). It is true, as the People note, that the weapons offenses of which defendant was convicted are "armed" felonies for purposes of the youthful offender statute (CPL 720.10 [2] [a]; *see* CPL 1.20 [41]), and that defendant, who was the sole participant in the crimes, is thus "eligible to be adjudicated a youthful offender only if the court determined that there were 'mitigating circumstances that bear directly upon the manner in which the crime[s were] committed' " (*People v Lugo*, 87 AD3d

1403, 1405, *lv denied* 18 NY3d 860, quoting CPL 720.10 [3]). When defendant was initially sentenced on the weapons offenses, however, he also stood convicted of murder in the second degree, a class A-I felony, which rendered him ineligible for youthful offender status. He therefore had no reason to request youthful offender status at that time. Once the murder conviction was vacated and the matter was remitted for sentencing on the reduced count, defendant requested youthful offender treatment and the court, in sentencing him as an adult on the manslaughter conviction, failed to rule on his request. We therefore hold the case, reserve decision and remit the matter to County Court to determine whether defendant is "eligible" for youthful offender treatment despite his conviction of the armed felony offenses and, if so, whether he should be afforded such treatment.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

276

KA 13-01755

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH TARTAGLIA, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.) rendered September 19, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed on his conviction of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]), and resentencing him to a determinate term of imprisonment of three years plus seven years of postrelease supervision. We reject defendant's contention that County Court erred in revoking his probation. One of the conditions of probation required defendant to "participate in a specialized treatment program for sex offenders as directed by the probation officer until satisfactorily terminated from said program. Satisfactory participation includes . . . progress toward regular treatment goals." Defendant was referred by his probation officer to North Coast Counseling for sex offender treatment, but he was discharged from that program because he did not make "reasonable progress" in treatment based on his repeated failure to accept responsibility for his sexual offense. The discharge summary states that defendant admitted at times that he abused the victim, while at other times he minimized or denied such conduct.

Although defendant concedes that he was discharged from treatment, he contends that, because he entered an *Alford* plea to the sex offense, he should not be punished for failing to admit his guilt of the underlying offense. We note as a preliminary matter that the record does not establish that defendant entered an *Alford* plea. Indeed, there is no mention of an *Alford* plea in the record, which

includes the transcript of the plea proceeding, and defendant did not deny culpability or assert his innocence during the proceeding. Even assuming, arguendo, that defendant entered an *Alford* plea, we would reject his contention. In *Matter of Silmon v Travis* (95 NY2d 470, 472-473), a parolee who entered an *Alford* plea contended that the parole board could not use his refusal to accept responsibility for his actions as a reason to deny him release to parole. The Court of Appeals rejected that contention, stating that "[t]he court's acceptance of his plea without an admission of culpability was not an indication that the State viewed him as innocent" (*id.* at 475-476). In a footnote, the Court cited with approval an out-of-state case in which a court found that a probation revocation based on failure to admit guilt was proper even though defendant entered an *Alford* plea (*see id.* at 478 n 3).

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

277

KA 13-01947

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID W. ROBERTS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered March 18, 2013. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). We reject defendant's contention that County Court abused its discretion in denying his motion to withdraw the guilty plea (*see People v Said*, 105 AD3d 1392, 1393, *lv denied* 21 NY3d 1019). "[D]efendant's conclusory and unsubstantiated claim of innocence is belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955). Contrary to defendant's further contentions, his fear of an unfair trial or the imposition of a longer sentence after trial do not constitute coercion (*see generally People v Jackson*, 90 AD3d 1692, 1693, *lv denied* 18 NY3d 958; *People v Dumpson*, 238 AD2d 802, 803, *lv denied* 90 NY2d 892; *People v Patrick*, 163 AD2d 84, 84, *lv denied* 76 NY2d 895).

Defendant's contention that the court's redaction of the presentence report (PSI) was inadequate is unpreserved for our review inasmuch as he did not raise the issue before the sentencing court (*see generally People v Gibbons*, 101 AD3d 1615, 1616). In any event, although the words in the paragraph that the court redacted remain visible, it is evident from the court's notation thereon that the paragraph was redacted and that the material is not available for use

against defendant (*cf*. *People v Howard*, 124 AD3d 1350, 1351).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

284

CA 14-01684

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

ADAM WEIERHEISER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCCANN'S INC., DOING BUSINESS AS MOONEY'S SPORTS BAR & GRILL, AND DARRT AMUSEMENT, INC., DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT MCCANN'S INC., DOING BUSINESS AS MOONEY'S SPORTS BAR & GRILL.

SHANE & REISNER, LLP, OLEAN (JOHN M. COYLE OF COUNSEL), FOR DEFENDANT-APPELLANT DARRT AMUSEMENT, INC.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 15, 2014. The order denied the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while using an entertainment device owned by defendant Darrt Amusement, Inc. (Darrt) and installed at premises owned by defendant McCann's Inc., doing business as Mooney's Sports Bar & Grill (McCann's). Defendants each moved for summary judgment dismissing the amended complaint against them, and Supreme Court denied the motions. We affirm.

In support of its motion, McCann's contended that the action against it is barred by the doctrine of assumption of the risk. The court properly rejected that contention. This is not a situation in which McCann's, "solely by reason of having sponsored or otherwise supported some risk-laden but socially valuable voluntary activity[,] has been called to account in damages," and thus the doctrine of assumption of the risk does not apply (*Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 396; *see Custodi v Town of Amherst*, 20 NY3d 83, 88; *see generally Wolfe v North Merrick Union Free Sch. Dist.*, 122 AD3d 620, 621). Although McCann's amended notice of motion referenced the further contention that plaintiff's conduct was the sole proximate

cause of his injuries, that contention was not addressed in a supporting affidavit or affirmation and thus it is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD3d 984, 985). In light of our decision, we do not address McCann's remaining contention.

We likewise conclude that the court properly rejected Darrt's contention in support of its motion that it owed no duty of care to plaintiff. "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . The existence of one or more of these elements is sufficient to give rise to a duty of care" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296, *lv dismissed in part and denied in part* 73 NY2d 783). Here, Darrt failed to establish that none of those elements was present (*cf. Riddell v Brown* [appeal No. 5], 32 AD3d 1212, 1213, *lv denied* 8 NY3d 802; *see generally Parslow v Leake*, 117 AD3d 55, 61-62). We likewise reject Darrt's alternative contention in support of its motion, i.e., that even if it had a duty to plaintiff, it established that it did not breach that duty. In support of its motion, Darrt submitted evidence that Darrt's employees initially placed the device on the premises, but the employee who placed the device did not recall whether the location was in a corner. Darrt also submitted the deposition testimony of its vice president, who testified that the device should be placed in an area that had sufficient side clearance because of the follow through inherent in every punch to the device, and that placing the device in a corner could lead to a player hitting the wall. We thus conclude that, by its own submissions, Darrt failed to meet its initial burden of establishing its entitlement to summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

288

CA 14-00939

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

SCHWERZMANN & WISE, P.C., PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF HOUNSFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PAUL F. SHANAHAN, PITTSFORD, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 7, 2014. The order, among other things, granted plaintiff's motion for summary judgment on its account stated cause of action.

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: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

289

CA 14-00940

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

SCHWERZMANN & WISE, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF HOUNSFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PAUL F. SHANAHAN, PITTSFORD, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 30, 2014. The judgment, among other things, awarded plaintiff the sum of $182,137.89 as against defendant.

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

Memorandum: Plaintiff law firm commenced this action seeking to collect unpaid legal fees allegedly owed by defendant for services rendered between December 2009 and July 2012, asserting causes of action for breach of contract, an account stated, unjust enrichment, and quantum meruit. Plaintiff later moved for summary judgment on its account stated cause of action, and Supreme Court granted the motion. We now reverse.

" 'An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due' " (*Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981, 981; *see Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282). "An essential element of an account stated is an agreement with respect to the amount of the balance due" (*Erdman Anthony & Assoc.*, 298 AD2d at 981; *see Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 153-154). Such an agreement may be implied "if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the account is bound to examine the statement and object to it, if objection there be" (*Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431; *see Interman Indus. Prods.*, 37 NY2d at 153-154).

"Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Legum v Ruthen*, 211 AD2d 701, 703). While the failure to object to a bill may demonstrate an implicit agreement to the amount, there are also instances in which "accounts may be rendered without reasonable expectation that they will be scrutinized before they are accepted. Then mere silence and failure to object cannot be construed as an agreement upon the correctness of the accounts" (*Corr v Hoffman*, 256 NY 254, 266).

Here, plaintiff failed to establish in support of its motion that the only rational inference to be drawn from defendant's retention of the bills was its agreement to pay them. Although plaintiff was providing legal services on behalf of defendant, a third party, Upstate Power Corporation (Upstate), had agreed in 2008 to reimburse defendant for legal costs associated with a proposed wind farm. In support of its motion, plaintiff submitted monthly unpaid bills it sent to defendant between January 2010 through August 2012 to which defendant did not object. A number of the bills, however, were sent directly to Upstate for payment, with a "copy" having been sent to defendant. Notably, none of the bills has a running total; rather, the "balance due" on each bill was the fee allegedly owed for that particular month. Defendant could thus reasonably have concluded that Upstate was paying the bills all along. Indeed, Upstate had previously paid plaintiff $76,231.27 for its legal fees, and there is no indication in the record that plaintiff informed defendant that its subsequent bills were not being paid. It was not until October 5, 2012, after defendant terminated plaintiff's services, that plaintiff notified defendant of the accumulated total of unpaid fees. Under the circumstances, we conclude that there is an issue of fact whether defendant's silence upon receiving the bills may be construed as acceptance of the amount due (*see Legum*, 211 AD2d at 703-704).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

290

CA 14-00757

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

MARK JANCZYLIK, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 114527.)

GERARD A. STRAUSS, NORTH COLLINS, FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Glen T. Bruening, J.), entered July 24, 2013. The judgment dismissed the claim after a trial on liability.

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

Memorandum: Claimant, an inmate at a correctional facility, commenced this action seeking damages for injuries he sustained when he slipped and fell while working in the mess hall. We reject claimant's contention that the determination of the Court of Claims dismissing the claim following a bifurcated trial on liability is against the weight of the evidence (*see generally Farace v State of New York*, 266 AD2d 870, 870). "While it is well settled that this Court has the authority to independently consider the weight of the evidence on an appeal in a nonjury case, deference is still afforded to the findings of the Court of Claims where, as here, they are based largely on credibility determinations" (*Ring v State of New York*, 8 AD3d 1057, 1057, *lv denied* 3 NY3d 608 [internal quotation marks omitted]). Claimant's testimony concerning the condition of the floor in the dishwashing area of the mess hall where he fell varied from "getting a little wet," "just wet" and "getting wet substantially for that early in the shift" upon his initial trip into that area. He also denied that water had accumulated on the floor at that point. Given that inconsistent testimony, and claimant's further testimony that he told a specific correction officer of the "very, very wet" condition of the floor after his first trip and prior to his second trip into the "slop sink room" approximately 15 minutes later, when he fell in an accumulation of water one-eighth to one-quarter of an inch deep, we conclude that claimant failed to meet his burden of establishing the existence of a hazardous condition inasmuch as " '[t]he presence of a normal amount of water would not establish a

want of reasonable care' " (*Seaman v State of New York*, 45 AD3d 1126, 1127).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

298

KA 14-00197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME THOMPSON, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered December 16, 2013. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to the contention of defendant, we conclude that there was a reasonable basis articulated on the record to justify the determination to have him handcuffed when he testified before the grand jury (*see People v Rouse*, 79 NY2d 934, 935; *People v Jacobs*, 298 AD2d 954, 955, *lv denied* 99 NY2d 559). Defendant's contention that he was denied a fair trial based upon prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]; *People v Ross*, 118 AD3d 1413, 1416-1417, *lv denied* 24 NY3d 964) and, in any event, is without merit. We agree with defendant that the prosecutor acted improperly by eliciting testimony from defendant on cross-examination that several of the People's witnesses were mistaken (*see People v Railey*, 214 AD2d 455, 455, *lv denied* 86 NY2d 800; *People v Roundtree*, 190 AD2d 879, 880), calling a rebuttal witness to impeach defendant's credibility with respect to a collateral matter (*see People v Pavao*, 59 NY2d 282, 288-289; *People v Burns*, 122 AD3d 1435, 1436), and injecting his own credibility into the trial (*see People v Paperno*, 54 NY2d 294, 300). We conclude, however, that those improprieties were "not so egregious as to deprive defendant of his right to a fair trial, when viewed in the totality of the circumstances of this case" (*People v Martina*, 48 AD3d 1271, 1273, *lv denied* 10 NY3d 961 [internal quotation marks omitted]; *see People v Gonzalez*, 206 AD2d 946, 947, *lv denied* 84 NY2d 867). Indeed, the

improper conduct merely highlighted defendant's claim that the incident never occurred and that the entire case against him was fabricated.

Finally, the sentence, although the statutory maximum, is not unduly harsh or severe, particularly in view of defendant's lengthy criminal history and disciplinary record while incarcerated.

Frances E. Cafarell

Entered: March 27, 2015

Clerk of the Court

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

302

CAF 13-02018

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH ADDISON GELLING, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY COLLEEN MCNABB, RESPONDENT-RESPONDENT.

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

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-RESPONDENT.

ROSEMARIE RICHARDS, ATTORNEY FOR THE CHILD, GILBERTSVILLE.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered October 31, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended petition.

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 Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner father appeals from an order granting the motion by the Attorney for the Child to dismiss the father's amended petition seeking to modify an existing custody and visitation order. We agree with the father that Family Court erred in dismissing the amended petition. "To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Dobrouch v Reed*, 61 AD3d 1288, 1289; *see Matter of Wurmlinger v Freer*, 256 AD2d 1069, 1069). Here, the amended petition alleged that there had been a change in circumstances inasmuch as the prior order provided that there would be "such and further visitation with the subject child as the parties may mutually agree," but the respondent mother refused the father all visitation with the child. In our view, the father " 'ma[d]e a sufficient evidentiary showing of a change in circumstances to require a hearing' " (*Matter of Warrior v Beatman*, 70 AD3d 1358, 1359, *lv denied* 14 NY3d 711; *see also Matter of Telfer v Pickard*, 100 AD3d 1050, 1051; *Matter of Ruple v Harkenreader*, 99 AD3d 1085, 1086). We therefore reverse the order, reinstate the amended

petition, and remit the matter to Family Court for a hearing thereon.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

304

CAF 14-00642

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

IN THE MATTER OF MATT J.F., SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BILLIE L.F., RESPONDENT-RESPONDENT.

FERN S. ADELSTEIN, OLEAN, FOR PETITIONER-APPELLANT.

DARRYL R. BLOOM, OLEAN, FOR RESPONDENT-RESPONDENT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 18, 2014 in a proceeding pursuant to Family Court Act article 5. The order directed the parties and their marital child to submit to a genetic marker test.

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

Memorandum: In this proceeding pursuant to Family Court Act article 5, petitioner father appeals from an order directing the parties and their marital child to submit to a genetic marker test. While this appeal was pending, respondent mother commenced her own paternity proceeding. Family Court ordered a genetic marker test, to which the father did not object, it was determined that the father is the biological father of the subject child, and an order of filiation was entered. We therefore conclude that this appeal has been rendered moot and that, contrary to the contention of the father, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

317

KA 14-00973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. GREENFIELD, DEFENDANT-APPELLANT.

PATRICK T. CHAMBERLAIN, PENN YAN, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), dated May 5, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court's determination that defendant is a level two risk is based upon clear and convincing evidence (*see generally* § 168-n [3]), including "reliable hearsay contained in the case summary and the presentence report" (*People v Thompson*, 66 AD3d 1455, 1456, *lv denied* 13 NY3d 714; *see People v Young*, 108 AD3d 1232, 1232, *lv denied* 22 NY3d 853, *rearg denied* 22 NY3d 1036; *People v Lewis*, 45 AD3d 1381, 1381, *lv denied* 10 NY3d 703). Defendant failed to preserve for our review his challenge to the manner in which the hearing was conducted (*see People v Tubbs*, 124 AD3d 1094, 1095; *People v Williamson*, 73 AD3d 1398, 1398-1399) and, in any event, we conclude that the requisite standards were met (*see generally* § 168-n [3]).

We reject defendant's further contention that he was denied effective assistance of counsel because his attorney failed to request a downward departure from the presumptive risk level (*see People v Goldbeck*, 104 AD3d 567, 567-568, *lv denied* 21 NY3d 860; *People v Reid*, 59 AD3d 158, 159, *lv denied* 12 NY3d 708). It is well established that "[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702) and, here, we conclude that there are no "mitigating factors warranting a downward departure from his risk level" (*People v Merkley*, 125 AD3d 1479, ___; *see People v Sells*, 115

AD3d 1345, 1346, *lv denied* 23 NY3d 905; *People v Hays*, 99 AD3d 1212, 1212-1213, *lv denied* 20 NY3d 854).

Finally, we conclude that, contrary to defendant's contention, the court complied with the statutory mandate that the court set forth in the order "the findings of fact and conclusions of law" on which the determination is based (Correction Law § 168-n [3]; *see People v Carter*, 35 AD3d 1023, 1023-1024, *lv denied* 8 NY3d 810).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

318

KA 12-00720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE MCMILLAN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 4, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, criminal possession of a weapon in the second degree and menacing in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [4]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and menacing in the second degree (§ 120.14 [1]), defendant contends that his waiver of the right to appeal is unenforceable, and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant did not voluntarily waive his right to appeal, as defendant contends, and that his challenge to the severity of the sentence is therefore properly before us (*cf. People v Figueroa*, 17 AD3d 1130, 1130, *lv denied* 5 NY3d 788), we perceive no basis to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that, during his commission of the burglary, defendant pointed a loaded handgun at an infant and fired the weapon several times at another person. One of the bullets grazed that person's scalp. We also note that defendant, who was 20 years old when he committed the crimes, has a prior felony conviction and has violated two terms of probation. Consistent with its sentence promise, County Court sentenced defendant on the felony counts to an aggregate determinate term of imprisonment of 13 years, which is far less than the maximum of 25 years, and less than the 17 years requested by the People. Under the circumstances, it cannot be

said that the sentence is unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

320

KA 13-01459

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK R. RODDY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 30, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "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 Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

322

KA 13-01489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. BURNETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 23, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to suppress physical evidence, i.e., a handgun, and his subsequent oral statements to the police because the police lacked reasonable suspicion to justify the search of his person. We agree.

According to the evidence presented at the suppression hearing, two police officers on routine patrol in the City of Buffalo received a 911 dispatch at approximately 5:45 p.m. that an unidentified caller reported that a man wearing blue jeans and a blue hoodie had displayed a gun to a woman on Brinkman Street. About 10 minutes later, the officers observed a man dressed in blue jeans and a blue hoodie walking down a street that is a little over a mile away from the Brinkman Street address. According to one of the officers, the man, later identified as defendant, was “staring” at their marked police vehicle. The officers drove up next to defendant and requested identification. Defendant retrieved his identification from the pocket of his jeans and handed it to the officers. The officers

returned defendant's identification, and he began to walk away. The police followed defendant in the patrol vehicle and again pulled up next to him. Defendant's left hand was in the left pocket of his pants. One of the officers exited the patrol car, grabbed defendant's left hand inside of his jeans pocket, and felt what he believed to be a handgun. After several unsuccessful attempts to retrieve the object from defendant's pocket, defendant yelled "the gun's in my pajama pants." Defendant was wearing pajama pants underneath his jeans. The officer removed the gun from the pocket of defendant's pajama pants and placed him under arrest.

It is well established that, in evaluating the legality of police conduct, we "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858, citing *People v De Bour*, 40 NY2d 210, 215). In *De Bour*, the Court of Appeals "set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; 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; [and] level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime" (*People v Moore*, 6 NY3d 496, 498-499).

Here, contrary to defendant's contention, we conclude that the information provided in the 911 dispatch coupled with the officers' observations provided the police with "an objective, credible reason for initially approaching defendant and requesting information from him" (*People v Hill*, 302 AD2d 958, 959, *lv denied* 100 NY2d 539; *see People v Crisler*, 81 AD3d 1308, 1309, *lv denied* 17 NY3d 793). The officers pulled up next to defendant and, without exiting the vehicle, asked to see defendant's identification and asked defendant where he was going and where he was coming from, which was a permissible level one intrusion (*see People v McIntosh*, 96 NY2d 521, 525; *People v Hollman*, 79 NY2d 181, 185; *People v Rodriguez*, 82 AD3d 1614, 1615, *lv denied* 17 NY3d 800).

Contrary to the further contention of defendant, we conclude that his failure to answer the officers' questions about where he was going and where he was coming from, when added to the information acquired from the police dispatch and defendant's heightened interest in the patrol car, created a "founded suspicion that criminality [was] afoot," justifying a level two intrusion (*Hollman*, 79 NY2d at 185; *see Moore*, 6 NY3d at 500; *People v Glover*, 87 AD3d 1384, 1384, *lv denied* 19 NY3d 960; *People v Robinson*, 278 AD2d 808, 808-809, *lv denied* 96 NY2d 787). The common-law right of inquiry "authorized the police to ask questions of defendant—*and to follow defendant while attempting to engage him*—but not to seize him in order to do so" (*Moore*, 6 NY3d at 500 [emphasis added]). The police therefore acted lawfully in

following defendant for the purpose of obtaining an answer to their valid questions about his whereabouts. The encounter, however, quickly escalated to a level three intrusion when one of the officers grabbed defendant's hand and patted the outside of his pants pocket. "[A] stop and frisk is a more obtrusive procedure than a mere request for information or a stop invoking the common-law right of inquiry, and as such normally must be founded on a reasonable suspicion that the particular person has committed or is about to commit a crime" (*People v Benjamin*, 51 NY2d 267, 270). " '[W]here no more than a common-law right to inquire exists, a frisk must be based upon a reasonable suspicion that the officers are in physical danger and that defendant poses a threat to their safety' " (*People v Stevenson*, 273 AD2d 826, 827; *see Robinson*, 278 AD2d at 808; *see generally People v Lopez*, 71 AD3d 1518, 1519, *lv denied* 15 NY3d 753). Here, the People do not contend that the police had reasonable suspicion that defendant had committed or was about to commit a crime at the time of the frisk, and we agree with defendant that reasonable suspicion did not exist (*see People v Holmes*, 81 NY2d 1056, 1057-1058). Rather, the sole justification proffered for the officer's conduct was that he feared for his safety (*see People v Salaman*, 71 NY2d 869, 870). We thus must determine "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger" (*Terry v Ohio*, 392 US 1, 27). In making that determination, we must give "due weight . . . , not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience" (*id.*; *see People v Batista*, 88 NY2d 650, 653-654; *People v Russ*, 61 NY2d 693, 695). The fact that defendant's hand was in his pocket does not, standing alone, "provid[e] a reasonable basis for suspecting that [defendant] [was] armed and may [have been] dangerous" (*Russ*, 61 NY2d at 695; *see People v Santiago*, 64 AD2d 355, 361; *see also People v Gray*, 154 AD2d 301, 303). A jeans pocket, unlike a waistband or even a jacket pocket, is not "a common sanctuary for weapons" (*People v Canady*, 261 AD2d 631, 632, *lv dismissed* 93 NY2d 967, *reconsideration denied* 93 NY2d 1015; *see Holmes*, 81 NY2d at 1058; *De Bour*, 40 NY2d at 221). Moreover, unlike in other cases where we have sanctioned a frisk for weapons, there was no evidence in this case that defendant refused to comply with the officers' directives or that he made any furtive, suspicious, or threatening movements (*see e.g. People v Carter*, 109 AD3d 1188, 1189, *lv denied* 22 NY3d 1087; *People v Fagan*, 98 AD3d 1270, 1271, *lv denied* 20 NY3d 1061, *cert denied* ___ US ___, 134 S Ct 262; *Glover*, 87 AD3d at 1384-1385; *cf. People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992). Indeed, under the circumstances of this case, the presence of defendant's hand in his left pants pocket was particularly innocuous and " 'readily susceptible of an innocent interpretation' " (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844; *see People v Brannon*, 16 NY3d 596, 602). Defendant retrieved his identification from his left pants pocket and returned it to that pocket after complying with the officers' request to produce identification (*cf. Sims*, 106 AD3d at 1473-1474).

We therefore conclude that, "[b]ecause the officer lacked

reasonable suspicion that defendant was committing a crime and had no reasonable basis to suspect that he was in danger of physical injury, . . . the ensuing pat frisk of defendant was unlawful" (*People v Mobley*, 120 AD3d 916, 918; *see Stevenson*, 273 AD2d at 827; *Canady*, 261 AD2d at 632). We therefore reverse the judgment, vacate the plea, grant those parts of defendant's omnibus motion seeking to suppress the handgun seized from his person and his subsequent oral statements to the police, dismiss the indictment, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

323

KA 13-01948

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. CHRISLEY, DEFENDANT-APPELLANT.

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

JOHN R. CHRISLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 3, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends in his main brief that County Court abused its discretion in allowing the People to present evidence that, on a date prior to the incidents charged in the indictment, he had a wet spot on the crotch area of his pants after the then four-year-old victim had been sitting on his lap. We reject that contention. "Evidence of uncharged crimes may be admissible if it is relevant to establish some element of the crime under consideration or if it falls within one of the recognized exceptions to the general rule precluding such evidence, i.e., it is relevant to demonstrate motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of defendant" (*People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838; *see People v Ventimiglia*, 52 NY2d 350, 359; *People v Molineux*, 168 NY 264, 293-294), provided that "its probative value exceeds the potential for prejudice resulting to the defendant" (*People v Alvino*, 71 NY2d 233, 242). Here, the *Molineux* evidence admitted by the court was relevant to the issue of intent, i.e., whether defendant's subsequent touching of the victim's intimate parts was for the purpose of gratifying his sexual desire. Moreover, given that defendant suggested to the police that his touching of the victim was inadvertent, the evidence was relevant to establish the

absence of mistake. We further conclude that "the probative value of the evidence was not outweighed by its prejudicial effect, and the court's limiting instruction minimized any prejudice to defendant" (*People v Washington*, 122 AD3d 1406, 1408).

Defendant failed to preserve for our review his further contention in his main and pro se supplemental briefs that he was deprived of a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911, 912). In any event, most of the comments complained of by defendant were proper, and any improper comments were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Heck*, 103 AD3d 1140, 1143, *lv denied* 21 NY3d 1074).

Defendant failed to preserve for our review his further contention in his main brief that the evidence is legally insufficient to support the sexual abuse charges because the People failed to establish that he acted for the purpose of gratifying his sexual desires (*see People v Gray*, 86 NY2d 10, 19; *People v Washington*, 89 AD3d 1516, 1517, *lv denied* 18 NY3d 963). In any event, defendant's contention lacks merit inasmuch as the element of sexual gratification may be inferred from defendant's conduct (*see People v Willis*, 79 AD3d 1739, 1740, *lv denied* 16 NY3d 864; *People v Graves*, 8 AD3d 1045, 1045, *lv denied* 3 NY3d 674). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People's case rested largely on the credibility of the victim and, notwithstanding minor inconsistencies in the victim's testimony, there is no basis in the record for us to disturb the jury's determination to credit the victim's testimony (*see generally People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913). "Sitting as the thirteenth juror . . . [and] weigh[ing] the evidence in light of the elements of the crime[s] as charged to the other jurors" (*Danielson*, 9 NY3d at 349), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Kalen*, 68 AD3d 1666, 1666-1667, *lv denied* 14 NY3d 842).

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

327

CAF 13-01091

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

IN THE MATTER OF MARTHA S. AND MARY S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LINDA M.S., RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

PAULA A. CAMPBELL, BATAVIA, FOR PETITIONER-RESPONDENT.

PAUL B. WATKINS, ATTORNEY FOR THE CHILDREN, FAIRPORT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 20, 2013 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had neglected the subject children and placed the children in the custody of petitioner.

It is hereby ORDERED that the appeal insofar as it concerns the finding of neglect is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, found that the mother had neglected the subject children and placed the children in the custody of petitioner. The mother's challenge to the underlying neglect finding "is not reviewable on appeal because it was premised on [the mother's] admission of neglect and thereby made in an order entered on consent of the parties" (*Matter of Carmella J.*, 254 AD2d 70, 70; *see Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499; *Matter of June MM.*, 62 AD3d 1216, 1217, *lv denied* 13 NY3d 704). Because the mother never moved to vacate the neglect finding or to withdraw her consent to the order, her contention that her consent was not knowing, voluntary and intelligent is also not properly before us (*see* Family Ct Act § 1051 [f]; *Violette K.*, 96 AD3d at 1499; *June MM.*, 62 AD3d at 1217; *cf. Matter of Gabriella R.*, 68 AD3d 1487, 1487). The mother's challenge to Family Court's removal of the children from her home pending a final order of disposition "has been rendered moot by the court's subsequent . . . dispositional order" (*Matter of Joseph E.K. [Lithia K.]*, 118 AD3d 1324, 1324; *see Matter of Anthony C. [Juan C.]*, 99 AD3d 798, 799; *Matter of Mary YY. [Albert YY.]*, 98 AD3d 1198, 1198).

To the extent that the mother challenges the dispositional order, it is well established that "[t]he fashioning of an appropriate dispositional order is ordinarily a matter of discretion for . . . Family Court and such an order will be reversed [only] where it lacks [a] 'sound and substantial basis in the [record]' " (*Matter of Kevin C.*, 288 AD2d 311, 312; *see Matter of Stefani C.*, 61 AD3d 681, 681). Here, we conclude that " '[t]he dispositional order . . . reflect[s] a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and [is] supported by a sound and substantial basis in the record' " (*Matter of Elijah Q.*, 36 AD3d 974, 976, *lv denied* 8 NY3d 809; *see Matter of Gloria DD. [Brenda DD.]*, 99 AD3d 1044, 1045-1046; *Matter of Alexis AA. [John AA.]*, 97 AD3d 927, 929-930).

Frances E. Cafarell

Entered: March 27, 2015

Clerk of the Court

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

329

CA 14-01464

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

ELEANOR HEISLER, PLAINTIFF-RESPONDENT,

V ORDER

SAMARITAN KEEP HOME, INC., DEFENDANT-APPELLANT,
AND STEPHEN GRYBOWSKI, M.D., DEFENDANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered January 13, 2014. The order denied the motion of defendant Samaritan Keep Home, Inc. for summary judgment dismissing the complaint.

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

336

CA 13-02231

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

RALPH GUERRUCCI, ON BEHALF OF HIMSELF AND ALL
OTHER PERSONS SIMILARLY SITUATED,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCHOOL DISTRICT OF CITY OF NIAGARA FALLS,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JAMES C. ROSCETTI, NIAGARA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 24, 2013. The judgment denied the motion of plaintiffs for partial summary judgment on liability and granted the cross motion of defendant for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the amended complaint is reinstated, judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that the individual plaintiffs are entitled to the health insurance coverage provided in the collective bargaining agreement in effect at the time each individual plaintiff retired, and
>
> It is further ADJUDGED and DECLARED that those individual plaintiffs eligible for conversion of health insurance coverage "supplemental to Medicare" are entitled to such coverage that, when combined with Medicare, equals the health insurance benefits prior to such conversion,

and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: In appeal No. 1, plaintiffs, 31 retired administrators who were employed by defendant and their retiree association, commenced this breach of contract/declaratory judgment action seeking, inter alia, a declaration that the individual plaintiffs are entitled to the health insurance benefits provided in the collective bargaining agreement (CBA) in effect at the time each individual plaintiff retired.

Supreme Court denied plaintiffs' motion for partial summary judgment on liability and granted defendant's cross motion for summary judgment dismissing the amended complaint, and plaintiffs appeal. In appeal No. 2, plaintiffs appeal from an order that denied their motion seeking relief from the judgment in appeal No. 1 pursuant to CPLR 5015 (a).

In appeal No. 1, the parties do not dispute that the language at issue in the various CBAs is unambiguous and, at oral argument, defendant conceded that this case is controlled by *Kolbe v Tibbetts* (22 NY3d 344). The 1984-1987 and 1987-1990 CBAs provided that "[a]ny administrator who retires . . . shall continue to receive the Blue Cross/Blue Shield coverage in effect at the time of his or her retirement, excluding dental coverage and major medical insurance, until the administrator becomes eligible for Medicare, at which time the Board [of Education] shall no longer provide such coverage." Similarly, the 1990-1994 CBA provided that "[a]ny administrator who retires . . . shall continue to receive the Blue Shield coverage in effect at the time of his or her retirement, excluding dental, vision and major medical coverage, until the administrator becomes eligible for Medicare, at which time the Board [of Education] shall no longer provide such coverage," except for those retirees entitled to conversion of that coverage to coverage that is "supplemental to Medicare." Finally, the 1994-1997 and later CBAs provide that "[a]ny administrator who retires . . . shall continue to receive medical coverage in effect at the time of his or her retirement, excluding dental, vision and major medical coverage, until the administrator becomes eligible for Medicare, at which time the Board [of Education] shall no longer provide such coverage," except for those entitled to conversion of that coverage to coverage that is "supplemental to Medicare."

In appeal No.1, we agree with plaintiffs that the plain meaning of the provisions at issue in the CBAs is that, upon retirement, a retiree will receive the health insurance coverage that the retiree was receiving prior to retirement, until the retiree becomes eligible for Medicare (*see id.* at 353; *Della Rocco v City of Schenectady*, 252 AD2d 82, 84, *lv dismissed* 93 NY2d 1000).

Also with respect to appeal No. 1, we note that the CBAs provided that, when certain retirees "reache[d] his or her sixty-fifth (65th) birthday and qualifie[d] for medical insurance under Social Security, the coverage shall be changed to that which is supplemental to Medicare." We agree with plaintiffs that the supplemental coverage provided for in the CBAs required that defendant provide health insurance coverage that, when combined with Medicare, equaled the health insurance benefits that the retirees enjoyed prior to qualifying for Medicare. In interpreting a CBA, "it is logical to assume that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations by using language in each and every contract which fixed their rights to coverage as of the time they retired" (*Della Rocco*, 252 AD2d at 84). Additionally, this interpretation of the CBAs "give[s] fair meaning to all of the language employed by the parties to reach a practical

interpretation of the expressions of the parties so that their reasonable expectations will be realized . . . [and does] not . . . leave one of its provisions substantially without force or effect" (*Petracca v Petracca*, 302 AD2d 576, 577). In view of our determination that the CBAs prevented defendant from reducing the retirees' health insurance benefits during retirement and that the intent of the CBAs was to "fix[the retirees'] rights to coverage as of the time they retired" (*Della Rocco*, 252 AD2d at 84), we conclude that the provision for "coverage . . . which is supplemental to Medicare" means coverage that when combined with Medicare is equivalent to the health insurance coverage that the retirees enjoyed prior to becoming eligible for Medicare. Contrary to the court's determination, an interpretation of that provision to mean any coverage that defendant chooses to provide would defeat the reasonable expectations of the parties and render the "provision[] substantially without force or effect" (*Petracca*, 302 AD2d at 577). Plaintiffs thus are entitled to declarations in their favor in accordance with our decision. In addition, we remit the matter to Supreme Court for further proceedings in accordance with the relief sought in the second cause of action.

In light of our determination in appeal No. 1, we dismiss as moot the appeal from the order in appeal No. 2.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

337

CA 14-00751

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

RALPH GUERRUCCI, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCHOOL DISTRICT OF CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JAMES C. ROSCETTI, NIAGARA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 25, 2014. The order denied the motion of plaintiffs seeking relief from a judgment (denominated order) entered October 24, 2013.

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

Same memorandum as in *Guerrucci v School Dist. of City of Niagara Falls* ([appeal No. 1] ___ AD3d ___ [Mar. 27, 2015]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

338

CA 14-01305

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

THOMAS J. TUDISCO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAWNMARIE MINCER, DEFENDANT-RESPONDENT.

BECKERMAN AND BECKERMAN, LLP, ROCHESTER (STEVEN M. BECKERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARRETT GREISBERGER, LLP, WEBSTER (MARK M. GREISBERGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 30, 2013. The order, insofar as appealed from, granted in part the motion of defendant for summary judgment dismissing the complaint and dismissed the third and fourth causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated in its entirety.

Memorandum: Plaintiff commenced this action seeking to enforce an alleged oral agreement concerning the purchase of residential property. Several months after defendant filed an answer, defendant moved for summary judgment dismissing the complaint pursuant to CPLR 3211 (a) (5) and CPLR 3212 on the ground that the alleged agreement was not enforceable because of the statute of frauds (*see* General Obligations Law § 5-703 [1]). Supreme Court granted defendant's motion in part and dismissed the third and fourth causes of action. Plaintiff contends that defendant's motion should have been treated as a CPLR 3212 motion for summary judgment. We agree with that contention. The parties' course of litigation shows that they were "deliberately charting a summary judgment course" and treated the motion as a CPLR 3212 motion for summary judgment (*Nowacki v Becker*, 71 AD3d 1496, 1497 [4th Dept 2010]).

We agree with plaintiff that the court erred in granting defendant's motion in part. "The failure of [defendant] to support [her] motion with a copy of the pleadings requires denial of the motion, regardless of the merits of the motion" (*D.J. Enters. of WNY v Benderson*, 294 AD2d 825, 825; *see* CPLR 3212 [b]; *Notaro v Bison Constr. Corp.*, 32 AD3d 1218, 1219). In light of our determination, we

do not address plaintiff's remaining contentions.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

344

KA 13-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL S. BARBUTO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered August 8, 2012. The judgment convicted defendant, after a nonjury trial, of attempted robbery in the first degree (two counts) and criminal possession of a weapon 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, following a nonjury trial, of two counts of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [1], [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends, inter alia, that the evidence is legally insufficient to support the conviction. To the extent that defendant has preserved that contention for our review, we conclude that it lacks merit.

Initially, defendant contends that the evidence of serious physical injury is legally insufficient to support the conviction of attempted robbery in the first degree under Penal Law § 160.15 (1). The People presented evidence that, during the course of the attempted robbery, defendant stabbed the victim in the back of the neck and the back of the chest. As a result, the victim suffered a "moderate size[d]" hemopneumothorax, which meant that both air and blood were trapped inside the victim's chest. The victim also had a collapsed lung, "[s]o he did not have sufficient oxygen." A chest tube was inserted "[t]o evacuate blood and air so the lung [could] expand." Over the course of the first few hours of medical treatment, 20 ounces of blood were drained from the victim's chest. The People's medical expert testified that, if left untreated, the natural progression of the victim's hemopneumothorax could have resulted in death either from

a tension pneumothorax, i.e., air trapped in the chest with a high tension, or from the hemothorax which, if not drained, would cause a significant amount of bleeding. Such evidence is legally sufficient to establish serious physical injury (*see People v Guillen*, 65 AD3d 977, 977, *lv denied* 13 NY3d 939; *People v Thompson*, 224 AD2d 646, 646-647, *lv denied* 88 NY2d 970; *see also Matter of Eleda*, 280 AD2d 405, 405; *People v Wright*, 105 AD2d 1088, 1088-1089, *following remittal* 124 AD2d 1015, *lv denied* 69 NY2d 751).

Even assuming, arguendo, that defendant preserved for our review his contentions that there is insufficient proof of his "intent to cause a serious physical injury" and "that the proof also failed to establish he had formed the specific intent to commit a robbery" (*see generally People v Gray*, 86 NY2d 10, 19), we conclude that those contentions lack merit. It is well established that "a robbery occurs when a person forcibly steals property by the use of, or the threatened use of, immediate physical force upon another person for the purpose of compelling that person to deliver up property or to prevent or overcome resistance to the taking" (*People v Miller*, 87 NY2d 211, 214). The "gradation of robbery offenses [is based on] the presence of one of the enumerated 'aggravating factors' " (*id.* at 215). The attempt to commit a robbery occurs when "[a] person . . . fails to perpetrate the object crime, despite committing some act in furtherance of that illegal end" (*id.*). The specific intent required is the "intent to commit a robbery" (*id.* at 216), i.e. "to steal" (*People v De Jesus*, 123 AD2d 563, 564, *lv denied* 69 NY2d 745), not the intent to commit one of the enumerated aggravating factors (*see Miller*, 87 NY2d at 216-217). Thus, the People were not required to establish that defendant had the specific intent to cause a serious physical injury.

With respect to the specific intent to commit a robbery, we conclude that the evidence of such intent may " 'be inferred from . . . defendant's conduct and the surrounding circumstances' " (*People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is legally sufficient evidence to establish defendant's specific intent to commit a robbery. Defendant and the codefendant approached the victim; defendant used a knife to stab the victim; and, immediately thereafter, the codefendant said to the victim "give us all your money."

The remainder of defendant's challenges to the sufficiency of the evidence are not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' " to those grounds now raised on appeal (*Gray*, 86 NY2d at 19). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was denied effective assistance of counsel based on numerous alleged shortcomings of defense counsel. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147). With respect to defendant's contention that defense counsel should have called a medical expert to testify for the defense, "[i]t is well established that, '[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to' call such a witness" (*People v Burgos*, 90 AD3d 1670, 1670, *lv denied* 19 NY3d 862, quoting *People v Rivera*, 71 NY2d 705, 709). Defendant failed to do so. In any event, to the extent that defendant's contention is "based upon defense counsel's alleged failure to consult experts or to conduct an investigation with respect to the medical . . . evidence presented . . . , it involves matters outside the record on appeal . . . [and] must be raised by way of a motion pursuant to CPL article 440" (*People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318). We further conclude that "it is apparent from [defense counsel's] thorough cross-examination of prosecution witnesses and [her] overall performance that [she] had adequately prepared for trial" (*People v Adair*, 84 AD3d 1752, 1754, *lv denied* 17 NY3d 812; *see People v Washington*, 122 AD3d 1406, 1406).

Defendant contends that defense counsel was ineffective in failing to move for severance in order to eliminate a *Bruton* issue (*see Bruton v United States*, 391 US 123). The record establishes that counsel was aware of the issue and, for strategic reasons, opted against the motion for severance. Defendant thus failed to establish " 'the absence of strategic or other legitimate explanations' for [defense] counsel's" failure to move for severance (*People v Benevento*, 91 NY2d 708, 712; *see People v Reid*, 71 AD3d 699, 700, *lv denied* 15 NY3d 756; *People v Shell*, 152 AD2d 609, 610, *lv denied* 74 NY2d 899; *but see People v Jeannot*, 59 AD3d 737, 737, *lv denied* 12 NY3d 916).

With respect to defendant's final challenge to the effectiveness of defense counsel, we note that "[t]here is nothing in the record on appeal that would raise a colorable issue of ineffective assistance of trial counsel based on defendant's waiver of a jury trial. If defendant can demonstrate facts, not recited in the record, that would raise such issue, that issue can be pursued by motion pursuant to CPL 440.10" (*People v Barnes*, 143 AD2d 499, 499-500; *see People v Olson*, 35 AD3d 890, 890-891, *affd* 9 NY3d 968).

Contrary to defendant's contention, the sentence that County Court imposed on him as a second violent felony offender is not unduly harsh or severe. The People have correctly conceded, however, that "the presentence report has not been redacted as the court ordered at sentencing, and therefore it must be redacted to correct the

oversight" (*People v Howard*, 124 AD3d 1350, 1351).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

352

CA 14-01459

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

DAMARIS A. CORZATT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZACHAREY A. TAYLOR, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 25, 2014. The order granted the motion of defendant Zacharey A. Taylor to dismiss the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendant Zacharey A. Taylor is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. She had previously commenced an action in Rochester City Court seeking $4,741.04 for property damage to her vehicle. In consideration of that sum, plaintiff signed a release in favor of, inter alia, defendant Zacharey A. Taylor (defendant), releasing him from "all actions, causes of action . . . claims and demands whatsoever" that plaintiff "ever had" against defendant "from the beginning of the world to the day of the date of this RELEASE. And more particularly for any and all property damage claims as a result of [the subject] motor vehicle accident."

We conclude that Supreme Court erred in granting defendant's motion to dismiss the complaint against him in the instant action pursuant to CPLR 3211 (a) (5) based upon the release. "The meaning and scope of a release must be determined within the context of the controversy being settled" (*Matter of Schaefer*, 18 NY2d 314, 317; *see Kaminsky v Gamache*, 298 AD2d 361, 362), and "a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Cahill v Regan*, 5 NY2d 292, 299; *see Desiderio v Geico Gen. Ins. Co.*, 107 AD3d 662, 663; *Bugel v WPS Niagara Props.*, 19 AD3d 1081, 1082). "Moreover, it has long been the law that where a release contains a recital of a particular claim, obligation or controversy

and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby" (*Abdulla v Gross*, 124 AD3d 1255, 1257 [internal quotation marks omitted]). Here, viewing the release in the context of the controversy being settled and in light of the specific reference to plaintiff's property damage claims, we conclude that the parties intended that plaintiff release only such property damage claims (*see Bugel*, 19 AD3d at 1083; *Kaminsky*, 298 AD2d at 362).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

358

CA 14-01186

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

GREGORY G. GUZEK AND CRYSTAL GUZEK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

B & L WHOLESALE SUPPLY, INC., ROBERT D. PATKALITSKY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

LAW OFFICES OF JOHN WALLACE, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 22, 2014. The order, among other things, denied the motion of defendants B & L Wholesale Supply, Inc., and Robert D. Patkalitsky for summary judgment dismissing the complaint against them and granted the cross motion of plaintiffs to compel disclosure.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Gregory G. Guzek (plaintiff) in a three-vehicle collision. The accident occurred when the vehicle operated by defendant Robert D. Patkalitsky and owned by defendant B & L Wholesale Supply, Inc. (collectively, defendants), struck the stopped vehicle immediately behind plaintiff's stopped vehicle, thereby pushing it into plaintiff's vehicle. The record establishes that, at the time of the accident, it was snowing heavily and the road was slippery. According to Patkalitsky's deposition testimony, he lost control of his vehicle when a vehicle unexpectedly crossed his lane of travel. As a result, he braked, steered to the right, and slid into the vehicle behind plaintiff.

Supreme Court properly denied defendants' motion seeking summary judgment dismissing the complaint. On the issue of Patkalitsky's alleged negligence, defendants failed to meet their initial burden of establishing that they are entitled to judgment as a matter of law based upon the emergency doctrine. Defendants' own submissions raise triable issues of fact whether Patkalitsky was faced with an emergency

and whether he acted reasonably under the circumstances (*see Dalton v Lucas*, 96 AD3d 1648, 1649-1650; *see generally Lifson v City of Syracuse*, 17 NY3d 492, 497).

Defendants also sought summary judgment on the ground that plaintiff did not sustain a serious injury in the accident. Contrary to defendants' contention, we conclude that the court did not abuse its discretion in permitting plaintiffs to supplement their response to that part of defendants' motion. Plaintiffs sought such permission prior to the argument of the motion (*cf. Mullin v Waste Mgt. of N.Y., LLC*, 106 AD3d 1484, 1485), and defendants had an opportunity to reply to plaintiffs' additional submissions (*see Tierney v Girardi*, 86 AD3d 447, 448; *Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613, 614).

On the merits, we conclude that defendants failed to meet their initial burden with respect to the three categories of injury alleged by plaintiffs pursuant to Insurance Law § 5102 (d). Defendants' own submissions raise triable issues of fact with respect to the 90/180-day category (*see Houston v Geerlings*, 83 AD3d 1448, 1450), as well as the permanent consequential limitation of use and significant limitation of use categories (*see Clark v Aquino*, 113 AD3d 1076, 1077). Further, even assuming, arguendo, that defendants met their initial burden, we conclude that the affidavit of plaintiff's orthopedic surgeon raised triable issues of fact with respect to each category (*see id.* at 1077-1078). Plaintiffs failed to allege that plaintiff sustained a qualifying injury under the categories of fracture or significant disfigurement in their bill of particulars or supplemental bill of particulars before defendants filed their motion. Those categories were raised for the first time in the affirmation of plaintiffs' attorney responding to defendants' motion and, thus, they were not properly before the motion court (*see Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462, 462; *Robinson v Schiavoni*, 249 AD2d 991, 992), and they are not properly before this Court on appeal (*see Melino v Lauster*, 195 AD2d 653, 656, *affd* 82 NY2d 828; *Mrozinski v St. John*, 304 AD2d 950, 951).

Finally, we agree with defendants that the court erred in granting plaintiffs' cross motion to compel production of the recorded statement of a nonparty witness to defendants' liability insurer, and we therefore modify the order accordingly. That statement, prepared in anticipation of litigation, was conditionally privileged (*see* CPLR 3101 [d] [2]; *Johnson v Murphy*, 121 AD3d 1589, 1590), and the record does not support plaintiffs' contention that the statement was used to refresh the recollection of the nonparty witness at his deposition, thereby waiving the privilege (*see Hannold v First Baptist Church*, 254 AD2d 746, 747).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

361

KA 12-02198

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT JACKSON, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 28, 2011. The judgment convicted defendant, upon a jury verdict, of attempted burglary in the second degree, possession of burglar's tools, robbery in the second degree, burglary in the first degree, reckless endangerment in the first degree and unauthorized use of a vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of robbery in the second degree, burglary in the first degree, and unauthorized use of a vehicle in the first degree, suppressing the statements made by defendant on November 17, 2010, reducing that part convicting defendant of reckless endangerment in the first degree under count nine of the indictment to reckless endangerment in the second degree (Penal Law § 120.20) and vacating the sentence imposed on that count and as modified the judgment is affirmed, a new trial is granted on counts 5, 6 and 10 of the indictment, and the matter is remitted to Supreme Court, Erie County, for sentencing on count nine of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), possession of burglar's tools (§ 140.35), robbery in the second degree (§ 160.10 [2] [a]), burglary in the first degree (§ 140.30 [2]), reckless endangerment in the first degree (§ 120.25), and unauthorized use of a vehicle in the first degree (§ 165.08). Defendant's conviction stems from events that occurred on two separate days. On August 16, 2010, defendant was arrested after the police observed him attempting to break into a house with a screwdriver, and he gave a statement to the police denying that he was attempting to break into the house. On November 17, 2010, a 71-year-

old man was stabbed several times upon encountering an intruder in his garage. The intruder stole the victim's wallet, cell phone, and vehicle, and fled the scene. The victim contacted the police, and the police tracked the location of the victim's cell phone and located defendant and three other individuals inside the victim's vehicle. Defendant, who was the driver of the vehicle, led the police on a high-speed chase before crashing the vehicle. After he was arrested, defendant gave statements at the police station admitting that he was in the victim's garage, attacked him, robbed him, stole the vehicle, and led officers on a high-speed chase. Defendant's statements consisted of handwritten notes prepared by a police officer that defendant signed, a typed statement that defendant also signed, and a videotape of the interrogation, all of which were admitted in evidence at trial.

We agree with defendant that Supreme Court erred in failing to suppress the statements he made to the police on November 17, 2010. The evidence at the *Huntley* hearing established that a police officer transporting defendant to the police station on that date began to read the *Miranda* rights to defendant, but defendant interrupted the officer after a few words and told him that he knew his rights. At the police station, defendant was interviewed by a different officer but was not read his *Miranda* rights until after he gave his statements. We agree with defendant that his statements should have been suppressed because he was not advised of his *Miranda* rights. It is well settled that "[a]n individual taken into custody by law enforcement authorities for questioning 'must be adequately and effectively apprised of his rights' safeguarded by the Fifth Amendment privilege against self-incrimination" (*People v Dunbar*, 24 NY3d 304, 313, quoting *Miranda v Arizona*, 384 US 436, 467). The *Miranda* warnings "are an 'absolute prerequisite to interrogation' " (*id.* at 314, quoting *Miranda*, 384 US at 471). Here, the court concluded that defendant understood his rights based on the fact that he had been given *Miranda* warnings before he gave his August 16, 2010 statement. A court, however, does not " 'inquire in individual cases whether the defendant was aware of his rights *without* a warning being given' " (*id.* at 314, quoting *Miranda*, 384 US at 468). Defendant's statements made on November 17, 2010 must therefore be suppressed because the *Miranda* warnings were not given until after defendant was interrogated (*see generally People v Chapple*, 38 NY2d 112, 115).

The suppression of defendant's statements made on November 17, 2010 has no impact on his conviction of the charges arising from the August 2010 incident or his conviction of reckless endangerment in the first degree. We conclude, however, that a new trial is required for the remaining counts because the court's error in failing to suppress the statements is not harmless. While we conclude that the evidence of guilt, in particular the forensic evidence, is overwhelming, we cannot conclude that there is no reasonable possibility that the error might have contributed to the conviction (*see People v Crimmins*, 36 NY2d 230, 240-241). Defendant's statements placed him in the victim's garage as the attacker despite the victim's inability to identify him, he added incriminating details that other witnesses could not provide, and he corroborated details that other witnesses did provide.

Moreover, the jury acquitted defendant of several charges related to the November 2010 burglary and robbery incident, and thus must not have considered the evidence so overwhelming as to prove all counts. We further note that the People do not argue that any error would be harmless, and appear to agree that defendant's confession was central to their case. We therefore modify the judgment accordingly. In view of our determination to grant a new trial on the remaining counts, we address defendant's contention that the conviction of burglary in the first degree is not supported by legally sufficient evidence because there was no door connecting the garage to the house. That contention is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19), but it is without merit in any event (*see People v Green*, 141 AD2d 760, 761, *lv denied* 73 NY2d 786). Because "the garage in the present case was structurally part of a [house] which was used for overnight lodging . . . , it must be considered as part of a dwelling" (*Green*, 141 AD2d at 761). Defendant also failed to preserve for our review his contention that the conviction of unauthorized use of a vehicle is not supported by legally sufficient evidence (*see Gray*, 86 NY2d at 19), 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 contention that he was denied effective assistance of counsel. The constitutional right to effective assistance of counsel "does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial is not preserved for our review (*see People v Johnson*, 121 AD3d 1578, 1579), and is without merit in any event.

Defendant failed to preserve for our review his further contention that the conviction of reckless endangerment in the first degree is not supported by legally sufficient evidence (*see Gray*, 86 NY2d at 19), but we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we agree with defendant. The evidence established that defendant acted recklessly when he led the police on a high-speed chase in which he interfered with traffic, exceeded the speed limit, and ran several red lights and stop signs before crashing the vehicle. That evidence, without more, is insufficient to establish that defendant acted with the requisite depraved indifference to support a conviction of reckless endangerment in the first degree (*see People v Lostumbo*, 107 AD3d 1395, 1396; *see generally People v Maldonado*, 24 NY3d 48, 55). We therefore further modify the judgment by reducing the conviction of reckless endangerment in the first degree to reckless endangerment in the second degree (Penal Law § 120.20), and we remit the matter to Supreme Court for sentencing on that count (*see Lostumbo*, 107 AD3d at 1396).

We reject defendant's contention that the court abused its discretion in denying that part of his omnibus motion seeking severance. Defendant "failed to make a convincing showing that he would be unduly and genuinely prejudiced by the joint trial of the charges" (*People v Brown*, 254 AD2d 781, 782, *lv denied* 92 NY2d 1029). The People's proof with respect to the events in August 2010 and November 2010 was "straightforward and easily segregated" (*People v Daymon*, 239 AD2d 907, 908, *lv denied* 94 NY2d 821; *see People v Rios*, 107 AD3d 1379, 1380, *lv denied* 22 NY3d 1158) and, indeed, the jury acquitted defendant of some of the counts, thereby indicating that it was able to consider each count separately (*see Rios*, 107 AD3d at 1380).

Contrary to defendant's contentions, the court did not abuse its discretion in denying his request for youthful offender status (*see People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889), and the sentence imposed with respect to attempted burglary and possession of burglar's tools is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

362

KA 13-02075

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAVON JACKSON, DEFENDANT-APPELLANT.

STEVEN J. GETMAN, OVID, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 13, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25). Defendant's contention that the plea was not knowing and voluntary and that County Court therefore erred in denying his motion to withdraw the plea survives his valid waiver of the right to appeal (*see People v Lawrence*, 118 AD3d 1501, 1501). We conclude, however, that the court did not abuse its discretion in denying defendant's motion inasmuch as defendant's "allegations in support of the motion [were] belied by [his] statements during the plea proceeding" (*People v Williams*, 103 AD3d 1128, 1128, *lv denied* 21 NY3d 915; *see People v Farley*, 34 AD3d 1229, 1230, *lv denied* 8 NY3d 880). The record establishes that defendant pleaded guilty voluntarily, that he was satisfied with the representation provided by defense counsel, and that he understood the proceedings.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

363

KA 14-00544

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT OWENS, 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 Monroe County Court (Victoria M. Argento, J.), entered February 10, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that the People failed to notify him within 10 days prior to the SORA hearing that they intended to seek a determination different from that recommended by the Board of Examiners of Sex Offenders (Board), as required by Correction Law § 168-n (3), and that County Court did not otherwise provide him with a meaningful opportunity to respond to the People's requested departure. We agree (*see People v Scott*, 96 AD3d 1430, 1430-1431). The risk assessment instrument prepared by the Board did not assess points against defendant under risk factor 11, for having a history of drug or alcohol abuse. At the SORA hearing, however, the People for the first time requested that 15 points be assessed against defendant under risk factor 11, and the court granted that request. We need not remit the matter to County Court to comply with Correction Law § 168-n (3) (*see id.* at 1431), however, inasmuch as we also agree with defendant that the People "failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse" (*People v Coger*, 108 AD3d 1234, 1234-1235; *see generally People v Mingo*, 12 NY3d 563, 571). Without the 15 points assessed by the court under risk factor 11, the points assessed against defendant under the remaining risk factors make him a presumptive level one

risk, and there is no basis in the record for granting an upward departure based on an aggravating factor not taken into account by the risk assessment guidelines (*see generally People v Grady*, 81 AD3d 1464, 1464). We therefore modify the order by determining that defendant is a level one risk pursuant to SORA.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

364

KA 11-02123

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL SIERRA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered September 15, 2011. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated, a class D felony.

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 aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [ii]). Contrary to defendant's contention, County Court properly sentenced him pursuant to Penal Law § 60.21 to a five-year period of probation to run consecutively to his indeterminate term of imprisonment (*see* Vehicle and Traffic Law § 1193 [1] [c] [iii]; *People v Segatol-Islami*, 121 AD3d 1575, 1577; *People v O'Brien*, 111 AD3d 1028, 1029). "Inasmuch as the plain language of the statutes requires a sentencing court to impose a period of probation or conditional discharge in addition to any fine or term of imprisonment for convictions pursuant to Vehicle and Traffic Law § 1192, the Legislature clearly intended this type of cumulative sentence for felony driving while intoxicated convictions" (*People v Brainard*, 111 AD3d 1162, 1164).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

367

KA 13-00725

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. HOLLAND, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JEREMY V. MURRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 8, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and criminally using drug paraphernalia in the second degree (§ 220.50 [3]). Defendant failed to preserve for our review his contention that County Court should have suppressed his statement to the police as involuntary based upon alleged coercion by the police inasmuch as he did not move to suppress the statement on that ground (*see People v Lewis*, 124 AD3d 1389, 1390; *People Woodard*, 96 AD3d 1619, 1620, *lv denied* 19 NY3d 1030). In any event, we note that "[t]here is no indication in the record that defendant's statement[] [was] not voluntarily made" (*People v Topolski*, 28 AD3d 1159, 1160, *lv dismissed* 6 NY3d 898, *lv denied* 7 NY3d 764, *reconsideration denied* 7 NY3d 795; *see People v Kirton*, 36 AD3d 1011, 1012, *lv denied* 8 NY3d 947). Contrary to the further contention of defendant, "[t]he record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before making the statement" (*People v Irvin*, 111 AD3d 1294, 1295, *lv denied* 24 NY3d 1044; *see People v Sanders*, 74 AD3d 1896, 1896).

Defendant further contends that the evidence is legally insufficient to establish his constructive possession of cocaine and drug paraphernalia found in the bedroom of his girlfriend's residence.

We reject that contention (*see People v Patterson*, 13 AD3d 1138, 1139, *lv denied* 4 NY3d 801; *see generally People v Bleakley*, 69 NY2d 490, 495). A detective testified that defendant matched the description of a man who was reportedly selling cocaine out of the residence and, upon executing a search warrant for the residence, the police found cocaine and drug paraphernalia in a dresser drawer that also contained defendant's New York State benefit card and a prescription in his name. Further, defendant's girlfriend testified that defendant spent three or four nights a week at her home, and that he kept clothing and shoes in her bedroom. The evidence is thus legally sufficient to establish defendant's constructive possession of the cocaine (*see People v Holley*, 67 AD3d 1438, 1439, *lv denied* 14 NY3d 801; *People v Dorney*, 35 AD3d 1032, 1033-1034, *lv denied* 8 NY3d 921; *People v Lopez*, 112 AD2d 739, 739-740). In addition, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Archie*, 78 AD3d 1560, 1561-1562, *lv denied* 16 NY3d 856; *Patterson*, 13 AD3d at 1139; *see generally Bleakley*, 69 NY2d at 495).

We also reject defendant's contention that he was denied effective assistance of counsel. It is well settled that, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712), and defendant failed to meet that burden. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

368

KA 13-01176

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW A. DAVIS, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

MATTHEW A. DAVIS, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 18, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), burglary in the first degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of murder in the second degree and dismissing counts one and two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of murder in the second degree (Penal Law § 125.25 [3]) and one count each of burglary in the first degree (§ 140.30 [2]) and robbery in the first degree (§ 160.15 [1]). According to the evidence at trial, defendant and his two female accomplices came up with a plan to rob a man whom one of the accomplices had befriended on Facebook. Pursuant to the plan, the accomplices made arrangements with the victim to meet him alone at his apartment and, after socializing with the victim for a while, one of the accomplices left the apartment and held the door open so that defendant could enter. As defendant entered the apartment, the remaining accomplice fled, and a struggle ensued between defendant and the 41-year-old victim, who was overweight and had heart disease. At some point during or after the altercation, the victim suffered a fatal heart attack. Defendant left the apartment with a bag of stolen property, and the victim's body was found by relatives two days later. According to the autopsy report, the victim sustained a fractured jaw, lacerations on his face, and abrasions on his knees and right elbow. The physician who performed the autopsy concluded that the cause of death was "Hypertensive Cardiovascular Disease," with obesity being a

contributing factor.

We agree with defendant that the evidence is legally insufficient to support the conviction of the felony murder counts because the People failed to prove beyond a reasonable doubt that his actions caused the victim's death. A person is guilty of felony murder when, during the commission or attempted commission of an enumerated felony, either the defendant or an accomplice "causes the death of a person other than one of the participants" (Penal Law § 125.25 [3]). A person "causes the death" of another person "when the . . . culpable act is 'a sufficiently direct cause' of the death *so that the fatal result was reasonably foreseeable*" (*People v Hernandez*, 82 NY2d 309, 313-314 [emphasis added]). Such a culpable act is a sufficiently direct cause of death when it is "an actual contributory cause of death, in the sense that [it] 'forged a link in the chain of causes which actually brought about the death' " (*Matter of Anthony M.*, 63 NY2d 270, 280, quoting *People v Stewart*, 40 NY2d 692, 697). "An obscure or a merely probable connection between an assault and death will, as in every case of alleged crime, require acquittal of the charge of any degree of homicide" (*People v Brengard*, 265 NY 100, 108).

Here, we conclude that the People failed to prove beyond a reasonable doubt that it was reasonably foreseeable that defendant's actions, i.e., unlawfully entering the victim's apartment and assaulting him, would cause the victim's death. As noted, the victim died of a heart attack, and the injuries inflicted upon him by defendant were not life threatening. Indeed, the most serious injury inflicted was a fractured jaw. Although the Chief Medical Examiner testified for the People at trial that defendant caused the victim's death, she explained that her opinion in that regard was based on her assertion that, "but for" defendant's actions, the victim would not have died of a heart attack. As the court properly instructed the jury, however, "more than 'but for' causation [is] required" to establish felony murder (*Hernandez*, 82 NY2d at 318). Notably, the Chief Medical Examiner did not testify that defendant's culpable act was a direct cause of the death or that the fatal result was reasonably foreseeable. We thus conclude that the evidence is legally insufficient to establish that defendant committed felony murder, as charged in counts one and two of the indictment, and we therefore modify the judgment accordingly.

We reject defendant's further contention that the remaining counts, charging burglary and robbery in the first degree, must be dismissed because the People failed to corroborate the testimony of the accomplice who testified at trial, as required by CPL 60.22 (1). The accomplice's testimony was amply corroborated by, inter alia, a surveillance video from a camera inside the victim's apartment building and telephone records showing numerous cell phone calls between defendant and the accomplice shortly before and immediately after the crimes were committed (*see generally People v Reome*, 15 NY3d 188, 191-192; *People v Taylor*, 87 AD3d 1330, 1331, *lv denied* 17 NY3d 956).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or further modification of the judgment.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

369

KA 11-00939

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GAYDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 3, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon 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 plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress the weapon he discarded while he was being pursued by the police. We reject that contention. According to the evidence at the suppression hearing, there was a radio dispatch concerning an anonymous tip that two individuals were carrying handguns in a certain location, and a police officer who arrived at the scene less than two minutes after the dispatch observed that defendant and another individual matched the general description of the suspects and were within a block of the location described in the tip. The officer thus had a founded suspicion that criminal activity was afoot, justifying his initial common-law inquiry of defendant (*see People v Price*, 109 AD3d 1189, 1190, *lv denied* 22 NY3d 1043; *see generally People v Stewart*, 41 NY2d 65, 69). Defendant's flight upon seeing the officer exit his vehicle provided the officer with the requisite reasonable suspicion of criminal activity to warrant his pursuit of defendant (*see Price*, 109 AD3d at 1190). Defendant dropped the gun during the pursuit, which gave rise to probable cause to arrest defendant (*see People v Wilson*, 49 AD3d 1224, 1224-1225, *lv denied* 10 NY3d 966; *People v Lindsay*, 249 AD2d 937, 938, *lv denied* 92 NY2d 900), and "the recovery of the gun

discarded during [defendant's] flight was lawful inasmuch as the officer's pursuit . . . of defendant [was] lawful" (*People v Norman*, 66 AD3d 1473, 1474, *lv denied* 13 NY3d 940).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

372

CA 14-01089

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

NOAH DOOLITTLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIXON PEABODY LLP, DEFENDANT-RESPONDENT.

THOMAS & SOLOMON LLP, ROCHESTER (J. NELSON THOMAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 12, 2014. The judgment and order, insofar as appealed from, dismissed plaintiff's first, second, sixth and seventh causes of action upon defendant's motion for summary judgment.

It is hereby ORDERED that the judgment and order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied with respect to the first, second, sixth, and seventh causes of action, and those causes of action are reinstated.

Memorandum: Plaintiff, a former associate attorney in defendant's Rochester office, commenced this action seeking to recover a bonus that he allegedly earned during his employment with defendant. Plaintiff alleges that, during the course of his employment, various partners advised him and other associates that defendant would pay a bonus consisting of 5% of its annual fee collections in excess of $100,000 from any client generated by the associate (hereafter, collections bonus). In 2005, plaintiff generated a new client for defendant, and in August 2008 an award was issued in favor of the client in the amount of $19 million. In September 2008, plaintiff left defendant's employ for a new job. Plaintiff alleges that one of defendant's partners assured plaintiff that he would receive a collections bonus with respect to the client even if he terminated his employment with defendant. In November 2008, defendant collected a contingency fee of $5 million from the client. Defendant, however, did not pay plaintiff a 5% collections bonus in connection with that fee. Instead, in April 2009, defendant paid plaintiff a significantly smaller "team bonus" for his work on the matter. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, concluding that collections bonuses were discretionary in nature.

We note at the outset that plaintiff has not briefed any issues related to the fraud and deceit, misrepresentation, or unjust enrichment/restitution causes of action and therefore has abandoned any such issues (*see generally Route 104 & Rte. 21 Dev., Inc. v Chevron U.S.A., Inc.*, 96 AD3d 1491, 1492; *Ciesinski v Town of Aurora,* 202 AD2d 984, 984). We conclude that the court erred in granting those parts of the motion seeking summary judgment dismissing the remaining causes of action, i.e., the Labor Law, breach of contract, promissory estoppel, and quantum meruit causes of action. "An employee's entitlement to a bonus is governed by the terms of the employer's bonus plan" (*Hall v United Parcel Serv. of Am.*, 76 NY2d 27, 36, *rearg denied* 76 NY2d 889), and "a plaintiff cannot recover under New York law for breach of contract due to his employer's failure to pay him compensation pursuant to a plan, where the plan vests the employer with absolute discretion as to the entitlement and amount of any payments thereunder" (*Culver v Merrill Lynch & Co., Inc.*, 1995 WL 422203, *3 [SD NY]; *see Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 340). However, New York also has "a long-standing policy against forfeiture of earned wages" (*Gruber*, 52 AD3d at 340), which may apply to bonuses as well (*see Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 182). Thus, unless an employer "clearly indicate[s] that bonuses are discretionary" (*Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 448, *affd* 19 NY3d 1; *see Kaplan v Capital Co. of Am.*, 298 AD2d 110, 111, *lv denied* 99 NY2d 510), the issue "whether unpaid incentive compensation under a defendant's bonus plan constitutes a discretionary bonus or earned wages not subject to forfeiture is [one] of fact" (*Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 389 [internal quotation marks omitted]).

Here, we agree with plaintiff that defendant failed to establish as a matter of law that the collections bonuses were "solely and completely a matter of defendant's discretion" (*Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274, 275). In support of the motion, defendant submitted the deposition testimony of the partner responsible for managing the firm's bonus programs, who testified that, although defendant had a "practice" of paying collections bonuses, the bonuses were discretionary. Defendant also submitted its responses to plaintiff's interrogatories, in which it stated that "the bonus amount based on collections was at all times discretionary, and was not a required 5% of collections." According to defendant, the "discretionary bonuses for collections" were based on a variety of factors, including the realization rate for the collection, the associate's total compensation, input from the associate's practice group leader, the nature of the associate's efforts to generate business, and budgetary concerns. Defendant, however, also submitted plaintiff's deposition testimony, in which he testified that he was never told that the collections bonus was discretionary. That conflicting testimony raises an issue of fact whether the collection bonuses were discretionary (*see Gruber*, 52 AD3d at 340; *Mirchel*, 205 AD2d at 389-390; *Weiner v Diebold Group*, 173 AD2d 166, 167) and, indeed, the court so found.

The court concluded, however, that defendant established that the

collections bonuses were discretionary based upon defendant's submissions showing the history of associate collections bonuses from 2004 to 2008. Contrary to the court's determination, defendant's past practice with respect to collections bonuses is not dispositive of plaintiff's breach of contract cause of action. It is well established that "the existence of a binding contract is not dependent on the subjective intent" of the parties (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399). Rather, "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their *expressed words and deeds*" (*id.* [emphasis added]). With respect to incentive compensation in particular, an employer must "clearly state[]" that a bonus is "purely discretionary" (*Kaplan*, 298 AD2d at 111; *see Ryan*, 79 AD3d at 448), and "discretion will not be implied when such language is absent" (*Canet v Gooch Ware Travelstead*, 917 F Supp 969, 985-986). Thus, the relevant question is not whether defendant actually awarded associates precisely 5% of collections over $100,000, but whether defendant promised plaintiff that amount, particularly given the undisputed fact that plaintiff was unaware of defendant's past practice at the time of the alleged oral agreement. The partner in charge of the bonus program testified at his deposition that, whenever he spoke to associates about the collections bonus, he would "always" state that it was discretionary and that, "[i]f [he] talked about a specific percentage, . . . [he] would say it could be up to five percent, but taking into consideration . . . other factors." Plaintiff, however, averred that the partner told associates at a meeting in defendant's Rochester office that defendant "*would pay* an associate 5% of defendant's annual fee collections from any client generated by that associate if defendant's annual fee collections from that client exceeded $100,000" (emphasis added). According to plaintiff, the partner never stated that the collections bonus was discretionary, and plaintiff never heard anyone else state that the bonus was discretionary during his employment with defendant. We thus conclude that, given the conflicting evidence and testimony concerning the nature of the collections bonus and how it was presented to defendant's employees, including plaintiff, summary judgment on the breach of contract cause of action was inappropriate (*see Pyramid Brokerage Co., Inc. v Zurich Am. Ins. Co.*, 71 AD3d 1386, 1387; *Easton Telecom Servs., LLC v Global Crossing Bandwith, Inc.*, 62 AD3d 1235, 1237; *Gruber*, 52 AD3d at 340; *Mirchel*, 205 AD2d at 389-390). For the same reason, the Labor Law, promissory estoppel, and quantum meruit causes of action should not have been dismissed (*see Mirchel*, 205 AD2d at 389-390; *cf. De Madariaga v Union Bancaire Privée*, 103 AD3d 591, 591, *lv denied* 21 NY3d 854).

We have reviewed defendant's alternative grounds for affirmance (*see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), and we conclude that they lack merit.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

374

CA 14-01565

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

PATRICIA BURG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ACEA M. MOSEY, ADMINISTRATOR FOR THE ESTATE
OF CHARLES J. MUELLER, JR., DECEASED,
DEFENDANT-RESPONDENT,
AND JAMES D. HAKES, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ANDREW DRILLING OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 21, 2013. The order denied the motion of defendant James D. Hakes for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident, and James D. Hakes (defendant) appeals from an order denying his motion for summary judgment dismissing the complaint against him. We affirm. The accident occurred when defendant's vehicle crossed over several lanes in front of plaintiff's vehicle, causing plaintiff to apply her brakes and move to the shoulder of the highway. Plaintiff's vehicle did not make contact with defendant's vehicle when both vehicles came to rest on the shoulder of the highway, but a third vehicle rear-ended plaintiff's vehicle. It is well settled that " 'absent extraordinary circumstances . . . , injuries resulting from a rear-end collision are not proximately caused by any negligence on the part of the operator of a preceding vehicle when the rear-ended vehicle had successfully and completely stopped behind such vehicle prior to the collision' " (*Paterson v Sikorski*, 118 AD3d 1330, 1330). Here, contrary to defendant's contention, such extraordinary circumstances are present (*see Tutrani v County of Suffolk*, 10 NY3d 906, 907-908). The accident occurred on "a busy highway where vehicles could reasonably expect that traffic would continue unimpeded" (*id.* at 907), and defendant crossed over several lanes in front of plaintiff's vehicle, causing her to apply her brakes and move to the shoulder of the highway. Thus, there is a triable issue of fact whether defendant's conduct

"set into motion an eminently foreseeable chain of events that resulted in [the] collision between the vehicles driven by plaintiff and [the driver of the third vehicle]" (*id.* [internal quotation marks omitted]). Moreover, plaintiff testified at her deposition that her vehicle was rear-ended "seconds" after stopping on the shoulder of the highway, and it therefore cannot be said that defendant's actions were "so remote in time from plaintiff's injury as to preclude recovery as a matter of law" (*id.* at 907-908 [internal quotation marks omitted]). We note in addition that, "[u]nder these circumstances, it is irrelevant that plaintiff was able to stop her vehicle without striking [defendant's] vehicle" (*id*. at 908).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

375

CA 14-01460

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF THE TOROK TRUST,
PETITIONER-RESPONDENT,

V OPINION AND ORDER

TOWN BOARD OF TOWN OF ALEXANDRIA, TOWN OF ALEXANDRIA, TOWN OF ALEXANDRIA BOARD OF ASSESSMENT REVIEW AND ASSESSOR OF TOWN OF ALEXANDRIA, RESPONDENTS.

ALEXANDRIA CENTRAL SCHOOL DISTRICT, APPELLANT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR APPELLANT.

ANTONUCCI LAW FIRM, LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 26, 2014 in a proceeding pursuant to RPTL article 7. The order directed the Alexandria Central School District to make a tax refund to petitioner.

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

Opinion by CENTRA, J.P.:

In July 2007, petitioner commenced a tax certiorari proceeding pursuant to Real Property Tax Law article 7 seeking to reduce the assessment on its property for 2007. The Alexandria Central School District (District), the appellant herein, was served but did not intervene in the proceeding. Petitioner and respondents reached an agreement in December 2008 to reduce the assessment on the property for the 2007 tax year. In a stipulation of settlement and order entered January 2009, the parties agreed that RPTL 727 would apply to the settlement, and provided that, if petitioner had paid any taxes and/or special ad valorem levies prior to the issuance of the order, a tax and/or special ad valorem levy refund, based on the reduced assessment, would be made by the District for the 2007-2008 school tax year. The District issued a refund to petitioner for the 2007-2008 school tax year, but did not issue any refund for the 2008-2009 school tax year. Petitioner moved to compel the District to issue a refund for that school tax year, and the District opposed the motion on the

ground that petitioner never commenced a tax certiorari proceeding for the 2008 tax year. Supreme Court granted the motion, and we now conclude that the order should be affirmed.

The District, relying on *Matter of Scellen v Assessor for City of Glens Falls* (300 AD2d 979), contends that, because petitioner did not commence a tax certiorari proceeding challenging the 2008-2009 assessment, it cannot obtain a refund for any overpayments for that year. In *Scellen*, the Third Department held that the petitioner was required to challenge the assessed valuations of her properties while her earlier challenge was pending and, having failed to do so, could not obtain relief by relying on RPTL 727 (1) (*id.* at 980-981). In our view, the plain language of RPTL 727 (1) and the legislative history of that statute supports the conclusion that petitioner is entitled to the relief sought here, and we therefore decline to follow *Scellen*.

RPTL 727 (1) provides in relevant part that, "[e]xcept as hereinafter provided, . . . where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgment. Where the assessor or other local official having custody and control of the assessment roll receives notice of the order or judgment subsequent to the filing of the next assessment roll, he or she is authorized and directed to correct the entry of assessed valuation on the assessment roll to conform to the provisions of this section."

We must first examine "the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568). The statute imposes a three-year freeze of the assessment where an order or judgment is issued determining that the assessment is unlawful, unequal, excessive, or misclassified (*see id.*). Where, as here, there is a stipulation between the parties agreeing to a lower assessment, the stipulation has the same effect as a judicial determination that the assessment is unlawful, unequal, excessive, or misclassified (*see Matter of Rosen v Assessor of City of Troy*, 261 AD2d 9, 12). The three-year freeze applies to the "next three succeeding assessment rolls" from the "date of the most recent assessment under review" (RPTL 727 [1]). Here, the assessment under review was the 2007 tax year, and therefore the next three succeeding assessment rolls, i.e., from 2008 through 2010, must have that same assessment. The second sentence of RPTL 727 (1), which was added a few years after the statute was enacted, specifically addresses the situation in which the assessor receives the order or judgment after the next assessment roll has already been filed. In that case, the assessor is directed to correct the assessed valuation "to conform to" the requirements of RPTL 727. Once the assessment has been corrected, the property owner may make an application for a refund (*see* RPTL 726 [1] [c]). Therefore, the application of RPTL 727 (1) in this case resulted in an

automatic reduction in the assessment for the 2008-2009 school tax year, without the need for any filing of a tax certiorari proceeding by petitioner.

We further conclude that the legislative history of the statute supports petitioner's position that it is not barred from seeking a refund here. The intent of RPTL 727 was to reduce the need for repeated litigation in challenging tax assessments (*see* Governor's Approval Mem, Bill Jacket, L 1995, ch 693 [stating that, "by locking in the judicially-reduced assessments on most properties for the following three tax years, the bill will spare all parties the time and expense of repeated court intervention"]; Sponsor's Mem, Bill Jacket, L 1995, ch 693 ["taxpayers who are successful in obtaining reductions in assessments frequently have those assessments increased to pre-judicially determined levels the succeeding year. Even more disturbing is the fact that this pattern sometimes becomes an annual event, forcing the taxpayer to seek judicial review each and every year. This proposal would prohibit changes in assessed value for three years following assessment reductions ordered in tax certiorari proceedings (except under certain circumstances that are not relevant here)"]; *see also Rosen*, 261 AD2d at 12 [The purpose "was to prevent assessing units from increasing judicially reduced assessments in succeeding years, to prevent taxpayers from perpetually challenging their assessments . . . and to 'spare all parties the time and expense of repeated court intervention' "]). Indeed, "[w]here a dispute over valuation has been resolved by court order, both the town and the taxpayer should be allowed to rely on that resolution for a reasonable period of time" (*Malta Town Ctr. I, Ltd.*, 3 NY3d at 573 [Smith, J., dissenting]).

The District's contentions that requiring it to issue a refund would amount to an unconstitutional gift of public money, and that it cannot stipulate to a requirement that is barred by the constitution and case law, are without merit inasmuch as there *is* a legal basis for the School to issue the refund: RPTL 727 (1). The District's further contention that petitioner's request for a refund is time-barred under RPTL 726 (1) (c) is raised for the first time on appeal and is therefore not properly before us (*see Iocovozzi v Iocovozzi*, 107 AD3d 1438, 1438-1439; *Peak Dev., LLC v Construction Exch.*, 100 AD3d 1394, 1396; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

In sum, requiring petitioner here to commence a tax certiorari proceeding for the 2008-2009 school tax year would go against "[t]he interest in reduced litigation contemplated by the statutory respite period" (*Malta Town Ctr. I, Ltd.*, 3 NY3d at 569). Accordingly, we conclude that the court properly granted petitioner's motion seeking a refund of tax overpayments it made to the District for the 2008-2009 school tax year.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

380

CA 14-00171

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

BRENDA READING AND JAMES KRANZ,
PLAINTIFFS-RESPONDENTS,

V ORDER

ANTHONY FABIANO, M.D. AND KALEIDA HEALTH,
DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered June 11, 2013. The order granted in part the motion of defendants to compel certain discovery.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

381

CA 14-00172

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

BRENDA READING AND JAMES KRANZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANTHONY FABIANO, M.D. AND KALEIDA HEALTH,
DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 18, 2013. The order granted the motion of defendants for leave to reargue their prior motion to compel certain discovery and, upon reargument, adhered to its prior decision.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Brenda Reading (plaintiff) during a surgical procedure for the removal of a tumor on her pituitary gland. Plaintiffs alleged that defendant Anthony Fabiano, M.D. was negligent in the application of a skin preparation solution that came into contact with plaintiff's eyes during the surgery, resulting in, inter alia, damage to her corneas. By the order in appeal No. 2, Supreme Court granted defendants' motion for leave to reargue their prior motion to compel certain discovery and, upon reargument, adhered to its prior decision directing the disclosure of redacted portions of certain medical records. The court attached as "Exhibit A" to the order in appeal No. 2 an "amended memorandum decision and order" deleting the phrase "nor is there any claim for loss of enjoyment of life" from the original order. We dismiss the appeal from the "amended memorandum decision and order" in appeal No. 3, which did not effect a "material or substantial change" (*Matter of Kolasz v Levitt*, 63 AD3d 777, 779).

We affirm the order in appeal No. 2. "In bringing the action, plaintiff waived the physician/patient privilege only with respect to

the physical and mental conditions affirmatively placed in controversy" (*Mayer v Cusyck*, 284 AD2d 937, 938). Indeed, that waiver " 'does not permit wholesale discovery of information regarding [plaintiff's] physical and mental condition' " (*Carter v Fantauzzo*, 256 AD2d 1189, 1190). Contrary to defendants' contention, the allegations in the bill of particulars that plaintiff sustained "serious and permanent injuries, including: toxic keratitis; bilateral corneal abrasions; severe bilateral photophobia; impaired vision; decrease in vision; need for corneal transplants; loss of enjoyment of life; disability; and pain and suffering" "do not constitute such 'broad allegations of injury' that they place plaintiff's entire medical history in controversy" (*Tabone v Lee*, 59 AD3d 1021, 1022; *cf. Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946). The court properly conducted an in camera review to redact irrelevant information (*see generally Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338), and properly limited disclosure to the "conditions affirmatively placed in controversy" (*Mayer*, 284 AD2d at 938).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

382

CA 14-01602

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

BRENDA READING AND JAMES KRANZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANTHONY FABIANO, M.D. AND KALEIDA HEALTH,
DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

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

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Erie County (John M. Curran, J.), entered September 18, 2013. The amended order granted in part the motion of defendants to compel certain discovery.

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

Same memorandum as in *Reading v Fabiano* ([appeal No. 2] ___ AD3d ___ [Mar. 27, 2015]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

385

KA 14-00768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER P. ANNIS, DEFENDANT-APPELLANT.

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered April 17, 2013. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E 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 appeal from a judgment convicting him upon a jury verdict of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), defendant contends that the evidence is legally insufficient to establish that he was driving at the time of the accident. Defendant failed to preserve that contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that defendant's contention is without merit.

"It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926 [internal quotation marks omitted]; *see People v Bleakley*, 69 NY2d 490, 495). Here, we conclude that "there is ample evidence in the record from which the jury could have reasonably concluded that defendant was indeed driving at the time of the accident" (*People v Maricevic*, 52 AD3d 1043, 1044, *lv denied* 11 NY3d 790). When the police arrived at the scene, they observed that the vehicle had flipped over and that the driver's side window had been smashed. The police found defendant's wallet containing his driver's

license on the ceiling above the driver's seat. The police observed only one set of footprints leading away from the vehicle, which they followed, and eventually located defendant. Defendant, who appeared to be intoxicated, admitted that he had been drinking and that he was in the accident, but he denied that he was driving and refused to identify the alleged driver. No other individuals were observed in the vicinity of the accident. We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "The resolution of credibility issues by the jury and its determination of the weight to be given to the evidence are accorded great deference" (*People v Wallace*, 306 AD2d 802, 802; *see Bleakley*, 69 NY2d at 495; *People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998), and there is no reason to disturb that determination here (*see People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867; *People v Panek*, 305 AD2d 1098, 1098, *lv denied* 100 NY2d 623).

Defendant further contends that he was denied effective assistance of counsel because, inter alia, defense counsel withdrew his request for a *Martin* hearing, failed to call a particular witness, and failed to speak to one of the People's witnesses before trial. To the extent that defendant's contention "involve[s] matters outside the record on appeal, . . . the proper procedural vehicle for raising [that] contention[] is a motion pursuant to CPL 440.10" (*People v Archie*, 78 AD3d 1560, 1562, *lv denied* 16 NY3d 856). To the extent that defendant's contention is properly before us, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct is not preserved for our review (*see People v Ross*, 118 AD3d 1413, 1416-1417, *lv denied* 24 NY3d 964), 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, the sentence is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

387

KA 12-00384

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE SWAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered December 14, 2011. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree, assault in the second degree and resisting arrest.

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, attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by misconduct during the prosecutor's opening statement, direct examination of the victim, and summation (*see* CPL 470.05 [2]; *see People v Gates*, 6 AD3d 1062, 1063, *lv denied* 3 NY3d 659). In any event, we conclude that none of the alleged misconduct by the prosecutor was so egregious as to deprive defendant of a fair trial (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893).

We reject the further contention of defendant that he was denied effective assistance of counsel. "Inasmuch as defendant was not denied a fair trial by any alleged instances of prosecutorial misconduct, defense counsel's failure to object to those [instances] does not constitute ineffective assistance of counsel" (*People v Gaston*, 100 AD3d 1463, 1465). Defendant failed "to demonstrate the absence of strategic or other legitimate explanations for counsel's" alleged ineffectiveness in failing to make particular arguments or take particular actions (*People v Rivera*, 71 NY2d 705, 709), including the failure to challenge a prospective juror (*see People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968).

Although a prosecution witness testified in violation of County

Court's ruling excluding a portion of defendant's statement at the crime scene, defendant withdrew his mistrial motion based on that testimony and made no further objection when the court issued curative instructions. "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 Henry*, 9 AD3d 914, 915, *lv denied* 3 NY3d 675). The court thereafter properly denied defendant's pro se motion for a mistrial, which was based upon the same testimony, made at the close of the People's case (*see People v Ross*, 221 AD2d 383, 384, *lv denied* 87 NY2d 925).

The sentence is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

388

KA 13-00959

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERTON SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 9, 2013. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the third degree (§ 130.25 [2]).

Contrary to defendant's contention, County Court did not err in admitting in evidence the recording of the telephone conversation between defendant and the victim, together with a transcript of that conversation. The conversation was relevant, and the probative value outweighed any prejudice inasmuch as defendant's statements constitute an acknowledgment of guilt (*see generally People v Caban*, 14 NY3d 369, 374-375; *People v McCullough*, 117 AD3d 1415, 1416, *lv denied* 23 NY3d 1040). Defendant failed to preserve for our review his contention that the evidence violated his constitutional right to due process and a fair trial. In any event, we conclude that the contention is without merit.

We agree with defendant, however, that the court erred in admitting in evidence a video recording of the police interview of defendant. Defendant did not make any admissions during the 1½-hour interview, and the interviewing detective made references to alleged inculpatory evidence that was not admitted in evidence at trial. Although the court gave a limiting instruction that the jury was the sole factfinder and that it was to make its own credibility

determinations and to disregard the detective's statements that no one would believe defendant, we conclude that any probative value of the video recording " '[was] substantially outweighed by the danger that it [would] unfairly prejudice [defendant] or mislead the jury' " (*Caban*, 14 NY3d at 375, quoting *People v Scarola*, 71 NY2d 769, 777; *see People v Lunsford*, 244 AD2d 507, 507-508, *lv denied* 91 NY2d 927). We nevertheless further conclude that the error is harmless inasmuch as the evidence of guilt is overwhelming, and there is no significant probability that defendant would have been acquitted if the video recording had not been admitted in evidence (*see People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that the verdict is not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349; *see generally Bleakley*, 69 NY2d at 495). The victim testified to several specific incidents of rape between July 2007 and July 2008, when she was 12 years old, and to another incident when she was 16 years old. During a recorded telephone conversation with the victim, defendant made inculpatory statements. The victim asked defendant several times to promise that he would stop having sex with her, and he responded, "I will stop," and "I promised." When the victim stated that he had promised in the past that he would stop, defendant stated, "I'm serious now." Defendant told the victim during the telephone call to tell her mother that she had lied when she had accused defendant because the victim was angry with him for having a baby with another woman and therefore did not pay attention to the victim.

Defendant contends that the court failed to rule on the sufficiency of his prima facie showing that the People's exercise of a peremptory challenge was racially motivated. That contention is without merit inasmuch as "the sufficiency of the prima facie showing becomes moot" after the People offer, as they did here, a race-neutral explanation for the challenge (*People v Baxter*, 108 AD3d 1158, 1159 [internal quotation marks omitted]; *see People v Hecker*, 15 NY3d 625, 652). It is well established that the court's ultimate determination that there was no discriminatory intent is entitled to deference, and we see no need to disturb that determination here (*see People v Newman*, 71 AD3d 1509, 1509, *lv denied* 15 NY3d 754). We reject defendant's further contention that the court erred in granting the People's challenge for cause of a juror who provided an affirmative indication that she would be uncomfortable judging another person (*see generally People v Johnson*, 94 NY2d 600, 616). Defendant exhausted his peremptory challenges and therefore preserved for our review his contention that the court erred in denying his challenge for cause of a prospective juror (*see generally People v Thompson*, 21 NY3d 555, 560). That prospective juror stated that she had a cousin who had been sexually abused by her father and that she was "hypersensitive" about the subject. She also stated that she had not yet heard any

information and was therefore not "leaning one way or the other." Following questioning by the court whether she could be fair and unbiased, the prospective juror replied, "I believe I am. I'm a fair person in general terms." We conclude that, the juror's "statements here, taken in context and as a whole, were unequivocal" with respect to her ability to be fair and impartial (*People v Chambers*, 97 NY2d 417, 419; *see People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, *reconsideration denied* 15 NY3d 755, *cert denied* ___ US ___, 131 S Ct 326).

Defendant contends that he was denied effective assistance of counsel based upon defense counsel's failure to consult with or call a medical expert to challenge the People's expert regarding child abuse accommodation syndrome. To the extent that defendant's contention involves matters that do not appear on the record, that contention must be raised by way of a CPL article 440 motion. To the extent that defendant's contention may be reviewed, we conclude that it is without merit. Defense counsel effectively cross-examined the People's expert, and his failure to call an expert witness does not constitute ineffective assistance of counsel where, as here, " '[d]efendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Kilbury*, 83 AD3d 1579, 1580, *lv denied* 17 NY3d 860).

The sentence is not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

389

KA 12-01584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD VANHOOSER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 resentence of the Onondaga County Court (William D. Walsh, J.), rendered September 13, 2011. Defendant was resentenced upon his conviction of attempted burglary in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentenced as a predicate felon to 7 years of incarceration and 5 years of postrelease supervision. County Court later resentenced defendant as a second violent felony offender to the same sentence, and defendant now appeals from the resentence. "Defendant failed to preserve for our review his contention that the [8½-year] gap between his original sentence and his resentence violated his statutory right to have his sentence pronounced 'without unreasonable delay' " (*People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

390

KA 12-00729

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD VANHOOSER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 11, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts) and burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of burglary in the third degree (§ 140.20). We agree with defendant that the waiver of the right to appeal is invalid inasmuch as there is no indication in the record that defendant understood that the waiver of the right to appeal was separate and distinct from those rights automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256; *People v Blacknell*, 117 AD3d 1564, 1564-1565, *lv denied* 23 NY3d 1059; *People v Johnson*, 109 AD3d 1191, 1191, *lv denied* 22 NY3d 997). We further agree with defendant that this case should be remitted for a hearing on the issue whether he is a persistent violent felony offender. A persistent violent felony offender is one who is convicted of a violent felony offense after having previously been subjected to two or more predicate violent felony convictions (*see* § 70.08 [1] [a]). The sentence upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). However, "[i]n calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or

periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]).

Here, defendant admitted that he was convicted of two prior violent felonies, but objected to the tolling periods that were computed by County Court pursuant to Penal Law § 70.04 (1) (b) (v) and requested a hearing. After some discussion with the court, defendant conceded that the court's computations were correct, essentially waiving the necessity for a hearing. We agree with defendant that his waiver of the hearing was not effective because it was the product of impermissible coercion by the court. The court indicated that it could consider defendant's request for a hearing to be a violation of the plea agreement, but that was not accurate. "While [the court] did advise defendant during the plea hearing that he was going to be sentenced as a [persistent violent] felony offender, it never specifically instructed him that admitting such [persistent violent] felony offender status was a condition of the plea agreement and that his failure to do so would result in a more severe sentence" (*People v Marrero*, 30 AD3d 637, 638). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing following a hearing in which the People will have the burden of proof of establishing the appropriate time computations under Penal Law § 70.04 (1) (b) (v) and, consequently, whether defendant is a persistent violent felony offender (*see People v Shuler*, 100 AD3d 1041, 1044, *lv denied* 20 NY3d 988; *People v Williams*, 48 AD3d 715, 716, *lv denied* 10 NY3d 940; *see generally* CPL 400.15 [7] [a]; *People v Diggins*, 11 NY3d 518, 524).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

398

CA 13-02041

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

IN THE MATTER OF MICHAEL SHAW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 9, 2013 pursuant to a CPLR article 78 proceeding. The judgment confirmed the determination of respondent and dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]) and rule 104.11 (7 NYCRR 270.2 [B] [5] [ii] [threats of violent conduct]). The record on appeal does not support petitioner's contention that he was deprived of his right to attend the hearing. To the contrary, the escort officer testified at the hearing that petitioner had refused to attend, despite having been advised that the hearing would proceed in his absence (*see Matter of Rouse v Fischer*, 94 AD3d 1310, 1310; *Matter of Abreu v Bezio*, 84 AD3d 1596, 1596-1597, *lv dismissed* 17 NY3d 781, *appeal dismissed* 17 NY3d 915). We further conclude that, based upon his refusal to attend the hearing, petitioner has failed to preserve any procedural challenges to the manner in which those hearings were conducted (*see Matter of McFadden v Dubray*, 61 AD3d 1170, 1171; *Matter of Cooper v Selsky*, 43 AD3d 1254, 1255, *lv dismissed* 9 NY3d 1026).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

404

CA 14-01641

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

GARY BUHR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CONCORD SQUARE HOMES ASSOCIATES, INC.,
DEFENDANT-RESPONDENT.

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

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 26, 2013. The order, inter alia, denied the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 241 (6).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based upon the alleged violations of 12 NYCRR 23-9.4 (e) (1) and (h) (1) and reinstating that cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this common-law negligence and Labor Law § 241 (6) action seeking damages for injuries he sustained when he was assisting in the repair of a broken water pipe at an apartment complex owned by defendant. At the time of the accident, plaintiff's supervisor was operating a backhoe to identify and expose the broken pipe. After the broken pipe was identified, plaintiff was directed to exit the excavation while the supervisor moved the pipe with the teeth of the backhoe bucket. Plaintiff was climbing a ladder out of the excavation when the backhoe bucket swung toward him, struck him in the leg, and pinned his leg against the side of the excavation.

We conclude that Supreme Court properly granted that part of defendant's cross motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based upon the alleged violation of 12 NYCRR 23-4.2 (k). That regulation is not sufficiently specific to support the section 241 (6) cause of action (*see Webber v City of Dunkirk*, 226 AD2d 1050, 1051). We further conclude that the court properly denied plaintiff's motion seeking partial summary

judgment on liability pursuant to Labor Law § 241 (6), but erred in granting that part of the cross motion seeking summary judgment dismissing the section 241 (6) cause of action insofar as it is based upon the alleged violation of 12 NYCRR 23-9.4 (e) (1) and (h) (1). We therefore modify the order accordingly. Contrary to the court's determination, the testimony of the witnesses to the accident established that the backhoe was being "used for material handling" within the meaning of that regulation (*see Kropp v Town of Shandaken*, 91 AD3d 1087, 1091). In addition, the eyewitness testimony raises triable issues of fact concerning how the accident occurred, whether the regulations at issue were violated (*see Smith v Torre*, 247 AD2d 896, 897), and whether plaintiff was negligent (*see Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428; *Irwin v St. Joseph's Intercommunity Hosp.*, 236 AD2d 123, 131-132).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

405

KA 13-00726

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH RAUSCH, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ALICIA M. LILLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 8, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was deprived of effective assistance of counsel by his attorney's failure to obtain a ruling on his suppression motion before defendant pleaded guilty to the charge. We affirm.

Contrary to defendant's initial contention that his waiver of the right to appeal is not valid, "the record establishes that County 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 Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912), and the "[c]ourt's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882 [internal quotation marks omitted]).

Defendant's contention that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal only insofar as he demonstrates that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor

performance" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]; *see People v Jackson*, 90 AD3d 1692, 1694, *lv denied* 18 NY3d 958). Here, to the extent that defendant contends that his plea was infected by the allegedly ineffective assistance of counsel, i.e., defense counsel's failure to request a suppression ruling, that contention "involve[s] matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440" (*People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

407

KA 12-01055

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. EPPOLITO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANNA JOST, TONAWANDA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 26, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment that, upon his admission to violating conditions of probation, revoked the sentence of probation imposed on his conviction of attempted aggravated criminal contempt (Penal Law §§ 110.00, 215.52 [1]) and sentenced him to a term of imprisonment. In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (§ 120.05 [2]). Defendant concedes in both appeals that he failed to preserve for our review his contention that the admission and guilty plea, respectively, were not knowing, voluntary or intelligent "inasmuch as [he] failed to move to withdraw [his] admission [or plea] on that ground" or to vacate either judgment (*People v Shaw*, 118 AD3d 1461, 1461, *lv denied* 24 NY3d 1005; *see People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930; *see generally People v Lopez*, 71 NY2d 662, 665). These cases do not fall within the narrow exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666). Contrary to defendant's contention in appeal No. 2, he was properly sentenced as a second felony offender based on his conviction of attempted aggravated criminal contempt as a predicate felony (*see* Penal Law § 70.06 [1] [b] [ii]; *People v Newton*, 91 AD3d 1281, 1281, *lv denied* 19 NY3d 965). Finally, we conclude that the sentences in both appeals are not unduly harsh or severe.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

408

KA 12-01056

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. EPPOLITO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANNA JOST, TONAWANDA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 26, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Same memorandum as in *People v Eppolito* ([appeal No. 1] ___ AD3d ___ [Mar. 27, 2015]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

409

KA 11-00487

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW M. CARSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 26, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The People established at trial that the victim and a friend were standing near the victim's residence when defendant approached them. Defendant and the victim had a heated verbal exchange that resulted in defendant pulling a gun on the victim. Defendant then left the area, but he reappeared a few minutes later and fired three shots, one of which struck and killed the victim. Both altercations were observed by two eyewitnesses at the YMCA located across the street from the victim's residence. The altercations were also recorded by a video camera located outside a store that had a view of the YMCA and the sidewalk in front of the victim's residence. Viewing the evidence at trial 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). Contrary to defendant's contention, any discrepancies between defendant's appearance and the eyewitness testimony at trial presented mere credibility issues for the jury (*see People v Wilkins*, 75 AD3d 847, 848, *lv denied* 15 NY3d 857; *People v Smith*, 267 AD2d 407, 408). We conclude that "this is not an appropriate case [for this Court] to substitute [its] reliability determinations for those of the jury" (*People v Davis*, 115 AD3d 1167, 1168, *lv denied* 23 NY3d 1019).

Defendant failed to preserve for our review his contention that the photo array procedure was unduly suggestive because his photo presented a substantially narrower face than the other individuals displayed in the array inasmuch as he did not make that argument at the *Wade* hearing (*see People v Barkerx*, 114 AD3d 1244, 1247-1248, *lv denied* 22 NY3d 1196; *People v Bell*, 19 AD3d 1074, 1075, *lv denied* 5 NY3d 803, *reconsideration denied* 5 NY3d 850). We similarly conclude that defendant failed to preserve for our review his contention that the prospective jurors were not given the requisite oath pursuant to CPL 270.15 (1) (a) (*see People v Gaston*, 104 AD3d 1206, 1207, *lv denied* 22 NY3d 1156; *People v Schrock*, 73 AD3d 1429, 1432, *lv denied* 15 NY3d 855). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We also conclude that defendant "knowingly, intelligently and voluntarily waived his right to be present at sidebar conferences, as evidenced by the written waiver signed by defendant, defense counsel, and [Supreme C]ourt" (*People v Conway*, 277 AD2d 1020, 1020, *lv denied* 96 NY2d 782; *see People v Jones*, 111 AD3d 1148, 1149-1150, *lv denied* 23 NY3d 1063, 24 NY3d 1044), and we thus reject his contention that his exclusion from a sidebar conference requires reversal. In any event, that contention is without merit because there can be no violation of defendant's right to be present where, as here, a prospective juror was excused for cause by the court (*see People v Maher*, 89 NY2d 318, 325; *People v Jordan*, 88 AD3d 580, 580, *lv denied* 18 NY3d 884; *cf. People v Davidson*, 89 NY2d 881, 882-883). Finally, we reject defendant's contention that he received ineffective assistance of counsel. Viewing the evidence, the law, and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

410

KA 11-01583

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARTH HILL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 27, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and sexual abuse in the first degree (§ 130.65 [1]), defendant contends that County Court erred in denying his motion to suppress identification testimony on the ground that the lineup procedure was conducted after the two victims viewed photo arrays containing defendant's picture. We reject that contention. "It is well settled that '[m]ultiple pretrial identification procedures are not inherently suggestive' " (*People v Morgan*, 96 AD3d 1418, 1419, *lv denied* 20 NY3d 987), and here "the record supports the court's determination that the photo array[s] and subsequent lineup were not so suggestive as to create the substantial likelihood that defendant would be misidentified" (*People v Peterkin*, 81 AD3d 1358, 1359, *lv denied* 17 NY3d 799 [internal quotation marks omitted]). Contrary to defendant's further contention, the People established the reasonableness of the lineup identification procedure, and defendant failed to meet his ultimate burden of establishing that the lineup was unduly suggestive (*see People v Snell*, 118 AD3d 1350, 1350, *lv denied* 24 NY3d 965). Although defendant was taller than two of the fillers used in the lineup, " 'the alleged variations in appearance between the fillers and the defendant were not so substantial as to render the lineup impermissibly suggestive' " (*People v Davis*, 115 AD3d 1167, 1170, *lv denied* 23 NY3d 1019; *see People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833; *People v Freeney*, 291 AD2d 913, 913, *lv denied* 98 NY2d

637).

Defendant contends that the court erred in refusing to suppress his statements to the police because he was under the influence of a controlled substance when he waived his *Miranda* rights, and thus his waiver was invalid. We reject that contention, inasmuch as there is no evidence that defendant " '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 Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885). Finally, defendant failed to preserve for our review his challenge to the voluntariness of his plea inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Kuras*, 49 AD3d 1196, 1197, *lv denied* 10 NY3d 866; *People v DeJesus*, 248 AD2d 1023, 1023, *lv denied* 92 NY2d 878). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

411

KA 13-01959

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYLL J. CLARK, 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 Monroe County Court (John Lewis DeMarco, J.), entered October 3, 2013. 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*.). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to grant him a downward departure from his presumptive risk level. "A defendant seeking a downward departure has the initial burden of ' . . . identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account' " by the risk assessment guidelines (*People v Watson*, 95 AD3d 978, 979). Here, defendant asserted as mitigating factors that the statutory rape of which he was convicted does not usually result in a level three risk assessment and that the risk assessment instrument yielded the minimum amount of points to qualify as a level three risk, and we conclude that those are not "appropriate mitigating factor[s]" (*id.*; *cf. People v Smith*, 122 AD3d 1325, 1326; *People v Martinez-Guzman*, 109 AD3d 462, 462, *lv denied* 22 NY3d 854). With respect to defendant's contention that a downward departure was warranted by his success in treatment, we agree that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). "Even assuming, arguendo, that defendant established facts that his response to treatment was exceptional so as to warrant a downward departure, we

conclude upon examining all of the relevant circumstances that the court providently exercised its discretion in denying defendant's request for a downward departure" (*Smith*, 122 AD3d at 1326; *see People v Worrell*, 113 AD3d 742, 743).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

412

KA 11-00309

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVE J. GRAY, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered November 22, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress physical evidence because the testimony of the police officer who stopped him was not credible and, absent that officer's testimony, the People failed to meet their initial " 'burden of going forward to show the legality of the police conduct in the first instance' " (*People v Plumley*, 111 AD3d 1418, 1420, *lv denied* 22 NY3d 1140, quoting *People v Berrios*, 28 NY2d 361, 367). We reject that contention. "In reviewing a determination of the suppression court, great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986, 987, *lv denied* 86 NY2d 741; *see People v Mejia*, 64 AD3d 1144, 1145, *lv denied* 13 NY3d 861; *see generally People v Prochilo*, 41 NY2d 759, 761). Contrary to defendant's contention, the "minor discrepancies in [the] suppression hearing testimony [of the arresting officer] do not warrant disturbing the court's determination" (*People v Mills*, 93 AD3d 1198, 1199, *lv denied* 19 NY3d 964), and the court's determination is not clearly erroneous. Consequently, we conclude that the People met their initial burden and, because defendant failed to meet his "ultimate burden of proving that the [seized] evidence should not be used against him" (*Berrios*, 28 NY2d at 367), the court properly refused to suppress the handgun

that defendant discarded while fleeing from the police.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

413

KA 13-00699

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. CAUFIELD, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, 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 October 9, 2012. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]), defendant contends that his waiver of the right to appeal is not valid. We agree. "[T]he minimal inquiry made by County Court was 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 Box,* 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]). Moreover, the court "conflated the waiver of the right to appeal with the rights forfeited by defendant based on his guilty plea" (*People v Tate*, 83 AD3d 1467, 1467; *cf. People v Boatman*, 110 AD3d 1463, 1463, *lv denied* 22 NY3d 1039). Nevertheless, we affirm. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). In any event, that challenge is without merit because "there is no requirement that defendant recite the facts underlying the crime to which he is pleading guilty" (*People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932; *see People v Darling*, 125 AD3d 1279, ___).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

415

KA 11-00213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON R. WOODS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEON R. WOODS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered September 3, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends in his pro se supplemental brief that his waiver of the right to appeal is not valid. We reject that contention. Defendant's "responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly and voluntarily waived his right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019). Contrary to defendant's contention, the record establishes that he " 'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103, quoting *People v Lopez*, 6 NY3d 248, 256).

Defendant's contention in his main brief that his plea was not knowingly, voluntarily and intelligently entered survives his valid waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108, *lv denied* 22 NY3d 1159), but defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004; *People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). Contrary to defendant's contention, "[t]his is not one of those rare cases 'where the defendant's

recitation of the facts underlying the crime[] pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea[]' to obviate the preservation requirement" (*People v Rodriguez*, 17 AD3d 1127, 1129, *lv denied* 5 NY3d 768, quoting *People v Lopez*, 71 NY2d 662, 666). "Although the initial statements of defendant during the factual allocution may have negated the essential element of his intent to cause [serious physical injury], his further statements removed any doubt regarding that intent" (*People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760; *see Theall*, 109 AD3d at 1108).

Defendant's further contention in his pro se supplemental brief that he was denied effective assistance of counsel "does not survive the plea or the waiver by defendant of the right to appeal because defendant failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). Finally, although defendant's valid waiver of the right to appeal does not encompass his challenge in his pro se supplemental brief to the severity of his sentence inasmuch as County Court "failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration" (*People v Kelly*, 96 AD3d 1700, 1700), that challenge lacks merit.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

417

CAF 14-00451

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF PATRICK ORDONA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER COTHERN, RESPONDENT-APPELLANT.

IN THE MATTER OF PATRICK ORDONA,
PETITIONER-RESPONDENT,

V

PAMELA CAMPBELL, RESPONDENT-RESPONDENT,
AND JENNIFER COTHERN, RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

AVERY S. OLSON, JAMESTOWN, FOR PETITIONER-RESPONDENT.

JILL A. SPAYER, ATTORNEY FOR THE CHILD, DUNKIRK.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 13, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph to the extent that it delegates authority to a supervising agency to determine the duration of respondent-appellant's visitation with the subject children, and by striking the sixth ordering paragraph requiring respondent-appellant to show substantial compliance with the terms of the prior order concerning drug and alcohol evaluations, mental health evaluations and participation in a parenting skills training program as a prerequisite for modification of visitation and substituting therefor a provision directing that respondent-appellant comply with those conditions as a component of supervised visitation, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In this child custody and visitation proceeding pursuant to Family Court Act article 6, respondent-appellant (hereafter, mother) appeals

from an order that, inter alia, granted sole custody of the subject children to petitioner father and restricted the mother's visitation to supervised visits once per month, in the "day time only, up to a maximum of eight hours, depending upon the . . . availability" of an unspecified supervising agency. Contrary to the mother's contention, Family Court did not abuse its discretion in limiting the mother's visitation. It is well settled that "a court's determination regarding . . . visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record, i.e., is not supported by a sound and substantial basis in the record" (*Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [internal quotation marks omitted]; *see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). We conclude that there is a sound and substantial basis in the record to support the court's determination that the mother filed false reports with Child Protective Services regarding the father and repeatedly violated prior court orders regarding visitation, and "[i]t is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [internal quotation marks omitted]; *see generally Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726, *lv denied* 7 NY3d 717). We reject the mother's contention that the testimony of the father and his witnesses on those issues is not credible, and, in "reaching that conclusion, we defer to the court's opportunity to assess firsthand the character and credibility of the parties" and their witnesses (*Matter of Granger v Misercola*, 96 AD3d 1694, 1695, *affd* 21 NY3d 86).

Although the court's determination that visitation must be supervised is supported by the record (*see Matter of Peet v Parker*, 23 AD3d 940, 941; *Matter of St. Pierre v Burrows*, 14 AD3d 889, 892), we note that the court set no minimum time period for the monthly visitation and left the duration of visitation, "up to a maximum of eight hours," to be determined solely based on the availability of "any authorized agency that supervises visitation." Consequently, we agree with the mother that the court "erred in failing to set a supervised visitation schedule, implicitly leaving it to the supervisor to determine" the duration of each visit (*Matter of Bonthu v Bonthu*, 67 AD3d 906, 907, *lv dismissed* 14 NY3d 852; *see Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284, *lv denied* 17 NY3d 703). We therefore modify the order accordingly, and we remit the matter to Family Court to determine the duration of visitation.

Furthermore, "[a]lthough a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Avdic v Avdic*, 125 AD3d 1534, ___). Indeed, it is well settled "that the court lack[s] the authority to condition any future application for modification of her visitation on her participation in mental health counseling" (*Matter of Vieira v Huff*, 83 AD3d 1520, 1522). We therefore further modify the order by vacating the requirement that the mother show

substantial compliance with the terms of a prior order concerning drug and alcohol evaluations, mental health evaluations and a parenting skills training program as a prerequisite for a future application to modify visitation and by providing instead that the mother comply with those terms as a component of supervised visitation.

Finally, the mother contends for the first time on appeal that the Attorney for the Child for one of the two children had a conflict of interest that impacted her representation of the child, and thus the mother failed to preserve that contention for our review (*see Matter of Wood v Hargrave*, 292 AD2d 795, 796, *lv denied* 98 NY2d 608; *see also Matter of Carrieanne G.*, 15 AD3d 850, 850, *lv denied* 4 NY3d 709; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

418

CAF 14-00798

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF MARGARET J. RICHARDSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JILL LUDWIG, RESPONDENT-APPELLANT,
AND DANIEL LUDWIG, RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT.

ROBERT C. BALDWIN, ATTORNEY FOR THE CHILDREN, BARNEVELD.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), dated April 8, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner visitation with the subject children.

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

Memorandum: Petitioner, the maternal grandmother of the subject grandchildren, commenced this proceeding seeking visitation with them, and respondent mother appeals from an order that granted the petition, awarding the grandmother, inter alia, a minimum of six hours of visitation one weekend day per month with two of the subject grandchildren. We reject the mother's contention that Family Court erred in concluding that the grandmother had standing to seek visitation pursuant to Domestic Relations Law § 72 (1), inasmuch as the grandmother established that "conditions exist [in] which equity would see fit to intervene" (*see id.*; *Matter of E.S. v P.D.*, 8 NY3d 150, 157; *Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433). We also reject the mother's contention that the court erred in granting the petition. We conclude that the record supports the court's determination, which was based in part upon the credibility of the witnesses (*see generally Hilgenberg*, 100 AD3d at 1434), that visitation is in the best interests of those subject grandchildren (*see Matter of Morgan v Grzesik*, 287 AD2d 150, 156; *cf. Hilgenberg*, 100 AD3d at 1434-1435).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

420

CAF 13-01856

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF SKYVINN W.

HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CHRISTOPHER W., RESPONDENT-APPELLANT,
AND STEPHANIE W., RESPONDENT.
(APPEAL NO. 1.)

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

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA.

ALBERT F. LAWRENCE, ATTORNEY FOR THE CHILD, GREENFIELD CENTER.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered September 10, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, directed respondent Christopher W. to stay away from Skyvinn W.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kelly F. v Gregory A.F.*, 34 AD3d 1277, 1277).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

421

CAF 14-00121

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ALEXIA J. AND SKYVINN W.

HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTOPHER W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA.

ALBERT F. LAWRENCE, ATTORNEY FOR THE CHILD, GREENFIELD CENTER.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered December 9, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent neglected the subject children.

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

Memorandum: Respondent father appeals from an order that, inter alia, determined that he derivatively neglected one of the two subject children. Contrary to the father's contention, Family Court's determination of derivative neglect with respect to that child is supported by a preponderance of the evidence (*see generally Nicholson v Scopetta*, 3 NY3d 357, 368). Here, petitioner presented evidence that the father neglected the other subject child, he violated an order of protection issued for the benefit of the other subject child, and he was convicted upon his plea of guilty of aggravated driving while intoxicated under Vehicle and Traffic Law § 1192 (2-a) (b), for driving while intoxicated with a one-year-old passenger in the vehicle. "A finding of derivative neglect may be made where the evidence with respect to the child found to be abused or neglected 'demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care' " (*Matter of Jovon J.*, 51 AD3d 1395, 1396; *see generally* Family Ct Act § 1046 [a] [I]). Although the one-year-old passenger in the vehicle the father was driving while intoxicated was not a subject of the instant petition, "the court may make a finding of derivative neglect even if the child who was . . . abused [or neglected] is not a subject

of the neglect petition" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545; *see Matter of Kole HH.*, 61 AD3d 1049, 1052-1053; *see generally Matter of Justice T.*, 305 AD2d 1076, 1076-1077, *lv denied* 100 NY2d 512). We agree with the court that, in this case, the "circumstances surrounding the neglect of the . . . other children can be said to evidence fundamental flaws in the [father's] understanding of the duties of parenthood . . . , justifying the finding that the [father] derivatively neglected the subject child" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638, *lv denied* 17 NY3d 711 [internal quotation marks omitted]; *see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

424

CA 14-01673

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ANTHONY CATAFFO,
CLAIMANT-APPELLANT,

V ORDER

GRAND ISLAND CENTRAL SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (ALLISON M. BOZINSKI OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 6, 2013. The order denied the motion of claimant for leave to serve a late notice of claim.

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

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

427

CA 14-01647

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

STEVEN P. GRAHAM AND AMY P. GRAHAM,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEREMY D. GEROW AND RTE 36 HOLDINGS, LLC,
DEFENDANTS-RESPONDENTS.

VALERIO & KUFTA, P.C., ROCHESTER (MARK J. VALERIO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERNEST D. SANTORO, P.C., ROCHESTER (ERNEST D. SANTORO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered July 29, 2014. The order denied the motion of plaintiffs for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiffs commenced this action seeking damages allegedly sustained by Steven P. Graham (plaintiff) when a farm tractor with an attached field plow operated by defendant Jeremy D. Gerow and owned by defendant Rte 36 Holdings, LLC crossed the center line of the highway and collided with the vehicle driven by plaintiff. We agree with plaintiffs that Supreme Court erred in denying their motion seeking partial summary judgment on the issue of liability. Plaintiffs met their initial burden by establishing that defendants' field plow "crossed the center line of the highway and struck [plaintiff's] vehicle" (*Boorman v Bowhers*, 27 AD3d 1058, 1059). In opposition, defendants failed to meet their burden of providing a " 'non[]negligent explanation, in evidentiary form, for the collision' " (*Matte v Hall*, 20 AD3d 898, 900).

Defendants do not oppose plaintiffs' remaining contention that the serious injury threshold does not apply here because defendants' farm tractor and field plow are not "motor vehicles" under the Insurance Law and defendants therefore do not qualify as "covered persons" under Insurance Law § 5102 (j). In any event, plaintiffs are correct that, because there is no dispute that defendants' farm tractor and the attached field plow were being used exclusively for agricultural purposes, the serious injury threshold requirement is not

applicable (*see* §§ 5102 [j]; 5104 [a]; Vehicle and Traffic Law § 311 [2]; *Masotto v City of New York*, 38 Misc 3d 1226[A], n 5, 2013 NY Slip Op 50285[U], *4 n 5 [Sup Ct, Kings County]; *see generally Caruana v Oswego County Bd. of Coop. Educ. Servs.*, 26 AD3d 857, 858).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

428

CAF 14-01015

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JACOB A.T.,
RESPONDENT-APPELLANT.

YATES COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

SCOTT P. FALVEY, COUNTY ATTORNEY, CANANDAIGUA (HAYDEN M. DADD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 12, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudged that respondent is a juvenile delinquent and placed him in the custody of the Yates County Department of Social Services for a period of 12 months.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition and as modified the order is affirmed without costs and the matter is remitted to Family Court, Yates County, for further proceedings in accordance with the following memorandum: In these three consolidated appeals, respondent appeals from three orders, each adjudicating him to be a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute the crime of petit larceny (Penal Law § 155.25), in appeal Nos. 1 and 2, and the crime of criminal possession of stolen property in the fifth degree (§ 165.40), in appeal No. 3. After a dispositional hearing, Family Court placed respondent in the custody of the Yates County Department of Social Services (DSS) for a period of 12 months on each adjudication.

Respondent contends that the disposition placing him in the custody of DSS for one year is not the least restrictive disposition. It is well settled that, when determining an appropriate disposition in a juvenile delinquency case involving acts that are not felonies, "the court shall order the least restrictive available alternative" and "shall consider the needs and best interests of the respondent as well as the need for protection of the community" (Family Ct Act § 352.2 [2] [a]; *see generally Matter of Leporia L.L.*, 83 AD3d 1539, 1539). Although "[t]he court has broad discretion in determining the appropriate disposition in juvenile delinquency cases" (*Matter of*

Richard W., 13 AD3d 1063, 1064), we agree with respondent that the court abused its discretion under the circumstances presented here. The evidence presented at the dispositional hearing and the predispositional and probation update reports prepared in conjunction with that hearing establish that respondent's home environment was "toxic" and he suffered from mental health issues that required treatment. In addition, the update to the original report indicated that respondent had recently been staying with a family friend who had known him since birth, that the friend had petitioned for custody of respondent, and that there had been no new arrests during that time. The update also indicated that the friend was able to devote significant time to supervising respondent, and that the friend resided with a woman who managed a residential home. In addition, both the family friend and the woman with whom he lived testified at the dispositional hearing that they could help with respondent's supervision. Consequently, "we agree with [respondent] that the court erred in failing to consider the least restrictive available alternative in fashioning an appropriate dispositional order" (*Matter of Nicolette R.*, 9 AD3d 270, 271, *lv denied* 3 NY3d 610). We therefore modify the order by vacating the disposition and, in light of the lapse of time since the order was entered, we remit the matter to Family Court for a new dispositional hearing.

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

429

CAF 14-01016

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JACOB A.T.,
RESPONDENT-APPELLANT.

YATES COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

SCOTT P. FALVEY, COUNTY ATTORNEY, CANANDAIGUA (HAYDEN M. DADD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 12, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudged that respondent is a juvenile delinquent and placed him in the custody of the Yates County Department of Social Services for a period of 12 months.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition and as modified the order is affirmed without costs and the matter is remitted to Family Court, Yates County, for further proceedings in accordance with the same memorandum as in *Matter of Jacob A.T.* ([appeal No. 1] ___ AD3d ___ [Mar. 27, 2015]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court

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

430

CAF 14-01017

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JACOB A.T.,
RESPONDENT-APPELLANT.

YATES COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 3.)

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

SCOTT P. FALVEY, COUNTY ATTORNEY, CANANDAIGUA (HAYDEN M. DADD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 12, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudged that respondent is a juvenile delinquent and placed him in the custody of the Yates County Department of Social Services for a period of 12 months.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition and as modified the order is affirmed without costs and the matter is remitted to Family Court, Yates County, for further proceedings in accordance with the same memorandum as in *Matter of Jacob A.T.* ([appeal No. 1] ___ AD3d ___ [Mar. 27, 2015]).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court