



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

DECISIONS FILED
DECEMBER 28, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

930

CA 12-00329

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

RICHARD BRUCE, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ACTUS LEND LEASE, DEFENDANT-APPELLANT-RESPONDENT.

NEWMAN MYERS KREINES GROSS HARRIS, P.C., NEW YORK CITY (CHARLES D. COLE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated August 25, 2011. The order denied plaintiff's motion for partial summary judgment and denied defendant's cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he allegedly sustained when a roof truss that he was securing to a building under construction broke apart, striking him and knocking him off a ladder. The truss broke apart when the hoist to which it was attached was raised prematurely. We conclude that Supreme Court properly denied both plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim and defendant's cross motion for summary judgment dismissing that claim. A plaintiff is entitled to summary judgment under Labor Law § 240 (1) by establishing that he or she was "subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries" (*Peters v Kissling Interests, Inc.*, 63 AD3d 1519, 1520, *lv denied* 13 NY3d 903, citing *Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978). A defendant is entitled to summary judgment dismissing a Labor Law § 240 (1) cause of action or claim by establishing that a statutory violation did not occur, an alleged statutory violation was not a proximate cause of the accident, or the plaintiff's conduct was the sole proximate cause of the accident (*see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8).

Here, we conclude on the record before us that plaintiff was not injured based on the "falling object" theory of recovery. Indeed,

because it is undisputed that the truss was rising when it struck plaintiff, the alleged injury could not have been the result of "the application of the force of gravity to the [truss]" (*Runner v Stock Exch., Inc.*, 13 NY3d 599, 604; see *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427). We nevertheless conclude that there is an issue of fact on the record before us with respect to the "falling worker" theory of recovery. More specifically, there are issues of fact under that theory of recovery "concerning the adequacy of the protection afforded to plaintiff, both in terms of the [safety devices] provided to him and the absence of other safety devices . . . [, and] whether the conduct of plaintiff was the sole proximate cause of his injuries" (*Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077; see *Trippi v Main-Huron, LLC*, 28 AD3d 1069, 1070; see also *Donovan v CNY Consol. Contrs.*, 278 AD2d 881, 881).

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

969

CA 12-00420

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

QP, INC., PLAINTIFF-RESPONDENT,

V

ORDER

THE FLANDERS GROUP, INC., DEFENDANT-APPELLANT.

A decision order having been entered December 28, 2012, affirming an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), dated October 5, 2011, in a breach of contract action,

Now, upon the Court's own motion, with knowledge that a stipulation of discontinuance was filed by the parties in the Monroe County Clerk's Office on November 29, 2012, without notice to this Court,

It is hereby ORDERED that the decision order entered December 28, 2012, is vacated and the appeal is dismissed as moot.

Frances E. Cafarell

Entered: January 8, 2013

Clerk of the Court

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

1038

CA 12-00609

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

HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF
HSBC BANK USA, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V

ORDER

JUAN E. IRENE, PLLC, ET AL., DEFENDANTS,
AND JUAN E. IRENE, INDIVIDUALLY AND DOING
BUSINESS AS THE LAW OFFICE OF JUAN E.
IRENE, ESQ., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (CHARLES
D.J. CASE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 31, 2011. The order, insofar as appealed from, granted that part of plaintiff's motion seeking summary judgment against defendant Juan E. Irene, individually and doing business as The Law Office of Juan E. Irene, Esq., in the amount of \$124,984.37, plus interest, costs, disbursements and attorneys' fees.

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* 5501 [a] [1]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1039

CA 12-00617

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

HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF
HSBC BANK USA, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JUAN E. IRENE, PLLC, ET AL., DEFENDANTS,
AND JUAN E. IRENE, INDIVIDUALLY AND DOING
BUSINESS AS THE LAW OFFICE OF JUAN E.
IRENE, ESQ., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (CHARLES
D.J. CASE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered May 31, 2011. The judgment, insofar as appealed from, awarded plaintiff money damages against defendant Juan E. Irene, individually and doing business as The Law Office of Juan E. Irene, Esq.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously vacated and the order entered May 31, 2011 insofar as appealed from is reversed on the law without costs.

Memorandum: Plaintiff commenced this action seeking to collect the outstanding balance owed on a line of credit by defendant Juan E. Irene, PLLC (hereafter, PSLLC), a domestic professional service limited liability company. Plaintiff moved for summary judgment against defendants, jointly and severally, in the principal amount of \$124,984.37 together with interest, costs and attorneys' fees. Plaintiff also moved for an order of replevin and a writ of seizure with respect to certain secured collateral. Juan E. Irene, individually and doing business as The Law Office of Juan E. Irene, Esq. (defendant), appeals from a judgment that brings up for review the underlying order granting plaintiff's motion in its entirety. As limited by his brief, defendant contends that Supreme Court erred in granting that part of plaintiff's motion for summary judgment against him. We agree with defendant.

On November 25, 2002, the PSLLC entered into a business line of

credit agreement with a bank. Pursuant to a general security agreement, the PSLLC granted the bank a security interest in the PSLLC's assets, accounts and other intangible property. Defendant executed the line of credit and security agreements in his capacity as the sole member of the PSLLC. Defendant, however, neither cosigned nor guaranteed the line of credit in his individual capacity. On May 27, 2009, the bank assigned the PSLLC's line of credit to plaintiff. On June 3, 2009, the PSLLC was dissolved by the filing of articles of dissolution with the New York State Department of State.

It is undisputed that, following the dissolution of the PSLLC, defendant engaged in the practice of law in his individual capacity at the same location where the PSLLC had been located and under an assumed name, i.e., "DBA," "The Law Office of Juan Irene, Esq." Personal injury cases previously handled by the PSLLC were transferred to defendant's law practice, and defendant does not dispute that plaintiff has a security interest in a portion of the attorney's fees that may be generated by those personal injury cases. After the dissolution of the PSLLC, plaintiff thereafter commenced this action. As relevant to these appeals, plaintiff moved for summary judgment seeking a money judgment for the amount outstanding on the line of credit together with interest, costs and attorneys' fees. The court, concluding that defendant was liable to plaintiff as a "successor by merger" to the PSLLC, granted the motion and judgment was entered thereon.

Defendant contends that the court erred in granting that part of plaintiff's motion for summary judgment against him because plaintiff failed to establish that the de facto merger doctrine applies. We agree. Initially, we note that, although the parties did not originally brief the issue whether the de facto merger doctrine imposes successor liability on an individual or sole proprietorship allegedly merging with a domestic professional service limited liability company, at oral argument this Court directed the parties to make supplemental submissions on that issue, and they have done so. Thus, the issue of the applicability of the de facto merger doctrine to plaintiff's successor liability claim against defendant is properly before us (see 22 NYCRR 1000.11 [g]).

The "corporate law doctrine" of de facto merger was originally developed to protect, inter alia, shareholder rights, but it has been applied in products liability and breach of contract actions (*Sweatland v Park Corp.*, 181 AD2d 243, 246; see *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245; *Washington Mut. Bank, F.A. v SIB Mtge. Corp.*, 21 AD3d 953, 954; *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 247-248). The doctrine "creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the [preexisting] liabilities of the acquired corporation" (*Simpson v Ithaca Gun Co., LLC*, 50 AD3d 1475, 1476, *lv denied* 11 NY3d 709 [internal quotation marks omitted]).

We reject plaintiff's contention that the de facto merger doctrine renders defendant liable to plaintiff as a successor by

merger to the PSLLC. Inasmuch as the PSLLC was a New York professional service limited liability company created pursuant to Limited Liability Company Law article 12, any merger or consolidation between defendant and the PSLLC would be governed by that article. Pursuant to Limited Liability Company Law §§ 1213 and 1216, a professional service limited liability company may, under certain circumstances, be merged or consolidated with another limited liability company, a foreign professional service limited liability company or some "other business entity." Limited Liability Company Law § 102 (v) defines "[o]ther business entity" as "any person *other than a natural person* or domestic limited liability company" (emphasis added), and the statute therefore specifically excludes a professional service limited liability company from being merged or consolidated with a "natural person" (§ 102 [v]; see §§ 1213, 1216). Here, defendant is clearly a "natural person," despite the fact that he practices law under an assumed name and the fact that his law practice is characterized as a "sole proprietorship" (see generally *Steele v Hempstead Pub Taxi*, 305 AD2d 401, 401; *Kaczorowski v Black & Adams*, 293 AD2d 358, 358-359). Thus, even if defendant and the PSLLC desired to be merged, rather than having such merger imposed upon them by a judicially created doctrine, such a merger could not be accomplished under the Limited Liability Company Law.

Notably, although invited to do so by this Court, plaintiff has not identified any New York authority that permits a New York corporation or professional service limited liability company to merge with an individual doing business as a "sole proprietorship," i.e., a natural person, or that imposes a merger under the de facto merger doctrine. Instead, in support of its position, plaintiff cites *Tift v Forage King Industries, Inc.* (108 Wis 2d 72, 73-74, 322 NW2d 14, 14-15), wherein the court applied successor liability in a products liability action that involved the acquisition of the assets of a sole proprietor by a corporation. The court in *Tift* decided that action based upon the public policy and common law of the state of Wisconsin (*id.* at 82-83). We are unpersuaded by *Tift*. Significantly, the New York Business Corporation Law limits mergers to corporations and "other business entities" (§ 901 [c] [1]). The term "[o]ther business entity," as defined under the Business Corporation Law, excludes "a natural person" (§ 901 [b] [7]). Thus, under New York law, neither a professional limited liability company nor a corporation is permitted by statute to merge with a "natural person," individual or "sole proprietorship."

We therefore vacate the judgment insofar as appealed from and reverse the underlying order insofar as appealed from.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1166

CA 12-00827

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

IN THE MATTER OF THE ESTATE OF GARY M. PHILLIPS,
DECEASED.

KELLY E. HEBERLEIN, AS EXECUTOR OF THE ESTATE MEMORANDUM AND ORDER
OF GARY M. PHILLIPS, DECEASED,
PETITIONER-APPELLANT;

CHERIL M. EBERTH, ALLISON M. ALBERTI,
RESPONDENTS-APPELLANTS,
AND LORRIE MACDIARMID, RESPONDENT-RESPONDENT.

FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR
PETITIONER-APPELLANT AND RESPONDENTS-APPELLANTS.

THE LAW OFFICE OF ROBERT WEIG, LANCASTER (ROBERT E. WEIG OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered July 22, 2011. The order, inter alia, in
effect granted that part of the cross motion for summary judgment of
respondent Lorrie MacDiarmid with respect to her proposed construction
of article four of the last will and testament of decedent.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying that part of respondent's
cross motion for summary judgment construing article four of
decedent's last will and testament in her favor and vacating that part
of the order and as modified the order is affirmed without costs, and
the matter is remitted to Surrogate's Court, Erie County, for further
proceedings in accordance with the following Memorandum: Petitioner
commenced this proceeding seeking construction of certain provisions
of the last will and testament (will) of her father, Gary M. Phillips
(decedent). In the will, decedent devised his property to petitioner
and her sisters, respondents Cheril M. Eberth and Allison M. Alberti
(collectively, daughters) and his live-in girlfriend, Lorrie
MacDiarmid (respondent). Thereafter, petitioner moved for summary
judgment, contending that the third and fourth articles of the will
are ambiguous and require Surrogate's Court to consider extrinsic
evidence in order to construe the meaning of those articles.
Respondent cross-moved for summary judgment, contending that the will
is unambiguous and thus that the Surrogate is precluded from
considering extrinsic evidence in construing the will. The Surrogate
in effect granted that part of petitioner's motion with respect to her
proposed construction of article three and that part of respondent's

cross motion with respect to her proposed construction of article four. We agree with the daughters that the Surrogate erred in granting that part of respondent's cross motion with respect to the construction of article four and that extrinsic evidence is necessary to resolve the latent ambiguity in that article.

Initially, we note that we further agree with the daughters that respondent's challenge to the Surrogate's construction of article three of the will is not properly before us inasmuch as respondent failed to take a cross appeal from the order (see *Harris v Eastman Kodak Co.*, 83 AD3d 1563, 1564; *Matijiw v New York Cent. Mut. Fire Ins. Co.*, 292 AD2d 865, 866; see generally CPLR 5515 [1]). With regard to article four of the will, we note as background that, at the time of his death, decedent owned a lot measuring 120 feet by 300 feet (lot), upon which his house and a garage were located. Decedent also owned 88 acres of land adjacent to the lot. The 88-acre parcel (hereafter, farmland) included a "pole barn" that decedent used to house his tractor and cows. In article four of the will, decedent bequeathed his residence "*and the plot of land appurtenant thereto*" to respondent (emphasis added). That article provides that, "[i]f any balance of a mortgage, loan, or encumbrance against the said residence, *or the plot of land appurtenant thereto*, remains unpaid at the time of my death, then I direct that the recipient or recipients of such property shall receive the property subject to the said mortgage, loan or encumbrance" (emphasis added). The fifth article of the will granted to the daughters in equal shares "the rest, residue and remainder of [decedent's] property, both real and personal, of whatsoever kind and nature and wherever located, to which [decedent] may be entitled in any manner at the time of [his] death."

In the petition, petitioner contended with respect to article four of the will that the phrase "the plot of land appurtenant thereto" referred to the lot on which decedent's residence was located, not to the farmland. Petitioner attached extrinsic evidence supporting her proposed construction of article four as exhibits to the petition. In opposing the admission of that extrinsic evidence, respondent contended that, under the plain language of article four of the will, she was entitled to the residence, the lot, and the farmland.

As noted above, petitioner moved and respondent cross-moved for summary judgment. In support of her motion, petitioner contended that the phrase "the plot of land appurtenant thereto" in article four is ambiguous, requiring extrinsic evidence to determine decedent's intent. In opposition to petitioner's motion and in support of her cross motion, respondent contended that the terms of the will were clear and unambiguous and thus that the consideration of extrinsic evidence was precluded. The Surrogate concluded that the bequest of real property to respondent under article four consisted of decedent's residence, the lot, and the farmland. The Surrogate therefore agreed with respondent that decedent's intent could be inferred from the "four corners of the will" and thus that reference to extrinsic evidence was improper. That was error.

It is well settled that, "in a will construction proceeding, the search is for the decedent's intent . . . and not for that of the draft[er]" (*Matter of Cord*, 58 NY2d 539, 544, *rearg denied* 60 NY2d 586; see *Matter of Bielely*, 91 NY2d 520, 525; *Matter of Gustafson*, 74 NY2d 448, 451; *Matter of Shannon*, 107 AD2d 1084, 1085). In ascertaining decedent's intent, " 'a sympathetic reading of the will as an entirety' is required" (*Matter of Carmer*, 71 NY2d 781, 785, quoting *Matter of Fabbri*, 2 NY2d 236, 240; see *Matter of Scale*, 38 AD3d 983, 984). "[T]he best indicator of the testator's intent is found in the clear and unambiguous language of the will itself and, thus, where no ambiguity exists, [e]xtrinsic evidence is inadmissible to vary the terms of a will" (*Scale*, 38 AD3d at 985 [internal quotation marks omitted]; see *Cord*, 58 NY2d at 544; *Matter of Goldstein*, 46 AD2d 449, 450, *affd* 38 NY2d 876). "If, on the other hand, a provision of the will is ambiguous, extrinsic evidence is properly considered in discerning the testator's true intent" (*Matter of McCabe*, 269 AD2d 727, 729; see *Matter of Schermerhorn*, 31 NY2d 739, 741; *Goldstein*, 46 AD2d at 451). "A latent ambiguity arises when the words used are neither ambiguous nor obscure but ambiguity appears relative to persons or things meant" (*Matter of Blodgett*, 168 Misc 898, 901).

As noted above, decedent's will devised his residence "and the plot of land appurtenant thereto" to respondent. "Appurtenant" has been defined as "[a]nnexed to a more important thing" (Black's Law Dictionary 118 [9th ed 2009]). Moreover, courts have defined an appurtenance as "something annexed to or belonging to a 'more important' thing and not having an independent existence" (*Matter of Crystal v City of Syracuse, Dept. of Assessment*, 47 AD2d 29, 32, *affd* 38 NY2d 883), i.e., "a thing used with and related to or dependent upon another thing more worthy" (*Woodhull v Rosenthal*, 61 NY 382, 390). Under such a definition, "land can never be appurtenant to other land, or pass with it as belonging to it" (*id.*; see *Armstrong v DuBois*, 90 NY 95, 102). Nevertheless, a court's definition of the term "appurtenant" in the abstract "does not prevent a different meaning which any grantor may himself [or herself] give to the word as he [or she] uses it. When a grantor makes a strip of land, by express words, 'appurtenant' to two other pieces, his [or her] meaning is to be discovered from the context, and not from the books" (*Putnam v Putnam*, 77 App Div 554, 556). Here, the will does not refer to land appurtenant to *other land*; rather, it refers to land appurtenant to decedent's residence (see generally *Schermerhorn*, 31 NY2d at 741).

We conclude that the definition of "appurtenant" does not clarify decedent's intent with regard to the farmland (see *Carmer*, 71 NY2d at 785), nor does a sympathetic reading of the entire will clarify his intent. Rather, the language in article four referring to "the plot of land appurtenant" to decedent's residence is ambiguous, and the Surrogate should have considered extrinsic evidence " 'to explain to what particular pieces of land the language of the will referred' " (*Schermerhorn*, 31 NY2d at 741, quoting *Matter of Phipps*, 214 NY 378, 381, *rearg denied* 215 NY 652; see *McCabe*, 269 AD2d at 729; *Matter of Schaffner*, 162 AD2d 972, 972; *Goldstein*, 46 AD2d at 450-451). It is

undisputed that, at the time of his death, decedent owned the lot on which his residence was located as well as the adjacent farmland. It is not clear from the four corners of the will, however, whether, in referring to "the plot of land appurtenant to" his residence, decedent was referring to the smaller lot upon which his residence was situated or the adjacent farmland. Thus, contrary to the Surrogate's determination, we conclude that the language of article four does not unambiguously provide that the plot of land appurtenant to the residence is separate and distinct from decedent's residence.

We further conclude that the Surrogate erred in determining that the second paragraph of article four clearly indicates that the plot of land appurtenant to the residence refers to the farmland. The Surrogate adopted respondent's position that, if the plot of land appurtenant to the residence referred to the lot upon which the residence was located, the second paragraph of article four relating to a mortgage would be rendered meaningless. The Surrogate agreed with respondent that because a mortgage could not be secured against the residence separate and distinct from the land upon which it was built, the appurtenant plot of land must refer to the farmland. As noted above, however, the aim in construing a will is to determine the intent of the decedent, not that of the drafter (see *Cord*, 58 NY2d at 544). Here, the Surrogate's conclusion assumes that decedent would have understood that the lot could not be mortgaged separately from the residence, and there is no basis for that assumption.

We further conclude that the parties' submissions raise issues of fact concerning decedent's intent. In support of her motion, petitioner submitted, inter alia, the deposition testimony of the attorney who drafted the will, a will questionnaire completed by decedent, and the attorney's notes relating to his preparation of the will. On the will questionnaire, decedent wrote, "I would like to leave my house [in or on] . . . lot size 120 x 130 to [respondent]." Similarly, the attorney's notes state "[to respondent] . . . [the residence] (w/mtge). house property 120 x 300 she'll take home subject to mtge [sic] . . . [r]est of estate to 3 girls = shares, per stirpes." At his deposition, the attorney testified that the reference to the land appurtenant to the residence in article four was intended to mean the house and the plot of land on which the house stood. He "assume[d]" that such plot was the "120 by 300" foot lot "because those are the numbers that appear[ed] in [his] notes and . . . on the will questionnaire." The attorney did not recall decedent referring to any real property other than the lot on which the residence was located.

Petitioner also submitted a tax map indicating that the county taxed the lot and the farmland separately, deeds establishing that the farmland was transferred separately from the lot, and the mortgage on the lot. That evidence suggests that decedent viewed the lot and the farmland separately, and may support the daughters' contention that the plot of land appurtenant to the residence was the lot upon which the residence sits (see generally *Schermerhorn*, 31 NY2d at 741). Respondent, however, referred to evidence reflecting that, when decedent originally purchased the lot and the farmland in 1978, it

consisted of one parcel and, according to respondent, decedent partitioned the parcel only in anticipation of his then-pending divorce. Respondent further asserted that she and decedent shared the chores associated with maintaining the farmland and that the utilities servicing the pole barn, located on the farmland, were attached to the meters located inside the residence. Thus, we conclude that, under these circumstances, the parties should be given the opportunity to present extrinsic evidence at a hearing before the Surrogate regarding decedent's intended distribution under article four of the will (see *McCabe*, 269 AD2d at 729; *Schaffner*, 162 AD2d at 973; cf. *Goldstein*, 46 AD2d at 452; see also *Matter of Malasky*, 275 AD2d 500, 502; see generally *Matter of White*, 65 AD3d 1255, 1258).

We therefore modify the order accordingly, and we remit the matter to the Surrogate for further proceedings in accordance with our decision.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1168

CA 12-00643

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

BETH ANNE GRANT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SCOTT C. GRANT, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (MICHELLE M.F. SCHWACH OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

CHRISTOPHER J. BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR
GARRETT G., IAN G. AND ALEXIS G.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 14, 2011. The order denied that part of the motion of plaintiff seeking permission to relocate with the parties' children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision that, "if Plaintiff relocates to Ohio, notwithstanding this Court's Decision, the Defendant shall be granted custody of the parties' three (3) minor children with an appropriate access schedule to be arranged between the children and the Plaintiff" and as modified the order is affirmed without costs.

Memorandum: Plaintiff mother moved, inter alia, to modify the parties' custody arrangement by permitting her to relocate to Ohio with the parties' three children. Pursuant to their custody arrangement, the parties shared joint custody of the children, but the mother had primary physical custody and defendant father had visitation. Additionally, the parties had agreed that the children would not be removed from Erie County without the father's consent or in the absence of a court order. The father opposed the mother's motion and cross-moved for custody in the event that the mother relocates. Following a hearing regarding only the issue of relocation, Supreme Court denied that part of the mother's motion seeking permission to relocate with the children and further ordered that, "if the [mother] relocates to Ohio, notwithstanding this Court's Decision, the [father] shall be granted custody of the parties' three (3) minor children with an appropriate access schedule to be arranged between the children and the [mother]." The court reserved decision

on all other relief requested by the parties.

We conclude that the court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests (see *Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627; *Matter of Seyler v Hasfurter*, 61 AD3d 1437, 1437; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871, lv denied 6 NY3d 714). "The determination of the trial court, which heard and observed the witnesses, is entitled to great deference and should not be disturbed where, as here, it had a sound and substantial basis in the record" (*Salerno v Salerno*, 273 AD2d 818, 818; see *Matter of Battaglia v Hopkins*, 280 AD2d 953, 954). We modify the order, however, by vacating the provision that custody of the children will be transferred to the father in the event that the mother relocates to Ohio. That provision, "while possibly never taking effect, impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child[ren]'s best interests at that time" (*Matter of Brzozowski v Brzozowski*, 30 AD3d 517, 518; see *Matter of Carter v Kratzenberg*, 209 AD2d 990, 990; *Rybicki v Rybicki*, 176 AD2d 867, 871).

We further conclude that, contrary to the mother's contention, the court did not fail to render a decision regarding the other relief requested in her motion, but rather expressly reserved decision on those issues. Thus, the mother's remaining contentions are not properly before us.

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

1182

CA 12-00675

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

IN THE MATTER OF COLONIAL SURETY COMPANY,
PETITIONER-APPELLANT,

V

ORDER

LAKEVIEW ADVISORS, LLC, RESOLUTION MANAGEMENT,
LLC, NATIONAL CREDIT ADJUSTERS, LLC, NEAVERTH
ENTERPRISES, LLC, ARENA DEVELOPMENT, LLC, AND
ROBERT J. GOODYEAR, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF COLONIAL SURETY COMPANY,
PETITIONER-APPELLANT,

V

NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT,
LLC, ROBERT J. GOODYEAR, ANITA M. HANSEN
AND GARY ALBANESE, RESPONDENTS-RESPONDENTS.

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL),
FOR PETITIONER-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS J. GAFFNEY OF
COUNSEL), FOR RESPONDENT-RESPONDENT RESOLUTION MANAGEMENT, LLC.

LAW OFFICE OF JOHN K. JORDAN, BUFFALO (JOHN K. JORDAN OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT,
LLC, AND ROBERT J. GOODYEAR.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 15, 2012. The order denied the motion of petitioner for a stay of evidentiary hearings.

Now, upon reading and filing the stipulation to discontinue appeal signed by the attorneys for the parties on October 17, 2012,

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

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1187

CA 12-00677

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

IN THE MATTER OF COLONIAL SURETY COMPANY,
PETITIONER-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT,
LLC, ROBERT J. GOODYEAR, RESPONDENTS-RESPONDENTS,
ANITA M. HANSEN AND GARY ALBANESE,
RESPONDENTS-RESPONDENTS-APPELLANTS.

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL),
FOR PETITIONER-APPELLANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS GAFFNEY OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

JOHN K. JORDAN, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 28, 2012. The order determined that an evidentiary hearing is required in the proceeding.

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

Memorandum: Petitioner, Colonial Surety Company (Colonial), commenced a CPLR article 52 proceeding against Lakeview Advisors, LLC (Lakeview), Resolution Management, LLC (Resolution), and National Credit Adjusters, LLC, seeking to enforce a judgment that it obtained against nonparty Paul W. O'Brien (proceeding No. 1). Colonial sought to enforce the judgment by obtaining an order directing Resolution to give Colonial certain payments that it purportedly owed to Lakeview, which Colonial contended was O'Brien's alter ego. While proceeding No. 1 was pending, Supreme Court directed Resolution to deposit the disputed payments into an escrow account. Lakeview and Resolution alleged that Lakeview was not itself entitled to those payments but, rather, Lakeview was a conduit for funds that certain third parties, known in these proceedings as the note holders, had loaned indirectly to Resolution through Lakeview. Resolution further alleged that it renegotiated the loans so that it owed the money directly to the note holders and thereby eliminated its debt to Lakeview. In reliance upon that purported renegotiation, Resolution did not deposit funds into escrow and instead sent payments directly to the note holders. Upon Colonial's application to have Resolution held in contempt, the court

found Resolution in contempt for failing to deposit the funds as directed. Prior to imposing the penalty for that finding of contempt, however, the court issued an order and judgment in which it concluded that the prejudice to the note holders from depriving them of their funds outweighed Colonial's right to enforce its judgment against those funds, and the court dismissed the petition in proceeding No. 1. On a prior appeal, this Court reversed that order and judgment, reinstated the petition, and directed the court upon remittal to determine, after a new hearing on the petition, "the rights of any claimant to the funds held in escrow upon the intervention of such party" (*Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 1257).

Colonial then commenced another proceeding against the note holders (proceeding No. 2), seeking an order directing them to pay into escrow the funds that Resolution allegedly paid them in violation of the prior escrow order. Both Colonial and the note holders sought summary disposition of proceeding No. 2, but the court denied those requests and ordered an evidentiary hearing on the factual issues regarding the competing claims to the funds, to be held in conjunction with the hearing that this Court directed in proceeding No. 1. Colonial appeals and respondent note holders Anita M. Hansen and Gary Albanese cross-appeal from the order insofar as it denied their respective requests for summary disposition of the petition.

We reject the contention of Colonial that it was entitled to summary disposition of proceeding No. 2 in its favor. Colonial contends that it is entitled to claw back the payments made to the note holders because those payments were made in violation of the court's prior escrow order and were therefore void ab initio, requiring the note holders to disgorge them. Upon the record before us, we reject that contention. Although there is evidence in the record that Resolution made the payments in violation of the court's escrow order, there is also evidence in the record that the note holders had not received notice of that order before the payments were made to them, and that they had a good-faith claim to the funds they received. As Colonial correctly contends, transfers made in violation of a court order are void insofar as property is transferred to an entity that has notice of the order, with no or inadequate consideration, and the court may direct that the recipients of such transfers convey the property pursuant to the escrow order (*see Skiff-Murray v Murray*, 17 AD3d 807, 808-809; *Catalano v Catalano*, 158 AD2d 570, 572, *order amended* 176 AD2d 278). Contrary to Colonial's contention, however, the transfers were voidable in this instance, rather than void. " 'A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done' " (*Blinn v Schwarz*, 177 NY 252, 259). A transfer will be void where the transferor has no title to the property, and thus cannot transfer any interest in it (*see Yin Wu v Wu*, 288 AD2d 104, 105; *Kraker v Roll*, 100 AD2d 424, 430-431).

Here, the record reflects that Resolution had title to the funds

that it transferred, but Colonial alleges that it transferred the property in violation of the escrow order in proceeding No. 1. Consequently, the transactions are voidable, and Colonial is not entitled to claw back the payments that were made until there has been a determination of the factual issues, including the parties' conflicting claims to the funds, the extent of any consideration that the note holders provided for the loans, and the extent of the prejudice to any party that would arise from the loss of the funds. We therefore agree with the note holders that the court did not err in refusing to direct them to disgorge the payments made to them by Resolution, absent such findings. Contrary to the contentions of Albanese and Hansen on their cross appeal, however, those same factual issues bar summary disposition of the petition in their favor inasmuch as the transfers are voidable.

We have considered the remaining contentions of the parties, including whether the court was required to use its inherent power to order the note holders to place the funds into the escrow account immediately, and conclude that they are without merit, or are moot in light of our determination.

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

1219

KA 07-02489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JESSICA L. SANTIAGO, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 3, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of murder in the second degree under the first count of the indictment (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on that count, and by reversing that part convicting defendant of murder in the second degree under the second count of the indictment (§ 125.25 [4]) and dismissing that count and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for sentencing on the conviction of manslaughter in the second degree.

Memorandum: On appeal from a judgment convicting her upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [2], [4] [depraved indifference, depraved indifference with victim less than 11 years old, respectively]), defendant contends that the conviction is not supported by legally sufficient evidence. We note at the outset that defendant does not on appeal dispute that the evidence is legally sufficient to establish that she acted recklessly, but instead contends that the evidence is legally insufficient to establish that she acted with depraved indifference to human life. We agree. 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 insufficient to prove beyond a reasonable doubt that defendant "acted with the culpable mental state of depraved indifference" (*People v Swinton*, 7 NY3d 776, 777, rearg denied 7 NY3d 864). The evidence established that defendant, at around 4:00 p.m., suffocated her almost two-year-old son who was crying by placing a comforter over his face and then leaving the room after he "passed out." Defendant did not return

to her son's room until late the next morning, which was almost 19 hours later. At trial, the People proceeded on the theory that defendant acted with depraved indifference in that she "abandon[ed] a helpless and vulnerable victim in circumstances where the victim is highly likely to die" (*People v Suarez*, 6 NY3d 202, 212). We conclude, however, that the evidence is legally insufficient to establish that defendant's actions "r[ise] to the level of 'wickedness, evil or inhumanity' so 'as to render the actor as culpable as one whose conscious objective is to kill' " (*People v Matos*, 19 NY3d 470, 476, quoting *Suarez*, 6 NY3d at 214). We therefore modify the judgment by reducing the conviction of murder in the second degree under the first count of the indictment (§ 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on that count (see CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on the conviction of manslaughter in the second degree (see CPL 470.20 [4]). We further modify the judgment by reversing that part convicting defendant of murder in the second degree under the second count of the indictment (Penal Law § 125.25 [4]). We dismiss that count of the indictment rather than reducing it, however, inasmuch as manslaughter in the second degree is not a lesser included offense of that count (see *People v Robinson*, 278 AD2d 798, 798, *lv denied* 96 NY2d 762). In light of our determination that the evidence is legally insufficient, we do not address defendant's contention that the verdict is against the weight of the evidence, which is also based on her contention that she did not act with depraved indifference.

In addition, defendant contends that she was denied a fair trial by prosecutorial misconduct on summation. The vast majority of the alleged improprieties are unreserved for our review because defendant either failed to object to them or she raised only general objections (see CPL 470.05 [2]; *People v Brown*, 94 AD3d 1461, 1462, *lv denied* 19 NY3d 995). In any event, we conclude that defendant's contention is without merit. Many of the comments were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). Although we agree with defendant that the prosecutor improperly characterized certain testimony of the Medical Examiner, we conclude that the court's curative instruction alleviated any prejudice (see *People v Bowen*, 60 AD3d 1319, 1320, *lv denied* 12 NY3d 913). Moreover, while there was no basis for the prosecutor to suggest that defendant must have smelled the body decomposing in her home, that comment was not so egregious as to deprive defendant of a fair trial (see *People v Gutierrez*, 96 AD3d 1455, 1456, *lv denied* 19 NY3d 997; *People v Szyzskowski*, 89 AD3d 1501, 1503). We reject defendant's further contention that she received ineffective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments made by the prosecutor (see *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954; *cf. People v Fisher*, 18 NY3d 964, 966-967).

We reject defendant's contention that the court erred in denying her request for a missing witness charge. Two police investigators were in the interview room when defendant gave a written statement, and one of those investigators testified at trial and read defendant's statement into evidence. The testimony of the other investigator, who was not

called to testify, would have been cumulative, and thus a missing witness charge was inappropriate (see *People v Hawkins*, 84 AD3d 1736, 1737, lv denied 17 NY3d 806; *People v Duda*, 45 AD3d 1464, 1466, lv denied 10 NY3d 764; see also *People v Buckler*, 39 NY2d 895, 897; see generally *People v Gonzalez*, 68 NY2d 424, 427-428). Defendant's contention that the court failed to provide a meaningful response to the jury's request for clarification of a certain jury instruction is not preserved for our review (see *People v Swail*, 19 AD3d 1013, 1013, lv denied 6 NY3d 759, reconsideration denied 6 NY3d 853). In any event, her contention is without merit. Under the circumstances of this case, the court's rereading of the instruction constituted a meaningful response (see CPL 310.30; *People v Santi*, 3 NY3d 234, 248).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1227

CA 12-00259

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

IN THE MATTER OF ADM, LLC, DAVID MORRELL
AND ANNE MORRELL, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

VILLAGE OF MACEDON AND VILLAGE OF MACEDON
ZONING BOARD OF APPEALS,
RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF ADM, LLC, DAVID MORRELL
AND ANNE MORRELL, PETITIONERS-APPELLANTS,

V

VILLAGE OF MACEDON PLANNING BOARD,
RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

ADM, LLC, DAVID MORRELL AND ANNE MORRELL,
PLAINTIFFS-APPELLANTS,

V

VILLAGE OF MACEDON, VILLAGE OF MACEDON
PLANNING BOARD, AND REROB, LLC,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

NESBITT & WILLIAMS, NEWARK (ARTHUR B. WILLIAMS OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS AND DEFENDANTS-RESPONDENTS VILLAGE OF MACEDON
AND VILLAGE OF MACEDON PLANNING BOARD.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (REUBEN ORTENBERG OF
COUNSEL), FOR DEFENDANT-RESPONDENT REROB, LLC.

Appeal from a judgment and order (one paper) of the Supreme Court,
Wayne County (John J. Ark, J.), entered October 13, 2011 in proceedings
pursuant to CPLR article 78 and a declaratory judgment action. The
judgment and order dismissed the petitions and complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) appeal from a judgment and order dismissing both their complaint for a declaration and their two CPLR article 78 petitions, all of which challenged various zoning ordinances and determinations related to the proposed construction of a single-bay car wash in respondent-defendant Village of Macedon.

At the outset, we deny defendant REROB, LLC's renewed motion to dismiss the instant appeal as moot. Although the subject car wash has already been constructed and a certificate of occupancy has been issued, petitioners had sought to enjoin its construction during the pendency of this appeal and thus should be permitted to raise the present challenges (see *Matter of Camardo v City of Auburn*, 96 AD3d 1437, 1438; *Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313, *lv dismissed* 7 NY3d 803).

Turning to the merits of petitioners' appeal, we conclude that Supreme Court properly dismissed both the petitions and the complaint. First, to the extent that the complaint sought to annul or vacate the various administrative determinations at issue here or to prohibit respondents from granting future applications for either site-plan approvals or special use permits in connection with the disputed car wash, a CPLR article 78 proceeding, rather than a declaratory judgment action, was the appropriate procedural vehicle by which to raise those challenges (see *Matter of Schweichler v Village of Caledonia*, 45 AD3d 1281, 1282, *lv denied* 10 NY3d 703; *Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals*, 27 AD3d 1191, 1192; *Home Bldrs. Assn. of Cent. N.Y. v Town of Onondaga*, 267 AD2d 973, 974). Second, although properly raised by way of declaratory judgment, the procedural challenges in the complaint to the zoning ordinance's purported amendment are nevertheless time-barred, as are the CPLR article 78 petitions themselves (see CPLR 217 [1]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202-203; *Schiener v Town of Sardinia*, 48 AD3d 1253, 1254).

In any event, petitioners failed to establish the "existence of an injury in fact--an actual legal stake in the matter being adjudicated" and therefore lack standing to commence either the action for a declaration or the two CPLR article 78 proceedings (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772; see *Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1598-1599, *lv dismissed and denied* 17 NY3d 838; *Matter of Brown v County of Erie*, 60 AD3d 1442, 1443-1444). Moreover, contrary to petitioners' contention, "the threat of increased business competition . . . is not an interest protected by the zoning laws" and thus could not itself confer standing, even if adequately demonstrated (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 415; see generally *Matter of Brighton Residents Against Violence to Children v MW Props.*, 304 AD2d 53, 56-58, *rearg denied* 306 AD2d 960, *lv denied* 100 NY2d 514).

In light of our determination, we need not address petitioners' remaining contentions.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1234

CA 12-00641

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

JOSEPH V. MANTIONE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CRAZY JAKES, INC., DOING BUSINESS AS CRAZY
JAKE'S RESTAURANT, CRAZY JAKE'S RESTAURANT,
WEBSTER PROPERTIES OF WNY, INC., GREG T. DOEL,
TIMMY L. BROCIUS, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE M. LIEBNER
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 16, 2012 in a personal injury action. The order denied the motion of defendants-appellants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of the alleged misconduct of "bouncers" at defendant Crazy Jake's Restaurant, a restaurant and bar operated by defendant Crazy Jakes, Inc., doing business as Crazy Jake's Restaurant (collectively, Crazy Jake's). Before answering the complaint, defendants Webster Properties of WNY, Inc. (Webster), Greg T. Doel and Timmy L. Brocius, as well as Crazy Jake's (collectively, defendants), moved to dismiss the complaint in its entirety against Doel and Brocius; the second cause of action, for intentional tort, against Crazy Jake's and Webster; the third cause of action, for negligent hiring and retention, against Crazy Jake's; and the fourth cause of action, for punitive damages, against Crazy Jake's and Webster (see CPLR 3211 [a] [7]). In support thereof, defendants submitted, inter alia, affidavits from Doel and Brocius, wherein they averred that they were not present at the time of the incident. Supreme Court properly denied defendants' motion.

In determining a CPLR 3211 motion, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and 'the criterion is whether the proponent of the

pleading has a cause of action, not whether he has stated one' " (*Leon v Martinez*, 84 NY2d 83, 88; see *Gibraltar Steel Corp. v Gibraltar Metal Production*, 19 AD3d 1141, 1142). The court may also consider affidavits and other evidentiary material to "establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636; see *Gibraltar Steel Corp.*, 19 AD3d at 1142). "Any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, [however,] and the benefit of every possible favorable inference is afforded to the plaintiff" (*Gibraltar Steel Corp.*, 19 AD3d at 1142).

Defendants contend that the court erred in denying that part of their motion to dismiss the complaint against Doel and Brocius because the evidence conclusively established that they were not present at the time of the incident and thus were not participants in the wrongful conduct. We reject that contention. In opposition to the motion, plaintiff submitted an affidavit in which he stated that Doel and Brocius were present at the time of the incident. Thus, accepting that fact as true, as we must on this motion to dismiss, we conclude that the evidence does not conclusively establish that Doel and Brocius were not present at the time of the incident and that they therefore were not participants in the wrongful conduct (see generally *Rovello*, 40 NY2d at 636; *Clark v Pine Hill Homes, Inc.*, 112 AD2d 755, 755). In light of that determination, we need not address at this juncture defendants' contention that Doel and Brocius are entitled to dismissal of the complaint against them on the ground that they cannot be held liable for the torts of others.

Defendants also contend that the court erred in denying that part of their motion seeking dismissal of the cause of action for negligent hiring and retention against Crazy Jake's because the complaint does not allege that Crazy Jake's had reason to know that the bouncers employed by it had a propensity for the conduct that caused the injury. We reject that contention. There is no requirement that a cause of action for negligent hiring and supervision be pleaded with specificity (see *Porcelli v Key Food Stores Co-Op., Inc.*, 44 AD3d 1020, 1021). Moreover, we note that plaintiff submitted an affidavit wherein he averred that, prior to the incident, complaints had been made regarding the use of force by Crazy Jake's bouncers.

We have considered defendants' remaining contentions and conclude that they are without merit.

Frances E. Cafarell

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

1274

CA 12-00358

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

PIA THOMAS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DUNKIRK RESORT PROPERTIES, LLC,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael F. Griffith, A.J.), entered November 29, 2011 in a personal injury action. The order granted the motion of defendant Dunkirk Resort Properties, LLC for summary judgment and dismissed the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Dunkirk Resort Properties, LLC is denied and the complaint against it is reinstated.

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained during the course of her employment at a hotel owned by defendant Dunkirk Resort Properties, LLC (Dunkirk Resort) and managed by her employer, nonparty S & K Hospitality, LLC (S & K). She now appeals from an order granting Dunkirk Resort's motion for summary judgment dismissing the complaint against it.

Supreme Court erred in granting Dunkirk Resort's motion insofar as it contended that it was an out-of-possession landlord and thus was not responsible for the allegedly dangerous condition that caused plaintiff's injuries. "To begin, we reject the out-of-possession landlord standard as applied by the court . . . as no leasehold was created by the agreement" between Dunkirk Resort and S & K (*Gronski v County of Monroe*, 18 NY3d 374, 379, *rearg denied* 19 NY3d 856). Although that agreement is called a "Lease Operating Agreement," such a designation alone does not make it a lease (*see Feder v Caliguira*, 8 NY2d 400, 404-405; *Women's Interart Ctr., Inc. v New York City Economic Dev. Corp.*, 97 AD3d 17, 21). Rather, it is a management

agreement concerning the hotel (see generally *Matter of Davis v Dinkins*, 206 AD2d 365, 366-368, lv denied 85 NY2d 804; *Slutzky v Cuomo*, 114 AD2d 116, 118, appeal dismissed 68 NY2d 663). In addition, Dunkirk Resort's own submissions raise a triable issue of fact whether it was indeed an out-of-possession landlord, inasmuch as it maintained its principal address at the hotel (see generally *Kolmel-Hayes v South Shore Cruise Lines, Inc.*, 23 AD3d 530, 530-531; *Massucci v Amoco Oil Co.*, 292 AD2d 351, 352). In sum, "[v]iewing all of the evidence in the light most favorable to the plaintiff, as we must on this motion for summary judgment, we cannot say . . . that, as a matter of law, [Dunkirk Resort] relinquished complete control of the [hotel] to [S & K]" (*Gronski*, 18 NY3d at 381).

With respect to the alternative ground for affirmance advanced by Dunkirk Resort (see generally *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), namely, that it should have been granted summary judgment based on the exclusivity provision of Workers' Compensation Law § 11, we conclude that it failed to meet its burden of establishing the applicability of that dispositive defense as a matter of law (see generally *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594-595). Although Dunkirk Resort and S & K have the same two members, one of those members testified at his deposition that the two companies were formed for different purposes, have their own bank accounts, and file separate tax returns (see *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 965; *Wernig v Parents & Bros. Two*, 195 AD2d 944, 945-946), and there is no evidence that either company is involved in the day-to-day operations of the other (see *Samuel*, 75 AD3d at 595). We thus conclude that triable issues of fact remain with respect to whether Dunkirk Resort is the alter ego of S & K and therefore entitled to the protection of Workers' Compensation Law § 11 (see *Shelley v Flow Intl. Corp.*, 283 AD2d 958, 960, lv dismissed 96 NY2d 937).

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

1275

CA 12-00826

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

IN THE MATTER OF KELIANN ELNISKI,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS COACH LINES, INC.,
RAEANNE ARGY-TYLER AND MICHAEL J. DOWD,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (MICHAEL C. O'NEILL OF COUNSEL), FOR
PETITIONER-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HOWARD S. ROSENHOCH OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS NIAGARA FALLS COACH LINES, INC.
AND RAEANNE ARGY-TYLER.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered April 20, 2012. The order and judgment, inter alia, determined the value of petitioner's shares in respondent Niagara Falls Coach Lines, Inc.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating that part determining the value of petitioner's shares and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, petitioner appeals from an order and judgment that, inter alia, valued her minority share of the stock in respondent Niagara Falls Coach Lines, Inc. (NFCL), a subchapter S corporation, at \$1.4 million, directed NFCL to pay that sum to petitioner in installments, and ordered petitioner to relinquish her shares to NFCL, free and clear of any encumbrances, upon an initial payment by NFCL in the amount of \$500,000.

We reject petitioner's contention that Supreme Court erred in setting the terms and conditions of the transfer of her shares. A trial court has discretion in setting the terms and conditions by which the shares of a minority shareholder are transferred in these circumstances, such as by establishing a payment schedule or by requiring that a bond or other acceptable security instrument be posted (*see Matter of Cortland MHP Assoc. [Petralia-Burnham]*, 267 AD2d 1013, 1013-1014; *Matter of Penepent Corp.* [appeal No. 11], 198 AD2d 782, 783, lv denied 83 NY2d 797; *Matter of Seagroatt Floral Co.*

[*Riccardi*], 167 AD2d 586, 589, *mod on other grounds* 78 NY2d 439; see also Business Corporation Law § 1118 [c] [2]). On this record, it cannot be said that the court abused its discretion in setting the terms and conditions of the instant transfer.

With respect to the court's valuation of petitioner's shares, "[t]he determination of a [factfinder] as to the value of a business, if it is within the range of testimony presented, will not be disturbed on appeal where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques" (*Matter of McKeown [Image Collision, Ltd.]*, 94 AD3d 1445, 1446 [internal quotation marks omitted]). Nevertheless, we agree with petitioner that the court erred in accepting the valuation assessment of respondents' expert insofar as it calculated the after-tax value of the shares (see *Burrows v Burrows*, 270 AD2d 871, 871; *Stolow v Stolow*, 149 AD2d 683, 686, *mot to resettle granted* 152 AD2d 559; *Siegel v Siegel*, 132 AD2d 247, 251-252, *appeal dismissed* 71 NY2d 1021, *lv denied* 74 NY2d 602). We therefore modify the order and judgment in appeal No. 1 by vacating the court's valuation determination, and we remit the matter to Supreme Court for further proceedings consistent with our decision. In light of our determination, we need not address petitioner's remaining contentions in appeal No. 1. Finally, we dismiss the appeal from the order in appeal No. 2 inasmuch as the issues raised therein have been rendered moot by our determination in appeal No. 1.

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

1276

CA 12-01180

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

IN THE MATTER OF KELIANN ELNISKI,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS COACH LINES, INC.,
RAEANNE ARGY-TYLER AND MICHAEL J. DOWD,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (MICHAEL C. O'NEILL OF COUNSEL), FOR
PETITIONER-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HOWARD S. ROSENHOCH OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS NIAGARA FALLS COACH LINES, INC.
AND RAEANNE ARGY-TYLER.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 20, 2012. The order, inter alia, directed that the proposed order and judgment of respondents be signed and entered.

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

Same Memorandum as in *Matter of Elniski v Niagara Falls Coach Lines, Inc.* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1282

KA 11-00256

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JON T. MAGLIOCCO, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Genesee County Court (Robert C. Noonan, J.), rendered January 6, 2011. The resentence certified defendant as a sex offender.

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

Memorandum: Defendant appeals from a resentence certifying him as a sex offender pursuant to Correction Law § 168-d based on his conviction, upon his plea of guilty, of unlawful surveillance in the second degree (Penal Law § 250.45 [3]). In his brief, defendant contends that being certified as a sex offender is akin to receiving an enhanced sentence and thus that County Court erred in imposing that enhanced sentence without affording him the opportunity to withdraw his guilty plea. We reject that contention. The court was not required to address the Sex Offender Registration Act consequences that flowed from defendant's conviction during the plea allocution because they are "collateral rather than direct consequences of a guilty plea" (*People v Gravino*, 14 NY3d 546, 550), and defendant's claimed lack of awareness of those consequences did not affect the voluntariness of his guilty plea (*see id.*). Also, the court was not required to conduct a factfinding hearing before certifying defendant as a sex offender because defendant was not convicted of an offense listed in Correction Law § 168-d (1) (b) or (c) (*see Gravino*, 14 NY3d at 557 n 5).

Contrary to the further contention of defendant, the court properly concluded, "after considering 'the nature and circumstances of the crime and . . . the history and character of the defendant, . . . that [his] registration [as a sex offender] would [not] be unduly harsh and inappropriate' " (*People v Allen*, 64 AD3d 1190, 1191, *lv*

denied 13 NY3d 794, quoting Correction Law § 168-a [2] [e]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1292

CA 12-00982

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

RONALD M. FELIX AND FELIX ENTERPRISES, INC.,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BRAND SERVICE GROUP LLC AND DAVID BRAND,
DEFENDANTS-APPELLANTS.

MICHAEL F. MCPARTLAN, GRAND ISLAND, FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 2, 2011. The order granted the motion of plaintiffs for a preliminary injunction.

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

Memorandum: Plaintiffs and defendants entered into an asset purchase agreement for the purchase of an AAMCO franchise by plaintiffs for \$675,000. The parties executed a promissory note and an escrow agreement, pursuant to which \$250,000 was placed into an escrow account at M&T Bank to ensure payment of any outstanding sales tax liability. The New York State Department of Taxation and Finance determined that defendants owed \$115,860.84 to the State of New York, which was paid from the escrow account, leaving a balance of \$134,139.16 in that account.

On March 25, 2011, plaintiffs commenced this action alleging causes of action for rescission of the asset purchase agreement, promissory note and escrow agreement, fraud, unjust enrichment, the imposition of a constructive trust, an accounting, and any allowable injunctive relief. Plaintiffs also moved by order to show cause for a preliminary injunction preventing release of the remaining funds in the escrow account to any party during the pendency of this action. We conclude that Supreme Court did not abuse its discretion in granting plaintiffs' motion.

Preliminary injunctions are proper with respect to the release of funds in escrow where it is necessary to preserve the status quo during the pendency of the litigation (*see Bashein v Landau*, 96 AD2d 479, 479). In order to establish its entitlement to a preliminary

injunction, the moving party bears the burden of demonstrating, by clear and convincing evidence, " (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216, quoting *Doe v Axelrod*, 73 NY2d 748, 750).

We conclude that plaintiffs met their burden with respect to the first prong of the test, i.e., a likelihood of ultimate success on the merits, with respect to the rescission and fraud causes of action. Plaintiffs submitted evidence that defendants misrepresented the amount of weekly gross receipts of the business, sold fraudulent warranties, underreported income by keeping two sets of financial records and provided plaintiffs with an inaccurate 2008 profit and loss statement.

Plaintiffs also met their burden with respect to the second prong of the test, i.e., whether there will be irreparable injury if the provisional relief is withheld. Plaintiffs submitted evidence that the funds in the escrow account, if dispersed, likely will not be recoverable due to defendants' precarious financial position. Indeed, they submitted evidence that defendant David Brand has various outstanding debts, including an outstanding tax liability of \$115,860.84 to the State of New York, and that he was at risk of bankruptcy if he did not sell the AAMCO franchise.

Finally, we conclude that plaintiffs met their burden with respect to the third prong of the test, i.e., whether a balance of the equities tips in plaintiffs' favor. Such a balancing involves an inquiry whether "the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (*Destiny USA Holdings, LLC*, 69 AD3d at 223 [internal quotation marks omitted]). Here, the irreparable injury to plaintiffs is more burdensome than the harm caused to defendants through the imposition of the injunction. While defendants may be delayed in paying off debt or using the escrow money for other purposes, plaintiffs may never be able to recover the money, if disbursed, even if plaintiffs ultimately prevail in the underlying action.

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

1299

CA 11-02562

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

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

V

MEMORANDUM AND ORDER

MICHAEL STEINMETZ, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (James C. Tormey, III, J.), entered October 7, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, granted petitioner's motion to change the venue of the trial to Delaware County.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, respondent appeals from that part of an order granting petitioner's motion to change the venue of the trial from Oneida County to Delaware County. We agree with respondent that Supreme Court erred in granting the motion inasmuch as petitioner failed to establish good cause for a change of venue (see Mental Hygiene Law § 10.08 [e]).

"Although the convenience of witnesses may constitute good cause . . . , here petitioner failed to 'set forth specific facts sufficient to demonstrate a sound basis for the transfer' " (*Matter of State of New York v Carter*, 100 AD3d 1438, ___, quoting *Matter of State of New York v Williams*, 92 AD3d 1271, 1271-1272; see *Matter of State of New York v Zimmer* [appeal No. 2], 63 AD3d 1562, 1562-1563). In support of the motion, petitioner's attorney stated in a conclusory manner that all of the possible witnesses would face a hardship in having to travel from Delaware County to Oneida County. Although petitioner also submitted affidavits from four government-employed witnesses, those affidavits stated only that they had "been advised by the Office of the Attorney General that [they] may be subpoenaed to testify" and that travel from Delaware County to Oneida County would be burdensome

(emphasis added). In *Carter* we held that a speculative and conclusory affidavit such as the affidavits submitted in this case was insufficient to meet petitioner's initial burden on a motion to change venue, and we perceive no basis upon which to distinguish this case from *Carter*.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1318

CA 12-01228

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

BANK OF NEW YORK MELLON, FORMERLY KNOWN AS
BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE
LOAN TRUST 2006-16 CB MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-16 CB,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JEAN WHITTY, ALSO KNOWN AS JEAN C. WHITTY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

RICHARD E. CLARK, PLLC, LIVERPOOL (RICHARD E. CLARK OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BLANK ROME LLP, NEW YORK CITY (ADAM M. SWANSON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered May 10, 2012. The order, among other things, granted the motion of defendant Jean Whitty, also known as Jean C. Whitty, to dismiss the complaint and dismissed the complaint without prejudice.

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

Memorandum: In this mortgage foreclosure action, Jean Whitty, also known as Jean C. Whitty (defendant), moved to dismiss the complaint with prejudice. Supreme Court granted that part of the motion to dismiss the complaint, but ordered that it be dismissed without prejudice. We affirm. Contrary to defendant's contention, we conclude under the circumstances presented here that the court did not abuse its discretion in dismissing the complaint without prejudice (*see generally Castillo v County of Suffolk*, 307 AD2d 305, 305). We have reviewed defendant's remaining contentions and conclude that they are either without merit or not preserved for our review.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1322

KA 09-01187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISIAH WILLIAMS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 1, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on count two of the indictment, and count four of the indictment is dismissed without prejudice to the People to re-present any appropriate charges under such count to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and grand larceny in the fourth degree (§ 155.30 [1]). Viewing the evidence in light of the elements of those 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). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

We agree with defendant, however, that reversal is required because the verdict sheet contained an improper notation. Pursuant to CPL 310.20 (2), deliberating jurors may be provided with "[a] written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon. Whenever the court submits two or more counts charging offenses set forth in the same article of the law, the court may set forth the dates, names of complainants or specific statutory language, without defining the terms, by which the counts may be distinguished;

provided, however, that the court shall instruct the jury in its charge that the sole purpose of the notations is to distinguish between the counts." "Nothing of substance can be included [in the verdict sheet] that the statute does not authorize" (*People v Miller*, 18 NY3d 704, 706).

Here, CPL 310.20 (2) was violated when County Court annotated the verdict sheet with, inter alia, the check number corresponding to count two of the indictment, under which defendant was convicted of criminal possession of a forged instrument in the second degree. Under these circumstances, the error requires reversal of the judgment with respect to both the conviction under that count and the conviction of grand larceny in the fourth degree as a lesser included offense under count four of the indictment because, despite the absence of any improper annotation in relation thereto, count four is "factually related" to count two (*People v Kelly*, 76 NY2d 1013, 1015; see *People v Williams*, 237 AD2d 982, 983, lv denied 90 NY2d 866). Contrary to the People's contention, "harmless error analysis is inappropriate where the limits imposed on verdict sheet annotations by CPL 310.20 (2) have been exceeded" (*Miller*, 18 NY3d at 709).

We agree with defendant that reversal is also required based on the court's improper limitation of defense counsel's summation. "It is, of course, the right of counsel during summation 'to comment upon every pertinent matter of fact bearing upon the questions the jury have to decide' " (*People v Ashwal*, 39 NY2d 105, 109 [citation omitted]). Here, the court sustained the People's objection to the part of defense counsel's summation that impugned the credibility of defendant's alleged accomplice by suggesting that he testified against defendant only to shorten his own sentence. The court erred in sustaining that objection because the prosecutor had previously elicited testimony regarding the alleged accomplice's cooperation agreement and sentencing promise. Inasmuch as the evidence of defendant's guilt is not overwhelming, the error is not harmless (see *People v Santiago*, 17 NY3d 661, 673-674; *People v Crimmins*, 36 NY2d 230, 241-242).

We thus reverse the judgment and grant a new trial on count two of the indictment. Inasmuch as defendant was convicted of grand larceny as a lesser included offense under count four of the indictment, we dismiss that count with leave to re-present any appropriate charges thereunder to another grand jury (see *People v Gonzalez*, 61 NY2d 633, 634-635; *People v Collier*, 303 AD2d 1008, 1009, lv denied 100 NY2d 579). In light of our determination, we need not address defendant's remaining contentions.

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

1324

KA 11-02185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JIBRIL A. BURT, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered September 29, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary 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 second degree (Penal Law § 140.25 [2]), defendant contends that his waiver of the right to appeal is unenforceable and that he should have been afforded youthful offender treatment. We reject those contentions. Defendant waived his right to appeal both orally and in writing, and the record demonstrates 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 Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). Further, "the record as a whole, including the written waiver of the right to appeal, establishes 'that the defendant 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). Defendant's valid waiver of the right to appeal encompasses his contention that he should have been afforded youthful offender treatment (*see People v Rush*, 94 AD3d 1449, 1449-1450, *lv denied* 19 NY3d 967). Finally, there is no merit to defendant's contention that the court failed to rule on his request for such treatment inasmuch as the court's comments at sentencing establish that the request was denied.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1327

KA 10-01107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISIAH WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered July 24, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (four counts) and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing in accordance with the following Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of criminal possession of stolen property in the fifth degree (§ 165.40). In appeal No. 3, he appeals from a judgment convicting him upon a jury verdict of eight counts of criminal possession of a forged instrument in the second degree (§ 170.25), two counts of petit larceny (§ 155.25), and one count each of grand larceny in the third degree (§ 155.35 [1]), identity theft in the first degree (§ 190.80 [2]), and scheme to defraud in the first degree (§ 190.65 [1] [b]).

We first address the contentions of defendant with respect to appeal No. 2 that are preserved for our review. Contrary to defendant's contention, defense counsel neither became a witness against defendant nor made any statements adverse to him (*see People v Viscomi*, 286 AD2d 886, 886, *lv denied* 97 NY2d 763; *People v Caple*, 279 AD2d 635, 636, *lv denied* 96 NY2d 798; *see also People v Rivers*, 296 AD2d 861, 862, *lv denied* 99 NY2d 539). We reject defendant's contention that County Court's pretrial *Molineux* ruling constitutes an abuse of discretion (*see People v Molineux*, 168 NY 264, 293-294; *People v Siplin*, 66 AD3d 1416, 1417, *lv denied* 13 NY3d 942; *People v*

Gonzalez, 62 AD3d 1263, 1265, *lv denied* 12 NY3d 925). Moreover, the court's limiting instruction "served to alleviate any potential prejudice resulting from the admission of the evidence" (*People v Alke*, 90 AD3d 943, 944, *lv denied* 19 NY3d 994; see *People v Freece*, 46 AD3d 1428, 1429, *lv denied* 10 NY3d 811). Defendant's further contention that the court abused its discretion in overruling defense counsel's objection to the scope of the People's redirect examination of a witness lacks merit. "[D]efendant opened the door to the redirect examination by only partially exploring on cross-examination the issue whether the witness and defendant had engaged in criminal activity together in the past, rendering further examination and clarification on that issue appropriate" (*People v Blair*, 94 AD3d 1403, 1404, *lv denied* 19 NY3d 971; see *People v Massie*, 2 NY3d 179, 183-185). Contrary to defendant's contention, we also conclude that the court did not err in determining that the identification of defendant by two of the People's witnesses was confirmatory (see *People v Rodriguez*, 79 NY2d 445, 449-452; *People v Cancer*, 16 AD3d 835, 838-839, *lv denied* 5 NY3d 826; *People v Lainfiesta*, 257 AD2d 412, 415-416, *lv denied* 93 NY2d 926).

We next address the contentions defendant raises with respect to appeal No. 2 that are unpreserved for our review. Defendant's contention that the court erred in allowing a witness to testify that he had allegedly committed uncharged crimes outside the scope of the *Molineux* ruling is not properly before us inasmuch as defendant did not object at the time of that testimony (see *People v Manning*, 67 AD3d 1378, 1380, *lv denied* 14 NY3d 803). We decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Moreover, "[b]y failing to object to the court's ultimate *Sandoval* ruling, defendant [also] failed to preserve for our review his further contention . . . that the ruling constitutes an abuse of discretion" (*People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). In any event, we conclude that the court's *Sandoval* ruling did not constitute a " 'clear abuse of discretion' " warranting reversal (*id.* at 1151-1152). Where, as here, "the convictions that the People seek to use are for crimes of individual dishonesty, the convictions should usually be admitted on a trial for similar charges, notwithstanding the risk of possible prejudice, because the very issue on which the offer is made is that of the veracity of the defendant as a witness in the case" (*People v Williams*, 98 AD3d 1234, 1235 [internal quotation marks omitted]).

We next address defendant's contentions relating to appeal No. 3. Defendant's contention that the court erred in failing to correct an alleged inconsistency between the verdict sheet and the jury's response to the poll concerning its verdict on the third count of the indictment is unpreserved for our review (see *People v Mercado*, 91 NY2d 960, 963; *People v Shaver*, 86 AD3d 800, 802-803, *lv denied* 18 NY3d 962, *reconsideration denied* 19 NY3d 967; *People v Lynch*, 81 AD3d 1292, 1292-1293, *lv denied* 17 NY3d 807). In any event, " '[b]ased on the minutes and the jury verdict sheet,' " it is clear that the clerk merely misspoke when she indicated that the jury had acquitted defendant of criminal possession of a forged instrument in the second

degree as charged in the third count of the indictment, and that the jury had actually found defendant guilty of that count (*Lynch*, 81 AD3d at 1293). Further, we note that the parties do not dispute that the fourth count of the indictment, which charged defendant with petit larceny, was later dismissed on the People's consent by an order of County Court (Vincent Dinolfo, J.), determining defendant's motion pursuant to CPL article 440. Consequently, defendant's contentions that the verdict convicting him of that crime is against the weight of the evidence, and that the prosecutor failed to correct perjured testimony with respect to that count, are academic.

Defendant next contends that the verdict is against the weight of the evidence insofar as it convicted him of criminal possession of a forged instrument in the second degree under count five of the indictment and petit larceny as a lesser included offense of grand larceny in the fourth degree under count seven of the indictment. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's further contention that the court erroneously admitted evidence of uncharged crimes not authorized by the *Molineux* ruling lacks merit (*cf. People v Ventimiglia*, 52 NY2d 350, 361-362).

We agree with defendant, however, that the court erred in failing to suppress the in-court identification of defendant by the witness who specifically linked him at trial to the charge set forth in count six of the indictment on the ground that it was based on an unduly suggestive photo array procedure. Contrary to the People's assertion, this contention is preserved for our review (*see People v Feingold*, 7 NY3d 288, 290). On the merits, the People did not meet their initial burden of establishing "the reasonableness of the police conduct and the lack of any undue suggestiveness" with respect to the first of two photo arrays in which the subject witness identified defendant inasmuch as there was no testimony with respect to that photo array (*People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833; *see People v Coleman*, 73 AD3d 1200, 1203). Contrary to the People's further assertion, the error in admitting that identification testimony is not harmless beyond a reasonable doubt (*cf. People v Siler*, 45 AD3d 1403, 1403, *lv denied* 10 NY3d 771; *People v Davis*, 15 AD3d 930, 931, *lv denied* 5 NY3d 761). We therefore grant that part of defendant's omnibus motion seeking to suppress the identification testimony with respect to count six of the indictment.

We further conclude with respect to both appeals, however, that the court erred in allowing defendant to proceed pro se. Here, prior to sentencing in appeal No. 2, the court granted defendant's request to proceed pro se after he made what were, in the court's view, baseless accusations against his respective attorneys. Defendant subsequently proceeded pro se at sentencing at the first trial, i.e., the trial at issue in appeal No. 2, and he likewise proceeded pro se throughout the second trial, i.e., the trial at issue in appeal No. 3. We conclude that the court erred in allowing defendant to proceed pro se inasmuch as it did not "undertake a searching inquiry . . . to

insur[e] that . . . defendant [was] aware of the dangers and disadvantages of proceeding without counsel" (*People v Crampe*, 17 NY3d 469, 481 [internal quotation marks omitted]; see *People v Allen*, 99 AD3d 1252, 1253). Moreover, defendant did not forfeit his right to counsel. " 'While egregious conduct by defendants can lead to a deemed forfeiture of the fundamental right to counsel' . . . there was no such conduct by defendant here to warrant 'an extreme, last-resort forfeiture analysis' " (*People v Bullock*, 75 AD3d 1148, 1149-1150, quoting *People v Smith*, 92 NY2d 516, 521). We further conclude that the tainted proceedings adversely impacted defendant, thereby warranting vacatur of the sentence in appeal No. 2 and reversal of the judgment in appeal No. 3 (see *Allen*, 99 AD3d at 1253; see generally *People v Wardlaw*, 6 NY3d 556, 559). We further note that the new trial granted with respect to appeal No. 3 should be preceded by a hearing to determine whether the subject witness with respect to count six of the indictment has an independent basis for an in-court identification of defendant (see *People v Delamota*, 18 NY3d 107, 119; *People v Wilson*, 5 NY3d 778, 780).

Finally, we have reviewed defendant's remaining contentions and conclude that they are either without merit or are rendered academic as a result of our decision herein.

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

1328

KA 10-00172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISIAH WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered January 21, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (eight counts), petit larceny (two counts), grand larceny in the third degree, identity theft in the first degree and scheme to defraud in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to suppress the identification testimony with respect to count 6 of the indictment is granted, and a new trial is granted on counts 3, 5, 6 and 8 through 15 of the indictment and count 7 of the indictment is dismissed without prejudice to the People to re-present any appropriate charge under that count of the indictment to another grand jury.

Same Memorandum as in *People v Williams* ([appeal No. 2] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1330

KA 11-00199

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BARTON DEPAUL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (William D. Walsh, A.J.), rendered October 18, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and menacing 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 jury trial of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and menacing in the second degree (§ 120.14 [1]), arising from an incident in which defendant pointed a BB gun at a police officer and demanded the officer's money. According to the trial testimony of the officer, the BB gun appeared to be a real handgun and he feared for his life. On appeal, defendant contends that the evidence is legally insufficient to establish that the BB gun was loaded or operable. That contention is unreserved for our review because defendant's motion for a trial order of dismissal was not specifically directed at that alleged deficiency in the People's proof (*see People v Gray*, 86 NY2d 10, 19). In any event, because defendant was charged with possessing an "imitation pistol," the People were not required to prove that the BB gun was loaded or operable. The cases relied upon by defendant are distinguishable because the defendants therein were charged with possessing firearms; it is well settled, however, that a BB gun is not a firearm (*see People v Wilson*, 283 AD2d 339, 340, *lv denied* 97 NY2d 644; *see generally People v Perez*, 93 AD3d 1032, 1038 n 2, *lv denied* 19 NY3d 1000).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1334

CA 12-00877

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

BIRDSONG ESTATES HOMEOWNERS ASSOCIATION, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE D.P.S. SOUTHWESTERN CORP., ALSO KNOWN AS
D.P.S. SOUTHWESTERN CORP., DEFENDANT-RESPONDENT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCAK OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 13, 2012. The judgment, among other things, denied plaintiff's motion for partial summary judgment and granted defendant's cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a judgment declaring the parties' respective rights regarding the development of a residential subdivision in the Town of Orchard Park under the terms of a contract entitled "Declaration of Protective Covenants, Conditions, Restrictions, Easements, Charges, and Liens - Birdsong Estates" (Declaration). By its first counterclaim, defendant also sought such a judgment. We conclude that Supreme Court properly denied plaintiff's motion for, inter alia, partial summary judgment granting the declaration sought in the complaint and dismissing defendant's first counterclaim. We further conclude, however, that the court erred in granting defendant's cross motion for summary judgment dismissing the complaint and granting the declaration sought in the first counterclaim.

By having each sought "summary judgment, both parties bore the burden of establishing that their construction of the [Declaration] 'is the only construction which can fairly be placed thereon' " (*Levey v Leventhal & Sons*, 231 AD2d 877, 877; see *Lipari v Maines Paper & Food Serv.*, 245 AD2d 1085, 1085). Neither party met that burden.

Here, while both plaintiff and defendant relied upon the purportedly plain and unambiguous provisions of the Declaration to support their respective motions, "the[ir] intricate effort[s] to explain the meaning of [those provisions] demonstrate[] the lack of clarity and the ambiguity of the language" thereof (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923; see *Jellinick v Naples & Assoc.*, 296 AD2d 75, 78-79). Moreover, the extrinsic evidence necessary to ascertain the parties' intent and resolve the Declaration's ambiguity, particularly with respect to articles VII and VIII thereof, presents triable issues of fact that may not be determined by summary judgment (see *Jellinick*, 296 AD2d at 79; *Arrow Communication Labs.*, 206 AD2d at 923). We therefore modify the judgment accordingly.

We reject plaintiff's contention that section 11.10 of the Declaration entitles it to judgment as a matter of law despite the foregoing ambiguities. That section provides that plaintiff's construction of the Declaration shall be final and binding "in the absence of an adjudication by a court of competent jurisdiction to the contrary." Whether there will be a contrary adjudication by such a court remains to be determined, and thus plaintiff may not invoke that provision as a basis for summary judgment under these circumstances.

We likewise reject plaintiff's further contention that it is entitled to judgment as a matter of law, even assuming the Declaration's ambiguity, by operation of the doctrine of *contra proferentum*, under which the ambiguities therein would be construed against defendant as the drafter. That doctrine "is a rule of construction that should be employed only as a last resort" (*Fernandez v Price*, 63 AD3d 672, 676; see *Mobil Oil Corp. v Fraser*, 55 AD2d 824, 825, *lv denied* 41 NY2d 804), and we conclude that its application at this stage of the litigation is unwarranted.

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

1343

TP 11-01737

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

IN THE MATTER OF TIMOTHY BEARDSLEE, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES AND LIVINGSTON COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENTS.

PANZARELLA & COIA, P.C., ROCHESTER (CHAD M. HUMMEL OF COUNSEL), FOR
PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF
COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered August 24, 2011) to review a determination of respondents. The determination denied the application of petitioner to amend to unfounded an indicated report of maltreatment.

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

Memorandum: Petitioner contends that the New York State Office of Children and Family Services (respondent) erred in refusing to amend to unfounded an indicated report of child maltreatment with respect to his foster son, maintained in the New York State Central Register of Child Abuse and Maltreatment, and to seal that amended report. We reject that contention. The proof presented at a fair hearing by respondent Livingston County Department of Social Services (DSS) established that petitioner, in contravention of his foster parent contract, spanked the child, leaving a mark in the shape of his hand that was still visible the following day. We conclude, therefore, that respondent's determination that DSS established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the child based on excessive corporal punishment is supported by substantial evidence (*see Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062, lv denied 5 NY3d 702).

Contrary to the further contention of petitioner, the Administrative Law Judge's refusal to grant certain subpoenas did not

deprive him of the right to a fair hearing because the subpoenas would have resulted in the introduction of irrelevant or duplicative evidence (*see generally Matter of Flynn v Hevesi*, 308 AD2d 674, 676, *lv denied* 1 NY3d 504).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1344

TP 12-01111

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

IN THE MATTER OF MEREDITH REYNOLDS, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT AND ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Ontario County [William F. Kocher, A.J.], entered May 29, 2012) to review a determination of respondents. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment indicating petitioner for maltreatment be amended to unfounded and sealed.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying her request to amend to unfounded an indicated report of child maltreatment of her son and her boyfriend's son, maintained at respondent New York State Central Register of Child Abuse and Maltreatment, and seeking to seal that amended report. We reject petitioner's contention that respondent Ontario County Department of Social Services (DSS) failed to sustain its burden at the fair hearing of establishing that she committed an act of maltreatment. "At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705 [internal quotation marks omitted]). "Our review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner[']s application for expungement" (*id.*

[internal quotation marks omitted]; see *Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293). We conclude on the record before us that the determination that DSS established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the subject children is supported by substantial evidence (see *Mangus*, 68 AD3d at 1775; cf. *Hattie G.*, 48 AD3d at 1293; see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1346

KA 11-01632

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CEDRICK K. BRADBERRY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 1, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1348

CAF 11-02135

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

IN THE MATTER OF CATTARAUGUS COUNTY DEPARTMENT
OF SOCIAL SERVICES, ON BEHALF OF DAWN M.
LOVELESS, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFERY M. GORE, RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered October 14, 2011 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, sentenced respondent to four months in jail.

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

Memorandum: Respondent appeals from an order confirming the determination of the Support Magistrate that respondent had willfully violated a prior child support order and that directed that he be incarcerated for a period of four months. We affirm the order with respect to the willful violation of the support order. "There is a presumption that a respondent has sufficient means to support his or her . . . minor children . . . , and the evidence that respondent failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, quoting Family Ct Act § 454 [3] [a]; see *Matter of Jelks v Wright*, 96 AD3d 1488, 1489). Here, petitioner met its burden of demonstrating that respondent willfully violated the prior order by submitting evidence that respondent failed to pay support pursuant to the order, and the burden therefore shifted to respondent to submit "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70; see *Jelks*, 96 AD3d at 1489). Respondent failed to meet that burden inasmuch as he did not present evidence establishing that he made reasonable efforts to obtain gainful employment to fulfill his support obligation (see *Jelks*, 96 AD3d at 1489; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065).

Respondent's contention that a jail term was improperly imposed

is moot inasmuch as the commitment portion of the order has expired by its own terms (see *Matter of Alex A.C. [Maria A.P.]*, 83 AD3d 1537, 1538; *Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537). We therefore dismiss respondent's appeal from that part of the order (see *Alex A.C.*, 83 AD3d at 1538).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1350

CAF 12-01211

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

IN THE MATTER OF DEBORAH A. AVOLA,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTOPHER W. HORNING, RESPONDENT-RESPONDENT.

MAI LUTTERUS LIINVE, ATTORNEY FOR THE CHILD,
APPELLANT.

PROVEN AND QUENCER, WATERTOWN (LISA A. PROVEN OF COUNSEL), FOR
PETITIONER-APPELLANT.

MAI LUTTERUS LIINVE, ATTORNEY FOR THE CHILD, WATERTOWN, APPELLANT PRO
SE.

RUTHANNE G. SANCHEZ, WATERTOWN, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered October 18, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner mother and the Attorney for the Child appeal from an order that dismissed the mother's petition seeking to modify the prior joint custody order entered upon the parties' stipulation by awarding her sole custody of the parties' child. We affirm. "[T]here is a sound and substantial basis in the record for Family Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the subject child would be served by modifying the existing custody arrangement" (*Matter of Wawrzynski v Goodman*, 100 AD3d 1559, ___; see generally *Matter of Yaddow v Bianco*, 67 AD3d 1430, 1431; *Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, lv denied 13 NY3d 715). Contrary to the mother's contention, the parties' communication problems did not constitute a change in circumstances. Although the record reflects that the parties experience some difficulty in communicating with each other, there does not appear to have been a change in the parties' communication issues since the prior custody order was entered (see *Matter of Chant v Filippelli*, 277 AD2d 741, 742). Moreover, the

record reflects that the parties' communication issues have not meaningfully interfered with the child's emotional and intellectual development, health, or success in school (see *Marcantonio v Marcantonio*, 307 AD2d 740, 741). Contrary to the mother's further contention, the father's alleged failure to spend time with the child when the child was in his physical custody also did not establish the requisite change in circumstances (see generally *Matter of Kerwin v Kerwin*, 39 AD3d 950, 951).

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

1351

CAF 11-00001

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

IN THE MATTER OF KRISTINA A. BUSHNELL,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL S. BUSHNELL, RESPONDENT-APPELLANT.

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

NIXON PEABODY LLP, ROCHESTER (DWIGHT R. COLLIN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 29, 2010 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, adjudged that respondent had willfully failed to obey a court order.

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

Memorandum: Respondent appeals from an order finding that he willfully violated a prior order of child support and sentencing him to six months of weekends in jail. We conclude that Family Court properly found that respondent willfully violated the prior order of support (see *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065). There is a presumption that a respondent has sufficient means to support his minor children (see Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69; *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452), and the evidence that respondent failed to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). The burden therefore shifted to respondent to present "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70). Respondent claimed that his business failed in the economic downturn, rendering him unable to make the required support payments. After his business deteriorated, however, respondent did not actively pursue other employment options (cf. *Matter of Davis-Taylor v Davis-Taylor*, 79 AD3d 1312, 1314; *Matter of Westchester County Commr. of Social Servs. v Perez*, 71 AD3d 906, 907). Thus, respondent failed to meet his burden inasmuch as he failed to introduce "evidence establishing that he made reasonable efforts to obtain gainful employment to meet his . . . support obligations" (*Christine L.M.*, 45 AD3d at 1452 [internal quotation marks omitted]; see *Hunt*, 30 AD3d at 1065). Additionally, we note that respondent did not sell his assets to enable him to make support

payments (*cf. Davis-Taylor*, 79 AD3d at 1314; *Westchester County Commr. of Social Servs.*, 71 AD3d at 907).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1352

CAF 11-02134

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

IN THE MATTER OF HEIDI BARKSDALE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFERY M. GORE, SR., RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered October 14, 2011 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, sentenced respondent to four months in jail.

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

Memorandum: Respondent appeals from an order confirming the determination of the Support Magistrate that respondent had willfully violated a prior child support order and that committed him to a four-month jail term. We affirm the order with respect to the willful violation of the support order. "There is a presumption that a respondent has sufficient means to support his or her . . . minor children . . . , and the evidence that respondent failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452, quoting Family Ct Act § 454 [3] [a]; see *Matter of Jelks v Wright*, 96 AD3d 1488, 1489). Consequently, the evidence submitted by petitioner that respondent failed to pay support as set forth in the prior order was sufficient to establish that he willfully violated that prior order. Thus, the burden shifted to respondent to submit "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70; see *Jelks*, 96 AD3d at 1489). Respondent did not present evidence establishing that he made reasonable efforts to obtain gainful employment to fulfill his support obligation, and he therefore failed to meet that burden (see *Jelks*, 96 AD3d at 1489; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065).

Respondent's contention that a jail term was improperly imposed is moot inasmuch as that part of the order with regard to the

commitment has expired by its own terms (see *Matter of Alex A.C. [Maria A.P.]*, 83 AD3d 1537, 1538; *Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537). We therefore dismiss respondent's appeal from that part of the order (see *Alex A.C.*, 83 AD3d at 1538).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1353

CA 12-00328

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION UNDER
ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY
DIANA SACHS AYLWARD, JOHN C. CARBONARA,
GRETCHEN CIRCONI, ROBERT FREEDMAN, MONTE K.
HOFFMAN, PETER HOGAN, NANCY KARP, JOEL
LEVIN, NORA SANTIAGO, THOMAS J. SCIME,
JONATHAN D. WEIR AND PETER ALLEN WEINMANN,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO AND ITS ASSESSOR AND BOARD
OF ASSESSMENT REVIEW, RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, LLP, BUFFALO (JORGE S. DE ROSAS OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS
OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 18, 2011 in a proceeding pursuant to RPTL article 7. The order denied petitioners' motion to preclude an interior inspection of their homes.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioners commenced these proceedings seeking review of their residential real property tax assessments pursuant to RPTL article 7. They appeal from four orders denying their motions to preclude respondents from conducting interior inspections of their homes in order to prepare a defense to the petitions. Petitioners contend that Supreme Court erred in requiring them to move to preclude those inspections rather than requiring respondents to move to allow the inspections. We agree.

Discovery in RPTL article 7 proceedings is governed by CPLR 408, which requires a court's leave to obtain formal disclosure beyond a notice to admit (*see Matter of Wendy's Rests., LLC v Assessor, Town of Henrietta*, 74 AD3d 1916, 1917). Here, the court failed to comply with CPLR 408 in ordering petitioners either to move to preclude the demanded inspections or to have any objection thereto deemed waived. The court's error significantly altered the proof required on this

issue and thereby enabled respondents to access the interior of petitioners' homes without having to show its need for such access. Indeed, respondents opposed the motions to preclude by submitting only an affidavit in which their attorney asserted that petitioners had presumptively consented to the interior inspections by having challenged their tax assessments and that the publicly available information about the properties was insufficient to prepare an effective defense to the petitions. The attorney, however, did not acknowledge that the interior details of the subject homes could have just as easily been obtained by way of a notice to admit (see CPLR 408; CPLR 3123), a procedure that would not have required the leave of a court.

In sum, by proceeding in contravention of CPLR 408, the court improperly relieved respondents of their burden to make the required showing, such as by way of an appraiser's affidavit, that interior inspections were necessary to prepare their defense (see generally *Matter of Wendy's Rests.*, 74 AD3d at 1917). Moreover, by erroneously requiring petitioners to move to preclude, the court did not properly evaluate the reasonableness of the inspections sought by respondents, i.e., the court did not conduct the necessary Fourth Amendment analysis balancing respondents' need for interior inspections against the invasion of petitioners' privacy interests that such inspections would entail (see *Matter of Yee v Town of Orangetown*, 76 AD3d 104, 111-113, citing *Schlesinger v Town of Ramapo*, 11 Misc 3d 697, 699-700; see generally *Camara v Municipal Court of City & County of San Francisco*, 387 US 523). Under these circumstances, we reverse the orders and remit the matters to Supreme Court for further proceedings not inconsistent with our decision herein.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1354

CA 12-00330

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION UNDER
ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY
BESSIE ALEXANDER, PAULETTE A. CAMPAGNA,
RONALD CARUSO, LAWRENCE CATALDI, PAUL V.
CRAPSI, JR., MICHAEL FLAHERTY, AMY FLAHERTY,
TIMOTHY MCGUAN, BEVERLY I. MILEHAM, WILLIAM N.
NAPLES, HOLLOWAY ORTMAN AND GLENN VOELKER,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, AND ITS ASSESSOR AND BOARD
OF ASSESSMENT REVIEW, RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, LLP, BUFFALO (JORGE S. DE ROSAS OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS
OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 18, 2011 in a proceeding pursuant to RPTL article 7. The order denied petitioners' motion to preclude an interior inspection of their homes.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *Matter of Aylward v City of Buffalo* (___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1355

CA 12-00331

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION UNDER
ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY
DAVID G. COHEN, SETH B. COLBY, GRACE
MUNSCHAUER, ANTHONY PICCIONE, JENNIE
PICCIONE, MAXINE S. SELLER, DAVID G.
STRACHAN, ARTHUR ZILLER AND LINDA MARSH,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

ASSESSOR, CITY OF BUFFALO, AND BOARD OF
ASSESSMENT REVIEW OF CITY OF BUFFALO, COUNTY
OF ERIE AND STATE OF NEW YORK,
RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, LLP, BUFFALO (JORGE S. DE ROSAS OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS
OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 18, 2011 in a proceeding pursuant to RPTL article 7. The order denied petitioners' motion to preclude an interior inspection of their homes.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *Matter of Aylward v City of Buffalo* (___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1356

CA 12-00332

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION UNDER
ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY
KATHRYN GORDON, SHARON J. HADJ-CHIKH,
BRENDA LANE, LOUIS LAZAR, JAMES C. ROMANELLO,
ROSS T. RUNFOLA, JOAN L. SKERKER AND GRACE S.
WALSH, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

ASSESSOR, CITY OF BUFFALO, AND BOARD OF
ASSESSMENT REVIEW OF CITY OF BUFFALO, COUNTY
OF ERIE, AND STATE OF NEW YORK,
RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, LLP, BUFFALO (JORGE S. DE ROSAS OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS
OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 18, 2011 in a proceeding pursuant to RPTL article 7. The order denied petitioners' motion to preclude an interior inspection of their homes.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *Matter of Aylward v City of Buffalo* (___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1357

CA 12-01064

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

JOSEPH LUNA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ZOOLOGICAL SOCIETY OF BUFFALO, INC.,
DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (GARY J. O'DONNELL OF
COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 17, 2011. The order granted the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

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 working as a carpenter on a construction project for defendant. Supreme Court properly granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Plaintiff sustained his initial burden of establishing that he was injured as the result of a fall from an elevated work surface and that defendant failed to provide a sufficient safety device (*see Ferris v Benbow Chem. Packaging, Inc.*, 74 AD3d 1831, 1832; *see generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603). In opposition, defendant failed to raise a triable issue of fact whether plaintiff's " 'own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of the accident' " (*Mazurett v Rochester City School Dist.*, 88 AD3d 1304, 1305, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). We reject defendant's contention that there is an issue of fact whether plaintiff was a recalcitrant worker whose own actions were the sole proximate cause of the accident. Although defendant submitted evidence that plaintiff was instructed not to work in a particular area and violated those instructions, "the nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices so as to give [a worker] proper protection" (*Long v Cellino &*

Barnes, P.C., 68 AD3d 1706, 1707 [internal quotation marks omitted]), which was not done here. Thus, "[t]he mere failure by plaintiff to follow safety instructions does not render plaintiff a recalcitrant worker" (*Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106 [internal quotation marks omitted]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1366

KA 09-02305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BERNABE ENCARNACION, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered April 9, 2009 pursuant to the 2004 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1991 conviction of, inter alia, two counts of criminal sale of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to the 2004 Drug Law Reform Act ([DLRA-1] L 2004, ch 738, § 23). Defendant failed to preserve for our review his contention that County Court erred in failing to hold an evidentiary hearing inasmuch as he did not request such a hearing (*see id.; People v Murray*, 89 AD3d 567, 568, *lv denied* 18 NY3d 960; *People v Highsmith*, 79 AD3d 1741, 1742, *lv denied* 16 NY3d 831). In any event, that contention lacks merit. Defendant appeared with defense counsel before the court on the resentencing application, and defense counsel " 'explained to the court why resentencing was warranted' " (*People v Morales*, 46 AD3d 1395, 1395, *lv dismissed* 10 NY3d 768). The court also gave defendant the opportunity to address the court directly on his application for resentencing. Under those circumstances, " 'the hearing requirement of [DLRA-1] was met' " (*id.; cf. People v Irvin*, 96 AD3d 1453, 1453).

We reject the further contention of defendant that the court erred in denying his resentencing application. DLRA-1 provides that, in reviewing an application for resentencing, the court may consider "any facts or circumstances relevant to the imposition of a new sentence which are submitted by [the defendant] or the [P]eople and may, in addition, consider the institutional record of confinement of [the defendant]" (L 2004, ch 738, § 23). The court may also consider

a defendant's subsequent convictions (see *People v Dominguez*, 88 AD3d 901, 901, *lv denied* 18 NY3d 882; *People v Vega*, 40 AD3d 1020, 1020, *lv dismissed* 9 NY3d 852; *People v Gonzalez*, 29 AD3d 400, 400, *lv denied* 7 NY3d 867). In short, "the court is vested with the discretion to deny an application for resentencing if 'substantial justice dictates that the application should be denied' " (*People v Rivers*, 43 AD3d 1247, 1247, *lv dismissed* 9 NY3d 993, quoting L 2004, ch 738, § 23), and we conclude that this is such a case.

Only five years after his drug conviction, defendant stabbed a fellow inmate to death, for which he was convicted of murder in the second degree and promoting prison contraband in the first degree. On that basis alone, we conclude that the court did not err in determining that "substantial justice dictates that [defendant's] application should be denied" (L 2004, ch 738, § 23; see e.g. *People v Arroyo*, 99 AD3d 515, 516; *People v Alvarez*, 94 AD3d 587, 587, *lv denied* 19 NY3d 956; *Rivers*, 43 AD3d at 1248). Indeed, we note that the purpose of the various DLRAs was to "grant relief from what the Legislature perceived as the 'inordinately harsh punishment for low level non-violent drug offenders' that the Rockefeller Drug Laws required" (*People v Paulin*, 17 NY3d 238, 244 [emphasis added]) and, based upon defendant's conduct in prison, it is evident that he is not such an offender.

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

1371

KA 09-01307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRAVONTAE MCKINLEY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloï, J.), rendered June 18, 2009. 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: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress a handgun discarded by defendant while he was being pursued by a police officer, a controlled substance seized from his person following his arrest, and a postarrest showup identification. The officer who pursued defendant testified at the suppression hearing that the police received a 911 call reporting that shots had been fired near the intersection of East Fayette Street and Columbus Avenue in Syracuse. The information transmitted to the police indicated that four black males, at least one of whom was dressed in dark clothing, were reportedly involved in the incident. Within a minute and a half of the dispatch, the pursuing officer and two other police officers in an unmarked vehicle approached a group of four black males, one of whom was defendant, walking approximately one block from the scene of the alleged shooting. The police vehicle pulled up to the four individuals and, as the officers were exiting the vehicle, defendant and another male dressed in dark clothing fled in different directions. The officer who pursued defendant testified that he repeatedly yelled, "stop, police" while he was pursuing defendant. During the course of the pursuit, defendant discarded a handgun. The police thereafter apprehended defendant and, during a search incident to his arrest, discovered a bag containing cocaine. The witness who placed the 911

call then identified defendant as the shooter in a postarrest showup identification.

We conclude that, based upon defendant's physical and temporal proximity to the scene of the reported incident and the fact that the group of males matched the description of the individuals involved in the shooting, the officers had a founded suspicion that criminal activity was afoot, justifying their initial common-law inquiry of defendant (see *People v De Bour*, 40 NY2d 210, 223; *People v Brown*, 67 AD3d 1439, 1439-1440, *lv denied* 14 NY3d 798; *People v Williams*, 39 AD3d 1269, 1270, *lv denied* 9 NY3d 871). We further conclude that defendant's flight as the officers began to exit their vehicle and his continued flight in defiance of orders to stop furnished the requisite reasonable suspicion to justify a greater level of police intrusion (see *Williams*, 39 AD3d at 1270), i.e., police pursuit (see *People v Pines*, 99 NY2d 525, 526-527; *People v Sierra*, 83 NY2d 928, 929).

Defendant contends that the police lacked reasonable suspicion justifying pursuit because the record does not establish that defendant knew that the approaching individuals were police officers, citing *People v Riddick* (70 AD3d 1421, 1424, *lv denied* 14 NY3d 844). Even assuming, arguendo, that defendant's contention is preserved for our review, we conclude that it is without merit. Here, unlike in *Riddick*, the police were responding to a reported crime, and the police therefore had a founded suspicion that criminal activity was afoot before approaching defendant (see *id.* at 1422). Thus, under the circumstances of this case, including the report of shots fired and the fact that the four individuals matched the description of the individuals involved in the shooting incident, we conclude that defendant's flight from the officers and his refusal to stop after the officers explicitly identified themselves as police and he was directed to stop justified the pursuit of defendant (see generally *People v Bachiller*, 93 AD3d 1196, 1197, *lv dismissed* 19 NY3d 861; *Brown*, 67 AD3d at 1439-1440; *People v Martinez*, 59 AD3d 1071, 1072, *lv denied* 12 NY3d 856).

Because the record supports the determination of the suppression court that the police had reasonable suspicion to pursue defendant, defendant's abandonment of a handgun during the pursuit was not precipitated by illegal conduct and, thus, denial of suppression was proper (see *Sierra*, 83 NY2d at 930). The search of defendant's person, resulting in the seizure of the controlled substance sought to be suppressed, was incident to defendant's lawful arrest (see *Williams*, 39 AD3d at 1270), as was the postarrest identification of defendant.

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

1373

KA 11-00287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EARL HOWARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 4, 2011. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and 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 a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. 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, although a different verdict would not have been unreasonable, County Court did not fail to give the evidence the weight it should be accorded (*see People v Johnson*, 94 AD3d 1563, 1564, *lv denied* 19 NY3d 962; *see generally People v Bleakley*, 69 NY2d 490, 495). Three witnesses who had lived on the same street with defendant testified at trial that they saw defendant shoot the victim. Another witness, who previously had been defendant's drug-dealing associate, testified that defendant admitted to him that he shot the victim, and the People also presented uncontroverted circumstantial evidence of defendant's consciousness of guilt, i.e., that he moved to California several days after the shooting (*see People v Westbrook*, 90 AD3d 1536, 1536, *lv denied* 18 NY3d 963). Although defendant challenges the credibility of the prosecution witnesses on various grounds, the court stated that it found the testimony of those witnesses to be "unequivocal and rather compelling." It is well settled that " 'credibility determinations by the court . . . are entitled to great deference' " (*People v Wall*, 48 AD3d 1107, 1108, *lv denied* 11 NY3d 742), and minor inconsistencies in

the testimony of certain prosecution witnesses do not render their testimony incredible as a matter of law (*see People v Coble*, 94 AD3d 1520, 1522, *lv denied* 19 NY3d 995).

We also reject defendant's contention that he received ineffective assistance of counsel because his trial attorney failed to object to the introduction of various photographs of defendant depicting him, in defendant's words, as a "gleeful, defiant outlaw." "To 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 alleged deficiency (*People v Rivera*, 71 NY2d 705, 709), and defendant failed to do so here. Indeed, the record establishes that the court in this nonjury trial was aware from other evidence, including defendant's own testimony, that defendant was a drug dealer with a prior criminal record, which may have been the basis for defense counsel's failure to object to the admissibility of the photographs. In any event, even assuming, arguendo, that it was error for defense counsel not to object to the photographs, we conclude that the single alleged failure was not "sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857).

Contrary to defendant's further contention, the court did not err in allowing a prosecution witness to testify that defendant told the witness that he returned to Buffalo from California because "the detectives came out there to [defendant's] house so he came back." As the People assert, that testimony, although hearsay, was admissible "as an admission inconsistent with defendant's innocence" (*People v McCray*, 227 AD2d 900, 900, *lv denied* 89 NY2d 866). The fact that defendant returned to Buffalo after the police discovered his location in California tends to support the prosecution's theory that defendant fled to California after the shooting to avoid arrest, and that he did not go there simply because his mother thought that he needed a "different environment," as the mother testified on defendant's behalf at trial.

Considering the brutal and senseless nature of defendant's killing of the victim, we reject defendant's challenge to the severity of the sentence. Finally, we have reviewed defendant's remaining contentions and conclude that they lack merit.

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

1374

CAF 11-01895

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

IN THE MATTER OF JOANNA P., SAMANTHA M.,
JULIAN W., AND ADAIR M.

MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

PATRICIA M., RESPONDENT-APPELLANT.

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

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

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR JOANNA P. AND SAMANTHA M.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR JULIAN W. AND ADAIR M.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 22, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

It is hereby ORDERED that said appeal insofar as it concerned respondent's oldest child is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect. We dismiss as moot the appeal from the order insofar as it concerned the mother's oldest child inasmuch as she has attained the age of 18 (*see Matter of Anthony M.*, 56 AD3d 1124, 1124, *lv denied* 12 NY3d 702).

We conclude that petitioner met its initial burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the younger children, and the mother failed to establish that she "had 'a meaningful plan for the child[ren's] future, including that [she has] addressed the problems that caused the removal' of the child[ren]" (*Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374, *lv denied* 15 NY3d 708). "Petitioner was not required to ensure that the mother succeeded in overcoming her obstacles but, rather, the mother was required to assume some

responsibility in dealing with those challenges" (*Matter of Gerald G. [Orena G.]*, 91 AD3d 1320, 1320, lv denied 19 NY3d 801). " '[A]lthough [the mother] participated in [some of] the services offered by petitioner, [s]he failed to address successfully the problems that led to the removal of the child[ren] and continued to prevent [their] safe return' " (*Matter of Brittany K.*, 59 AD3d 952, 953, lv denied 12 NY3d 709).

Contrary to the mother's contention, the record supports Family Court's determination that a suspended judgment would not serve the best interests of the younger children (see *Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307-1308, lv denied 14 NY3d 709; see generally *Matter of Mercedes L.*, 12 AD3d 1184, 1185; *Matter of Saboor C.*, 303 AD2d 1022, 1023). " 'The progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren's] unsettled familial status' " (*Matter of Roystar T. [Samaritan B.]*, 72 AD3d 1569, 1569, lv denied 15 NY3d 707).

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

1383

CA 12-00670

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

ROMANA MATTIOLI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF GREECE, DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (ANTHONY M. SORTINO OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 28, 2011. The judgment and order, inter alia, denied that part of the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for losses she sustained when her real and personal property was damaged in a flood that allegedly occurred when a retention pond overflowed after a rainstorm in 2008. Defendant appeals from a judgment and order that, inter alia, denied that part of its motion for summary judgment dismissing the complaint. Contrary to defendant's contention, Supreme Court properly denied that part of the motion. Although defendant met its initial burden on the motion by submitting evidence establishing that it had not received prior written notice of the alleged defect as required by defendant's Town Code (*see generally Davison v City of Buffalo*, 96 AD3d 1516, 1518), plaintiff raised a triable issue of fact whether defendant had received such notice (*see generally Cruzado v City of New York*, 80 AD3d 537, 538). In addition, plaintiff raised "a triable issue of fact concerning the applicability of [an] exception to the prior written notice requirement, i.e., whether [defendant] created the allegedly dangerous condition 'through an affirmative act of negligence' " (*Smith v City of Syracuse*, 298 AD2d 842, 842-843; *see Jannicelli v City of Schenectady*, 90 AD3d 1206, 1207).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1384

CA 12-01031

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

RUSSELL J. FARACI, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF TREVOR JOSEPH FARACI,
AN INFANT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RENEE URBAN, DEFENDANT-APPELLANT,
WILLIAM BUIL, DEFENDANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 11, 2011. The order denied the motion of defendant Renee Urban for summary judgment dismissing the complaint against her.

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

Memorandum: Plaintiff commenced this action seeking damages for the injuries that his son sustained when he was bitten by a dog in a house owned by Renee Urban (defendant) and occupied by defendant William Buil, who was both defendant's tenant and the dog's owner. Defendant appeals from an order denying her motion for summary judgment dismissing the complaint against her.

"To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog" (*Sarno v Kelly*, 78 AD3d 1157, 1157). Insofar as relevant here, knowledge of a dog's vicious propensities may be shown, inter alia, by evidence of a defendant's awareness that the dog would "growl, snap or bare its teeth" (*Collier v Zambito*, 1 NY3d 444, 447; see *Bard v Jahnke*, 6 NY3d 592, 597).

Here, it is undisputed that defendant was aware that a dog was kept on the premises by her tenant and that she could have required

him to remove or confine that dog. Furthermore, contrary to defendant's contention, she failed to demonstrate as a matter of law that the dog did not have vicious tendencies, inasmuch as her own submissions established that the dog had previously growled at and tried to claw through a window to get at mail-carriers and others who came to the door (see *Rosenbaum v Rauer*, 80 AD3d 686, 686; *Jones v Pennsylvania Meat Mkt.*, 78 AD3d 658, 659).

We agree with defendant, however, that she is entitled to summary judgment because she established as a matter of law that she neither knew nor should have known of the dog's alleged vicious propensities and because plaintiff failed to raise a triable issue of fact in opposition thereto. Specifically, defendant "submitted sworn testimony at an examination before trial that she had no knowledge of any vicious propensities of her tenant's dog[, and, given that p]laintiff has submitted no proof to the contrary" (*Gill v Welch*, 136 AD2d 940, 940), "[t]here is no evidence from which to infer that the dog exhibited vicious propensities at a time when defendant was present on the property . . . nor is there any evidence that anyone communicated any complaints about the dog to defendant" (*LePore v DiCarlo*, 272 AD2d 878, 879, lv denied 95 NY2d 761; see *Craft v Whittmarsh*, 83 AD3d 1271, 1272; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's mere speculation that defendant might have had knowledge of a prior incident involving the dog is insufficient to raise a triable issue of fact in opposition to summary judgment (see *Craft*, 83 AD3d at 1273; see generally *Miletich v Kopp*, 70 AD3d 1095, 1096).

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

1385

CA 12-01068

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

IN THE MATTER OF THE FORECLOSURE OF TAX
LIENS BY PROCEEDING IN REM PURSUANT TO
ARTICLE 11 OF THE REAL PROPERTY TAX LAW
BY COUNTY OF LIVINGSTON, RELATING TO THE
2009 TOWN AND COUNTY TAX.

MEMORANDUM AND ORDER

COUNTY OF LIVINGSTON, PETITIONER-APPELLANT;

JEFFREY MORT, RESPONDENT-RESPONDENT.

JASON S. DIPONZIO, ROCHESTER, FOR PETITIONER-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County
(Dennis S. Cohen, A.J.), entered September 26, 2011. The order
granted respondent's motion to vacate a default judgment in a tax
foreclosure proceeding.

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

Memorandum: In this proceeding pursuant to RPTL article 11,
petitioner appeals from an order granting respondent's motion pursuant
to RPTL 1131 to vacate the default judgment of foreclosure. Contrary
to the contention of petitioner, we conclude that Supreme Court did
not abuse its discretion in granting the motion.

To establish an excusable default under CPLR 5015 (a) (1), the
defaulting party must proffer a reasonable excuse for the default as
well as a meritorious defense to the action or proceeding (see *Lauer v
City of Buffalo*, 53 AD3d 213, 216-217; *Matter of Clinton County
[Miner]*, 39 AD3d 1015, 1016; *Matter of Jefferson County*, 295 AD2d 934,
934). "The determination whether an excuse is reasonable lies within
the sound discretion of the motion court" (*Lauer*, 53 AD3d at 217).
"In making [its] discretionary determination, the court should
consider relevant factors, such as the extent of the delay, prejudice
or lack of prejudice to the opposing party, whether there has been
willfulness, and the strong public policy in favor of resolving cases
on the merits" (*Moore v Day*, 55 AD3d 803, 804; see *Puchner v Nastke*,
91 AD3d 1261, 1262; *Kahn v Stamp*, 52 AD2d 748, 749).

Here, we conclude that the court did not abuse its discretion in

determining that respondent had a reasonable excuse for his default and a meritorious defense to the proceeding (see *Lauer*, 53 AD3d at 217; see generally *Solomon Abrahams, P.C. v Peddlers Pond Holding Corp.*, 125 AD2d 355, 357). Respondent moved to vacate the default judgment on July 22, 2011, just four days after the default judgment of foreclosure was entered. Although respondent failed to interpose an answer to the petition and notice of foreclosure, he averred that, prior to the June 13, 2011 redemption date, he twice contacted petitioner to advise it of his situation and that he intended to pay all taxes due. Notably, petitioner does not contend that it suffered any prejudice attributable to respondent's delay, and we discern none on this record. Indeed, although the default judgment ordered the transfer of title to petitioner, the record establishes that the property had not yet been auctioned when respondent moved to vacate the default. Unlike the defaulting parties in the cases cited by petitioner (see e.g. *Katz v Marra*, 74 AD3d 888, 891, *appeal dismissed* 15 NY3d 837), respondent does not contend that he could not afford to pay his taxes. Rather, respondent averred that he took steps to secure the necessary funds prior to the date of redemption, but that he did not receive those funds until approximately one month after the redemption date.

In sum, " '[g]iven the brief overall delay, the promptness with which [respondent] moved to vacate the judgment, the lack of any intention on [respondent's] part to abandon the [proceeding], [petitioner's] failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits,' " we conclude that the court did not abuse its discretion in vacating the default judgment (*Crandall v Wright Wisner Distrib. Corp.*, 59 AD3d 1059, 1060).

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

1390

TP 12-01112

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

IN THE MATTER OF PAUL J. NOE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

GALEN D. KIRKLAND, COMMISSIONER, NEW
YORK STATE DIVISION OF HUMAN RIGHTS,
NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENTS-PETITIONERS,
AND LEON H. MARTIN, III, RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR
RESPONDENTS-PETITIONERS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered June 14, 2012) to review a determination of respondents-petitioners. The determination found that petitioner-respondent had engaged in an unlawful discriminatory practice.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay respondent Leon H. Martin, III, the sum of \$10,000 as damages for mental anguish and humiliation with interest at the rate of 9% per annum commencing March 7, 2012, and to pay the Comptroller of the State of New York the sum of \$20,000 for a civil fine and penalty, with interest at the rate of 9% per annum commencing March 7, 2012.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 to challenge the determination of respondents-petitioners (respondents) that found, after a hearing, that he had unlawfully discriminated against respondent Leon H. Martin, III, (complainant) based on race and that ordered him to pay a civil fine and compensatory damages. Respondents cross-petitioned to enforce the determination. We now confirm the determination, dismiss the petition, and grant the cross petition.

Petitioner first contends that the determination is not supported by substantial evidence. "[T]he scope of judicial review under the

Human Rights Law is extremely narrow and is confined to the consideration of whether the Division's determination is supported by substantial evidence in the record. Courts may not weigh the evidence or reject the Division's determination where the evidence is conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). Here, the record establishes that petitioner, an experienced landlord, refused to lease an available commercial space to complainant only after meeting him in person and voicing concerns about the race of his existing residential tenants as compared to that of complainant. The record also establishes that petitioner's purported concerns about complainant's intended use of the space were merely a pretext for racial discrimination, given that he could have easily tailored a lease to address any such concerns. We therefore conclude that the determination is supported by substantial evidence (*see Matter of County of Onondaga v Mayock*, 78 AD3d 1632, 1633; *Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1350-1351).

Contrary to petitioner's second contention, an award of compensatory damages for mental anguish and humiliation is supported by the evidence adduced at the administrative hearing, which reveals that petitioner's conduct reminded complainant of the segregation that he previously experienced in Alabama and caused him to resort to using his spouse and her business as a front through which to lease commercial space (*see Mayock*, 78 AD3d at 1633-1634; *Matter of New York State Off. of Mental Health v New York State Div. of Human Rights*, 75 AD3d 1023, 1025). We note that petitioner does not challenge the amount awarded in compensatory damages.

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

1398

CAF 12-00010

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LATOYA DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

LAW OFFICE OF PETER VASILION, WILLIAMSVILLE (PETER P. VASILION OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Memorandum: In these appeals, petitioner father appeals from orders that dismissed his petitions seeking, inter alia, to modify a prior consent order that allowed him to correspond only by mail with his child. By his petitions, the father sought an order allowing telephone calls and visitation with his child. We note at the outset that the appeal from the order in appeal No. 4 must be dismissed because the appeal was taken from the same order as in appeal No. 3.

We conclude that Family Court properly dismissed the father's petitions. " 'Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[]' " (*Matter of Donnelly v Donnelly*, 55 AD3d 1373, 1373). As limited by his brief, the father contends on appeal that there was a change in circumstances warranting a reexamination of the issue of visitation because he had been transferred from one correctional facility to another that was closer to the child. We reject that contention. "Even accepting the father's allegations as true, [we conclude that] they do not set forth a change in circumstances which would warrant the relief sought" (*Matter of Januszka v Januszka*, 90 AD3d 1253, 1254; see generally *Matter of*

Jackson v Beach, 78 AD3d 1549, 1550).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1399

CAF 12-00011

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LATOYA DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

LAW OFFICE OF PETER VASILION, WILLIAMSVILLE (PETER P. VASILION OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie
Bailey, J.), entered October 24, 2011. The order dismissed the
petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1]
___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1400

CAF 12-00012

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

HERMAN DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID A. SHAPIRO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1401

CAF 12-00013

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

HERMAN DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID A. SHAPIRO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1402

CAF 12-00014

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HERMAN DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 5.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID A. SHAPIRO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1403

CAF 12-00015

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

LINDA DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 6.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID A. SHAPIRO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1404

CAF 12-00016

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LINDA DORSEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 7.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID A. SHAPIRO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1405

CAF 12-00017

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 8.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1406

CAF 12-00018

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RONALD DAVID RAGIN, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 9.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR AALIYAH R.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 24, 2011. The order dismissed the petition.

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

Same Memorandum as in *Matter of Ragin v Dorsey* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1408

CAF 12-00155

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF ASHLEA KASPROWICZ,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KRISTOPHER OSGOOD, RESPONDENT-APPELLANT.

IN THE MATTER OF KRISTOPHER OSGOOD,
PETITIONER-APPELLANT,

V

ASHLEA KASPROWICZ, RESPONDENT-RESPONDENT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-APPELLANT AND
PETITIONER-APPELLANT.

CAROLYN KELLOGG JONAS, WELLSVILLE, FOR PETITIONER-RESPONDENT AND
RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), dated December 5, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied respondent-petitioner's written objections to an order issued by the Support Magistrate.

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

Memorandum: Respondent-petitioner father appeals from an order confirming the finding of the Support Magistrate that he willfully violated an order of child support. We affirm (*see Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065). There is a presumption that a parent has sufficient means to support his or her minor children (*see Family Ct Act § 437; Matter of Powers v Powers*, 86 NY2d 63, 68-69; *Hunt*, 30 AD3d at 1065), and the evidence that the father failed to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). The burden then shifted to the father to present "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70; *see Hunt*, 30 AD3d at 1065). The Support Magistrate, who was in the best position to evaluate the credibility of the witnesses (*see Matter of Natali v Natali*, 30 AD3d 1010, 1011-1012), determined that the father was not credible and did

not make reasonable efforts to obtain employment (*see Christine L.M.*, 45 AD3d at 1452-1453; *Hunt*, 30 AD3d at 1065), and “[g]reat deference should be given to the determination of the Support Magistrate” (*Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323, *lv denied* 19 NY3d 803; *see Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128). We note in any event that Family Court properly granted the relief sought in the violation petition based on the father’s failure to submit a financial disclosure statement (*see* § 424-a [b]). The father’s contention that the court erred in failing to cap his unpaid child support arrears at \$500 pursuant to Family Court Act § 413 (1) (g) “is raised for the first time on appeal and thus is not preserved for our review” (*Matter of Cattaraugus County Dept. of Social Servs. v Stark*, 75 AD3d 1098, 1098; *see Creighton v Creighton*, 222 AD2d 740, 743).

We likewise reject the contention of the father that the court erred in confirming the Support Magistrate’s denial of his petition for a downward modification of his support obligation (*see Matter of Duerr v Cuenin*, 280 AD2d 903, 904). The father failed to meet his burden of “establishing that he diligently sought re-employment commensurate with his former employment” (*Matter of Leonardo v Leonardo*, 94 AD3d 1452, 1453, *lv denied* 19 NY3d 807; *cf. Matter of Glinski v Glinski*, 199 AD2d 994, 994-995). Furthermore, the Support Magistrate did not err in denying the father’s petition without receiving financial disclosure statements (*cf. Matter of Malcolm v Trupiano*, 94 AD3d 1380, 1381; *Matter of Harvey v Benedict*, 83 AD3d 1402, 1402-1403) because the burden was on the father to demonstrate a substantial change in circumstances warranting a downward modification (*see Leonardo*, 94 AD3d at 1453; *Duerr*, 280 AD2d at 904). We conclude that any alleged error by the Support Magistrate in relying on documents not in evidence in making its determination as to the father’s credibility “is harmless because that [credibility] determination is supported by admissible evidence” (*Matter of Nathaniel W.*, 24 AD3d 1240, 1241, *lv denied* 6 NY3d 711).

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

1411

CA 12-00808

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

COLLEEN A. DALY PERRY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH J. PERRY, DEFENDANT-RESPONDENT.

CLAIR A. MONTROY, III, ORCHARD PARK, FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 25, 2011 in a divorce action. The judgment, among other things, awarded plaintiff maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion by awarding plaintiff maintenance in the sum of \$1,000 per month for a period of 10 years retroactive to June 23, 2009 and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, to recalculate the amount of retroactive maintenance due from that date in accordance with the following Memorandum: In this divorce action, plaintiff appeals from a judgment that, among other things, awarded her maintenance for eight years in the sum of \$500 per month for four years and thereafter in the sum of \$440 per month. Plaintiff contends that the award of maintenance was unreasonably low and should have been nondurational or, at a minimum, extended beyond eight years.

Although "[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Boughton v Boughton*, 239 AD2d 935, 935; see *Scala v Scala*, 59 AD3d 1042, 1043; *Frost v Frost*, 49 AD3d 1150, 1150-1151), "this Court's authority in determining issues of maintenance is as broad as that of the trial court" (*Scala*, 59 AD3d at 1043). Here, we conclude that Supreme Court improvidently exercised its discretion in directing defendant to pay maintenance for a period of eight years and in sums that, combined with plaintiff's disability income, leave her at an income level where she could become a public charge. Considering all of the evidence presented in this case, including the uncontroverted testimony of plaintiff concerning her disability, her receipt of Social Security disability benefits, the disparity in the parties' incomes, plaintiff's health, her lack of work history during the marriage, the distribution of marital debts and assets, and defendant's waiver of child support from plaintiff, the correct sum which is \$300 annually pursuant to the Child Support Standards Act, we conclude that defendant's obligation to pay maintenance should

continue for a period of 10 years rather than eight years (*see Rindos v Rindos*, 264 AD2d 722, 723). We further conclude that an award in the sum of \$1,000 per month comports with the intended purpose of durational maintenance, i.e., "to provide the economically-disadvantaged spouse with an opportunity to achieve independence" (*Sass v Sass*, 276 AD2d 42, 48). We therefore modify the judgment accordingly. We note that, at the conclusion of the period of maintenance, plaintiff is not precluded from making an application to modify the judgment to continue maintenance if she has not become self-supporting (*see id.*).

Finally, we further modify the judgment to make the award of maintenance retroactive to June 23, 2009, the date of the application therefor (*see Burns v Burns*, 84 NY2d 369, 377; *Kelly v Kelly*, 19 AD3d 1104, 1107, *appeal dismissed* 5 NY3d 847, *reconsideration denied* 6 NY3d 803), and we remit the matter to Supreme Court for a determination of the amount of retroactive maintenance and whether such arrears are to be paid "in one lump sum or periodic sums" (*Magyar v Magyar* [appeal No. 2], 272 AD2d 941, 942) and/or pursuant to an income execution or Spousal Support Only Income Withholding Order.

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

1413

CA 12-01206

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

JOANNE MONACO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

AMANDA M. STEINER AND TERRENCE J. STEINER,
DEFENDANTS-RESPONDENTS.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NANCY A. LONG OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 14, 2011 in a personal injury action. The order granted defendants' motion for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. Supreme Court properly granted the motion. Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury under any of the categories alleged, i.e., the permanent loss of use, permanent consequential limitation of use, significant limitation of use and 90/180-day categories (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and plaintiff failed to raise an issue of fact with respect to the permanent loss of use and 90/180-day categories (*see generally id.*). Although plaintiff arguably raised an issue of fact whether she is suffering from a permanent consequential limitation of use or a significant limitation of use, the motion nevertheless was properly granted inasmuch as her medical expert failed to establish that the injuries were causally related to the accident and not to her prior neck and back complaints (*see Pommells v Perez*, 4 NY3d 566, 572; *MacMillan v Cleveland*, 82 AD3d 1388, 1388-1389; *Clark v Perry*, 21 AD3d 1373, 1374).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1414

CA 12-00542

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

JOEL MURCIN AND MARIA MURCIN, INDIVIDUALLY AND
AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MAC CONTRACTING, LLC, DEFENDANT-RESPONDENT.

GARVEY & GARVEY, BUFFALO (DENNIS J. GARVEY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

LAW OFFICE OF LAURIE G. OGDEN, BUFFALO (GARY O'DONNELL OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 29, 2011. The order, among other things, denied plaintiffs' cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and granting that part of the cross motion seeking a determination that the backhoe involved in the accident is a "motor vehicle" for purposes of the application of Vehicle and Traffic Law § 375 (1) (a) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Joel Murcin (plaintiff) at a construction site when he was struck and run over by a backhoe. During the course of his operation of the backhoe, plaintiff parked the machine on a downward slope and then exited the machine in order to remove large stones from the front bucket and to place the stones by hand in forming a drainage system. During this process, the unoccupied backhoe moved down the slope, knocked plaintiff to the ground and eventually came to rest with plaintiff trapped underneath. The backhoe was leased to plaintiff's employer by defendant. Contrary to plaintiffs' contention, Supreme Court properly denied their cross motion insofar as it sought summary judgment on the issue of negligence. Even assuming, *arguendo*, that plaintiff set the parking brake before exiting the machine, we conclude that plaintiffs failed to establish that the alleged negligence of defendant in the maintenance or repair of the backhoe resulted in a defect in the parking brake that caused the machine to roll down the slope and injure plaintiff (*cf. McDonald v Grasso*, 220 AD2d 867, 868-869). However, we agree with plaintiffs that, under the circumstances of this case, the backhoe is a "motor vehicle" for purposes of the brake

maintenance requirement in Vehicle and Traffic Law § 375 (1) (a) (see § 125; PJI 2:86). We therefore modify the order by granting plaintiffs' cross motion to the extent that they sought a determination to that effect.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1415

CA 12-01156

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

HAROLD WILSON AND GEORGIA WILSON,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

CHRISTOPHER COLOSIMO AND R.J. CHEVROLET, INC.,
DOING BUSINESS AS BOB JOHNSON CHEVROLET,
DEFENDANTS-RESPONDENTS.

HOGAN WILLIG, AMHERST (ERIC B. GROSSMAN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (ERICA M. DIRENZO OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 15, 2011. The order and judgment granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Harold Wilson (plaintiff) allegedly sustained when the recycling truck he was driving was rear-ended by a vehicle owned by defendant R.J. Chevrolet, Inc., doing business as Bob Johnson Chevrolet, and operated by defendant Christopher Colosimo. According to plaintiffs' supplemental bill of particulars, plaintiff allegedly sustained a serious injury under the permanent consequential limitation of use, the significant limitation of use and the 90/180-day categories of serious injury. Defendants initially moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d) that was proximately caused by the accident. Plaintiffs opposed the motion and cross-moved for partial summary judgment on their claim for economic loss in excess of basic economic loss. Supreme Court granted defendants' motion and denied plaintiffs' cross motion. We note that

the order does not address the dismissal of plaintiffs' claim for economic loss, which does not require a showing of serious injury (see generally *Montgomery v Daniels*, 38 NY2d 41, 47-48; *Colvin v Slawoniewski*, 15 AD3d 900, 900). In its bench decision, however, the court awarded defendants summary judgment dismissing that claim on the authority of CPLR 3212 (b). Where, as here, " 'there is a conflict between an order and a decision,' " the decision controls (*Stivers v Brownell*, 63 AD3d 1516, 1517-1518). We conclude that the court erred in granting those parts of defendants' motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. We therefore modify the order accordingly.

Defendants met their initial burden on the motion by submitting an expert's affirmation establishing as a matter of law that there was "no sign of injury to the cervical, thoracic or lumbar spine, and a marked exaggeration of the response to testing in the upper and lower extremities and no objective findings concerning neck, shoulders, lumbar spine, hips, knees, ankles, and feet." Defendants' expert attributed plaintiff's complaints of pain to preexisting injuries and "multilevel degenerative changes." Furthermore, because defendants' expert concluded that the only objective medical findings of an injury to plaintiff were related to a preexisting degenerative condition of his spine, "plaintiff[s] had the burden to come forward with evidence addressing defendant[s'] claimed lack of causation" (*Carrasco v Mendez*, 4 NY3d 566, 580; see *Mendola v Doubrava*, 99 AD3d 1247, 1248; *Webb v Bock*, 77 AD3d 1414, 1415).

In opposition to defendants' motion, however, plaintiffs raised triable issues of fact with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury by submitting the affidavit and attached report of plaintiff's treating chiropractor as well as an affidavit and attached reports and records from a physician specializing in occupational medicine. Those documents "contain the requisite objective medical findings that raise issues of fact whether plaintiff sustained a serious injury" as a result of the instant accident (*Roll v Gavitt*, 77 AD3d 1412, 1413; see *Terwilliger v Knickerbocker*, 81 AD3d 1350, 1351; *Harris v Carella*, 42 AD3d 915, 916-917; cf. *Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1155).

Nevertheless, we agree with defendants that the court properly granted that part of their motion regarding the 90/180-day category of serious injury. Defendants submitted competent evidence establishing that plaintiff's activities " 'were not curtailed to a great extent' and that [he] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury" (*Schreiber v Krehbiel*, 64 AD3d 1244, 1246). Plaintiffs submitted nothing in opposition to defendants' motion with respect to that category and thus failed to raise a triable issue of fact whether plaintiff "was unable to perform substantially all of the material acts that constituted [his] usual and customary daily activities during the requisite period of time" (*Burke v Moran*, 85 AD3d 1710, 1711; see generally *Licari v Elliott*, 57 NY2d 230, 236).

Finally, we conclude that the court properly denied plaintiffs' cross motion and granted defendants summary judgment pursuant to CPLR 3212 (b) on plaintiffs' claim for economic loss in excess of basic economic loss. Although a claim for economic loss does not require the plaintiff to have sustained a serious injury (*see generally Montgomery*, 38 NY2d at 47-48; *Colvin*, 15 AD3d at 900; *Barnes v Kociszewski*, 4 AD3d 824, 825), plaintiffs here "failed to produce any evidence in admissible form which supports such a claim" (*Watford v Boolukos*, 5 AD3d 475, 476; *see Insurance Law §§ 5102 [a] [1] - [3]; 5104 [a]*). While plaintiffs correctly contend that they need not await the full \$50,000 payout for basic economic losses from their first-party no-fault policy before making a claim under Insurance Law § 5102 (a) for those additional economic losses that exceed the basic economic loss threshold, they still failed to establish that plaintiff's total economic losses here did actually "exceed basic economic loss" (*Watkins v Bank of Castile*, 172 AD2d 1061, 1062 [emphasis added]; *see Diaz v Lopresti*, 57 AD3d 832, 833).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1416

CA 12-01121

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND VALENTINO, JJ.

ELLIOTT C. MCFADDEN AND ARGUSTER MCFADDEN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEW CASTLE HOTEL, LLC, DOING BUSINESS AS
WOODCLIFF HOTEL & SPA, DEFENDANT-APPELLANT.

MACDONALD & HAFNER, ESQS., BUFFALO (SHAWN MARTIN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ATTI LAW, P.C., CHEEKTOWAGA (MARK LEWIS OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 9, 2012. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Elliott C. McFadden (plaintiff) when he tripped and fell in defendant's hotel and broke his shoulder. Following discovery, defendant moved for summary judgment dismissing the complaint on the grounds that plaintiff was unable to identify the cause of his fall; any defect was trivial and nonactionable; and the absence of a defect in defendant's floor and floor drain eliminated any duty of inspection. Supreme Court properly denied defendant's motion. Even assuming, arguendo, that defendant established as a matter of law that the cause of the fall was speculative (*see Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1606), we conclude that plaintiffs raised an issue of fact concerning the cause of the fall by submitting plaintiff's deposition testimony and the accident and incident reports setting forth that plaintiff fell because a grate over a floor drain was lower than the floor. We further conclude on the record before us that "defendant failed to meet its burden of establishing as a matter of law that the alleged defect 'was too trivial to constitute a dangerous or defective condition' " (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362; *see generally Trincere v County of Suffolk*, 90 NY2d 976, 977-978; *Gafter*, 85 AD3d at 1605-1606). Indeed, one of defendant's employees acknowledged the presence of a lip on the drain. Finally, inasmuch as there is an issue of fact concerning the existence of a defect, we do not reach

defendant's contention that the absence of a defect eliminated any duty of inspection.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1417

CA 12-00363

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

KENNETH POLK AND CARA POLK,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JOSEPH GUGINO, SR., INDIVIDUALLY AND DOING
BUSINESS AS J. GUGINO CONSTRUCTION, JOSEPH
GUGINO, JR., INDIVIDUALLY AND DOING BUSINESS
AS J. GUGINO CONSTRUCTION, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (RICHARD M. SCHERER, JR.,
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 15, 2011. The order denied defendants Joseph Gugino, Sr., individually and doing business as J. Gugino Construction and Joseph Gugino, Jr., individually and doing business as J. Gugino Construction's pre-answer motion to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the sixth cause of action against defendants Joseph Gugino, Sr., individually and doing business as J. Gugino Construction, and Joseph Gugino, Jr., individually and doing business as J. Gugino Construction, and dismissing that cause of action against them and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action against, inter alia, Joseph Gugino, Sr., individually and doing business as J. Gugino Construction, and Joseph Gugino, Jr., individually and doing business as J. Gugino Construction (defendants) after the roof on their home began leaking six months after they purchased the home. Defendants had repaired the roof two years before plaintiffs purchased the home, and defendants' contract with the previous homeowners included a 10-year guarantee for the workmanship. Supreme Court denied defendants' pre-answer motion to dismiss the complaint against them.

We conclude that the court should have granted that part of the motion with respect to the sixth cause of action insofar as it alleges

a breach by defendants of a duty to disclose, but otherwise properly denied the motion. We therefore modify the order accordingly. "Motions to dismiss should not be granted unless it is clear that there can be no relief under any of the facts alleged in the complaint" (*H. M. Brown, Inc. v Price*, 38 AD2d 680, 680). " '[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' " (*Leon v Martinez*, 84 NY2d 83, 88; see *Raquet v Travelers Cas. & Sur. Co.*, 2 AD3d 1310, 1311), and plaintiffs' allegations "must be assumed to be true" (*Becker v Schwartz*, 46 NY2d 401, 408). Here, any duty to disclose may properly be asserted only against defendant sellers and defendant agent (see generally *Platzman v Morris*, 283 AD2d 561, 562), but the complaint otherwise does not fail to state a cause of action against defendants (see CPLR 3211 [a] [7]). We therefore modify the order accordingly.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1418

CA 12-01159

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

DONNA STRZELCZYK AND THOMAS STRZELCZYK,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEIL PALUMBO, TAMMY PALUMBO,
DEFENDANTS-RESPONDENTS,
AND SATURN OF ROCHESTER, INC., DOING BUSINESS
AS SATURN OF WEST RIDGE, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF
COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 2, 2012. The order, among other things, denied in part the motion of Saturn of Rochester, Inc., doing business as Saturn of West Ridge, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the claim for breach of express warranty and dismissing that claim and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries sustained by Donna Strzelczyk (plaintiff) in an accident caused by an alleged defect in the antilock brake system (ABS) of an automobile owned by defendant Tammy Palumbo, operated by defendant Neil Palumbo, and purchased from Saturn of Rochester, Inc., doing business as Saturn of West Ridge (defendant). Defendant moved for summary judgment dismissing the amended complaint against it on the ground that plaintiffs failed to establish that the ABS defect existed at the time the vehicle was sold to Tammy Palumbo, and Supreme Court granted the motion in part by dismissing the negligence causes of action against defendant. Contrary to the contention of defendant, the court properly denied its motion with respect to the cause of action based on strict products liability and the claim based on breach of implied warranty. "A plaintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case . . . The existence of a defect may be inferred from the circumstances of the accident and from proof that

the product did not perform as intended" (*Landahl v Chrysler Corp.*, 144 AD2d 926, 927). The Palumbos' "account of the car's performance . . . after it was purchased and the description of the manner in which the accident occurred tend to establish that the accident was the result of a [defect in the ABS sensor]" (*id.*). Plaintiffs also submitted an expert affidavit demonstrating that the ABS defect caused the accident. Further, the deposition testimony of defendant's former employee and owner and defendant's service records establish that the left rear ABS sensor was defective in a way that would cause the ABS to activate at inappropriate times. Defendant failed to meet its burden of "establishing that plaintiff's injuries were not caused by a manufacturing defect in the product" (*Brown v Borruso*, 238 AD2d 884, 885), and instead "merely focused on the claimed deficiency in plaintiffs' proof" (*Landahl*, 144 AD2d at 927).

As plaintiffs correctly concede, however, the court erred in denying that part of defendant's motion with respect to the claim based on breach of express warranty because the contract explicitly disclaimed any express warranties on behalf of defendant (see *Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 19). We therefore modify the order accordingly. Finally, we reject defendant's contention that a separate claim against "Saturn of West Ridge" should be dismissed. The caption has been amended to reflect that "Saturn of Rochester, Inc., doing business as Saturn of West Ridge" is the sole remaining defendant aside from the Palumbos, and there is no "separate claim" against Saturn of West Ridge.

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

1419

CA 12-01179

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF RICHARD YACKEL, MARK
STRYZYNSKI AND ROCHESTER FIREFIGHTERS
ASSOCIATION, INC., I.A.F.F., LOCAL 1071,
AFL/CIO, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, CITY OF ROCHESTER FIRE
DEPARTMENT AND JOHN D. CAUFIELD, AS FIRE
CHIEF FOR CITY OF ROCHESTER FIRE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA, PC, ROCHESTER (LAWRENCE J. ANDOLINA
OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR
GREEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Monroe County (Ann Marie Taddeo, J.), entered January 17, 2012 in a
proceeding pursuant to CPLR article 78. The judgment granted
respondents' motion to dismiss the petition.

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

Memorandum: Petitioners commenced this proceeding pursuant to
CPLR article 78 challenging an administrative order issued by
respondent John D. Caufield, as Fire Chief for the City of Rochester
Fire Department (Fire Chief), that, inter alia, effectively demoted
the individual petitioners from the rank of battalion chief to
captain. The demotions resulted from the abolition of battalion chief
positions as part of 2011-2012 budget cuts made by respondent City of
Rochester (City), and the decision of the individual petitioners to
exercise their "retreat rights" pursuant to Civil Service Law § 81.

Supreme Court properly granted respondents' motion to dismiss the
petition. We reject petitioners' contention that the Fire Chief acted
in excess of his authority as the appointing authority for respondent
City of Rochester Fire Department when he issued the challenged
administrative order (see City Charter § 8B-1 [D]). In addition, we
conclude that section 8B-4 of the City Charter, providing that
"members of the Fire Department . . . hold their respective offices
during good behavior or until by age or disease they become personally

incapacitated to discharge their duties," does not curtail the "undisputed management prerogative of the [City], as an employer, to abolish positions in the competitive class civil service in the interest of economy" (*Matter of Saur v Director of Creedmoor Psychiatric Ctr.*, 41 NY2d 1023, 1024; see generally *Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 521).

Petitioners' contention that they were entitled to a hearing to explore whether the City acted in good faith when it abolished positions within the Fire Department is raised for the first time on appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). The court properly rejected petitioners' further contention that, as a matter of procedural due process, the individual petitioners were entitled to a hearing prior to their demotions; respondents' action was not based upon the conduct or competency of the individual petitioners (see generally *Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498, 504-505), but rather the demotion of the individual petitioners was a function of their seniority and the operation of Civil Service Law §§ 80 and 81.

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

1420

KA 11-00974

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MILTON HILL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 27, 2010. 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 one count of burglary in the first degree (Penal Law § 140.30 [1]). Defendant contends that Supreme Court erred in refusing to suppress his statement to the police because the statement was made in violation of his right to counsel. We reject that contention. "The testimony of defendant that he invoked his right to counsel before confessing presented a credibility issue that [the c]ourt was entitled to resolve in the People's favor" (*People v Price*, 309 AD2d 1259, 1259, lv denied 1 NY3d 578; see *People v McCooey*, 156 AD2d 927, 927, lv denied 75 NY2d 921). " 'The suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*People v Twillie*, 28 AD3d 1236, 1237, lv denied 7 NY3d 795; see *People v Alexander*, 51 AD3d 1380, 1382, lv denied 11 NY3d 733). Here, the record supports the court's determination that defendant did not invoke his right to counsel before confessing to his involvement in the charged crime.

We reject defendant's further contention that his sentence is unduly harsh or severe. While defendant received a more severe sentence than that of his codefendants, we note that he was the one

who carried a gun and shot the victim.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1421

KA 11-02317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS SCOTT, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 20, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Although defendant's contention that County Court erred in failing to hold an *Outley* hearing to determine the legality of his postplea arrest survives his valid waiver of the right to appeal (see *People v Arrington*, 94 AD3d 903, 903; *People v Peck*, 90 AD3d 1500, 1501; *People v Butler*, 49 AD3d 894, 895, *lv denied* 10 NY3d 932, *reconsideration denied* 11 NY3d 830), that contention is nevertheless unpreserved for our review inasmuch as he failed to request such a hearing and did not move to withdraw his plea on that ground (see *People v Anderson*, 99 AD3d 1239, 1239; *People v Bragg*, 96 AD3d 1071, 1071; *Arrington*, 94 AD3d at 903). 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]), particularly in light of defendant's admission that, less than three weeks after pleading guilty, he purchased and possessed heroin in violation of an express condition of the plea agreement.

Defendant likewise failed to preserve for our review his contention that the court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea because he did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction on that ground (see *People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *People v Magliocco*, 78 AD3d 1648, 1649, *lv denied* 16 NY3d 798). In any event,

that contention lacks merit. The record establishes that defendant "was clearly informed of the consequences of his failure" to abide by the conditions of his plea agreement (*Sprague*, 82 AD3d at 1649; see *People v Winters*, 82 AD3d 1691, 1691, *lv denied* 17 NY3d 810). Thus, upon defendant's violation of a condition of the plea agreement, the court was "no longer bound by the agreement and [was] free to impose a greater sentence without offering . . . defendant an opportunity to withdraw his . . . plea" (*Sprague*, 82 AD3d at 1649 [internal quotation marks omitted]; see *People v Faso*, 82 AD3d 1584, 1584, *lv denied* 17 NY3d 816, *reconsideration denied* 17 NY3d 952; *People v Vaillant*, 77 AD3d 1389, 1390).

Defendant further contends that the sentence is unduly harsh and severe given his age, health, and drug addiction. That contention is properly before us despite defendant's valid waiver of the right to appeal because the court "failed to advise defendant of the potential periods of incarceration that could be imposed, including the potential periods of incarceration for an enhanced sentence . . . , before he waived his right to appeal" (*People v Trisvan*, 8 AD3d 1067, 1067, *lv denied* 3 NY3d 682; see *People v Huggins*, 45 AD3d 1380, 1380-1381, *lv denied* 9 NY3d 1006; *People v Mack*, 38 AD3d 1292, 1293). We nevertheless reject defendant's contention. Defendant has a lengthy criminal history, which includes convictions of petit larceny, criminal sale of a controlled substance, and robbery. The statement of defendant that he is HIV positive, without any additional information as to the state of his health, is insufficient to warrant a reduction of the sentence. Defendant is only 56 years old and, contrary to his contention, the seven-year sentence does not equate to a de facto death sentence (see *People v Spitzley*, 303 AD2d 837, 838, *lv denied* 100 NY2d 599; *People v Jones*, 290 AD2d 726, 727, *lv denied* 97 NY2d 756). Moreover, the circumstances defendant cites on appeal, i.e., his age, health, and drug addiction, were before the court at the time of sentencing (see *People v Tasber*, 273 AD2d 542, 543, *lv denied* 95 NY2d 858). Thus, defendant has not established "extraordinary circumstances . . . that would warrant a reduction of the sentence as a matter of discretion in the interest of justice" (*People v Taplin*, 1 AD3d 1044, 1046, *lv denied* 1 NY3d 635 [internal quotation marks omitted]; see generally *People v McGarry*, 219 AD2d 744, 744, *lv denied* 87 NY2d 848).

Finally, we reject defendant's unsupported contention that the court punished him for his heroin addiction.

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

1426

KA 11-01396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

BROOKS BAKER, DISTRICT ATTORNEY, BATH (JAMES P. MILLER OF COUNSEL),
FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered February 2, 2011. The judgment convicted defendant, upon his plea of guilty, of forgery 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 a plea of guilty of forgery in the second degree (Penal Law § 170.10 [1]), defendant contends that the superior court information (SCI) and waiver of indictment were jurisdictionally defective because they contain discrepancies in the date and location of the crime charged therein. We reject that contention. Although defendant is correct that a "valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*People v Harper*, 37 NY2d 96, 99), an accusatory instrument is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime" (*People v Quamina*, 207 AD2d 1030, 1030, lv denied 84 NY2d 1014, quoting *People v Iannone*, 45 NY2d 589, 600). In the case relied upon by defendant, *People v Roe* (191 AD2d 844, 845), the court determined that the SCI was jurisdictionally defective because it charged defendant with a nonexistent crime. Here, however, the SCI effectively charged defendant with the commission of a particular crime, i.e., forgery in the second degree in violation of Penal Law § 170.10 (1). Thus, any mistake in the SCI "with respect to date, time or place is a technical defect rather than a jurisdictional defect vital to the sufficiency of the [SCI] or the guilty plea entered thereto" (*People v Cox*, 275 AD2d 924, 925, lv denied 95 NY2d 962 [internal quotation marks omitted]; see *People v Dudley*, 28 AD3d 1182, 1183, lv denied 7 NY3d 788; *People v Kepple*, 98 AD2d 783, 783). Because the SCI is not jurisdictionally defective, defendant's challenges to the SCI are forfeited by defendant's plea of guilty (*Cox*, 275 AD2d at 925), and in any event the valid waiver of

the right to appeal encompasses those nonjurisdictional challenges (see *People v Nichols*, 32 AD3d 1316, 1317, lv denied 8 NY3d 848, reconsideration denied 8 NY3d 988). Contrary to the further contention of defendant, the record establishes that he freely and voluntarily waived indictment and consented to be prosecuted by way of an SCI (see CPL 195.10, 195.20; *People v Burney*, 93 AD3d 1334, 1334).

In addition, we reject the contention of defendant that his guilty plea was not knowing, voluntary, or intelligent. Although his contention survives his valid waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground and thus failed to preserve that contention for our review (see *People v Russell*, 55 AD3d 1314, 1314-1315, lv denied 11 NY3d 930; *People v Harrison*, 4 AD3d 825, 826, lv denied 2 NY3d 740).

Finally, we conclude that County Court did not err in sentencing defendant as a second felony offender. Whether defendant committed the crime at issue on January 6, 2010 or January 30, 2010 is of no moment inasmuch as, under either date, only nine years elapsed between the date of sentencing upon his prior conviction, i.e., January 30, 2001, and the date of the instant offense (see Penal Law § 70.06 [1] [b] [iv]). Thus, there is no basis to disturb defendant's sentence.

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

1432

CAF 11-01663

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

IN THE MATTER OF MALIK S.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JANA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered August 8, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, revoked a suspended judgment and terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for a dispositional hearing in accordance with the following Memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the child who is the subject of this proceeding. In appeal No. 2, the mother appeals from an order setting forth the terms and conditions regarding posttermination contact with the child.

With respect to appeal No. 1, it is well settled that, during the period of a suspended judgment, a parent " 'must comply with [the] terms and conditions set forth in the judgment that are designed to ameliorate' " the circumstances which resulted in the original finding of permanent neglect (*Matter of Kaleb U.*, 280 AD2d 710, 712). If the agency establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, Family Court may revoke the suspended judgment and terminate parental rights (*see Matter of Gracie YY.*, 34 AD3d 1053, 1054; *Matter of Nikkias T.*, 32 AD3d 1220, 1221, *lv denied* 7 NY3d 716). Here, petitioner met that burden inasmuch as the evidence established that the mother violated numerous terms of the suspended judgment (*see Matter of Elizabeth J. [Jocelyn J.]*, 87 AD3d 1406, 1406, *lv denied* 18 NY3d 804; *Matter of Ronald O.*, 43 AD3d 1351, 1352).

The mother's contention that petitioner was required to submit medical or psychological evidence establishing that termination of her parental rights was in the best interests of the child is unpreserved for our review and without merit (see generally *Matter of McCullough v Brown*, 21 AD3d 1349, 1349). The mother also failed to preserve for our review her contention that the court should have extended the term of the suspended judgment (see Family Ct Act § 633 [b]; see generally *Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319, lv denied 18 NY3d 802).

Nevertheless, petitioner and the mother allege new circumstances and request that we remit this matter to the court for a dispositional hearing. It is well settled that "changed circumstances may have particular significance in child custody matters," and we may take notice of those new circumstances (*Matter of Michael B.*, 80 NY2d 299, 318). Here, the alleged new circumstances include allegations that the adoptive placement was disrupted and the child is currently living in a group home, that no other adoptive placement has been located, that the child no longer wishes to be adopted, that the child has reestablished contact with his maternal grandmother, and that the maternal grandmother intends to pursue legal custody. In light of those alleged new circumstances, " 'it is not clear that termination of the mother's parental rights is in the child's best interests' " (*Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360; see *Matter of Arthur C.*, 66 AD3d 1009, 1010). We therefore reverse the order in appeal No. 1 and remit the matter to Family Court for a dispositional hearing to determine the child's best interests.

With respect to appeal No. 2, in light of our determination in appeal No. 1, we reverse the order granting posttermination contact.

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

1433

CAF 11-02480

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

IN THE MATTER OF MALIK S.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JANA M., RESPONDENT-APPELLANT,
TAMMY Y.K., RESPONDENT.
(APPEAL NO. 2.)

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered September 19, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order set forth the terms and conditions regarding posttermination contact of respondent mother with the subject child.

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

Same Memorandum as in *Matter of Malik S.* ([appeal No. 1] ___ AD3d ___ [Dec. 28, 2012]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1448

KA 10-01825

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DASHAWN DAVIS, 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 (RENE JUAREZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 5, 2010. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fourth degree, criminal possession of a controlled substance in the seventh degree, criminal possession of a weapon in the second degree, criminally using drug paraphernalia in the second degree, criminal possession of marihuana in the fourth degree, unlawful possession of marihuana, and unlawfully tinted windows.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [12]), CPCS in the fourth degree (§ 220.09 [1]), CPCS in the seventh degree (§ 220.03), criminal possession of a weapon in the second degree (§ 265.03 [3]), criminally using drug paraphernalia in the second degree (§ 220.50 [3]), criminal possession of marihuana in the fourth degree (§ 221.15), and unlawful possession of marihuana (§ 221.05). We reject defendant's contention that Supreme Court erred in refusing to suppress evidence that was seized from his apartment by parole officers and provided to police officers. It is well settled that a "parole officer may conduct a war[r]antless search where 'the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty' " (*People v Nappi*, 83 AD3d 1592, 1593, lv denied 17 NY3d 820, quoting *People v Huntley*, 43 NY2d 175, 181; see *People v Scott*, 93 AD3d 1193, 1194, lv denied 19 NY3d 967, reconsideration denied 19 NY3d 1001). On the date of defendant's arrest, he was a parolee. Defendant was arrested for

possessing cocaine and marihuana that the police found on his person during a lawful traffic stop and pat down. The police officers contacted the Division of Parole to inform it of defendant's parole violation. Parole officers decided to search defendant's apartment, and they requested the help of police officers and a canine unit. Based on the evidence presented at the suppression hearing, we cannot conclude that the court "erred, as a matter of law, in concluding that the search of the defendant's apartment by [the] parole officer[s], with police assistance, . . . 'was in furtherance of parole purposes and related to [their] duty . . . as parole officer[s]' " (*People v Johnson*, 63 NY2d 888, 890, *rearg denied* 64 NY2d 647; *see Scott*, 93 AD3d at 1194; *People v Lynch*, 60 AD3d 1479, 1480, *lv denied* 12 NY3d 926).

Defendant also challenges the sufficiency and weight of the evidence supporting the convictions of criminal possession of a weapon and controlled substances, contending that the People failed to show constructive possession of the weapon and drugs by demonstrating that he "had dominion and control over the area where the contraband was found" (*People v Shoga*, 89 AD3d 1225, 1227, *lv denied* 18 NY3d 886; *see Penal Law § 10.00 [8]*). At trial, the People established that defendant was living in the apartment, he told his parole officer that he was living in that apartment, he had keys to the apartment and to a safe in the apartment in which contraband was found, his name was on the apartment's mailbox, pieces of mail addressed to him were found in the apartment, and items of male clothing were found in the apartment. Viewed in the light most favorable to the People, the evidence is legally sufficient to establish that he had dominion and control over the area where the contraband was found (*see People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the possessory crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), including criminally using drug paraphernalia in the second degree, we conclude that the verdict is not against the weight of the evidence (*see id.* at 348-349; *People v Lane*, 7 NY3d 888, 890; *Bleakley*, 69 NY2d at 495). We further conclude that the sentence is not unduly harsh or severe.

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

1449

KA 11-02529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CYNTHIA MOORE, ALSO KNOWN AS CYNTHIA Y. MOORE,
ALSO KNOWN AS CYNTHIA A. MOORE,
DEFENDANT-APPELLANT.

KELIANN M. ELNISKI, ORCHARD PARK, 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 December 10, 2010. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). After defendant pleaded guilty but before she was sentenced, she suffered a traumatic brain injury that allegedly impacted her cognitive abilities. Upon defense counsel's request, County Court issued an order of examination pursuant to CPL article 730 to determine defendant's competency. The two examination reports that were prepared were inconclusive on the issue of defendant's competency, however, and the court ordered that a third examination be conducted. The third examination was never completed. Instead, upon defense counsel's request, the matter proceeded to sentencing, where defense counsel acknowledged that defendant was being sentenced without conclusive proof of her competence.

We agree with defendant that the court abused its discretion in failing sua sponte to order a competency hearing to determine whether defendant was fit to proceed at the time of sentencing (*see People v Garrasi*, 302 AD2d 981, 983, lv denied 100 NY2d 538; *see also People v Armlin*, 37 NY2d 167, 171-172; *People v Bangert*, 22 NY2d 799, 800; *see generally People v Tortorici*, 92 NY2d 757, 765-766, cert denied 528 US 834). Although a defendant is presumed to be competent (*see Tortorici*, 92 NY2d at 765) and "[t]he determination of whether to

order a competency hearing lies within the sound discretion of the . . . court" (*id.* at 766; see *People v Hawkins*, 70 AD3d 1389, 1390, *lv denied* 14 NY3d 888), "[a] court may not . . . sentence a defendant who is incompetent" (*People v Rojas*, 43 AD3d 413, 414). Moreover, "[t]he court has 'the authority, and the continuing obligation, to address . . . evidence [of incompetence] at any time it believe[s] circumstances warrant[] a hearing' " (*Garrasi*, 302 AD2d at 983, quoting *People v Williams*, 85 NY2d 945, 948). Here, in light of the inconclusive nature of the competency examination reports, defense counsel's acknowledgment that competency had not been determined (*cf. Tortorici*, 92 NY2d at 767), and the absence of any indication in the record that the court had the opportunity to interact with and observe defendant prior to sentencing in order to assess her capacity (*cf. People v Cipollina*, 94 AD3d 1549, 1550, *lv denied* 19 NY3d 971; *People v Chicherchia*, 86 AD3d 953, 954, *lv denied* 17 NY3d 952), we conclude that the court erred in sentencing defendant without first ordering a competency hearing.

We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to resentence defendant. "If the court is 'of the opinion that the defendant may be an incapacitated person' at that time (CPL 730.30 [1]), it shall order a competency hearing before imposing sentence" (*Garrasi*, 302 AD2d at 983). In view of our determination, we do not address defendant's remaining contention concerning defense counsel's alleged ineffectiveness in failing to object at sentencing in the absence of an unequivocal competency determination.

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

1450

KA 11-00847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM M. DEAN, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 29, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (three counts), grand larceny in the third degree, criminal mischief in the second degree, petit larceny, grand larceny in the fourth degree (two counts) and criminal mischief in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for resentencing on that count.

Memorandum: On appeal from a judgment convicting him following a jury trial of various crimes arising out of three burglaries, defendant contends that the conviction is not supported by legally sufficient evidence because the jury made inferences from other inferences in reaching its verdict. Defendant failed to preserve that contention for our review because he failed to renew his motion for a trial order of dismissal on that ground after presenting evidence (see *People v Hines*, 97 NY2d 56, 61, rearg denied 97 NY2d 678). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). With respect to defendant's contention that he was denied effective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). Defendant has failed to demonstrate "the absence of strategic or other legitimate explanations" for the various allegations of ineffectiveness (*People v Rivera*, 71 NY2d 705, 709).

Defendant contends that the prosecutor engaged in misconduct on summation but failed to preserve for our review any of the alleged instances of misconduct (see CPL 470.05 [2]; *People v Cox*, 21 AD3d 1361, 1363-1364, *lv denied* 6 NY3d 753), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Defendant further contends that County Court violated the Confrontation Clause by ruling that defense counsel opened the door to a hearsay statement. We reject that contention. In *People v Reid* (19 NY3d 382, 384-385), the Court of Appeals concluded that the door could be opened to evidence that was otherwise inadmissible under the Confrontation Clause. We further conclude that the rule enunciated in *Reid* should be applied retroactively (see *People v Pepper*, 53 NY2d 213, 219-221, *cert denied* 454 US 967).

We note that there is discrepancy between the certificate of conviction and the sentencing minutes with respect to count three, charging defendant with burglary in the second degree (Penal Law § 140.25 [2]). Defendant was sentenced to a determinate term of five years' imprisonment with three years' postrelease supervision, but the certificate of conviction states that defendant was sentenced to seven years' imprisonment with five years' postrelease supervision. In addition, the period of postrelease supervision must in any event be at least five years (see §§ 70.00 [6]; 70.06 [6] [b]; 70.45 [2]). Thus, we modify the judgment by vacating the sentence imposed on count three, and we remit the matter to County Court for resentencing on count three and for the court to correct the discrepancy between the certificate of conviction and the sentencing minutes regarding that count (see *People v Hall*, 5 AD3d 1011, 1011-1012).

We have considered defendant's remaining contentions and conclude that they are without merit.

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

1452

KA 08-01812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. POWELL, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL A. POWELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered June 23, 2008. The judgment convicted defendant, after a nonjury trial, of burglary in the third degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25). In his main and pro se supplemental briefs, defendant contends that the evidence is not legally sufficient to support the conviction because, inter alia, the structure involved does not constitute a building within the meaning of the burglary statute. We reject that contention. " 'Building,' in addition to its ordinary meaning, includes any structure . . . used by persons for carrying on business therein" (§ 140.00 [2]). It is well settled that a garage is a building within the meaning of the statute (see e.g. *People v Avilez*, 56 AD3d 1176, 1176-1177, lv denied 12 NY3d 755; *People v Horn*, 302 AD2d 975, 975, lv denied 100 NY2d 539). Contrary to defendant's further contention, a structure under construction that has walls and a roof is a building within the meaning of the statute (see *People v Angel*, 178 AD2d 419, 419, lv denied 79 NY2d 852; see also *People v Fox*, 3 AD3d 577, 578, lv denied 2 NY3d 739; see generally *People v Fennell*, 122 AD2d 69, 70-71, lv denied 68 NY2d 1000), and "[t]he structure need not . . . be fully completed or occupied" (*Fox*, 3 AD3d at 578). We conclude that the evidence, viewed in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621), 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 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 *Bleakley*, 69 NY2d at 495).

With respect to defendant's contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel, it is well settled that the "failure of defense counsel to facilitate defendant's testimony before the grand jury does not, per se, amount to the denial of effective assistance of counsel" (*People v Simmons*, 10 NY3d 946, 949; see *People v Johnson*, 94 AD3d 1563, 1564, lv denied 19 NY3d 962; *People v Perez*, 67 AD3d 1324, 1325, lv denied 13 NY3d 941). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's contention that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention in his main brief that the indictment must be dismissed because the stolen doors were improperly returned to the owner in violation of Penal Law § 450.10 (see *Matter of Matthew M.R.*, 37 AD3d 1135, 1135-1136; *People v Watkins*, 239 AD2d 448, lv denied 91 NY2d 837). In any event, defendant seeks only dismissal of the indictment based on that alleged violation, and the statute provides that "[f]ailure to comply with any one or more of the provisions of this section shall not for that reason alone be grounds for dismissal of the accusatory instrument" (§ 450.10 [10]). Defendant also failed to preserve for our review his contention in his main brief that the prosecutor violated his right to discovery under CPL 240.20 "inasmuch as he did not object to the prosecutor's failure to disclose [photographs of the stolen property] when defendant was made aware of [their] existence during the trial" (*People v Jones*, 90 AD3d 1516, 1517, lv denied 19 NY3d 864; see *People v Benton*, 87 AD3d 1304, 1305, lv denied 19 NY3d 862; *People v Delatorres*, 34 AD3d 1343, 1344, lv denied 8 NY3d 921). In any event, reversal based on any such violation would not be required because "defendant failed to establish that he was 'substantially prejudice[d]' " by the prosecutor's failure to disclose such photographs (*Delatorres*, 34 AD3d at 1344).

Defendant further contends in his main brief that Monroe County Sheriff's Deputies stopped his vehicle and placed him in custody without probable cause to believe that he had committed a crime and thus that County Court erred in refusing to suppress evidence seized following that allegedly unlawful arrest. We reject that contention. A homeowner called 911 at approximately 3:30 a.m. to report that a person was removing property from a neighboring house that was under construction, and was placing the property in a pickup truck. The emergency dispatcher broadcast that information and a description of the truck, which had distinctive lights and a cap over the bed. A deputy found defendant in the driver's seat of a pickup matching that description, which was stopped partly on the roadway at 3:45 a.m., approximately one quarter of a mile from the location from which the property was taken. As the deputy approached the driver's door, he noticed that there were two new house doors in the bed of the pickup,

still in their original packing. After briefly questioning defendant, the deputy placed him in the rear of a patrol vehicle and held him a brief time until the owner of the property responded to that location and confirmed that the property was his. We conclude that the deputy "had reasonable suspicion to stop and detain defendant 'based on the totality of the circumstances,' " including a radio transmission providing a description of the vehicle operated by the perpetrator of the crime and the deputy's observation of the vehicle operated by defendant, which matched that radio transmission, defendant's proximity to the location of the crime, the brief period of time between the crime and the discovery of defendant near the location of the crime, and defendant's possession of the apparently stolen property (*People v Moss*, 89 AD3d 1526, 1527, *lv denied* 18 NY3d 885).

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

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

1454

KA 10-02448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE FISHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 30, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and unlawful possession of marihuana.

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 criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and unlawful possession of marihuana (§ 221.05), defendant contends that County Court should have granted his motion to dismiss the indictment because the prosecutor's instruction on the agency defense was so confusing as to render the grand jury proceedings defective. That contention is "not preserved for our review because defendant did not move to dismiss the indictment pursuant to CPL 210.35 (5)" (*People v Workman*, 277 AD2d 1029, 1031, *lv denied* 96 NY2d 764; *see People v Beyor*, 272 AD2d 929, 930, *lv denied* 95 NY2d 832). In any event, defendant's contention lacks merit. Although a "defendant need not demonstrate actual prejudice under th[e] statutory scheme to prevail" (*People v Sayavong*, 83 NY2d 702, 709), " 'dismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897; *see People v Huston*, 88 NY2d 400, 409). Additionally, a grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" and it is "sufficient if the District Attorney provides the [g]rand [j]ury with enough information

to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*People v Calbud, Inc.*, 49 NY2d 389, 394-395). Here, "the prosecutor's instructions to the grand jury were 'not so misleading or incomplete that the integrity of the proceedings was substantially undermined' " (*People v Woodring*, 48 AD3d 1273, 1275-1276, *lv denied* 10 NY3d 846).

Contrary to defendant's further contention, the court's charge on the agency defense does not require reversal. Upon our review of that charge "as a whole against the background of the evidence produced at the trial" (*People v Andujas*, 79 NY2d 113, 118; *see People v Waldriff*, 46 AD3d 1448, 1448, *lv denied* 9 NY3d 1040), we conclude that "[t]he charge properly conveyed the agency defense to the jury" (*People v Schiano*, 198 AD2d 820, 820, *lv denied* 82 NY2d 930).

Defendant contends that the evidence is not legally sufficient to support the conviction because the People failed to disprove his agency defense beyond a reasonable doubt. That contention is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19) and, in any event, it lacks merit. "The determination . . . whether the defendant was a seller, or merely a purchaser doing a favor for a friend, is generally a factual question for the jury to resolve on the circumstances of the particular case" (*People v Lam Lek Chong*, 45 NY2d 64, 74, *cert denied* 439 US 935; *see People v Brown*, 50 AD3d 1596, 1597). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is " 'legally sufficient . . . to establish that defendant was the seller of a controlled substance and not an agent of the buyer' " (*People v Poole*, 79 AD3d 1685, 1686, *lv denied* 16 NY3d 862). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "It cannot be said that, in rejecting the agency defense, the jury failed to give the evidence the weight it should be accorded" (*People v Watkins*, 284 AD2d 905, 906, *lv denied* 96 NY2d 943).

Finally, the sentence is not unduly harsh or severe.

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

1457

CAF 11-02003

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

IN THE MATTER OF ELIZABETH STORELLI,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY STORELLI, RESPONDENT-APPELLANT.

LEAH K. BOURNE, ROCHESTER, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (ALECIA J. SPANO OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered September 15, 2011 in a proceeding pursuant to Family Court Act article 4. The order, among other things, determined that respondent was in willful violation of a child support order

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Monroe County, for a new hearing.

Memorandum: Respondent appeals from an order determining that he was in willful violation of a child support order and sentencing him to six months' incarceration. We note at the outset that respondent's appeal is not moot. "Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt, an appeal from that order is not rendered moot simply because the resulting prison sentence has already been served" (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863).

We agree with respondent that he was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order. "Although a party may proceed pro se, [a] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of the [right to counsel] . . . In order for the court to ensure that the waiver of the right to counsel is valid, the court must conduct a searching inquiry of [the] party . . . [, and] there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of Commissioner of Genesee County Dept. of Social Servs. v Jones*, 87 AD3d 1275, 1275-1276 [internal quotation marks omitted]). The record establishes that respondent advised the Support Magistrate that he had spoken to a person at the Public Defender's

Office and expected an attorney to be at the hearing. The Support Magistrate reminded respondent that he stated at the initial appearance that he would be representing himself. When asked by the Support Magistrate whether he was prepared to go forward with the hearing, respondent replied "Well, I guess I am." " 'Where, as here, the court fails to conduct a searching inquiry, reversal is required' " (*id.* at 1276). We therefore reverse the order and remit the matter to Family Court for a new hearing.

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1463

CA 12-00651

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

GLORIA SCHENBACK, JASON ROSENTHAL AND
THOMAS DOMBROWSKI, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

UNITED FRONTIER MUTUAL INSURANCE COMPANY,
INTERPLEADER PLAINTIFF,

V

ERIC PRUTSMAN, INTERPLEADER DEFENDANT-RESPONDENT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAW OFFICES OF RICHARD S. BINKO, BUFFALO (RICHARD S. BINKO OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

JOHN RICHARD STREB, KENMORE, FOR INTERPLEADER DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 9, 2012. The order, insofar as appealed from, granted the motion of plaintiffs for summary judgment and determined that Eric Prutsman was an insured under his parents' homeowners policy.

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

Memorandum: This appeal arises from an action pursuant to Insurance Law § 3420 (b) to recover from defendant-interpleader plaintiff, United Frontier Mutual Insurance Company (United), the amount of a default judgment that plaintiffs obtained against interpleader defendant, Eric Prutsman. Prutsman's parents were insured by United and, pursuant to the terms of the policy, Prutsman also would be covered if he resided in his parents' household. United appeals from an order that, inter alia, granted plaintiffs' motion for summary judgment on their complaint, determining that Prutsman is an insured under the United policy and thus that plaintiffs are entitled to recover against United pursuant to Insurance Law § 3420 (b).

"A resident is one who lives in the household with a certain degree of permanency and intention to remain" (*Canfield v Peerless Ins. Co.*, 262 AD2d 934, 934-935, lv denied 94 NY2d 757; see *Matter of State Farm Mut. Auto. Ins. Cos. v Jackson*, 31 AD3d 1171, 1171-1172). "The standard for determining residency for purposes of insurance coverage 'requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain' " (*Government Empls. Ins. Co. v Paolicelli*, 303 AD2d 633, 633; see *Canfield*, 262 AD2d at 934-935). Here, plaintiffs met their initial burden on their motion by establishing that Prutsman's stay in their house was only temporary and that plaintiffs, Prutsman and his parents intended at all times that he return to the parents' house to live (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition, United failed to raise a triable issue of fact (see generally *Konstantinou v Phoenix Ins. Co.*, 74 AD3d 1850, 1851, lv denied 15 NY3d 712; *Matter of Prudential Prop. & Cas. Ins. Co. [Galioto]*, 266 AD2d 926, 926).

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

1464

CA 12-01207

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

THERESA A. SMYTH AND JOSEPH M. ZABLOTSKY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BENJAMIN J. MCDONALD, BARBARA F. MCDONALD AND
EARL L. MCDONALD, DEFENDANTS-APPELLANTS.

ADAMS, HANSON, REGO, CARLIN, HUGHES, KAPLAN & FISHBEIN, WILLIAMSVILLE
(BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE CAREY FIRM, LLC, GRAND ISLAND (SHAWN W. CAREY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 19, 2011 in a personal injury action. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries Theresa A. Smyth (plaintiff) allegedly sustained when a vehicle owned by defendants Barbara F. McDonald and Earl L. McDonald and operated by defendant Benjamin J. McDonald rear-ended her vehicle in October 2006. Supreme Court erred in denying defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). With respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury allegedly sustained by plaintiff, defendants met their initial burden on the motion by submitting, inter alia, the records concerning medical treatment received by plaintiff immediately following the accident, which establish that plaintiff did not sustain a traumatic injury and that there was an unexplained gap in treatment after plaintiff's last physical therapy visit in January 2007. Plaintiff next sought treatment with her primary care physician in August 2009 and thereafter resumed physical therapy. Defendants contend that the 31-month gap in plaintiff's treatment is fatal to her claim that she sustained a serious injury within the meaning of those two categories of serious injury. We agree. We conclude that plaintiffs failed to raise a triable issue of fact to defeat the motion with respect to those two categories. Plaintiffs submitted,

inter alia, the affidavit of a physician who treated plaintiff for her back condition for the first time in October 2009, but they failed to provide a reasonable explanation for the lengthy gap in treatment (see *Pommells v Perez*, 4 NY3d 566, 574). Thus, although the treating physician provided objective medical evidence that plaintiff was injured, the 31-month gap in treatment renders his opinion as to causation purely speculative (see *Smith v Reeves*, 96 AD3d 1550, 1551). Plaintiff stopped attending physical therapy in early 2007 because her primary care physician would not provide a new prescription for physical therapy and instead recommended that plaintiff engage in a pain management program. Plaintiff asserted that she chose not to engage in the pain management program because she thought that she would have to take narcotic medication, which she was not willing to do, and she hoped that her injury would heal on its own over time. That, however, is not a reasonable explanation for the 31-month gap in treatment, which fatally undermines plaintiffs' claim of serious injury with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury (see *Semonian v Seidenberg*, 71 AD3d 1562, 1563; *Wei-San Hsu v Briscoe Protective Sys., Inc.*, 43 AD3d 916, 917; *Colon v Kempner*, 20 AD3d 372, 374; see generally *Pommells*, 4 NY3d at 574). Although plaintiffs assert with respect to the gap in treatment that further physical therapy would have been palliative and that plaintiff's request for no-fault benefits was denied, those assertions are not supported by the record (cf. *Brown v Dunlap*, 4 NY3d 566, 577; *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 492).

With respect to the significant disfigurement category of serious injury alleged by plaintiffs, we further conclude that defendants met their initial burden on the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). In addition, plaintiffs failed to raise an issue of fact whether plaintiff sustained such an injury because the alleged disfigurement of plaintiff's scapula, of which in any event there is no photograph in the record, is not readily observable to others (see *Mahar v Bartnick*, 91 AD3d 1163, 1166; see also *Wiegand v Schunck*, 294 AD2d 839, 839), and plaintiffs did not present evidence that "a reasonable person viewing the plaintiff's [scapula] in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn" (*O'Brien v Bainbridge*, 89 AD3d 1511, 1513 [internal quotation marks omitted]).

Finally, with respect to the 90/180-day category of serious injury alleged by plaintiffs, we conclude that defendants met their initial burden by submitting plaintiff's "medical records establishing that there are no 'objective medical findings of a medically determined injury or impairment of a nonpermanent nature which caused the alleged limitations on [her] daily activities' within 90 of the 180 days immediately following the occurrence of the injury or impairment" (*Harrity v Leone*, 93 AD3d 1204, 1205). Plaintiffs failed to raise an issue of fact with respect to that category. The affidavit of plaintiff's treating physician, based upon his treatment of plaintiff beginning three years after the accident, is "too remote to be probative of plaintiff's accident-related claim" and is therefore insufficient to raise an issue of fact as to the causal link

between plaintiff's alleged injuries and her limitations within the 180 days following the accident (*Whisenant v Farazi*, 67 AD3d 535, 536; see *Smith*, 96 AD3d at 1552).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1468

KA 11-00252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK WALTON, DEFENDANT-APPELLANT.

LEONARD, CURLEY & WALSH, PLLC, ROME (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered October 20, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05), defendant contends that his plea was not voluntarily, knowingly, and intelligently entered because he did not recite one of the elements of that crime, i.e., that he threatened the witness. Defendant's contention is actually a challenge to the factual sufficiency of the plea allocution, and thus that challenge is encompassed by the valid waiver of the right to appeal (*see People v Peters*, 59 AD3d 928, 928, *lv denied* 12 NY3d 820; *People v Branch*, 49 AD3d 1206, 1206, *lv denied* 10 NY3d 932; *People v Wilson*, 38 AD3d 1348, 1348, *lv denied* 9 NY3d 927).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1469

KA 11-02359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RODNEY ADAMS, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered September 28, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County 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 (§ 168-n [3]; *see People v Carter*, 35 AD3d 1023, 1023-1024, *lv denied* 8 NY3d 810). We reject defendant's further contention that the People failed to present clear and convincing evidence to support the assessment of 15 points against him for a history of substance abuse (*see generally People v Thompson*, 66 AD3d 1455, 1455-1456, *lv denied* 13 NY3d 714). That assessment is supported by the reliable hearsay contained in the presentence report and the case summary (*see People v Rotterman*, 96 AD3d 1467, 1468, *lv denied* 19 NY3d 813; *Thompson*, 66 AD3d at 1456; *see generally People v Mingo*, 12 NY3d 563, 573), which incorporated information from the presentence report. The presentence report set forth that defendant admitted to using marihuana and cocaine on a daily basis before his incarceration, and that admission was included in the case summary. At the SORA hearing, defendant claimed that he lied at the time of the presentence report to gain an advantageous sentence. Inasmuch as defendant admitted that he lied in order to benefit himself, the court was justified in discounting his statement at the hearing and assessing points for a history of substance abuse under risk factor 11. Finally, we reject defendant's contention that he was denied effective assistance of counsel at the SORA hearing (*see Rotterman*, 96

AD3d at 1468; *People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1470

KA 11-00927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ENNIS E. RUFFIN, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ENNIS E. RUFFIN, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered October 7, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in or near school grounds.

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 sale of a controlled substance in or near school grounds (Penal Law § 220.44 [2]), defendant contends in his main brief that his plea allocution was not factually sufficient. Defendant, on appeal, does not challenge the validity of his waiver of the right to appeal, however, and thus his contention is encompassed by that waiver (*see People v Lewandowski*, 82 AD3d 1602, 1602). We further conclude that "the challenge by defendant [in his main brief] to the sufficiency of the evidence before the grand jury is forfeited by his guilty plea" (*People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859; *see People v Dunbar*, 53 NY2d 868, 871).

In addition, by pleading guilty, defendant forfeited his contention in his pro se supplemental brief with respect to preindictment prosecutorial misconduct (*see People v Di Raffaele*, 55 NY2d 234, 240; *People v Oliveri*, 49 AD3d 1208, 1209). Finally, defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel. That contention does not survive his guilty plea or his waiver of the right to appeal because "[t]here is no showing 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*

Robinson, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1474

KA 11-00795

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER 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 (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 20, 2011. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the consent to search his apartment obtained from the complainant involved in an alleged domestic dispute with defendant was invalid and thus that Supreme Court erred in refusing to suppress evidence obtained by the police during the resulting search. We reject that contention. The People met their burden of establishing that the police reasonably believed that the complainant had the requisite authority to consent to the search of defendant's apartment (*see People v Gonzalez*, 88 NY2d 289, 295; *People v Adams*, 53 NY2d 1, 9-10, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854). The evidence at the suppression hearing established that police officers responding to a report of a domestic dispute at defendant's apartment were met by the complainant, who stated that she was defendant's girlfriend, that she lived in the apartment, and that she wanted to retrieve certain items of personal property but was afraid that defendant would return to the apartment. The complainant further stated that defendant kept a gun in the apartment and had threatened to shoot her. The complainant permitted the police officers to enter the apartment, directed an officer to the location of the gun, and collected some belongings from a closet that contained both men's and women's clothing. Thus, "the record establishes that the searching officer[s] relied in good faith on the apparent authority of [the complainant] to consent to the search, and

the circumstances reasonably indicated that [she] had the requisite authority to consent to the search" (*People v Fontaine*, 27 AD3d 1144, 1145, lv denied 6 NY3d 847; see *People v Frankline*, 87 AD3d 831, 833, lv denied 19 NY3d 973; *People v Littleton*, 62 AD3d 1267, 1269, lv denied 12 NY3d 926). Contrary to defendant's contention, the searching officers were "not required to make 'some inquiry into the actual state of authority' " of complainant to consent to a search because they were not " 'faced with a situation which would cause a reasonable person to question the consenting part[y's] power or control over the premises or property to be inspected' " (*Fontaine*, 27 AD3d at 1145, quoting *Adams*, 53 NY2d at 10). Finally, the sentence is not unduly harsh or severe.