SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 8, 2014

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. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 13-01535

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

MICHELLE T. HAUBER-MALOTA, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

PHILADELPHIA INSURANCE COMPANIES, TOKIO MARINE GROUP AND PHILADELPHIA CONSOLIDATED HOLDING CORP., DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SHAW & SHAW, P.C., HAMBURG (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered May 23, 2013. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Opinion by CARNI, J.:

On May 4, 2006, plaintiff was a passenger in a vehicle operated by her coemployee, Brenda Wilcox, and owned by their common employer, Joan A. Male Family Support Center (JMFSC), when the vehicle was rear-ended by another vehicle operated by Cathlyn M. Haggerty, and owned by Michael Haggerty. Cathlyn Haggerty was also employed by JMFSC, and there is no dispute that she, plaintiff and Wilcox, although in two different vehicles, were all within the course of their employment at the time of the accident. Plaintiff commenced a personal injury action against the Haggertys, but that action was dismissed on the ground, inter alia, that plaintiff's remedy against her coemployee was limited to the recovery of workers' compensation benefits (*see* Workers' Compensation Law § 29 [6]). In that action, the exclusivity provisions of the Workers' Compensation Law also barred plaintiff's derivative claim against Michael Haggerty as the owner of the other vehicle under Vehicle and Traffic Law § 388 (*see Naso v Lafata*, 4 NY2d 585, 589-591, *rearg denied* 5 NY2d 861; *Rauch v Jones*, 4 NY2d 592, 596; *see also Isabella v Hallock*, 22 NY3d 788, 794).

Plaintiff subsequently commenced this action seeking supplementary uninsured/underinsured motorist (SUM) benefits from defendants as insurers of the vehicle owned by her employer, JMFSC. Defendants moved

for summary judgment seeking dismissal of the complaint on the ground, inter alia, that plaintiff's exclusive remedy was the recovery of workers' compensation benefits. Supreme Court denied the motion on the ground, inter alia, that the Workers' Compensation Law was not a bar to plaintiff's recovery of SUM benefits under the automobile liability insurance policy issued to her employer, JMFSC. We agree with defendants that the court erred in denying the motion on that ground.

Thus, in what is a matter of first impression in this State, we are presented with the following question:

> Whether an employee, injured in a motor vehicle accident while in the course of her employment, who is barred by the exclusive remedy provisions in the Workers' Compensation Law from suing a coemployee based on negligence, is entitled to SUM benefits under her employer's automobile liability insurance policy?

We first observe that plaintiff correctly contends that the exclusive remedy provision in Workers' Compensation Law § 29 (6) does not bar all actions by injured employees against an employer's insurer for SUM benefits. Although workers' compensation benefits generally are "exclusive and in place of any other liability whatsoever" (§ 11), the statute "cannot be read to bar all suits to enforce contractual liabilities" (*Matter of Elrac, Inc. v Exum*, 18 NY3d 325, 328). Because an action to recover uninsured motorist benefits "is predicated on [the] insurer's contractual obligation to assume the risk of loss associated with an uninsured motorist" (*Matter of Shutter v Philips Display Components Co.*, 90 NY2d 703, 709), the Workers' Compensation Law does not categorically bar such an action against an employer's insurer (*see generally Elrac, Inc.*, 18 NY3d at 328). However, the critical distinction in this case is that the motor vehicle accident involved vehicles operated by coemployees.

Under every policy of automobile liability insurance issued or delivered in this State, an insurer must pay an insured person uninsured motorist benefits in the amount that he or she "*shall be entitled to recover* as damages from an owner or operator of an uninsured motor vehicle" (Insurance Law § 3420 [f] [1] [emphasis added]). As is the case here, every such policy shall, at the option of the insured, also provide SUM coverage, in varying policy limits not relevant to our analysis (*see* § 3420 [f] [2] [A]). Insurance Department Regulation No. 35-D, "implements" section 3420 (f) (2) of the Insurance Law (11 NYCRR 60-2.0 [a]), and it "establish[es] a standard form for SUM coverage [i.e., the prescribed SUM endorsement], in order to eliminate ambiguity, minimize confusion and maximize its utility" (11 NYCRR 60-2.0 [c]; *see* 11 NYCRR 60-2.3 [f]). Pursuant to 11 NYCRR 60-2.3 (f), the SUM endorsement to the policy issued by defendants to plaintiff's employer in this case required payment of "all sums that the insured . . . shall be *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured" (emphasis added). Defendants' contractual liability to provide SUM benefits is therefore "premised in part upon the contingency of a third party's tort liability" (*Commissioners*

of State Ins. Fund v Miller, 4 AD2d 481, 482).

Thus, plaintiff may receive SUM benefits under the policy only if she is "legally entitled to recover damages" from the owner or operator (11 NYCRR 60-2.3 [f]). The prescribed SUM endorsement language at issue is plain and unambiguous. Indeed, as noted above, the standard form for SUM coverage was promulgated in order to "eliminate ambiguity, minimize confusion and maximize its utility" (11 NYCRR 60-2.0 [c]; *see also Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 200-201). In interpreting that language, we are guided by decisions of other jurisdictions applying similar SUM endorsement language and the exclusivity provisions of the Workers' Compensation Law to actions in which an employee seeks uninsured motorist benefits for injuries sustained in accidents with coemployees. In the overwhelming majority of those decisions, all interpreting similar "legally entitled to recover damages" policy language, the courts have concluded that, because of workers' compensation exclusive remedy provisions, a plaintiff is not entitled to uninsured motorist benefits (*see e.g. State Farm Mut. Auto. Ins. Co. v Slusher*, 325 SW3d 318, 323 [Ky]; *Ex parte Carlton*, 867 So2d 332, 338 [Ala]; *Kough v New Jersey Auto. Full Ins. Underwriting Assn.*, 237 NJ Super 460, 469, *cert denied* 121 NJ 638; *Allstate Ins. Co. v Boynton*, 486 So2d 552, 558-559 [Fla]; *see also* John P. Ludington, Annotation, *Automobile Uninsured Motorist Coverage: "Legally Entitled to Recover" Clause as Barring Claim Compensable Under Workers' Compensation Statute*, 82 ALR 4th 1096, § 6 [a]).

Here, pursuant to the plain language of the SUM endorsement, plaintiff is not "legally entitled to recover damages" from the owner and operator of the offending vehicle because of the status of the operator, Cathlyn Haggerty, as plaintiff's coemployee (*see* Workers' Compensation Law § 29 [6]; *Naso*, 4 NY2d at 589). Accordingly, we conclude that plaintiff is not entitled to recover SUM benefits under the policy, and that the order should be reversed, the motion should be granted, and the complaint should be dismissed.

In light of the foregoing, we need not address defendants' contention that the Haggerty vehicle was not an "uninsured motor vehicle" under the circumstances.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

459

CA 13-01332

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

MARY KALK BIELBY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL MIDDAUGH, INDIVIDUALLY AND AS SHERIFF OF ONEIDA COUNTY, PETER PARAVATI, INDIVIDUALLY AND AS UNDERSHERIFF OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, THE ESTATE OF JAMES ENGLISH, DECEASED, JOSEPH LISI, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, COUNTY OF ONEIDA, AND PATRICIA COPPERWHEAT, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-RESPONDENTS.

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (BARTLE J. GORMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DANIEL MIDDAUGH, INDIVIDUALLY AND AS SHERIFF OF ONEIDA COUNTY, PETER PARAVATI, INDIVIDUALLY AND AS UNDERSHERIFF OF ONEIDA COUNTY SHERIFF'S DEPARTMENT, COUNTY OF ONEIDA, AND PATRICIA COPPERWHEAT, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT.

BARTH SULLIVAN BEHR, SYRACUSE (JAMES J. GRECO OF COUNSEL), FOR DEFENDANT-RESPONDENT JOSEPH LISI, INDIVIDUALLY AND AS AN EMPLOYEE OF ONEIDA COUNTY SHERIFF'S DEPARTMENT.

DAVID R. DIODATI, NEW HARTFORD, FOR DEFENDANT-RESPONDENT THE ESTATE OF JAMES ENGLISH, DECEASED.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 26, 2012. The order and judgment granted the motions of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying those parts of the motion of defendants Daniel Middaugh, individually and as Sheriff of Oneida County, Peter Paravati, individually and as Undersheriff of Oneida County Sheriff's Department, County of Oneida, and Patricia Copperwheat, individually and as an employee of the Oneida County Sheriff's Department seeking dismissal of the seventh and eighth causes of action and reinstating those causes of action of the amended complaint against those

defendants, and by denying the motion of defendant estate of James English and reinstating the amended complaint with respect to that defendant, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages relative to the termination of her employment with the Oneida County Sheriff's Department (OCSD). Plaintiff worked in an office of the OCSD as a secretary for defendant Peter Paravati, who was the Undersheriff of defendant County of Oneida (County), and her job duties required her to, inter alia, receive bail money delivered to her from the County jail by correction officers, including James English, and to prepare bail monies for deposit into the bail account. Plaintiff was also required to prepare deposit slips for bail monies that she received.

In July 2001, defendant Joseph Lisi, an OCSD lieutenant, conducted an internal investigation into missing bail monies and, following that investigation, plaintiff admitted to falsifying bail account records. Plaintiff, who was by then represented by counsel, subsequently entered into an agreement with the Oneida County District Attorney's office pursuant to which she resigned her position effective July 16, 2001 and paid $16,827.74 to the County. That payment represented the amount of the shortfall in the County's bail account calculated by defendant Patricia Copperwheat, an OCSD account supervisor. In exchange for her resignation and the payment, plaintiff was allowed to—and ultimately did—plead guilty to one count of official misconduct, a class A misdemeanor (Penal Law § 195.00 [1]). Defendants Daniel Middaugh, the Sheriff of the County, Paravati, the County and Copperwheat (collectively, County defendants) moved for an order dismissing the amended complaint against them pursuant to CPLR 3211 and CPLR 3212. Defendant estate of James English also moved for summary judgment dismissing the amended complaint against it pursuant to CPLR 3212, while defendant Lisi made a separate motion seeking an order dismissing the amended complaint against him pursuant to CPLR 3211 and CPLR 3212. Supreme Court granted the motions based on, inter alia, its conclusion that the action is barred by the doctrines of res judicata and collateral estoppel because an action that plaintiff had commenced in the United States District Court against Middaugh, Paravati, English, Lisi and the County was previously determined on the merits against plaintiff. We conclude that those doctrines are inapplicable here, but we affirm parts of the order and judgment on other grounds (*see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546).

With respect to res judicata, i.e., claim preclusion, we note that " 'a valid final judgment bars future actions between the same parties on the same cause of action' (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). 'As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" ' (*id.*, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Thus, res judicata applies '. . . to issues which were or could have been raised in the prior [action]' (*Matter of Eagle Ins. Co. v Facey*, 272 AD2d 399, 400 [2000])" (*Zayatz v Collins*, 48 AD3d 1287, 1289; *see Matter of Hunter*, 4 NY3d 260, 269). Dismissal of an action by a federal court, however, does not have res judicata effect when the federal court declines to exercise its pendent jurisdiction over

related state law claims, or otherwise dismisses those claims without prejudice (*see McLearn v Cowen & Co.*, 60 NY2d 686, 688; *Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196; *cf. Troy v Goord*, 300 AD2d 1086, 1087).

Applying those rules here, we conclude that res judicata does not bar the state action. The District Court's decision in the federal action specifically states that the Court was declining supplemental, i.e., pendent, "jurisdiction over plaintiff's state law claims." We further conclude that the County's "transactional analysis approach" to this issue is without merit (*see generally Hunter*, 4 NY3d at 269).

Collateral estoppel, by contrast, precludes a party "from relitigating an issue that has already been decided against that party" (*Zayatz*, 48 AD3d at 1289; *see Tuper v Tuper*, 34 AD3d 1280, 1282). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling . . . The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party . . . The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096 [internal citations omitted]).

Applying those rules here, we conclude that plaintiff is collaterally estopped from asserting only that part of the 11th cause of action asserting a claim for constructive discharge against the County. The 11th cause of action has two components, i.e., a claim for constructive discharge, and a claim for wrongful termination. "Constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation" (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621-622 [internal quotation marks omitted]; *see Thompson v Lamprecht Transp.*, 39 AD3d 846, 848) and, inasmuch as the District Court concluded in the federal action that plaintiff had "resigned because of the plea agreement resulting from her official misconduct (falsifying the bail account records)," we conclude that the claim for constructive discharge asserted in the 11th cause of action is barred by collateral estoppel (*see generally Buechel*, 97 NY2d at 303-304). We further conclude that the part of the 11th cause of action asserting a claim for wrongful termination is not barred by collateral estoppel. That claim is premised upon the theory that plaintiff was coerced into resigning, and "[a] resignation under coercion or duress is not a voluntary act and may be nullified" (*Matter of Mangee [Mamorella]*, 239 AD2d 892, 892; *see Matter of Gould v Board of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 NY2d 446, 451). The question whether plaintiff was coerced into resigning was not fully litigated in the federal action, and thus the doctrine of collateral estoppel does not apply to the claim for wrongful termination (*cf. Buechel*, 97 NY2d at 303-304).

We nevertheless affirm parts of the order and judgment on alternative grounds that the court rejected (*see Parochial Bus. Sys.*, 60 NY2d at 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). We agree with the County defendants to the extent that they contend that plaintiff's failure to serve a notice of claim on the County requires dismissal of the tort claims against the County, including the claim for wrongful termination, and the negligence claims against Paravati and Copperwheat (*see* County Law § 52 [1]; General Municipal Law § 50-e; *Csaszar v County of Dutchess*, 95 AD3d 1009, 1010). We further conclude that the cause of action for intentional infliction of emotional distress should be dismissed as time-barred (*see* CPLR 215 [3]), and that plaintiff's constitutional tort claims fail to state a cause of action (*see Martinez v City of Schenectady*, 97 NY2d 78, 83-84; *cf.* Civil Service Law § 75-b). We also dismiss both plaintiff's cause of action for breach of her employment contract on the ground that plaintiff failed to proceed pursuant to her collective bargaining agreement (*see Matter of Board of Educ., Commack Union Free Sch. Dist. v Ambach*, 70 NY2d 501, 508, *cert denied* 485 US 1034), and plaintiff's cause of action against Middaugh, Paravati, Lisi and Copperwheat for tortious interference with plaintiff's employment contract (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424-425; *LaBarte v Seneca Resources Group*, 285 AD2d 974, 977). Plaintiff failed to state a claim for prima facie tort (*see generally Posner v Lewis*, 18 NY3d 566, 570 n 1; *Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501), and we further conclude that plaintiff's negligence causes of action should be dismissed (*see Ciapa v Misso*, 103 AD3d 1157, 1158; *Alabisi v Bonda*, 262 AD2d 948, 948), and that the punitive damages claim should be dismissed as against all defendants except for the estate of James English (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613, 616-617; *cf. Englert v Schaffer*, 61 AD3d 1362, 1363).

In sum, only plaintiff's seventh and eighth causes of action, which allege that Middaugh, Paravati, and the County breached their agreement with plaintiff not to publish information about plaintiff's official misconduct, and plaintiff's causes of action against the estate of James English remain for trial, and we therefore modify the order and judgment accordingly.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

552

CA 13-01125

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

STATE BANK OF TEXAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAANAM, LLC, DEFENDANT,
MILIND K. OZA AND NAYNA M. OZA,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICE OF CARL E. PERSON, NEW YORK CITY (CARL E. PERSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MORRISROE HEBERT LLP, BUFFALO (RICHARD J. MORRISROE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John A. Michalek, J.), entered September 25, 2012. The order, among other things, denied the motion of defendants Milind K. Oza and Nayna M. Oza to vacate a prior order and judgment of the court dated June 28, 2012.

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, Chautauqua County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, the individual defendants (defendants), the personal guarantors of the note at issue, appeal from an order denying their motion to vacate the order and judgment entered on their default, which granted plaintiff's motion for summary judgment on the complaint and counterclaims, and awarded plaintiff $501,633.50. In appeal No. 2, defendants appeal from an order that, inter alia, denied their motion for leave to reargue or renew the motion to vacate. We conclude in appeal No. 1 that the court erred in denying the motion to vacate without conducting a traverse hearing to determine whether defendants were properly served with plaintiff's motion for summary judgment. We therefore reverse the order in appeal No. 1 and remit the matter to Supreme Court to decide the motion to vacate following a traverse hearing. In light of our determination in appeal No. 1, we dismiss as moot the appeal from the order in appeal No. 2.

We conclude that defendants established in support of the motion to vacate that there is an issue of fact whether their counsel received adequate notice of the return date for plaintiff's motion for summary judgment, thus raising the possibility that the court did not have "jurisdiction to entertain the motion" (*Financial Servs. Veh. Trust v Law*

Offs. of Dustin J. Dente, 86 AD3d 532, 532; *see Nowak v Oklahoma League for Blind*, 289 AD2d 995, 995; *Hibbard v Shaad*, 99 AD2d 670, 670; *see generally* CPLR 5015 [a] [4]). It is undisputed that plaintiff's counsel failed to enter the return date of June 28, 2012 on the notice of motion mailed with the other motion papers to defendants' counsel on May 30, 2012 (May 30 package) (*cf. Bush v Hayward*, 156 AD2d 899, 900, *lv denied* 75 NY2d 709). It is also undisputed that a subsequent notice of motion mailed as part of a "proof of service packet" was not delivered to defendants' counsel until two days before the return date (*see Bigaj v Gehl*, 154 AD2d 893, 893). In opposition to defendants' motion to vacate, plaintiff contended that the May 30 package mailed to defendants' counsel contained a cover letter stating the time, place, and date that the motion for summary judgment would be heard. In an affirmation, defendants' counsel denied that a cover letter was included in the May 30 package and averred that he therefore did not submit papers in opposition or appear in court on the return date. Although plaintiff submitted the affidavits of its counsel's secretary and a mailroom employee to whom the secretary delivered the May 30 package in support of its position that the cover letter was included in the May 30 package, we note that the affidavits were inconsistent with respect to whether the cover letter was included in the contents of the May 30 package and whether the May 30 package was sealed before the secretary delivered it to the mailroom employee (*see generally Daulat v Helms Bros., Inc.*, 32 AD3d 410, 411). In our view, those inconsistencies constitute "convincing supporting circumstances" for the position of defendants' counsel that the cover letter was not in the May 30 package (*Matter of Futterman v New York State Div. of Hous. & Community Renewal*, 264 AD2d 593, 595, *lv dismissed* 94 NY2d 846, 847). Under all of the circumstances of this case, we conclude that the "affirmation from [defendants' counsel] that [he] never received [the cover letter] . . . is sufficient" to raise the issue whether defendants' counsel received adequate notice in the May 30 package of the return date for plaintiff's motion for summary judgment (*Adames v New York City Tr. Auth.*, 126 AD2d 462, 462; *see Matter of Harrell v Fischer*, 114 AD3d 1092, 1092-1093; *Daulat*, 32 AD3d at 411; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 344; *see generally Matter of Bart-Rich Enters., Inc. v Boyce-Canandaigua, Inc.*, 8 AD3d 1119, 1120).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

553

CA 13-01126

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

STATE BANK OF TEXAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAANAM, LLC, DEFENDANT,
MILIND K. OZA AND NAYNA M. OZA,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICE OF CARL E. PERSON, NEW YORK CITY (CARL E. PERSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MORRISROE HEBERT LLP, BUFFALO (RICHARD J. MORRISROE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John A. Michalek, J.), entered September 25, 2012. The order denied the motion of defendants Milind K. Oza and Nayna M. Oza seeking, inter alia, leave to renew.

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

Same Memorandum as in *State Bank of Texas v Kaanam, LLC* ([appeal No. 1] ___ AD3d ___ [Aug. 8, 2014]).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

591

CA 13-02209

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ.

DAVID KRAJNIK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORBES HOMES, INC., DOING BUSINESS AS
FORBES CAPRETTO, DEFENDANT-RESPONDENT,
AND BURCHVILLE CONSTRUCTION, INC.,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS, LLC, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 27, 2013. The order, among other things, denied the motion of defendant Burchville Construction, Inc., for summary judgment, granted the cross motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) and granted the motion of defendant Forbes Homes, Inc., doing business as Forbes Capretto, for conditional indemnification and contribution against Burchville Construction, Inc.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's cross motion against defendant Burchville Construction, Inc., granting in part the motion of defendant Burchville Construction, Inc. and dismissing the Labor Law cause of action against it, and denying that part of the motion of defendant Forbes Homes, Inc., doing business as Forbes Capretto, for summary judgment on its cross claim for indemnification and contribution against defendant Burchville Construction, Inc. and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working at premises owned by defendant Forbes Homes, Inc., doing business as Forbes Capretto (Forbes). Defendant Burchville Construction, Inc. (Burchville) contracted with Forbes to perform the framing work on a new home construction project undertaken by Forbes at the premises as general contractor. When the construction of the home was in the final stages, plaintiff's employer, the supplier of the window units in the home, sent him to the work site to conduct

a final operational inspection of all the windows. While in the attic checking a window installed on a vertical wall, plaintiff attempted to reach the window by using a makeshift ladder already in place and consisting of two boards, each two inches by four inches, nailed across the vertical framing members under the window. Plaintiff fell between the attic floor joists to the floor of the foyer below and sustained injuries.

Insofar as relevant to this appeal, Burchville moved for summary judgment dismissing the complaint and all cross claims against it, and plaintiff cross-moved for, inter alia, partial summary judgment on liability on the Labor Law § 240 (1) claim against Burchville. In addition, Forbes moved, inter alia, for summary judgment on its cross claim for conditional contractual and common-law indemnification or contribution against Burchville. Supreme Court, also as relevant on appeal, denied Burchville's motion, granted that part of plaintiff's cross motion with respect to Burchville, and granted that part of Forbes' motion with respect to Burchville.

We agree with Burchville that the court erred in granting that part of plaintiff's cross motion with respect to Burchville and in denying that part of its motion with respect to the Labor Law cause of action against it. We therefore modify the order accordingly. By the express terms of Labor Law §§ 240 (1) and 241 (6), the nondelegable duties imposed by those statutes apply only to "contractors and owners and their agents." Labor Law § 200 is a codification of "landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). Here, in the absence of any evidence that Burchville exercised any authority or control over the work site or the injury-producing work, we conclude that Burchville was not a statutory agent of either an owner or general contractor (*see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427-1428).

We conclude, however, that the court properly denied that part of Burchville's motion with respect to the common-law negligence cause of action. Even assuming, arguendo, that Burchville met its initial burden with respect to that cause of action, we conclude that plaintiff raised an issue of fact whether Burchville's employees negligently installed the makeshift ladder. An award of summary judgment in favor of a subcontractor dismissing a negligence cause of action is improper where, as here, there is a triable issue of fact whether the subcontractor created an unreasonable risk of harm that was a proximate cause of the plaintiff's injuries (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523, *lv dismissed* 16 NY3d 794). Thus, the court properly denied that part of Burchville's motion (*see Severino v Hohl Indus. Servs.*, 300 AD2d 1049, 1049; *see also Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195-1196).

We further conclude that the court erred in granting that part of Forbes' motion seeking summary judgment on its cross claim for contractual and common-law indemnification or contribution against Burchville, and we therefore further modify the order accordingly. Contrary to Burchville's contention, however, the court properly denied that part of its motion for summary judgment dismissing that cross claim against it.

With respect to contractual indemnification, we note that the contract required Burchville to indemnify Forbes only if Burchville was negligent and, contrary to Burchville's contention, there are triable issues of fact with respect thereto (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188). With respect to common-law indemnification and/or contribution, we conclude that, although Burchville established as a matter of law that it did not supervise or direct the injury-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378), there are issues of fact whether Burchville was the party responsible for the allegedly negligent placement of the makeshift ladder. We thus conclude that summary judgment was not appropriate with respect to common-law indemnification or contribution (*see Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277-1278).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

600

CA 13-02032

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 1, 2013. The order granted the motion of plaintiff-petitioner for partial summary judgment and denied the cross motion of defendant-respondent for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff-petitioner's motion is denied, defendant-respondent's cross motion is granted and the fourth and sixth causes of action are dismissed.

Memorandum: Plaintiff-petitioner, DiPizio Construction Company, Inc. (DiPizio), and defendant-respondent, Erie Canal Harbor Development Corporation (Erie), entered into a construction agreement (Contract) pursuant to which DiPizio was to provide construction services for a certain revitalization project. DiPizio thereafter commenced this hybrid breach of contract action and CPLR article 78 proceeding contending, inter alia, that Erie had breached the Contract and the New York State Finance Law. DiPizio thereafter moved for partial summary judgment on liability on the fourth and sixth causes of action, and Erie cross-moved for partial summary judgment dismissing those causes of action. Supreme Court granted DiPizio's motion and denied Erie's cross motion. We now reverse.

In the fourth cause of action, DiPizio contended that Erie breached the Contract when it refused to accept DiPizio's material handling plan (MHP), which sought to dispose of nonhazardous contaminated soil at a facility approved by the New York State Department of Environmental Conservation (DEC) rather than a sanitary or industrial landfill. In the sixth cause of action, DiPizio contended that Erie breached the Contract when it refused to approve DiPizio's proposal to substitute

Chester Gray granite for Virginia Mist granite.

Resolution of this appeal depends on the principles of contract interpretation. "It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567; *see RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411). Therefore, "[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms" (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, *lv denied* 97 NY2d 603; *see Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799). It is likewise well settled that "[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [internal quotation marks omitted]).

We conclude that DiPizio failed to meet its burden on the motion and that Erie met its burden on the cross motion by establishing that its construction of the Contract is the only construction that can fairly be made. The "Contract Documents" included, inter alia, the Contract, the project manuals and addenda, the information to bidders and the special conditions. The provisions concerning the MHP are found in Project Manual Section 312003 Part 3.1, which deals with the identifying information that was to be included in the MHP. Pursuant to Part 3.1 (A) (7), the information contained in the MHP was to include identification of the primary and backup facilities for disposal of nonhazardous contaminated soil. That provision of the Contract states that "[t]he primary and backup facilities may be a recycling/treatment facility or a [DEC] approved lined landfill or *other facility approved by [DEC] to accept this material*" (emphasis added). Part 3.2 specifies the manner in which contaminated soil stockpiles and excavated materials are to be removed from the site. Part 3.2 (E) provides that, "[a]t a minimum, if soil testing indicates the excavation material is not hazardous, based on the known contaminants present[,] these wastes *must* be disposed of at a sanitary or industrial landfill permitted to receive such wastes" (emphasis added).

DiPizio sought to dispose of the nonhazardous contaminated soil at a DEC approved facility that was *not* a sanitary or industrial landfill. DiPizio contended that, inasmuch as Part 3.1 (A) (7) permits the use of such a facility, Erie's refusal to approve of that disposal plan constitutes a breach of the Contract. The Contract, however, also incorporated the terms of all of the information sent to bidders, including responses to requests for information (RFIs) that were sent to bidders before DiPizio executed the Contract. In one such response, Erie's project manager specifically stated that, "[f]or excess material requiring removal from site[,] . . . 'these wastes *must* be disposed of at a sanitary or industrial landfill permitted to receive such wastes' " (emphasis added). Moreover, in response to two different RFIs made by DiPizio before DiPizio

executed the Contract, Erie's project manager clearly and unambiguously stated that any plan to use DEC approved facilities in lieu of landfills was in violation of Section 312003 Part 3.2 (E) and was "not consistent with the project requirements."

To the extent that DiPizio and the court relied upon an internal letter between Erie's project manager and Erie recognizing that the reason for DiPizio's low bid was its desire to seek an acceptable DEC alternative to the landfill, we conclude that the document was not part of the Contract Documents and is thus extrinsic evidence that we may not consider where, as here, the Contract is not ambiguous (*see South Rd. Assoc., LLC v International Bus Machs. Corp.*, 4 NY3d 272, 278). It is well settled that " 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' " (*id.*).

Although Section 312003 Part 3.1 (A) (7) at first glance seems to permit use of a DEC approved facility in lieu of a landfill, upon closer inspection it is clear that the section concerns only the identification information that must be included in the MHP. The section concerning the actual disposal of nonhazardous contaminated soil and the responses to the RFIs, as incorporated into the Contract, contain specific mandatory provisions requiring that such material be disposed of at a sanitary or industrial landfill. " '[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect' " (*Burgdorf v Kasper*, 83 AD3d 1553, 1555). Moreover, "it is a well-established principle of contract interpretation that specific provisions concerning an issue are controlling over general provisions" (*Huen N.Y., Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1338; *see generally Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46). Relying on those fundamental rules of contract interpretation, we conclude that the Contract clearly and unambiguously requires nonhazardous contaminated soil to be disposed of at a sanitary or industrial landfill.

Inasmuch as Erie "establish[ed] that its construction of the [Contract] is the only construction [that] can fairly be placed thereon" (*Nancy Rose Stormer, P.C.*, 66 AD3d at 1450 [internal quotation marks omitted]), Erie is entitled to partial summary judgment dismissing the fourth cause of action.

With respect to the sixth cause of action, concerning DiPizio's attempt to substitute Chester Gray granite for Virginia Mist granite, we again conclude that DiPizio failed to meet its burden on the motion and that Erie, in support of its cross motion, established its entitlement to partial summary judgment dismissing that cause of action. Project Manual Section 044310 Part 2.2 discusses the Contract requirements for granite. Part 2.2 (A) states that the material must comply with "ASTM C 615," and Part 2.2 (B) lists the material specifications to which all granite must conform. Part 2.2 (D), however, provides that "Type A Granite *shall be* Virginia Mist granite . . . *or approved equal* . . . [and] Type B Granite shall be Cambrian Black granite . . . or approved equal" (emphasis added). Project Manual Section 016000 Part 2.1 (A) (6) further provides that, "[f]or products specified by name and accompanied by the term .

. . 'or approved equal,' " the proposed substitute product must comply with the " 'Comparable Products' Article to obtain approval for use." A Comparable Product is defined in Section 016000 Part 1.3 (A) (3) as a "[p]roduct that is demonstrated and approved through submittal process to have the indicated qualities related to type, function, dimension, in-service performance, *physical properties*, appearance, and other characteristics that equal or exceed those of [the] specified product" (emphasis added). Section 8 (D) of the Special Conditions, which are part of the Contract Documents, clearly states that "[t]he Architect's/Engineer's decision on substitutions and/or equivalencies shall be final and is not subject to dispute by" DiPizio.

DiPizio contends that the "approved equal" requirement in Section 044310 Part 2.2 (D) applies only to approval of the aesthetic properties of the granite because, otherwise, the material specification requirements of Part 2.2 (A) and (B) would be rendered superfluous. Erie contends that the material requirements of Section 044310 Part 2.2 (A) and (B) are merely the minimum requirements for any granite to be used on the Project and apply to both Type A and Type B granite. According to Erie, Part 2.2 (A) and (B) are not rendered superfluous by the "approved equal" requirements of Part 2.2 (D) inasmuch as the material specification requirements of Part 2.2 (A) and (B) apply to other types of granite used on the site. Erie thus contends that the "approved equal" requirements for Type A granite apply to all of the qualities of the named granite, including the physical properties.

There is no dispute that Chester Gray granite complies with the material requirements outlined in Part 2.2 (A) and (B) and that the architect ultimately approved the aesthetic properties of the Chester Gray granite. There is also no dispute that Erie's architect determined that the physical properties of Chester Gray granite were inferior to that of Virginia Mist granite and rejected the substitution on that ground.

In our view, the Contract clearly and unambiguously requires that the proposed substitute for Virginia Mist granite must have the indicated qualities related to, inter alia, physical properties "that equal or exceed those of" Virginia Mist granite. Erie established that the physical properties of Chester Gray granite did not equal or exceed those of Virginia Mist granite and, therefore, Erie had the discretion to deny approval of the proposed substitution. Inasmuch as the decision of Erie's architect with respect to substitutions is final, we conclude that Erie is entitled to partial summary judgment

dismissing that cause of action.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

601

CA 13-02033

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 1, 2013. The order granted the motion of plaintiff-petitioner seeking leave to renew and, upon renewal, directed that defendant-respondent shall not compromise or take any action that would effectively compromise plaintiff-petitioner's claims against it.

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

Memorandum: Supreme Court erred in granting the motion of plaintiff-petitioner (plaintiff) seeking leave to renew its prior motion to enjoin defendant-respondent (defendant) from terminating the construction agreement (Contract) between the parties (*see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.* [appeal No. 1], ___ AD3d ___ [Aug. 8, 2014]), and, upon renewal, granting plaintiff the injunctive relief sought. It is well established that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Luppino v Mosey*, 103 AD3d 1117, 1118). Plaintiff, as the movant, "bore the burden of proving that the new evidence [it] sought to present could not have been discovered earlier with due diligence and would have led to a different result" (*Matter of Lamar Cent. Outdoor, LLC v State of New York*, 64 AD3d 944, 951). We conclude that plaintiff failed to meet its burden.

In denying plaintiff's initial motion for an injunction, the court concluded that plaintiff would not suffer irreparable harm inasmuch as

plaintiff had an adequate remedy at law, i.e., monetary damages against defendant. In seeking leave to renew, plaintiff contended that, following the denial of the initial motion, defendant terminated the Contract with plaintiff and thereafter pursued settlement negotiations with plaintiff's surety, Travelers Insurance Company (Travelers), while excluding plaintiff from the negotiations. Plaintiff thus contended that such new evidence established that plaintiff would be unable to secure money damages against defendant and would have led to a different result on the initial motion for injunctive relief.

It is undisputed that, before the initial motion, Travelers began sending representatives to meetings in an effort to negotiate a settlement between the parties. It is also undisputed that Travelers had entered into a surety agreement with plaintiff long before the initial motion was heard. We therefore conclude that the ongoing negotiations and Traveler's involvement in the process were "within the purview of plaintiff's knowledge at the time" of plaintiff's original motion (*Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1303; *see Kirby v Suburban Elec. Engrs. Contrs., Inc.*, 83 AD3d 1380, 1381, *lv dismissed* 17 NY3d 783). To the extent that plaintiff now contends that its exclusion from the negotiations constitutes new evidence that would change the result, we reject that contention. Plaintiff failed to submit any evidence, such as the surety agreement, to support its contention that the ongoing negotiations between defendant and Travelers constitutes new evidence that will impact plaintiff's ability to secure its remedy against defendant. If in fact that surety agreement, had it been submitted, would have supported plaintiff's contention that plaintiff had lost the ability to secure an adequate remedy at law, we conclude that plaintiff failed to demonstrate that the evidence "was not in existence or not available at the time of [the original motion]" (*Kirby*, 83 AD3d at 1381). Thus, plaintiff could have submitted that surety agreement in support of the original motion. "Although a court has discretion to 'grant renewal, in the interest of justice, upon facts [that] were known to the movant[] at the time the original motion was made' . . . , it may not exercise that discretion unless the movant[] establish[es] a 'reasonable justification for the failure to present such facts on the prior motion' " (*id.*, quoting CPLR 2221 [e] [3]). Plaintiff provided no such justification.

Based on our determination, we do not address defendant's remaining contentions.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

602

CA 13-02034

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-PETITONER-RESPONDENT,

V ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 4, 2013. The amended order granted the motion of plaintiff-petitioner for partial summary judgment and denied the cross motion of defendant-respondent for partial summary judgment.

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

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

610

KA 11-01185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MUSTAFA BURRELL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 21, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the evidence is legally insufficient to establish that the victim sustained a physical injury. As defendant correctly concedes, he failed to preserve that contention for our review inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that the victim sustained a physical injury within the meaning of Penal Law § 10.00 (9) (*see People v Terrero*, 31 AD3d 672, 673, *lv denied* 7 NY3d 852; *People v Mack*, 268 AD2d 599, 600). Defendant cut the victim's neck with a knife, causing bleeding and requiring stitches (*see Terrero*, 31 AD3d at 673; *People v Amin*, 294 AD2d 863, 863, *lv denied* 98 NY2d 672; *Mack*, 268 AD2d at 600). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he is entitled to a new trial because County Court failed to give limiting instructions with respect to *Molineux* evidence establishing that he had been involved in a prior altercation with the victim. As defendant correctly concedes, that contention is "unpreserved for our review because his attorney did not request a limiting

instruction and failed to object to the court's failure to provide one" (*People v Williams*, 107 AD3d 1516, 1516, *lv denied* 21 NY3d 1047; *see* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant likewise failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation inasmuch as he failed to object to any of the challenged comments (*see People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078). In any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583).

We agree with defendant, however, that it is unclear from the record whether he was present for a portion of the *Ventimiglia* hearing conducted in chambers, and thus we are unable to determine whether defendant's right to be present at a material stage of the trial was violated (*see generally People v Russo*, 283 AD2d 910, 910, *lv dismissed* 96 NY2d 867). We therefore hold the case, reserve decision and remit the matter to County Court for a reconstruction hearing on the issue whether defendant was present at that portion of the *Ventimiglia* hearing (*see id.* at 910-911).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

611

KA 12-00137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZORAIDA Y. FIGUEROA-NORSE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 17, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of assault in the second degree (Penal Law § 120.05 [8]) and endangering the welfare of a child (§ 260.10 [1]) based on life-threatening injuries she caused to her then eight-year-old foster child. The victim sustained a head injury that rendered her unconscious and required surgery to relieve pressure on her brain. She was in a coma for approximately one month and, at the time of trial, suffered paralysis on the left side of her body as a result of the injury. In addition, the victim sustained an injury to her abdomen that resulted in perforation of her digestive system and also required surgery. Due to the nature of her head injury, the victim could not recall how she was injured. Defendant was arrested after her brother informed the police that she had assaulted the child at his home.

Defendant contends that County Court erred in refusing to suppress statements she made to the deputy sheriff who questioned her at the hospital where the victim was taken. According to defendant, her statements were involuntary because they were not preceded by *Miranda* warnings. We reject that contention. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963, quoting *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, defendant was not restrained in any way, nor was she told that she had to answer the deputy sheriff's

questions. Although defendant was with the deputy sheriff at the hospital for approximately 10 hours, the questioning was not continuous, and defendant was given multiple breaks to use the bathroom and obtain beverages. Defendant declined an offer of food and had contact by cell phone with her brother and mother. At one point, defendant left the hospital on her own to retrieve items from her vehicle, and then returned to the hospital for further questioning. Moreover, the record of the *Huntley* hearing establishes that the questioning was investigatory rather than accusatory in nature (*see People v Smielecki*, 77 AD3d 1420, 1421, *lv denied* 15 NY3d 956; *People v Murphy*, 43 AD3d 1276, 1277, *lv denied* 9 NY3d 1008). Finally, defendant did not make any admissions and was allowed to go home after the interview was completed. Under the circumstances, we conclude that "a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" during the interview (*People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d 830; *see People v Jones*, 110 AD3d 1484, 1485, *lv denied* 22 NY3d 1157; *People v Zuke*, 87 AD3d 1290, 1291, *lv denied* 18 NY3d 887).

We likewise reject defendant's contention that the statements were involuntary within the meaning of CPL 60.45 (2) because her will was overborne by the length of the questioning and promises made to her by the deputy sheriff. Defendant was not coerced by the use or threatened use of physical force, and, even assuming, arguendo, that the deputy sheriff promised defendant that she could talk to the victim's surgeon if she cooperated with the police, as defendant testified at the *Huntley* hearing, we conclude that such promise did not create "a substantial risk that the defendant might falsely incriminate [herself]" (CPL 60.45 [2] [b] [i]). Indeed, as noted, defendant did not incriminate herself during the interview, and she was not arrested until five days later.

Defendant contends that she was deprived of her right to a proper jury because a prospective juror did not serve on the jury despite not having been struck or challenged. Because defendant did not object to the failure of that prospective juror to be seated on the jury, however, she failed to preserve that contention for our review (*see People v Hayes*, 71 AD3d 1477, *lv denied* 15 NY3d 751), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note in any event that we perceive no prejudice to defendant arising from the failure of the prospective juror to be seated. As the Court of Appeals explained in a different context, "[e]ven if a juror is wrongly but not arbitrarily excused, the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3; *see People v Arnold*, 96 NY2d 358, 362).

Defendant also failed to preserve for our review her contention that the court should have removed a seated juror who the court noticed had "nodded off" during the preliminary instructions and opening statements (*see* CPL 470.05 [2]). The court learned from the juror during a discussion at the bench that she was tired due to her diabetes medication, and the court decided to adjourn the trial until the next morning to allow the juror to get a good night's sleep. Although present for the discussion

at the bench with the juror, defense counsel did not object to the court's course of action or request that the juror be removed as "grossly unqualified" (CPL 270.35 [1]). We note that there is no indication in the record that the juror missed any of the evidence presented at trial, 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]).

We reject defendant's contention that the evidence is legally insufficient to support the conviction. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's brother testified that he observed defendant strike the victim in the face between five and seven times on the day in question. According to defendant's brother, the victim then ran from the house bleeding from the nose and mouth, and defendant later carried the victim back inside and placed her in the basement as a form of "timeout." When defendant's brother checked on the victim approximately 20 minutes later, the victim was unconscious. Contrary to defendant's contention, her brother's testimony was not "incredible as a matter of law," i.e., " 'unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954; *see People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). We note in addition that defendant admitted at trial that she lied to the deputy sheriff when she said that the victim had fallen out of her arms and landed on the driveway, and that she told the same lie to several other people, including the victim's paternal grandfather, the victim's psychologist, and a social worker whom defendant phoned while driving the victim to the hospital. Defendant also admittedly lied when she told numerous people that the victim consumed some type of rancid liquid and had been vomiting all day.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*). The jury was entitled to credit the testimony of defendant's brother over that of defendant, and we afford great deference to the jury's credibility determinations. "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890; *see People v Roberts*, 111 AD3d 1308, 1309, *lv denied* 23 NY3d 967; *People v Allen*, 93 AD3d 1144, 1147, *lv denied* 19 NY3d 956).

Even assuming, arguendo, that we agree with defendant that the court erred in denying her request to admit in evidence a statement given to the police by a neighbor of defendant's brother who had died prior to trial

(*see generally People v Robinson*, 89 NY2d 648, 652-653), we conclude that such error is harmless. The proof of guilt is overwhelming, and there is no reasonable possibility that defendant would have been acquitted if the statement had been admitted (*see generally People v Crimmins*, 36 NY2d 230, 237).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

612

KA 10-01203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY T. MOBLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 12, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

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]). We agree with defendant that Supreme Court erred in denying his motion to suppress tangible property, i.e., a handgun, and his subsequent oral statements to the police because the police lacked reasonable suspicion to justify a search of his person.

On September 5, 2008, City of Rochester (City) police officers and New York State Troopers were patrolling allegedly high crime areas of the City. At approximately 7:30 p.m., a City police officer (the observing officer) was in an unmarked vehicle parked at the corner of North and Helena Streets. He observed defendant approximately 30 to 35 feet away, standing with a group of five or six men at the corner of North and Grace Streets, and he saw defendant use his right hand to "cup" a weighted object in his right pants pocket as he readjusted his clothing. The observing officer radioed another officer in a marked New York State police vehicle (the uniformed officer) that "a kid" on the corner "had made movements towards his right side," and requested that the uniformed officer "step out with" defendant. When the marked police vehicle approached defendant on North Street, defendant quickly turned away and walked down Grace Street. The observing officer then drove the unmarked vehicle past

defendant, and the observing officer's partner exited the vehicle, identified himself as a police officer and ordered defendant to stop and "show his hands." At that point, the marked vehicle approached on Grace Street and the uniformed officer observed an object in defendant's left hand. After the uniformed officer exited the marked vehicle, he observed defendant place the object into his left rear pants pocket. The uniformed officer seized defendant's hands, patted his left rear pants pocket, felt a hard object, reached into that pocket and removed a cell phone. He then patted defendant's right front pocket and felt the outline of a gun.

A police officer may stop a person to search for weapons where the officer "reasonably suspects that such person is committing, has committed or is about to commit" a crime (CPL 140.50 [1]), and the officer "reasonably suspects that he [or she] is in danger of physical injury" (CPL 140.50 [3]). "A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion' " (*People v Brannon*, 16 NY3d 596, 602). In contrast, however, "actions that are 'at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality' " (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844; *see People v De Bour*, 40 NY2d 210, 216). If the intruding officer lacks personal knowledge sufficient to establish reasonable suspicion, information that the intruding officer received "as a result of communication with" a fellow officer is presumed reliable (*People v Ketcham*, 93 NY2d 416, 419 [internal quotation marks omitted]; *see People v Ramirez-Portoreal*, 88 NY2d 99, 113). Nevertheless, a radio call from a fellow officer that defendant had made movements towards his right side "absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime" (*People v Ingram*, 114 AD3d 1290, 1293 [internal quotation marks omitted]; *see People v Cady*, 103 AD3d 1155, 1156; *Riddick*, 70 AD3d at 1422-1423). "The mere fact that defendant was located in an alleged high crime area does not supply that requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' " (*Riddick*, 70 AD3d at 1423; *see People v Powell*, 246 AD2d 366, 369, *appeal dismissed* 92 NY2d 886). Moreover, flight from an approaching police vehicle does not provide the requisite reasonable suspicion absent "specific circumstances indicating that the suspect may be engaged in criminal activity" (*People v Sierra*, 83 NY2d 928, 929; *see Riddick*, 70 AD3d at 1422).

In addition, we note that there was no evidence that the officer "reasonably suspect[ed] that he [was] in danger of physical injury" (CPL 140.50 [3]; *see Powell*, 246 AD2d at 369-370). We conclude that defendant's act of emptying the contents of his left hand, i.e., a cell phone, into his pocket in responding to a police command to "show his hands" was an innocuous act (*see Powell*, 246 AD2d at 369). The intruding officer—here, the uniformed officer—did not observe, nor was he aware of, any threatening gestures or weapons (*see id.*; *cf. People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992). Because the officer lacked reasonable suspicion that defendant was committing a crime and had no reasonable basis to suspect that he was in danger of physical injury, we further

conclude that the ensuing pat frisk of defendant was unlawful (*see* CPL 140.50 [1], [3]; *Riddick*, 70 AD3d at 1424; *Powell*, 246 AD2d at 369-370).

Inasmuch as the pat frisk was unlawful, "the handgun seized by the police should have been suppressed . . . , and the statements made by defendant to the police following the unlawful seizure also should have been suppressed as fruit of the poisonous tree" (*Riddick*, 70 AD3d at 1424). As a result, defendant's guilty plea must be vacated and, because our determination results in the suppression of all evidence of the charged crime, the indictment must be dismissed (*see id.*; *People v Stock*, 57 AD3d 1424, 1425). We therefore remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

613

CA 13-01771

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

IN THE MATTER OF THE ESTATE OF JOHN WAGNER,
DECEASED.

CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SALLY BAUMANN, OBJECTANT-RESPONDENT;

COLIN DESROSIERS AND MICHELLE DESROSIERS,
OBJECTANTS-APPELLANTS.
(APPEAL NO. 1.)

LACY KATZEN LLP, ROCHESTER (RACHELLE H. NUHFER OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

LAW OFFICE OF HEIDI W. FEINBERG, ROCHESTER (HEIDI W. FEINBERG OF COUNSEL), FOR PETITIONER-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (RENÉ H. REIXACH OF COUNSEL), FOR OBJECTANT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered July 18, 2013. The order, among other things, terminated a testamentary trust.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *Matter of Wagner* ([appeal No. 2] ___ AD3d ___ [Aug. 8, 2014]).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

614

CA 13-01772

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

IN THE MATTER OF THE ESTATE OF JOHN WAGNER,
DECEASED.

CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SALLY BAUMANN, OBJECTANT-RESPONDENT;

COLIN DESROSIERS AND MICHELLE DESROSIERS,
OBJECTANTS-APPELLANTS.
(APPEAL NO. 2.)

LACY KATZEN LLP, ROCHESTER (RACHELLE H. NUHFER OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

LAW OFFICE OF HEIDI W. FEINBERG, ROCHESTER (HEIDI W. FEINBERG OF COUNSEL), FOR PETITIONER-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (RENÉ H. REIXACH OF COUNSEL), FOR OBJECTANT-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered September 3, 2013. The decree granted the petition to terminate a testamentary trust and ordered that the remaining balance of the trust be delivered to Sally Baumann.

It is hereby ORDERED that the decree so appealed from is modified on the law by vacating the third decretal paragraph and as modified the decree is affirmed without costs, and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner and trustee Canandaigua National Bank and Trust Company (CNB) commenced this proceeding in Surrogate's Court to terminate the testamentary trust of decedent John Wagner pursuant to EPTL 7-1.19 as uneconomical. Decedent's grandchildren, i.e., the objectants-appellants herein (hereafter, grandchildren), moved for summary judgment seeking the principal of the trust, and Sally Baumann cross-moved for the same relief. Article V (B) of decedent's will established a trust for Baumann's benefit during her lifetime, permitting Baumann to live in decedent's residence and to receive the net income from the trust, and authorizing CNB, in its discretion, to use the principal for capital improvements to the residence. Decedent granted Baumann no right to the trust principal, but provided that, upon Baumann's death, the remaining trust principal, i.e., the property funding the trust, would be distributed to decedent's grandchildren, per stirpes.

Article VII (E) of decedent's will provided that, if "any trust" were terminated as uneconomical, the trust assets would be distributed to the "income beneficiary or beneficiaries" at the time of termination. It is undisputed on appeal that the subject trust was terminated as uneconomical pursuant to EPTL 7-1.19 because the costs of administering the trust exceeded the income generated by the trust.

In appeal No. 1, the grandchildren appeal from an order granting CNB's petition to terminate the trust and directing that the trust principal be distributed to Baumann and, in appeal No. 2, they appeal from the decree entered upon that order. As a preliminary matter, we note that, inasmuch as the order in appeal No. 1 is subsumed in the decree in appeal No. 2, we dismiss the appeal from the order in appeal No. 1 (*see* CPLR 5501 [a] [1]; SCPA 2701 [1] [b]; *Matter of Kalkman [Coulter]*, 77 AD3d 1287, 1289).

We agree with the grandchildren that the Surrogate erred in granting Baumann's cross motion for summary judgment and in directing that the trust principal be distributed to her. In determining the distribution of assets upon termination of an uneconomical trust, we must "effectuate the intention of the creator" of the trust (EPTL 7-1.19). In determining decedent's intention, we must engage in "a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed" (*Matter of Fabbri*, 2 NY2d 236, 240; *see Matter of Sawyer*, 4 AD3d 800, 801-802). If a "dominant purpose" can be discerned from reading the will, the individual provisions of the will must be read and given effect in light of that purpose (*see Fabbri*, 2 NY2d at 240). " '[W]here a will is capable of two interpretations, the one should be adopted which prefers persons of the testator's blood' " (*Matter of Symonds*, 79 AD2d 24, 26).

Here, there are two provisions in the will regarding the distribution of the trust principal. Article V (B) (4) provides that, upon the beneficiary's death, the property of the trust is to be distributed equally to the grandchildren. Article VII (E), however, states that the trustee may terminate any uneconomical trust and distribute the assets of the trust to the current income beneficiary, i.e., Baumann. We conclude that decedent intended to benefit both Baumann and the grandchildren and, thus, that the Surrogate erred in awarding the entire trust principal to Baumann. We also recognize, however, that decedent intended the trust to benefit Baumann during her lifetime and, thus, that the trust principal cannot be awarded entirely to the grandchildren. In light of those competing interests, we remit the matter to Surrogate's Court to determine "[t]he distribution of the trust assets . . . in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator" (EPTL 7-1.19 [a] [2]).

All concur except PERADOTTO and LINDLEY, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. In our view, Surrogate's Court properly determined that the language of decedent's will is clear and unambiguous, and that the will must therefore be enforced according to its terms. We would thus affirm the decree in appeal No. 2. It is well settled that "testamentary instruments are strictly construed so as to give full effect to the testator's clear intent" (*Matter of Covert*, 97 NY2d 68, 74; *see Matter of Murray*, 84 AD3d 106, 113, *lv*

denied 18 NY3d 874), and that the best evidence of the testator's intent is found in the clear and unambiguous language of the will itself (*see Matter of Walker*, 64 NY2d 354, 357-358; *Matter of Cord*, 58 NY2d 539, 544, *rearg denied* 60 NY2d 586). Although the testator's intent "must be gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed" (*Matter of Fabbri*, 2 NY2d 236, 240; *see Matter of Brignole*, 32 AD3d 538, 538-539), a court "may not rewrite a will 'in order to give effect to an intention which possibly the testator may have had but which is not revealed by the language used in the will' " (*Matter of Rutherford*, 125 AD2d 312, 313, quoting *Matter of Nelson*, 268 NY 255, 258; *see Matter of Cincotta*, 106 AD3d 998, 998, *lv denied* 22 NY3d 857).

Here, unlike the majority, we perceive no conflict between article V (B) of decedent's will and article VII (E). Article V (B) provides, inter alia, that the trust "beneficiary[, i.e., Sally Baumann,] shall retain no right to receive the trust principal or to have my Trustee distribute the trust principal to the beneficiary for her benefit or her estate," and that, upon Baumann's death, the "remaining trust property" shall be distributed in equal shares to decedent's grandchildren, i.e., the objectants-appellants herein (hereafter, grandchildren). Article VII (E) provides that, if the Trustee terminates the trust because it is uneconomical, the assets of the trust shall be given to "the current income beneficiary[, i.e., Baumann,] or beneficiaries in the proportions in which they are entitled to the income therefrom."

The two articles may be read in harmony as providing that, if the trust exists upon Baumann's death, the trust principal shall go to the grandchildren, but that the principal shall go to Baumann if the trust is terminated as uneconomical while Baumann is still alive. We thus agree with the Surrogate that a "plain reading of the Will compels a logical progression that once the Trust is collapsed, the prohibition against principal distributions is no longer operable and the corpus on hand is payable to the Beneficiary."

In our view, the conclusion reached by the majority is premised on the unstated assumption that decedent made a mistake in his will, and that he did not intend for Baumann to receive the trust proceeds upon termination of the trust as uneconomical, as clearly and unambiguously provided for in article VII (E). We agree with the Surrogate that the principles set forth in *Wright v Wright* (118 NYS 994, 996, *affd* 140 AD 634) apply to this case, i.e., that a " 'court should not read into a man's will language which he did not use, or so construe it that his intention, as expressed in the will, will be thwarted, and the court cannot devise a new scheme for a testator or

make a new will.' "

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-02014

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

JOSEPH LAUZONIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLLEEN LAUZONIS, DEFENDANT-APPELLANT.

FLAHERTY & SHEA, BUFFALO (KATHLEEN E. HOROHOE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR PLAINTIFF-RESPONDENT.

LAURA A. MISKELL, ATTORNEY FOR THE CHILDREN, LOCKPORT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 28, 2013. The order, among other things, denied defendant's motion to relocate outside the Lewiston-Porter School District.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first and third ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: In this divorce action, defendant mother sought permission to relocate with the parties' children from Lewiston to Grand Island. An order of custody and visitation provided that "neither party shall relocate the children out of their current school district without written consent from the other parent or a court order approving of same." At the time of entry of that order, the children attended school in the Lewiston-Porter School District in Niagara County. Plaintiff father thereafter cross-moved for sole custody of the children. Supreme Court denied defendant's motion and ordered a hearing on plaintiff's cross motion for sole custody. We agree with defendant that the court erred in denying her motion without conducting a hearing. We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing to determine whether the relocation is in the children's best interests (*see Matter of Chambers v Renaud*, 72 AD3d 1433, 1435).

It is well settled that relocation cases must be considered on a case-by-case basis "with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child[ren]" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739). While a geographic restriction agreed to by the parties and included in a separation agreement "is a relevant factor to consider in determining the child[ren]'s best interests,

it is not dispositive" (*Matter of Mineo v Mineo*, 96 AD3d 1617, 1618 [internal quotation marks omitted]; *see Tropea*, 87 NY2d at 741 n 2; *Matter of Bobroff v Farwell*, 57 AD3d 1284, 1284-1286; *Carlson v Carlson*, 248 AD2d 1026, 1028).

Here, the court failed to consider whether the proposed relocation was in the children's best interests, instead denying defendant's motion on the ground that "there [was] no change in circumstances warranting a hearing on the issue of defendant's relocation." That was error (*see Matter of Chancer v Stowell*, 5 AD3d 1082, 1083; *see also Matter of Adams v Bracci*, 91 AD3d 1046, 1046-1047, *lv denied* 18 NY3d 809). Generally, "[d]eterminations affecting custody and visitation should be made following a full evidentiary hearing" (*Matter of Naughton-General v Naughton*, 242 AD2d 937, 938; *see Matter of Pollard v Pollard*, 63 AD3d 1628, 1628), and we conclude that the submissions of defendant in support of her motion "established the need for a hearing on the issue whether [her] relocation is in the best interests of the child[ren]" (*Matter of Stevens v Stevens*, 286 AD2d 890, 890; *see Liverani v Liverani*, 15 AD3d 858, 858-859).

While no single factor is determinative in a relocation case, "economic necessity . . . may present a particularly persuasive ground for permitting the proposed move" (*Tropea*, 87 NY2d at 739; *see Matter of Thomas v Thomas*, 79 AD3d 1829, 1830; *Matter of Cynthia L.C. v James L.S.*, 30 AD3d 1085, 1085-1086). Here, defendant averred that she was unable to find appropriate, affordable housing or a suitable teaching position in the high-priced Lewiston area (*see Piccinini v Piccinini*, 103 AD3d 868, 870; *Matter of Eddington v McCabe*, 98 AD3d 613, 615; *Carlson*, 248 AD2d at 1027). Although plaintiff disputed several of defendant's factual assertions, particularly with respect to the extent of her job search, he did not assert that the proposed move would be detrimental to the children or to his relationship with the children, and he provided no reason for opposing the move, other than defendant's alleged failure to show a change in circumstances (*see Piccinini*, 103 AD3d at 870; *see generally Tropea*, 87 NY2d at 740-741). The proposed relocation involves a distance of only about 17 miles, and there is no indication in the record that plaintiff's access to the children would be significantly affected by the move (*see Mineo*, 96 AD3d at 1619; *Carlson*, 248 AD2d at 1028). Further, there is no indication in the record that the quality of the education provided by the Grand Island School District is inferior to that of the Lewiston-Porter School District, or that the children's lives would be enhanced educationally by remaining within the Lewiston-Porter School District (*see Mineo*, 96 AD3d at 1619; *Carlson*, 248 AD2d at 1028; *see also Bobroff*, 57 AD3d at 1286).

Contrary to the further contention of defendant with respect to plaintiff's cross motion, however, we conclude that plaintiff made "a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]; *see Matter of Dipaolo v Avery*, 93 AD3d 1240, 1241; *Matter of Bell v Raymond*, 67 AD3d 1410, 1411). It is well established that "the continued deterioration of the parties' relationship is a

significant change in circumstances justifying a change in custody" (*Matter of Gaudette v Gaudette*, 262 AD2d 804, 805, *lv denied* 94 NY2d 790; *see Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561). Here, plaintiff asserted in support of his cross motion that there had been a "complete break[]down in communication" between the parties since entry of the custody order. According to plaintiff, defendant had him arrested on baseless grounds, filed a false child protective services report against him, and refused to discuss important decisions concerning the children's health, education, and counseling. Plaintiff further averred that defendant "actively tried to tarnish [his] reputation in the community," disparaged him in the children's presence, and "actively trie[d] to alienate . . . the children" from him (*see Matter of Fox v Fox*, 93 AD3d 1224, 1224-1225; *Matter of Ciannamea v McCoy*, 306 AD2d 647, 648; *Matter of Fiori v Fiori* [appeal No. 1], 291 AD2d 900, 900). Although defendant disputes plaintiff's assertions, "[i]t is well established that determinations affecting custody should be made following a full evidentiary hearing, not on the basis of conflicting allegations" (*Matter of Smith v Brown*, 272 AD2d 993, 993; *see Pollard*, 63 AD3d at 1628).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-02013

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

MARVIN ZIELONKA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF SARDINIA, TOWN COUNCIL OF TOWN OF SARDINIA AND TOWN OF SARDINIA TOWN SUPERVISOR, DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered October 9, 2013. The order denied the motion of defendants to dismiss the complaint and/or for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part, dismissing the complaint in its entirety against defendants Town Council of Town of Sardinia and Town of Sardinia Town Supervisor and dismissing the second cause of action against defendant Town of Sardinia, and as modified the order is affirmed without costs.

Memorandum: Plaintiff was employed as code enforcement officer for defendant Town of Sardinia (Town) until his termination by defendant Town Council of Town of Sardinia (Council). Following his termination, plaintiff commenced this action against the Town, the Council, and defendant Town of Sardinia Town Supervisor (Supervisor) under Civil Service Law § 75-b, the public employees' whistleblower statute, alleging, inter alia, that his "termination was in retaliation for his refusal to perform" unauthorized functions and for his "act[ing] as a whistle-blower in reporting" those unauthorized directives "to the Town's outside attorney and others." Supreme Court denied defendants' pre-answer "motion to dismiss and/or for summary judgment," and defendants appeal.

We agree with defendants that the court erred in denying their motion insofar as it sought dismissal of the complaint against the Council and the Supervisor, and we therefore modify the order accordingly. Civil Service Law § 75-b protects a "public employee" from discharge or discipline by a "public employer" (§ 75-b [2] [a]). The statute applies only to governmental entities that actually employ the plaintiff (*see* § 75-b [1] [a]; *Frank v State of N.Y., Off. of Mental Retardation & Dev.*

Disabilities, 86 AD3d 183, 188; *Moore v County of Rockland*, 192 AD2d 1021, 1024). Furthermore, the Town cannot be held liable for punitive damages absent an express provision in the statute (*see Krohn v New York City Police Dept.*, 2 NY3d 329, 335-336; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1142). We therefore further modify the order by granting that part of the motion seeking dismissal of the second cause of action against the Town.

We reject defendants' contention, however, that the court erred insofar as it denied their motion to dismiss the first cause of action against the Town for failure to state a cause of action. The public employees' whistleblower statute prevents a public employer from, inter alia, terminating a public employee "because the employee discloses to a governmental body information . . . which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action" (Civil Service Law § 75-b [2] [a]). The term "improper governmental action" refers to "any action by a public employer or employee, or an agent" thereof, "which is undertaken in the performance of [his or her] official duties . . . and which is in violation of any federal, state, or local law, rule or regulation" (§ 75-b [2] [a]). The list of governmental bodies to which disclosure may be made includes, as relevant herein, a member of a town's legislature (*see* § 75-b [1] [c] [iii]). In addition, the statute requires that the employee, prior to disclosing the information, must have "made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and . . . provide[d] the appointing authority or designee a reasonable time to take appropriate action" (§ 75-b [2] [b]). The term "appointing authority" refers to "the officer, commission or body having the power of appointment to subordinate positions" (§ 2 [9]), which in this case is the Supervisor and the Council.

We conclude that plaintiff adequately alleged that he reasonably believed that he had been directed to perform an unlawful act. Civil Service Law § 75-b does not require an actual violation of the law for a subsequent action to be maintained thereunder (*see Bordell v Gen. Elec. Co.*, 88 NY2d 869, 871; *Barker v Peconic Landing at Southold, Inc.*, 885 F Supp 2d 564, 570; *see also* Labor Law § 740). Plaintiff need have had only "a reasonable belief of a possible violation" of the law (*Bordell*, 88 NY2d at 871; *see* § 75-b [2] [a] [ii]). Here, plaintiff alleged, inter alia, that he "could not legally" issue a stop work order to a developer working on a project, as he had been directed by the Supervisor, because "the developer had all of the necessary permits," and defendant's submissions do not conclusively establish that the developer lacked the necessary permits (*see generally Gibraltar Steel Corp. v Gibraltar Metal Processing*, 19 AD3d 1141, 1142). Construing the complaint liberally (*see Youssef v Triborough Bridge & Tunnel Auth.*, 24 AD3d 661, 661; *see also* CPLR 3026), and accepting plaintiff's factual allegations and all possible favorable inferences as true (*see Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that plaintiff adequately alleged that he believed that he had been ordered to commit an unlawful act and that his belief was reasonable.

We reject defendants' contention that plaintiff's purported act of

insubordination for failing to carry out the allegedly unlawful directive constitutes a " 'separate and independent basis' " for the termination (*cf. Rigle v County of Onondaga*, 267 AD2d 1088, 1089, *lv denied* 94 NY2d 764), inasmuch as the purported act of insubordination related directly to plaintiff's act of disclosure. We further conclude that plaintiff adequately alleged that he made a good faith effort to inform either the Council or the Supervisor (*see generally Brohman v New York Convention Ctr. Operating Corp.*, 293 AD2d 299, 299-300), prior to disclosure to a governmental body (*see* Civil Service Law § 75-b [2] [a], [b]). Plaintiff averred in his affidavit that he disclosed allegedly unlawful directives to the Supervisor and to at least one person who qualifies as a member of a governmental body, i.e., a Town Councilman (*see* § 75-b [1] [c] [iii]). Lastly, the transcript from plaintiff's examination pursuant to General Municipal Law § 50-h, which plaintiff submitted in opposition to the motion, supports the inference that plaintiff had multiple conversations with the Supervisor and the Town Attorney, giving them ample opportunity to withdraw the allegedly unlawful directive (*see* Civil Service Law § 75-b [2] [b]), before disclosing that directive to the Town Councilman (*see generally Leon*, 84 NY2d at 87-88).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

620

CA 13-01580

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

GENERAL MOTORS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

B.J. MUIRHEAD CO., INC., DEFENDANT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO, NEW YORK CITY (TIMOTHY J. MCHUGH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 15, 2013. The order denied the motion of defendant to dismiss the complaint and granted the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff and defendant entered into an agreement, as set forth in a purchase order, whereby defendant would provide certain maintenance services at a plant owned and operated by plaintiff. The agreement provided that defendant "shall maintain insurance coverage with carriers acceptable to [plaintiff] and in the amounts set forth in the Special Terms," which in turn required, inter alia, that defendant obtain insurance for "liability arising from premises." The parties agree that defendant obtained insurance protecting it from the specified risks. When one of defendant's employees commenced an action against plaintiff alleging that he was injured by a dangerous condition on the premises, defendant's insurer declined to defend plaintiff on the ground that plaintiff was not a named insured or otherwise covered by the policy that the insurer issued to defendant. Plaintiff commenced this breach of contract action, contending that defendant failed to comply with the contractual requirement that it obtain insurance protecting plaintiff. Defendant appeals from an order that, inter alia, denied its motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment.

We agree with defendant that the agreement does not require it to obtain insurance coverage on behalf of plaintiff, and we therefore reverse the order and dismiss the complaint. It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569). Furthermore, "[i]n determining whether a[n agreement] is ambiguous, the court first must determine whether the [agreement] 'on its face is reasonably susceptible of more than one interpretation'" (*Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1397, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573). Here, we reject plaintiff's contention that the agreement is reasonably susceptible of an interpretation requiring that defendant obtain insurance covering plaintiff. "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that[, as here,] merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured" (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647; *see Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966-967; *cf. Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1477, *lv dismissed in part and denied in part* 17 NY3d 843). Contrary to plaintiff's contention, "although the insurance rider in this case required [defendant] to obtain insurance on the [premises], there was no requirement that [plaintiff] be named as an additional insured on the policy" (*Wagner v Ploch*, 85 AD3d 1547, 1548).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

621

CA 13-02051

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

MICHAEL FASOLO AND PREMIER BUILDING GROUP, INC.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSEPH A. SCARAFILE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ALBANY (DAVID B. CABANISS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 20, 2013. The order granted defendant's motion for summary judgment dismissing plaintiffs' second amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of an alleged oral partnership agreement between Michael Fasolo (plaintiff) and defendant in connection with the development and sale of residential property. In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendant's motion for summary judgment dismissing the second amended complaint. In appeal No. 2, plaintiffs appeal from an order denying their motion for leave to reargue and renew their opposition to defendant's motion. We note at the outset with respect to appeal No. 2 that the appeal from the order therein must be dismissed to the extent that Supreme Court denied leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984). We otherwise affirm the order in each appeal.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10 [1]; *see Czernicki v Lawniczak*, 74 AD3d 1121, 1124). "When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties" (*Czernicki*, 74 AD3d at 1124; *see Bianchi v Midtown Reporting Serv., Inc.*, 103 AD3d 1261, 1261; *Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1565). Relevant factors for the court to consider in determining whether a partnership existed include the intent of the parties, whether there was a sharing of profits and losses, and

whether there was joint control and management of the business (*see Bianchi*, 103 AD3d at 1261-1262; *Kyle v Ford*, 184 AD2d 1036, 1036-1037; *Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508). "No one factor is determinative[but, rather,] it is necessary to examine the parties' relationship as a whole" (*Kyle*, 184 AD2d at 1037).

Here, we conclude with respect to the order in appeal No. 1 that defendant met his initial burden of establishing that no partnership existed (*see Cleland v Thirion*, 268 AD2d 842, 843; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of the motion, defendant submitted, inter alia, plaintiff's deposition testimony and tax filings establishing that the parties did not file partnership tax returns and that plaintiff reported income and losses from the business on his personal income tax returns (*see F&K Supply v Willowbrook Dev. Co.*, 304 AD2d 918, 920-921, *lv denied* 1 NY3d 502; *Cleland*, 268 AD2d at 844). The alleged partnership did not have a business name or bank account, and there were no partnership assets or capital contributions, which "strongly suggests that no partnership existed" (*Kyle*, 184 AD2d at 1036; *see Brodsky v Stadlen*, 138 AD2d 662, 663; *cf. Czernicki*, 74 AD3d at 1125).

With respect to the residential property at issue, defendant established that it was owned solely by plaintiffs and that defendant had no legal interest in the property. "[A]lthough individual property ownership does not prove the absence of a partnership, it can be evidence that the parties did not intend to create a partnership relation" (Partnership Law & Practice § 5:16; *see F&K Supply*, 304 AD2d at 921). Moreover, plaintiff admitted that defendant never agreed to share plaintiffs' losses with respect to the property at issue, "which is an 'essential element' of a partnership" (*Prince v O'Brien*, 256 AD2d 208, 212; *see Needel v Flaum*, 248 AD2d 957, 958; *Brodsky*, 138 AD2d at 664; *see generally* Partnership Law & Practice § 5:14). The record further reflects that plaintiffs controlled the project, which weighs heavily against the existence of a partnership (*see F&K Supply*, 304 AD2d at 920-921; *see also Cleland*, 268 AD2d at 843-844; *Needel*, 248 AD2d at 958). Although defendant signed the purchase order for the property, he averred that he did so at plaintiff's "request and instruction."

We further conclude that plaintiffs failed to raise a triable issue of fact with respect to the existence of a partnership (*see Cleland*, 268 AD2d at 843-844; *Needel*, 248 AD2d at 958; *see generally Zuckerman*, 49 NY2d at 562). In opposition to the motion, plaintiffs submitted evidence that the parties had a longstanding business and personal relationship and that, on several occasions prior to the dispute at issue, they split the profits from the sales of homes on which they worked together. Although the sharing of business profits constitutes prima facie evidence of the existence of a partnership (*see* Partnership Law § 11 [4]), it is not dispositive; rather, "all of the elements of the relationship must be considered" (*Blaustein*, 161 AD2d at 508; *see Boyarsky v Froccaro*, 131 AD2d 710, 712). Here, the record establishes that the parties did not "carry on" a single business "*as co-owners*" (§ 10 [1] [emphasis added]). Instead, the evidence establishes that plaintiff and defendant each had their own businesses and that they periodically collaborated on projects for their mutual benefit (*see generally* Partnership Law & Practice § 5:1).

Defendant's occasional use of partnership terminology is insufficient to raise an issue of fact with respect to the existence of a partnership (*see Kyle*, 184 AD2d at 1037).

Finally, we reject plaintiffs' contention that the court erred in failing to consider plaintiff's purported "transcripts" of recorded conversations between the parties. Even assuming, arguendo, that the transcripts were properly before the court (*see generally Matter of Cross v Davis*, 269 AD2d 833, 834, *lv denied* 95 NY2d 756), we conclude that they do not raise an issue of fact whether the parties formed a partnership.

We conclude with respect to the order in appeal No. 2 that the court properly denied that part of plaintiffs' motion for leave to renew. It is well settled that "[a] motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion" (*Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482; *see* CPLR 2221 [e] [2]). Here, the evidence submitted on renewal, i.e., an affidavit of plaintiffs' accountant, simply defended the accounting attached to the original complaint and did not present any new facts (*see Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170, *lv denied* 11 NY3d 825). In any event, we conclude that, "even if renewal had been granted, the . . . information [contained in the affidavit] would not have resulted in the denial of the original motion" (*Cole v Furman* [appeal No. 1], 285 AD2d 982, 982).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

622

CA 13-02057

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

MICHAEL FASOLO AND PREMIER BUILDING GROUP, INC.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSEPH A. SCARAFILE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ALBANY (DAVID B. CABANISS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 11, 2013. The order denied plaintiffs' motion for leave to renew and reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same Memorandum as in *Fasolo v Scarafile* ([appeal No. 1] ___ AD3d ___ [Aug. 8, 2014]).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

624

CA 13-00998

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

KAI LIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL CENTER, UNIVERSITY DENTAL FACULTY GROUP, DR. CARLO ERCOLI, DR. JANE BREWER, OSBORN, REED & BURKE, LLP, CHRISTIAN C. CASINI, ESQ., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

KAI LIN, PLAINTIFF-APPELLANT PRO SE.

THE WOLFORD LAW FIRM LLP, ROCHESTER (LEA T. NACCA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL CENTER, UNIVERSITY DENTAL FACULTY GROUP, DR. CARLO ERCOLI, OSBORN, REED & BURKE, LLP AND CHRISTIAN C. CASINI, ESQ.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT DR. JANE BREWER.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 15, 2013. The judgment and order granted the motions of defendants to dismiss the complaint, prohibited plaintiff from initiating any further actions against defendants without leave of court and granted legal fees and costs to defendants-respondents.

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

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, fraud and spoliation of evidence after her prior dental malpractice action was dismissed and the order dismissing that action was affirmed by this Court (*Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, *lv dismissed in part and denied in part* 17 NY3d 899, *rearg denied* 18 NY3d 878). Plaintiff appeals from a judgment and order that, inter alia, granted defendants' motions to dismiss the instant complaint and imposed sanctions in the form of an award of legal fees and costs to defendants-respondents (defendants). We reject plaintiff's contention that Supreme Court erred in dismissing the complaint. To the extent that the complaint alleged "fraud, misrepresentation, or other misconduct of an adverse party" committed during the course of the prior litigation, plaintiff's sole remedy was a motion to vacate the court's

prior order pursuant to CPLR 5015 (a) (3). "A litigant's remedy for alleged fraud in the course of a legal proceeding 'lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the [order] due to its fraudulent procurement, not a second plenary action collaterally attacking the [order]' " (*Vinokur v Penny Lane Owners Corp.*, 269 AD2d 226, 226; *see St. Clement v Londa*, 8 AD3d 89, 90). In addition, "the tort of third-party negligent spoliation of evidence . . . is not cognizable in this state" (*Ortega v City of New York*, 9 NY3d 69, 73). We have considered plaintiff's other contentions with respect to the dismissal of the complaint, and we conclude that they are without merit. Finally, we reject plaintiff's contention that the court erred in imposing sanctions. Absent a "clear abuse of discretion, we will not disturb the court's determination that the conduct in question was frivolous and that it warranted the imposition of" sanctions in the form of legal fees and costs (*Matter of Bedworth-Holgado v Holgado*, 85 AD3d 1589, 1590). We decline, however, to grant defendants' request for the imposition of sanctions based on plaintiff's pursuit of this appeal.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

658

CA 13-01539

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

JESSICA SANCHEZ, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

MARY E. DAWSON AND BIRNIE BUS SERVICE, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BREEDLOVE & NOLL, LLP, CLIFTON PARK (CARRIE MCLOUGHLIN NOLL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 28, 2012. The judgment dismissed the complaint upon a verdict of no cause of action.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Jessica Sanchez (plaintiff) when her vehicle was rear-ended by a vehicle driven by defendant Mary E. Dawson, an employee of defendant Birnie Bus Service, Inc. A jury subsequently determined that plaintiff did not sustain a serious injury under the significant disfigurement, permanent consequential limitation of use, significant limitation of use, or 90/180-day categories of Insurance Law § 5102 (d). Contrary to plaintiff's contention, Supreme Court properly denied her motion to set aside the verdict inasmuch as the jury fairly interpreted the evidence in finding that plaintiff did not sustain a serious injury.

The standard for determining whether a verdict should be set aside is whether "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]). Thus, a verdict should not be set aside unless it is " 'palpably irrational' " (*Quigley v Sikora*, 269 AD2d 812, 813) or " 'palpably wrong' " (*Mohamed v Cellino & Barnes*, 300 AD2d 1116, 1117, *lv denied* 99 NY2d 510). "To conclude as a matter of law that a jury verdict is not supported by sufficient evidence, there must be 'no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence

presented at trial' " (*Mazzella v Capobianco*, 27 AD3d 532, 532). We also note that, in evaluating a jury verdict, we accord " 'great deference . . . to the fact-finding function of the jury, [which] is in the foremost position to assess witness credibility' " (*Guthrie v Overmeyer*, 19 AD3d 1169, 1170).

Contrary to plaintiff's contention, a fair interpretation of the evidence supports the jury's determination that a postaccident surgical scar on her neck does not constitute a significant disfigurement (*see San George v Prowse*, 259 AD2d 988, 989). A significant disfigurement exists if a reasonable person viewing the plaintiff's body in its altered state regards "the condition as unattractive, objectionable, or the subject of pity or scorn" (*Heller v Jansma*, 103 AD3d 1160, 1161; *see Loiseau v Maxwell*, 256 AD2d 450, 450). Here, the subject scar, which the jury and the court had an opportunity to view in its entirety, is approximately four inches in length, and we perceive no basis for disturbing the jury's determination with respect thereto.

Contrary to plaintiff's further contention, with respect to the remaining categories of serious injury, we conclude that the jury was entitled to credit the testimony of defendants' witnesses and reject the testimony of plaintiff's witnesses (*see Guthrie*, 19 AD3d at 1170; *Betit v Weeden*, 251 AD2d 930, 932). Indeed, the record establishes that plaintiff's physicians and expert witnesses were unaware of certain facts that could have impacted their opinions, including a subsequent motor vehicle accident and a college physical education class. With respect to the physical education class, defendants presented the testimony of plaintiff's former physical education teacher who noted that, after the accident, plaintiff participated in both cardiovascular fitness and strength training, knowledge of which may have affected the opinions of her witnesses on the issue of the extent of plaintiff's claimed injuries. Inasmuch as plaintiff's physicians and expert witnesses acknowledged that, if the history as provided to them by plaintiff was inaccurate or incomplete, then their opinions might be inaccurate or incomplete, we conclude that the jury's determinations with respect to the remaining categories of serious injury constitute a fair interpretation of the evidence and were not " 'palpably irrational' " (*Quigley*, 269 AD2d at 813). Even assuming, arguendo, that plaintiff established a prima facie case of serious injury, the jury nevertheless was entitled to reject the opinions of plaintiff's physicians and expert witnesses (*see Brennan v Bauman & Sons Buses*, 107 AD2d 654, 655).

In view of our determination, we see no need to address plaintiff's remaining contention.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

659

CA 13-02157

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

JESSICA SANCHEZ, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V ORDER

MARY E. DAWSON AND BIRNIE BUS SERVICE, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BREEDLOVE & NOLL, LLP, CLIFTON PARK (CARRIE MCLOUGHLIN NOLL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 18, 2013. The order and judgment denied the motion of plaintiff Jessica Sanchez to set aside a jury verdict.

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

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

662

CA 13-02037

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

ALEXANDRA VILLAFRANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID N. ROSS, INC., DAVID ROSS, INDIVIDUALLY, AND HOWARD ROSS, INDIVIDUALLY, DEFENDANTS-RESPONDENTS.

SPANN & SPANN, P.C., DUNKIRK, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 7, 2013. The order granted the motion of defendants David N. Ross, Inc. and Howard Ross for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants David N. Ross, Inc. and Howard Ross.

Memorandum: Plaintiff commenced this action seeking injunctive relief and monetary damages based upon damage to her property allegedly caused by defendants' diversion of additional surface water onto her property. We agree with plaintiff that Supreme Court erred in granting the motion of defendants David N. Ross, Inc. (the Ross corporation) and Howard Ross (defendant) for summary judgment dismissing the complaint against them. We therefore reverse the order, deny the motion, and reinstate the complaint against those two parties (collectively, defendants).

Plaintiff and the Ross corporation own neighboring properties in the Town of Westfield, with plaintiff's property located to the west of the Ross property. Because of the topography of the area, surface water on the two properties naturally flows in a northwesterly direction. There is a central drainage ditch between the two properties that flows from the south to the north (hereafter, north-south ditch). The north-south ditch begins on the Ross property, runs along the boundary between the properties, and then extends north onto plaintiff's property. In the 1960s, defendant's father and plaintiff's father-in-law agreed to install an underground clay pipe running from east to west, starting from a catch basin on the Ross property and ending at a creek located on plaintiff's

property. The catch basin is located at the southern end of the north-south ditch, and its purpose is to act as a "clean-out in case the lines get plugged." There is also a 700- to 800-foot lateral drainage ditch running from east to west across the Ross property (hereafter, east-west ditch), which empties into the catch basin. Plaintiff alleges that defendants have made various modifications to the original drainage system over time, and that such modifications have diverted additional water from the Ross property onto her property.

A plaintiff "seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the defendant's land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendant's property" (*Cottrell v Hermon*, 170 AD2d 910, 911, *lv denied* 78 NY2d 853; *see Prachel v Town of Webster*, 96 AD3d 1365, 1366; *Moone v Walsh*, 72 AD3d 764, 764). Here, defendants failed to meet their burden on their motion of establishing their entitlement to judgment as a matter of law inasmuch as their own moving papers raise an issue of fact whether they diverted surface water onto plaintiff's property by artificial means (*see Vanderstow v Acker*, 55 AD3d 1374, 1375; *cf. Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant admitted that, in the summer of 2010, he "upgraded" a clay pipe located within the east-west ditch by removing it and installing 800 feet of perforated plastic pipe. Although that pipe is located entirely on the Ross property, it carries water into the north-south ditch, which ultimately terminates on plaintiff's property. Defendants also acknowledged that they had installed about 1,000 feet north of the catch basin a pipe that drains water from the Ross property and empties it directly into the north-south ditch. We agree with plaintiff and the court that whether defendants' actions constituted mere "routine maintenance and repair of existing . . . pipes", as defendants contend, raises an issue of fact. Moreover, defendants further acknowledged that there is periodic pooling of water around the catch basin. While defendants emphasize that such pooling occurred entirely on their property, the catch basin is located less than seven feet from the property line and, further, it is undisputed that the accumulated water ends up in the north-south ditch, where it ultimately flows onto plaintiff's property.

Even assuming, arguendo, that defendants met their initial burden on the motion, we conclude that plaintiff raised an issue of fact in opposition (*see Prachel*, 96 AD3d at 1366; *Moone*, 72 AD3d at 765; *cf. Tatzel v Kaplan*, 292 AD2d 440, 441). Plaintiff submitted, inter alia, affidavits of her husband in which he averred that defendants replaced the clay pipe in the east-west ditch in 2010 and "re-routed" that pipe to the north-south ditch, thus diverting additional water onto plaintiff's property. In his 2012 affidavit, plaintiff's husband further averred that defendants "are continuing this diversion process . . . as I have observed more ditching that is being placed with backhoes." A survey prepared in 2011 corroborates plaintiff's assertion that water flowing east to west across the Ross property ends up in the north-south ditch as opposed to flowing west through the clay pipe into the creek as originally agreed by the

parties and/or their predecessors. Further, plaintiff submitted an affidavit from an engineering expert who averred that, at some point between 2009 and 2012, defendants dug a new ditch connecting the east-west ditch to the north-south ditch and that, as a result, storm water that previously had flowed into the catch basin and through the underground clay pipe to the creek "is now redirected to the north and ultimately reaches [plaintiff's] property." In addition to the new plastic pipe in the east-west ditch that defendant admittedly installed, the expert observed "numerous perforated plastic pipe[s] under drains . . . on the Ross property to collect subsurface water," which "appear[ed] to be relatively new." The expert opined, within a reasonable degree of engineering certainty, that the "flow rate" and volume of water entering plaintiff's property from the north-south ditch is "more than twice . . . what previously existed," and that "the majority of this increased flow is directly due to the modifications [that defendants] made after 2009" (*see Prachel*, 96 AD3d at 1366).

We further agree with plaintiff that there is an issue of fact whether the drainage system modifications on defendants' property were a proximate cause of the alleged damage to her property (*see id.; Vanderstow*, 55 AD3d at 1375-1376). Defendants emphasize plaintiff's claimed inability to develop a subdivision on the property, asserting that such inability is the result of a variety of factors unrelated to any conduct on their part. Plaintiff, however, may recover damages for any diminution in the value of her property or the cost of remediation irrespective of the proposed subdivision (*see generally Jenkins v Etlinger*, 55 NY2d 35, 39).

Finally, we agree with plaintiff that there is an issue of fact with respect to the individual liability of defendant. It is well established that "[a] corporate officer may be held personally liable for a tort of the corporation if he or she committed or participated in its commission, whether or not his or her acts are also by or for the corporation" (*Apollo H.V.A.C. Corp. v Halpern Constr., Inc.*, 55 AD3d 855, 857; *see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541; *see also Kopec v Hempstead Gardens*, 264 AD2d 714, 716). Here, plaintiff alleged, and defendant admitted, that he personally cleaned out the east-west ditch in 2005 and replaced the east-west pipe in 2010. Defendant further admitted that, north of the catch basin, he replaced another pipe that flows into the north-south ditch. We thus conclude that there is an issue of fact whether defendant is individually liable for his allegedly tortious conduct (*see Huggins v Parkset Plumbing Supply, Inc.*, 7 AD3d 672, 673; *cf. Kopec*, 264 AD2d at 716; *Clark v Pine Hill Homes*, 112 AD2d 755, 755).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

664

CA 13-02212

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

ARTHUR E. BIGELOW, AS ADMINISTRATOR OF THE
ESTATE OF TERRANCE BIGELOW, DECEASED,
PLAINTIFF,

V MEMORANDUM AND ORDER

GENERAL ELECTRIC COMPANY, ET AL., DEFENDANTS.

GENERAL ELECTRIC COMPANY, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

CARRIER CORPORATION, THIRD-PARTY
DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (JOHN P. FREEDENBERG OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (JONATHAN S. HICKEY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered February 6, 2013. The order, among other things, denied the motion of third-party plaintiff for summary judgment granting common-law indemnification and granted the cross motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: In 2005 plaintiff's decedent was injured in a fire in his mobile home, and he died from those injuries nine days later. The fire originated in the area of an electrical outlet with a window air conditioning unit plugged into it, and an investigation conducted by the Genesee County Sheriff's Office concluded that the cause of the fire was most likely electrical in nature. The subject air conditioning unit was manufactured by third-party defendant, Carrier Corporation (Carrier), and marketed and sold by defendant-third-party plaintiff, General Electric Company (GE), under its brand name. Plaintiff commenced this negligence and strict products liability action against three defendants, including GE, on the theory that the fire was caused by the allegedly defective air conditioning unit. When Carrier refused to provide a defense and indemnification for GE in the main action, GE commenced this third-party

action seeking, inter alia, common-law indemnification from Carrier in the underlying action.

GE thereafter moved for summary judgment granting "common[-]law indemnification for all potential liability which may arise with respect to plaintiff's claims," and sought reimbursement from Carrier for all fees, costs, and expenses incurred by GE in defending the underlying action. Carrier cross-moved for summary judgment dismissing the third-party complaint on the ground that there had been no determination that GE or Carrier was liable for decedent's injuries and, further, that there was no evidence that the subject air conditioning unit was defective. GE also moved for summary judgment dismissing the complaint in the main action, and Carrier joined in that request by way of a cross motion. In a single decision, the court granted GE's motion in the underlying action, concluding that the air conditioning unit was not defective and that the fire was likely caused by a faulty wiring at the outlet and granted Carrier's cross motion to dismiss the third-party complaint, concluding that GE was not entitled to common-law indemnification from Carrier because there was no finding of fault on the part of Carrier.

The issue in this case is whether GE, a downstream retailer, is entitled to recoup its costs in defending a products liability action from Carrier, an upstream manufacturer, when they both are ultimately absolved of liability. We conclude that GE is not entitled to recoupment, and we therefore affirm.

Indemnification is grounded in the equitable principle that the party who has committed a wrong should pay for the consequences of that wrong (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 291; *Oceanic Steam Nav. Co. [Ltd.] v Compania Transatlantica Espanola*, 134 NY 461, 468). Thus, New York courts have consistently held that "common-law indemnification lies only against those who are *actually at fault*" (*Nourse v Fulton County Community Heritage Corp.*, 2 AD3d 1121, 1122 [emphasis added]; *see Colyer v K Mart Corp.*, 273 AD2d 809, 810), i.e., the "*actual wrongdoer*" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [emphasis added]). In the products liability context, a manufacturer is held accountable as a "wrongdoer" when it releases a defective product into the stream of commerce (*see Rosado v Proctor & Schwartz*, 66 NY2d 21, 25-26), and "innocent" sellers who merely distribute the defective product are entitled to indemnification from the at-fault manufacturer (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 62, *lv dismissed* 100 NY2d 614). That common-law right of indemnification "encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party" (*Chapel v Mitchell*, 84 NY2d 345, 347; *see Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265, *lv dismissed* 9 NY3d 891; *Colyer*, 273 AD2d at 810).

Although there are no state court cases in New York that directly address the issue presented here, we note that federal courts and the vast majority of courts in other states have concluded that, in the absence of fault on the part of the manufacturer for producing a defective product, there is no implied right to indemnification for defense costs assumed

by downstream distributors (*see e.g. Innovation Ventures, LLC v Ultimate One Distrib. Corp.*, ___ F Supp 2d ___, ___ [ED NY]; *Luna v American Airlines*, 769 F Supp 2d 231, 239 [SD NY]; *Papas v Kohler Co., Inc.*, 581 F Supp 1272, 1274 [Pa]; *Merck & Co., Inc. v Knox Glass, Inc.*, 328 F Supp 374, 378 [Pa]; *Clark v Hauck Mfg. Co.*, 910 SW2d 247, 252-253, *overruled on other grounds by Martin v Ohio County Hosp.*, 295 SW3d 104 [Ky]; *Krasny-Kaplan Corp. v Flo-Tork, Inc.*, 66 Ohio St 3d 75, 78-80, 609 NE2d 152, 154-155; *Borchard v WEFCO, Inc.*, 112 Idaho 555, 559, 733 P2d 776, 780; *Greenland v Ford Motor Co., Inc.*, 115 NH 564, 571, 347 A2d 159, 165; *SEMCO Energy, Inc. v Eclipse, Inc.*, 2012 WL 6049655, *6-7 [Mich App]; *Automatic Time & Control Co., Inc. v ifm Electronics*, 410 Pa Super 437, 438-442, 600 A2d 220, 221-223; *Oates v Diamond Shamrock Corp.*, 23 Mass App Ct 446, 448-449, 503 NE2d 58, 59-60, *review denied* 399 Mass 1104). In our view, those cases are persuasive and in accord with New York law on common-law indemnification and sound considerations of public policy.

Where, as here, it is ultimately determined that the subject product is free from defect, there is no "fault" or "wrongdoing" on the part of the manufacturer (*see generally Rosado*, 66 NY2d at 25-26). In that situation, we see no valid basis for shifting the retailer's defense costs onto the manufacturer inasmuch as *both* the retailer *and* the manufacturer are innocent parties. Thus, "the retailer is in a position no different from that of any other defendant forced to defend against spurious claims" (*Hanover Ltd. v Cessna Aircraft Co.*, 758 P2d 443, 448 [Utah App]). We therefore conclude that the
" 'general rule [that] attorneys' fees and disbursements are incidents of litigation' " and that each litigant is required to bear its own costs should apply (*Mount Vernon City Sch. Dist. v Nova Cas. Co.*, 19 NY3d 28, 39; *see Papas*, 581 F Supp at 1274; *Oates*, 23 Mass App Ct at 448-449, 503 NE2d at 59-60). To hold otherwise would require manufacturers to "become the insurer of [the] seller's defense costs, irrespective of whether the product was defectively manufactured" (*Merck & Co., Inc.*, 328 F Supp at 378; *see Greenland*, 115 NH at 571, 347 A2d at 165; *Automatic Time & Control Co., Inc.*, 410 Pa Super at 440, 600 A2d at 222). We decline to adopt such a rule.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

666

CA 12-01496

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

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

V MEMORANDUM AND ORDER

ANTHONY NERVINA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 17, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a detained sex offender requiring civil management.

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

Memorandum: In appeal No. 1, respondent appeals from an order determining that he is a dangerous sex offender requiring civil management pursuant to Mental Hygiene Law article 10. The jury found that respondent was sexually motivated in committing the crime of attempted burglary in the second degree and that he suffers from a mental abnormality (*see* § 10.03 [i]; *see also* Penal Law § 140.25 [2]). In appeal No. 2, respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility. We affirm in both appeals.

With respect to appeal No. 1, we note that the court declined to rule on that part of respondent's pretrial motion to preclude hearsay evidence and expressly directed respondent to raise appropriate objections at the time of trial, which respondent failed to do. This case is therefore distinguishable from *Matter of State of New York v Bass* (___ AD3d ___ [July 3, 2014]), in which the respondent's hearsay contention was preserved because the court expressly denied the respondent's motion in limine to preclude evidence on that ground. We therefore conclude that respondent's contention that his due process rights were violated when petitioner's experts provided testimony about the hearsay evidence that formed the basis of their opinions is unpreserved for our review (*see Matter of State*

of New York v Wilkes [appeal No. 2], 77 AD3d 1451, 1452), and we decline to exercise our power to review that contention in the interest of justice (*see Matter of State of New York v Muench*, 85 AD3d 1581, 1582). Contrary to respondent's contention, the recent decision from the Court of Appeals in *People v Finch* (___ NY3d ___ [May 13, 2014]) does not support his position that, because he objected to hearsay presented at the subsequent SIST violation hearing, he preserved his contention regarding hearsay presented at the previous jury trial. The Court of Appeals held in *Finch* that "a lawyer is not required, in order to preserve a point, to *repeat* an argument that the court has *definitively rejected*" (*id.* at ___ [emphasis added]). The Court did not hold that an attorney's objection at a later proceeding preserves for appellate review an alleged error in an earlier proceeding.

We reject respondent's further contention in appeal No. 1 that the jury's determination that the underlying crime was sexually motivated is against the weight of the evidence (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1301, *lv denied* 20 NY3d 856). To the extent that respondent contends that the evidence was legally insufficient to establish sexual motivation, we also reject that contention. Petitioner's evidence presented a valid line of reasoning and permissible inferences that could lead a rational jury to the conclusion that respondent committed the underlying offense "in whole or in substantial part for the purpose of [his] direct sexual gratification" (Mental Hygiene Law § 10.03 [s]; *see Matter of State of New York v Farnsworth*, 107 AD3d 1444, 1445).

We reject respondent's further contention in appeal No. 1 that the jury's verdict with respect to mental abnormality is against the weight of the evidence. Although respondent's expert witness testified that respondent did not suffer from a mental abnormality, the jury's verdict is entitled to deference, and we conclude that "the evidence does not preponderate[] so greatly in [respondent's] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence" (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474, *lv denied* 17 NY3d 702 [internal quotation marks omitted]). Respondent's further contention in appeal No. 1 that the personality disorders with which petitioner's expert witnesses diagnosed him cannot serve as the basis for a finding of mental abnormality is without merit (*see Matter of State of New York v Donald DD.*, 107 AD3d 1062, 1063-1064, *lv granted* 21 NY3d 866). The Mental Hygiene Law does not require that the underlying "condition, disease, or disorder" serving as the basis for a finding of mental abnormality have a sexual component to its diagnosis; rather, the law requires only that the underlying "condition, disease or disorder" affect respondent "in a manner that predisposes [him] to the commission of conduct constituting a sex offense and that results in [respondent] having serious difficulty in controlling such conduct" (§ 10.03 [i]). Here, both of petitioner's expert witnesses testified that the personality disorders with which they diagnosed respondent predisposed him to commit sex offenses and resulted in respondent's serious difficulty in controlling his behavior.

Contrary to respondent's contention in appeal No. 2, we conclude that, at the hearing regarding respondent's alleged violation of his SIST conditions, petitioner established by clear and convincing evidence that

respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.03 [e]; 10.07 [f]). Finally, we reject respondent's further contention in appeal No. 2 that "the court was required to specifically address the issue of a less restrictive alternative" (*Matter of State of New York v Gooding*, 104 AD3d 1282, 1282, *lv denied* 21 NY3d 862).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

667

CA 13-00996

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

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

V MEMORANDUM AND ORDER

ANTHONY NERVINA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered May 8, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Same Memorandum as in *Matter of State of New York v Nervina* ([appeal No. 1] ___ AD3d ___ [Aug. 8, 2014]).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

668

CA 13-02066

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

IN THE MATTER OF MATTHEW GRAF AND BETH GRAF, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF LIVONIA, FINGER LAKES TIMBER COMPANY, INC., AND TOWN OF LIVONIA JOINT ZONING BOARD OF APPEALS, RESPONDENTS-RESPONDENTS.

STEVEN D. SESSLER, GENESEO, FOR PETITIONERS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (TERENCE L. ROBINSON, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF LIVONIA AND TOWN OF LIVONIA JOINT ZONING BOARD OF APPEALS.

WOODS OVIATT GILMAN, LLP, ROCHESTER (REUBEN ORTENBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT FINGER LAKES TIMBER COMPANY, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered September 5, 2013 in a CPLR article 78 proceeding. The judgment denied the petition and dismissed the proceeding.

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

Memorandum: Petitioners commenced this CPLR Article 78 proceeding seeking, inter alia, to annul a determination of respondent Town of Livonia Joint Zoning Board of Appeals (ZBA). The ZBA determined, inter alia, that the sawmill project proposed by respondent Finger Lakes Timber Company, Inc. (FLTC) constituted a permissible "[a]gricultural or farming operation" within the meaning of the Town of Livonia Zoning Code. Petitioners appeal from a judgment denying their petition and dismissing the proceeding.

We agree with respondents that the appeal must be dismissed as moot. Petitioners did not seek injunctive relief or make any other attempts to preserve the status quo during the pendency of their administrative appeal, the CPLR article 78 proceeding, or this appeal, and the sawmill project is now complete (*see Matter of Gerster Sales & Serv., Inc. v Power Auth. of State of N.Y.*, 67 AD3d 1386, 1387, *lv denied* 14 NY3d 703; *Durham v Village of Potsdam*, 16 AD3d 937, 938, *lv denied* 5 NY3d 702; *Matter of G.Z.T. Indus. v Planning Bd. of Town of Fallsburg*, 245 AD2d 741, 742; *cf. Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*,

24 AD3d 1312, 1313, *appeal dismissed* 7 NY3d 803). Petitioners nonetheless assert that the appeal is not moot because the controversy does not concern the propriety of the building, but rather the use of FLTC's land to operate a sawmill. We reject that contention. FLTC sought permission to erect the building at issue for the express purpose of housing a portable sawmill and other milling equipment. FLTC spent an estimated $100,000 on the building, which is now complete and being used for its intended purpose (*see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173-174). Further, the ZBA granted FLTC's application for a conditional use permit authorizing its use of a portable sawmill on the property in 2006, well before the determination at issue.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

669

CA 13-02042

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

CYNTHIA M. TALLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS J. TALLO, DEFENDANT-APPELLANT.

STEPHEN M. LEONARDO, ROCHESTER, MICHAEL STEINBERG, FOR DEFENDANT-APPELLANT.

OLVER KORTS LLP, PITTSFORD (SALLY A. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered April 25, 2013. The order, inter alia, directed defendant to pay plaintiff the sum of $116,667 as a distributive award.

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

Memorandum: Defendant husband appeals from an order that, inter alia, directed him to make a $116,667 distributive payment to plaintiff wife pursuant to the parties' separation agreement, which was incorporated by reference into their judgment of divorce. Article V of the separation agreement required defendant to make monthly maintenance payments, commencing November 1, 2008 and continuing for a period of five years. Article V also listed five conditions or events that would terminate defendant's maintenance obligation. Article VI of the separation agreement required defendant to make an annual distributive payment from his 401(k) plan to plaintiff on the first business day of each calendar year from 2009 through 2012, provided for a final payment of $116,667 on January 2, 2013, and further provided that those "sums shall be deemed to be a distributive award." Article VI further provided that, "[d]uring such period(s) of time that said sums are transferred to [plaintiff], [defendant] shall not have the obligation to pay maintenance to [plaintiff] pursuant to Article V." Unlike Article V, Article VI contained no conditions or events that would relieve defendant of his obligation to make those distributive payments.

After defendant refused to make the final distributive payment, plaintiff moved by order to show cause for an order compelling defendant to make the final Article VI payment. We reject defendant's contention that Supreme Court erred in ordering him to make that payment. "A matrimonial settlement is a contract subject to principles of contract

interpretation . . . [, and] a court should interpret the contract in accordance with its plain and ordinary meaning" (*Herzfeld v Herzfeld*, 50 AD3d 851, 851 [internal quotation marks omitted]; *see generally Kamens v Utica Mut. Ins. Co.*, 6 AD3d 1237, 1239, *affd* 4 NY3d 460). "The interpretation of an unambiguous contractual provision is 'a function for the court' " (*Pyramid Brokerage Co. of Buffalo, Inc. v Atlas Auto Glass, Inc.*, 39 AD3d 1176, 1177, quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56). "[T]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [internal quotation marks omitted]; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573). "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, *rearg denied* 98 NY2d 693 [internal quotation marks omitted]; *see Pyramid Brokerage Co. of Buffalo, Inc.*, 39 AD3d at 1177). Article VI of the separation agreement expressly and unambiguously required defendant to transfer $116,667 from his 401(k) to plaintiff on January 2, 2013. The language of the agreement did not indicate that the payment was optional or terminable upon certain events. Although defendant urges us to apply the termination conditions or events contained in Article V to the payments required by Article VI, we decline to do so on the ground that we "may not by construction add . . . terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475; *see Camperlino v Bargabos*, 96 AD3d 1582, 1583).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

670

OP 13-02006

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

IN THE MATTER OF SHAWN A. PARKER, PETITIONER,

V MEMORANDUM AND ORDER

HON. DOUGLAS A. RANDALL, MONROE COUNTY COURT JUDGE, RESPONDENT.

JAMES L. RIOTTO, II, ROCHESTER, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent. The determination denied petitioner's application for a pistol permit.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his pistol permit application. A licensing officer, such as respondent herein, has broad discretion to grant or deny a permit under Penal Law § 400.00 (1) (*see Matter of Fromson v Nelson*, 178 AD2d 479, 479; *Matter of Covell v Aison*, 153 AD2d 1001, 1002, *lv denied* 74 NY2d 615; *Matter of Anderson v Mogavero*, 116 AD2d 885, 885). Under section 400.00 (4-a), the licensing officer must "either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for." If the licensing officer denies the application, "[t]he petitioner must be given the specific reasons for the denial . . . and be given an opportunity to respond to the objections to [his] application" (*Matter of Savitch v Lange*, 114 AD2d 372, 373; *see Matter of Anderson v Mulroy*, 186 AD2d 1045, 1045; *see also Matter of DiMonda v Bristol*, 219 AD2d 830, 831). Here, although respondent issued two written decisions denying petitioner's application—a preliminary, prehearing decision and a final, posthearing decision—he never provided a reason for the denial, despite a specific request from petitioner to do so. Thus, respondent failed to comply with the requirement set forth in section 400.00 (4-a). We therefore annul the determination and remit the matter to respondent to provide petitioner "with the specific reasons . . . for the denial of [his] application . . . and [to] afford [him] the opportunity to present evidence in response" (*Savitch*, 114 AD2d at 373; *see Anderson*, 186 AD2d at 1045). After receipt and review of any such evidence, respondent shall

make a new determination on petitioner's application (*see Savitch*, 114 AD2d at 373).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

678

KA 10-01026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FELIPE A. ROMERO, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

FELIPE A. ROMERO, DEFENDANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 2, 2010. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree, criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree and attempted criminal sale of a controlled substance in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for criminal possession of a controlled substance in the first degree, and attempted criminal sale of a controlled substance in the first degree to determinate terms of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of conspiracy in the second degree (Penal Law § 105.15), criminal possession of a controlled substance in the first degree (§ 220.21 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and attempted criminal sale of a controlled substance in the first degree (§§ 110.00, 220.43 [1]). Defendant contends that the People failed to meet their burden of establishing the legality of the police conduct in seizing his vehicle until a search warrant could be obtained (*see generally People v Di Stefano*, 38 NY2d 640, 652). Defendant agrees that the People established that they had reasonable suspicion to stop his vehicle by presenting the testimony of a police officer summarizing the information obtained by the police from eavesdropping warrants. We conclude that the People further established that the reasonable suspicion ripened into probable cause following the alert of a narcotics-sniffing canine (*see People v Devone*, 57 AD3d 1240, 1243, *affd* 15 NY3d 106; *People v Estrella*, 48 AD3d 1283, 1285, *affd* 10

NY3d 945, *cert denied* 555 US 1032). Contrary to defendant's contention, Supreme Court did not err in relying on hearsay evidence, i.e., the search warrant application containing the police officers' sworn accounts of the canine alert (*see* CPL 710.60 [4]; *People v Edwards*, 95 NY2d 486, 491; *People v Brink*, 31 AD3d 1139, 1140, *lv denied* 7 NY3d 865).

We agree with defendant, however, that the sentence is unduly harsh and severe insofar as the court imposed determinate terms of imprisonment of 16 years for criminal possession of a controlled substance in the first degree and attempted criminal sale of a controlled substance in the first degree, particularly in light of the sentences received by codefendants. As a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we therefore modify the judgment by reducing the determinate terms of imprisonment imposed on those counts to 10 years.

Defendant contends in his pro se supplemental brief that the indictment should be dismissed because the People failed to provide a copy of the eavesdropping warrant within 15 days after arraignment (*see* CPL 700.70). That contention is not preserved for our review (*see People v Highsmith*, 254 AD2d 768, 769, *lv denied* 92 NY2d 983, *reconsideration denied* 92 NY2d 1033; *see also People v Murphy*, 28 AD3d 1096, 1096, *lv denied* 7 NY3d 760) and, in any event, it is without merit. The record establishes that the court granted the People a 75-day extension of time upon their showing of good cause and the absence of prejudice to defendant (*see* CPL 700.70). We reject defendant's further contention in his pro se supplemental brief that he received ineffective assistance of counsel. Viewing the evidence, the law, and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have considered the remaining contentions raised in defendant's pro se supplemental brief and conclude that they are without merit.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

697

KA 13-00863

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT ARNEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 7, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [1]). We reject defendant's contention that his waiver of the right to appeal was invalid. "County Court's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882 [internal quotation marks omitted]). Defendant's further contention that "the court erred in failing sua sponte to inquire into his state of intoxication at the time of the commission of the crime is actually a challenge to the factual sufficiency of the plea allocution, and it is well settled that defendant's valid waiver of the right to appeal encompasses that challenge" (*People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). In any event, "[t]he issue of intoxication was raised by [defendant] for the first time in the presentence interview, and thus the court had no duty to make further inquiry at the time of the plea based on information in the presentence report" (*People v Jordan*, 292 AD2d 860, 861, *lv denied* 98 NY2d 698; *see People v Espinal*, 99 AD3d 435, 435, *lv denied* 20 NY3d 986). Because nothing in defendant's plea allocution cast doubt on the voluntariness of his plea and inasmuch as defendant made no motion to withdraw his plea, defendant's contention is unpreserved for our review (*see People v Lopez*, 71 NY2d 662, 665).

Although defendant's further contention that he is innocent survives his valid waiver of the right to appeal (*see People v Lewandowski*, 82 AD3d 1602, 1602; *see also People v Franco*, 104 AD3d 790, 790; *People v*

Wright, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912), that contention is also unpreserved for our review (*see Lewandowski*, 82 AD3d at 1602). In any event, defendant's assertion of innocence is conclusory and belied by his statements during the plea colloquy (*see id.; Wright*, 66 AD3d at 1334).

We further conclude that the contention of defendant that he was denied effective assistance of counsel "does not survive the plea or his valid waiver of the right to appeal because defendant 'failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance' " (*Lewandowski*, 82 AD3d at 1602-1603). " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Liggins*, 82 AD3d 1625, 1625, *lv denied* 17 NY3d 797, quoting *People v Ford*, 86 NY2d 397, 404). Here, defendant failed to assert his innocence or raise a possible intoxication defense at sentencing when given the opportunity to address the court and, given the favorable plea negotiated by defense counsel, which significantly reduced his sentencing exposure, we conclude that defendant was afforded meaningful representation (*see People v Neil*, 112 AD3d 1335, 1336).

Finally, we agree with defendant that "the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal' with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412; *see People v Maracle*, 19 NY3d 925, 927-928; *People v Milon*, 114 AD3d 1130, 1131). Nor is the deficiency in the allocution cured by defendant's written waiver of the right to appeal (*see People v Ramos-Roman*, 112 AD3d 1364, 1364; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see generally Maracle*, 19 NY3d at 927-928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

701

KA 12-01916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN BARILL, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's challenge is without merit (*see People v Wade*, 276 AD2d 406, 406, *lv denied* 96 NY2d 788; *see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Specifically, we conclude that the jury "did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense" and thus that the verdict is not against the weight of the evidence in that respect (*People v Wolf*, 16 AD3d 1167, 1168; *see generally Bleakley*, 69 NY2d at 495). We note that defendant inflicted 41 knife wounds on the victim, there was little sign of a struggle although the victim's blood was found throughout defendant's apartment, and defendant had only small cuts on his fingers that were consistent with his hand slipping on a knife blade as he stabbed the victim, as well as a few scratches on his back. Furthermore, defendant took preliminary steps to conceal the crime by gathering some of the weapons and the clothing he wore during the incident,

and bundling those items in a rug. Defendant also wiped the victim's blood off some of the knives, took a shower, changed his clothes and fled the scene, and he then took another shower and had his girlfriend cut his hair. Contrary to defendant's contention that the jury should have credited his testimony that his actions were justified, " '[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, which saw and heard the witnesses' " (*People v Sorrentino*, 12 AD3d 1197, 1197-1198, *lv denied* 4 NY3d 748).

Defendant's contentions with respect to the integrity of the grand jury proceedings are "not reviewable on appeal because the grand jury minutes are not included in the record on appeal" (*People v Dilbert*, 1 AD3d 967, 967-968, *lv denied* 1 NY3d 626; *see generally People v Hawkins*, 113 AD3d 1123, 1125, *lv denied* 22 NY3d 1156; *People v Lane*, 47 AD3d 1125, 1127 n 3, *lv denied* 10 NY3d 866; *People v Brooks*, 163 AD2d 864, 865, *lv denied* 76 NY2d 984).

We reject defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct. Defendant contends, inter alia, that the prosecutor impermissibly cross-examined him regarding his interest in the outcome of the trial. It is well settled, however, that a defendant is an interested witness as a matter of law (*see e.g. People v Newman,* 107 AD3d 827, 827-828; *People v Wilson*, 93 AD3d 483, 484, *lv denied* 19 NY3d 978; *People v Williams*, 81 AD3d 993, 994, *lv denied* 16 NY3d 901), and the prosecutor's cross-examination merely established that fact. Defendant failed to preserve for our review his contention that, on summation, the prosecutor "improperly expressed his personal belief" with respect to the evidence (*People v Morris*, 267 AD2d 1032, 1033, *lv denied* 95 NY2d 800), and in any event that contention is without merit. Defendant's additional contentions with respect to prosecutorial misconduct are also without merit.

Contrary to defendant's further contention, Supreme Court properly denied his request for an intoxication charge. Defendant failed to present evidence "tending to corroborate his claim of intoxication, such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state" (*People v Gaines*, 83 NY2d 925, 927). Consequently, although "there was evidence of defendant's alcohol . . . consumption, there was no evidence that could raise a reasonable doubt as to whether his faculties were so impaired at the time of the crime that he could not have formed the requisite intent" (*People v Malaussena*, 44 AD3d 349, 349, *affd* 10 NY3d 904).

Defendant further contends that the court erred in denying his request for a missing witness charge with respect to his girlfriend, who arrived at the scene of the crime after the stabbing. We reject that contention. "There are three preconditions to a missing witness instruction[.] First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable

to the party against whom the charge is sought . . . Third, the witness must be available to that party" (*People v Hall*, 18 NY3d 122, 131; *see People v Gonzalez*, 68 NY2d 424, 427). The initial burden of establishing entitlement to the charge rests upon the party seeking the instruction (*see Gonzalez*, 68 NY2d at 427-428; *see generally People v Thomas*, 56 AD3d 1241, 1241; *People v Wade*, 38 AD3d 1315, 1316, *lv denied* 8 NY3d 992). Here, in the absence of any evidence establishing that the witness was available to the People or would testify in their favor, "[d]efendant failed to meet his burden of establishing that he was entitled to a missing witness charge with respect to" his girlfriend (*Wade*, 38 AD3d at 1316).

Even assuming, arguendo, that defendant initially made a sufficient motion for a *Dunaway* hearing merely by mentioning the name of the case in his request for a *Huntley* hearing (*cf. People v Jones*, 95 NY2d 721, 725-729), we conclude that defendant abandoned that request because he "failed to seek a ruling on those parts of his omnibus motion concerning the alleged [*Dunaway*] violation . . . or to object to the admission of his statements in evidence at trial . . . on those grounds" (*People v Nix*, 78 AD3d 1698, 1699, *lv denied* 16 NY3d 799, *cert denied* ___ US ___, 132 S Ct 157; *see People v Wright*, 107 AD3d 1398, 1400; *People v Smith*, 13 AD3d 1121, 1122, *lv denied* 4 NY3d 803; *see generally People v Rodriguez*, 50 NY2d 553, 557).

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

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

703

KA 11-01064

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN BROWN, DEFENDANT-APPELLANT.

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

BRIAN BROWN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 24, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (six counts), attempted aggravated murder, aggravated assault upon a police officer and criminal possession of a weapon in the second degree (three counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]) and aggravated assault upon a police officer (§ 120.11), defendant contends that County Court erred in refusing to suppress his confession because it was obtained in violation of his right to counsel. More specifically, defendant contends that, after being advised of his *Miranda* rights, he invoked his right to counsel by stating to the police investigators, "I don't have an attorney" and "if I can't afford an attorney, will it make a difference?" We reject that contention. The statement "I don't have an attorney" does not constitute an unequivocal request for counsel (*see People v Ward*, 134 AD2d 544, 544-545, *lv denied* 70 NY2d 1012; *see also People v Cotton*, 277 AD2d 461, 462, *lv denied* 96 NY2d 757), nor does a statement from a suspect that he or she cannot afford an attorney constitute such a request (*see People v Mandrachio*, 55 NY2d 906, 907, *cert denied* 457 US 1122). Similarly, the statement, "if I can't afford an attorney, will it make a difference?" was merely "an inquiry about whether or not [defendant] should contact an attorney[, which] does not, without more, constitute an unequivocal invocation of the right to counsel" (*People v Hurd*, 279 AD2d 892, 893; *see People v Vaughan*, 48 AD3d 1069, 1071, *lv denied* 10 NY3d 845, *cert denied* 555 US 910; *People v Williams*, 286 AD2d 918, 919, *lv denied* 97 NY2d 763).

We reject defendant's further contention that his confession was involuntary "in the traditional, pre-*Miranda* sense." There is no evidence in the record that defendant's confession was "obtained from him . . . by the use or threatened use of physical force" by the police (CPL 60.45 [2] [a]; *see People v Kelly*, 309 AD2d 1149, 1151, *lv denied* 1 NY3d 575; *cf. People v Daniels*, 117 AD3d 1573, 1574-1575). Indeed, the DVD of defendant's interrogation shows a well-treated suspect who joked and laughed at times with the investigators, and who was afforded food, drink and opportunities for rest (*cf. People v Guilford*, 21 NY3d 205, 209-213).

Defendant's remaining contention with respect to the admissibility of his confession is that his waiver of *Miranda* rights was not voluntary, knowing and intelligent because one of the investigators told him that he "did not need an attorney." Because defendant "failed to raise this specific contention at the hearing or in his motion papers, this issue is unpreserved for [our] review" (*People v Grace*, 245 AD2d 387, 388, *lv denied* 91 NY2d 941; *see People v Tutt*, 38 NY2d 1011, 1012; *People v Louisias*, 29 AD3d 1017, 1018-1019, *lv denied* 7 NY3d 814). In any event, we conclude that any error in failing to suppress the confession is harmless inasmuch as the proof of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if the confession had been suppressed (*see People v Wardlaw*, 18 AD3d 106, 109, *affd* 6 NY3d 556; *see generally People v Crimmins*, 36 NY2d 230, 237). We note that, at the time of his arrest, defendant possessed the gun that was used to shoot the deputy sheriff and fired during the two bank robberies. Defendant also possessed more than $5,000 in cash. Moreover, defendant wrote a letter to the District Attorney while in jail, in which he stated, "The fact of the matter is I broke the law in Oneida County" and that "these crimes I committed [were] done out of love for my mother and desperation for a better life." Finally, defendant matched the description of the person who robbed the banks and shot the deputy sheriff, and he was wearing the same type and color of clothing.

Defendant further contends that the evidence is legally insufficient to establish that he intended to kill the deputy sheriff, which is a necessary element of attempted aggravated murder. We reject that contention as well. "A defendant may be presumed to intend the natural and probable consequences of his actions" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660; *see People v Ford*, 114 AD3d 1273, 1274, *lv denied* 23 NY3d 962), and "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682; *see People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832). Here, defendant's intent to kill may be inferred from the fact that, with a loaded gun in his hand, he extended his arm directly toward the deputy sheriff and fired at least three shots, one of which struck the deputy sheriff in the foot. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant possessed the intent to kill (*People v Bleakley*, 69 NY2d 490, 495; *see People v Geddes*, 49 AD3d 1255, 1256, *lv denied* 10 NY3d 863; *People v Sherry*, 41 AD3d 1235, 1236, *lv denied* 9 NY3d 926). Moreover, viewing the evidence

in light of the elements of the crime of attempted aggravated murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant testified that he intended only to scare the victim, "it was within the province of the jury to assess [his] credibility and reject [his] testimony" (*People v Mercado*, 113 AD3d 930, 932).

We have reviewed defendant's remaining contentions, including those raised in his pro se supplemental brief, and conclude that they lack merit.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

710

CA 13-01447

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

APRIL D'AMICO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CORRECTIONAL MEDICAL CARE, INC., COUNTY OF MONROE, MONROE COUNTY SHERIFF, ANDRE CARPIO, MARIA CARPIO, ALSO KNOWN AS MARIA UMAR, AND EMRE UMAR, DEFENDANTS-RESPONDENTS.

CHRISTOPHER J. ENOS, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (LOUIS JIM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CORRECTIONAL MEDICAL CARE, INC., ANDRE CARPIO, MARIA CARPIO, ALSO KNOWN AS MARIA UMAR AND EMRE UMAR.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MALLORIE C. RULISON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNTY OF MONROE AND MONROE COUNTY SHERIFF.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 19, 2012. The order granted the motions of defendants to dismiss the amended complaint and denied the cross motions of plaintiff for leave to serve an amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants Correctional Medical Care, Inc., Andre Carpio, Maria Carpio, also known as Maria Umar, and Emre Umar seeking dismissal of the first, second and fifth causes of action in the amended complaint against them except insofar as the motion sought dismissal of the fifth cause of action against defendant Emre Umar, and reinstating those causes of action to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for abuse of process, false imprisonment/false arrest, malicious prosecution, libel per se, intentional infliction of emotional distress, and negligence, after she was allegedly falsely accused of stealing a computer from defendant Correctional Medical Care, Inc. (CMC). Plaintiff appeals from an order granting the motions to dismiss of defendants CMC, Andre Carpio (Andre), Maria Carpio, also known as Maria Umar (Maria), and Emre Umar (Emre) (collectively, CMC defendants) and defendants County of Monroe (County) and Monroe County Sheriff (Sheriff) (collectively, County defendants) (*see* CPLR 3211 [a] [5], [7], [8]), and denying plaintiff's cross motions for leave to serve an amended complaint.

Initially, with respect to the CMC defendants, we note that plaintiff properly amended her complaint as of right by filing the verified amended complaint after the CMC defendants moved to dismiss the original complaint (*see* CPLR 3211 [f]; *see also* CPLR 3025 [a]; *STS Mgt. Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410), and by contemporaneously serving the amended complaint on the CMC defendants' attorney as part of her cross motion (*see* CPLR 2103 [b]). As a result, the amended complaint superseded the original complaint and became the only complaint in the case (*see Aikens Constr. of Rome v Simons*, 284 AD2d 946, 947; *see generally Preston v APCH, Inc.*, 89 AD3d 65, 69-70). "We [thus] consider the [CMC defendants'] motion to dismiss as directed against the amended complaint that plaintiff[] . . . submitted in [her] opposition to the motion" (*Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 288; *see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38).

With respect to the County defendants, the record establishes that they were served with the amended complaint prior to their service of a responsive pleading. Thus, the amended complaint was served as of right on the County defendants (*see* CPLR 3025 [a]). We further note that plaintiff has abandoned her sixth cause of action for intentional infliction of emotional distress (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Turning to the merits, "[o]n these motions to dismiss, we accept the facts alleged in the [amended] complaint as true and accord plaintiff the benefit of every favorable inference" (*Kirchner v County of Niagara*, 107 AD3d 1620, 1621). According to plaintiff, at some time prior to April 2008, CMC entered into a contract with the County whereby CMC would provide medical services to inmates at the Monroe County Jail, which was operated by the Sheriff. Maria served as CMC's chief executive officer; her husband, Emre, was the company's president; and Maria's brother, Andre, was the company's vice president. Plaintiff was employed by CMC as a health services administrator from April 1, 2008 until she was fired on February 1, 2009. In January 2010, plaintiff filed a sexual harassment lawsuit against CMC and Emre, alleging, inter alia, that she had been subjected to unwelcome sexual conduct by Emre during her employment with CMC. In December 2010, Maria, who was allegedly acting both individually and as CEO of CMC, Emre, and Andre all made statements to an investigator in the Sheriff's Office, in the form of supporting depositions, accusing plaintiff of stealing a laptop computer belonging to CMC the day after her employment was terminated. Plaintiff alleged that the CMC defendants made such statements with the intent of procuring her arrest for possession of a stolen computer that each defendant knew was, in fact, not stolen. On December 15, 2010, plaintiff was charged by misdemeanor information, which was affirmed by the investigator, with criminal possession of stolen property in the fifth degree, a class A misdemeanor (*see* Penal Law § 165.40). Shortly thereafter, plaintiff was arrested without a warrant and subjected to mandatory processing as a criminal defendant by the investigator and other members of the Sheriff's Office. On March 1, 2011, upon motion of her attorney, the misdemeanor information was dismissed in Town Court "as being defective on its face."

With regard to the first and second causes of action for abuse of

process and false imprisonment/false arrest, respectively, plaintiff alleged that the County defendants were vicariously liable for the actions of the investigator, who was acting "in the course of his employment with the [County], as a duly appointed Deputy acting under the supervision and control of the [Sheriff]." Plaintiff further alleged in the seventh cause of action that the County, acting through the Sheriff and his deputies and investigators, was negligent in allowing improper allegations of criminal conduct to be brought against her. Although the County defendants are not aggrieved parties on appeal (*see* CPLR 5511), we may consider their contentions as alternative grounds for affirmance inasmuch as they raised the issue of vicarious liability in Supreme Court (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). It is well settled that "[a] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility" (*Mosey v County of Erie*, 117 AD3d 1381, ___ [internal quotation marks omitted]; *see Trisvan v County of Monroe*, 26 AD3d 875, 876, *lv dismissed* 6 NY3d 891). Section 39-10 (B) of the Monroe County Code, of which we take judicial notice (*see St. David's Anglican Catholic Church, Inc. v Town of Halfmoon*, 11 AD3d 874, 876, citing CPLR 4511 [a]), provides that Sheriff's deputies are "included under the term 'employee' for convenience of reference within this chapter only," and that section further provides that "[t]he provisions of this chapter shall not be construed as establishing an employment or respondeat superior relationship between the County of Monroe and the Sheriff of the County of Monroe, the Undersheriff of the County of Monroe or any person appointed by the Sheriff of the County of Monroe, including but not limited to Sheriff's deputies. The provisions of this chapter shall not be construed as an assumption by the County of Monroe of responsibility or liability for the negligence or tortious conduct of the Sheriff of the County of Monroe, the Undersheriff of the County of Monroe or any person appointed by the Sheriff of the County of Monroe, including but not limited to Sheriff's deputies."

Thus, inasmuch as plaintiff asserted against the County causes of action based only on respondeat superior, we conclude that the "amended complaint was properly dismissed against [the County] because [the County] did not assume liability for the acts of the Sheriff or his deputies" (*Smelts v Meloni*, [appeal No. 3], 360 AD2d 872, 873, *lv denied* 100 NY2d 516).

It is also well established that "a Sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that this principle precludes vicarious liability for the torts of a deputy" (*Barr v Albany County*, 50 NY2d 247, 257; *see Mosey*, 117 AD3d at ___; *Trisvan*, 26 AD3d at 876). We thus conclude that the amended complaint was properly dismissed against the Sheriff inasmuch as all causes of action against him were based only on respondeat superior (*Trisvan*, 26 AD3d at 876).

We conclude, however, that the court erred in dismissing plaintiff's first cause of action, for abuse of process, against the CMC defendants, and we therefore modify the order accordingly. "A plaintiff asserting a cause of action for abuse of process must plead and prove that there

was '(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective' " (*Liss v Forte*, 96 AD3d 1592, 1593, quoting *Curiano v Suozzi*, 63 NY2d 113, 116). "In addition, the plaintiff must plead and prove actual or special damages . . . , although . . . legal fees incurred in defending against false criminal charges are sufficient" (*id.*; *see Parkin v Cornell Univ.*, 78 NY2d 523, 530). We conclude that the court erred in dismissing the cause of action for abuse of process on the ground that there was "no evidence" to support the first element, i.e., that there was no evidence that the CMC defendants caused criminal process to issue against plaintiff. It is well settled that on a motion to dismiss a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). "[T]he court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121, *lv denied* 99 NY2d 502). Moreover, contrary to the CMC defendants' contention, making a false report to the police that results in the issuance of criminal process may support a claim for abuse of process (*see Parkin*, 78 NY2d at 530-531; *Liss*, 96 AD3d at 1592-1593; *Light v Light*, 64 AD3d 633, 634). With regard to the second element, plaintiff sufficiently alleged that the CMC defendants intended to harm her by demeaning, humiliating, or defaming her rather than to secure justice for purported criminal conduct. With regard to the third element, plaintiff sufficiently alleged that the CMC defendants were manipulating the process to achieve a collateral objective, i.e., demeaning, humiliating, and defaming plaintiff in an attempt to gain an advantage in the sexual harassment lawsuit (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO,* 38 NY2d 397, 404; *Danahy v Meese*, 84 AD2d 670, 672). Contrary to the CMC defendants' further contention, plaintiff's amended complaint was sufficient to state a cause of action for abuse of process against CMC as a corporation. Finally, plaintiff properly pleaded special damages in her amended complaint inasmuch as legal fees incurred in defending against false criminal charges are sufficient to sustain a cause of action for abuse of process (*see Liss*, 96 AD3d at 1593; *see also Parkin*, 78 NY2d at 530).

We further conclude that the court erred in dismissing plaintiff's second cause of action, for false imprisonment/false arrest, against each of the CMC defendants, and we therefore further modify the order accordingly. "With respect to a cause of action for false arrest or false imprisonment . . . , the elements are that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Burgio v Ince*, 79 AD3d 1733, 1734; *see Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929). Here, plaintiff's allegations were sufficient to state a cause of action inasmuch as plaintiff alleged that the CMC defendants, including CMC acting through Maria as its CEO, gave false statements to the police with the intent of having plaintiff arrested;

that plaintiff was conscious of the confinement and did not consent thereto; and that, as a result of the actions of the CMC defendants, she was subjected to a warrantless, unprivileged arrest. The CMC defendants contend in response that they cannot be liable for plaintiff's arrest because they merely provided information to the police who thereafter acted on their own in determining that an arrest was legally justified, i.e., supported by probable cause (*see generally Lowmack v Eckerd Corp.*, 303 AD2d 998, 999). We note however, that lack of probable cause is not an element of the cause of action for false imprisonment/false arrest, and thus need not be pleaded (*see Broughton*, 37 NY2d at 457; *see also Quigley v City of Auburn*, 267 AD2d 978, 979).

We agree with the CMC defendants, however, that the court properly dismissed the fourth cause of action, for malicious prosecution, for failure to state a cause of action (*see* CPLR 3211 [a] [7]). " 'The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice' " (*Zetes v Stephens*, 108 AD3d 1014, 1015, quoting *Broughton*, 37 NY2d at 457; *see Smith-Hunter v Harvey*, 95 NY2d 191, 195). With regard to the second element, "any [final] termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the innocence of the accused" (*Cantalino v Danner*, 96 NY2d 391, 395, citing *Smith-Hunter*, 95 NY2d at 199; *see Martinez v City of Schenectady*, 97 NY2d 78, 84). It is well settled, however, that any disposition of the criminal action that does not terminate it, but permits it to be renewed, cannot serve as a foundation for a malicious prosecution action (*see Smith-Hunter*, 95 NY2d at 197). A dismissal without prejudice qualifies as a final, favorable termination if the dismissal represents the formal abandonment of the proceedings by the prosecutor (*see id.* at 198-199).

Here, plaintiff alleged in the complaint that the misdemeanor information was dismissed in Town Court "as being defective on its face." Plaintiff's submissions in opposition to the motion to dismiss (*see Gibraltar Steel Corp. v Gibraltar Metal Proc.*, 19 AD3d 1141, 1142), however, establish that plaintiff moved to dismiss the misdemeanor information on the ground that it was insufficient on its face because it was not supported by any nonhearsay allegations of fact sufficient to support a conviction (*see* CPL 170.30 [1] [a]; *see also* CPL 170.35 [1] [a]; 100.40 [1] [c]). Town Court dismissed the information without prejudice to the People to refile because, despite its doubts that the People would be able to successfully do so, it could not "foreclose [the People] from curing whatever defect [the misdemeanor information contained]." Inasmuch as the accusatory instrument was ultimately dismissed without prejudice to refile in order to correct the legal insufficiency of the allegations therein, we conclude that the dismissal was not final and thus cannot support a cause of action for malicious prosecution (*see Smith-Hunter*, 95 NY2d at 197; *MacFawn v Kresler*, 88 NY2d 859, 860).

Finally, we conclude that the court erred in dismissing plaintiff's fifth cause of action, for libel per se, against defendants CMC, Maria, and Andre, and we therefore further modify the order accordingly. "The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Salvatore v Kumar*, 45 AD3d 560, 563, *lv denied* 10 NY3d 703; *see generally* Restatement [Second] of Torts § 558). Making a false statement contained in a supporting deposition provided to the police constitutes libel on its face, i.e., libel per se, if it " 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or [to] induce an evil opinion of him [or her] in the minds of right-thinking persons' " (*Zetes*, 108 AD3d at 1018-1019, quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *rearg denied* 42 NY2d 1015, *cert denied* 434 US 969). An allegation that a defendant filed a false report accusing the plaintiff of a serious crime is sufficient to state a valid cause of action to recover damages for libel per se (*see Light*, 64 AD3d at 634; *Burdick v Verizon Communications*, 305 AD2d 1030, 1031; *see also Geraci v Probst*, 15 NY3d 336, 344-345). "[P]roof of special damages is not required for libel on its face or libel per se" (*Zetes*, 108 AD3d at 1019). In addition, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally" (CPLR 3016 [a]). Contrary to the CMC defendants' contention, the amended complaint sets forth "the particular words complained of" inasmuch as plaintiff attached complete copies of the supporting depositions to her amended pleading and "[a] copy of any writing which is attached to a pleading is a part thereof for all purposes" (CPLR 3014); plaintiff also specifically referenced in her amended complaint the statements at issue from the supporting depositions. Here, plaintiff's allegations of libel per se are legally sufficient. She alleged that the statements contained in the supporting depositions of Andre and Maria, who was allegedly acting both individually and as CEO of CMC, falsely accused her of committing a serious crime of possession of stolen property (Penal Law § 165.40; *see Epifani v Johnson*, 65 AD3d 224, 234; *see also Martin v Hayes*, 105 AD3d 1291, 1292-1293) or, arguably, grand larceny in the fourth degree (Penal Law § 155.30 [1]; *see generally Liberman v Gelstein*, 80 NY2d 429, 435); that the statements were published to the Sheriff's Office and thereafter filed in Town Court; and that the CMC defendants made such statements in bad faith, and for the purpose of humiliating plaintiff and subjecting her to criminal prosecution (*see generally Zetes*, 108 AD3d at 1018-1019; *Light*, 64 AD3d at 634). We also conclude, however, that plaintiff failed to state a cause of action for libel per se against Emre because the statements in his supporting deposition cannot be construed as accusing plaintiff of any crime.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

711

CA 13-01480

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

MICHAEL WROBEL, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF PENDLETON, ET AL., DEFENDANTS,
COUNTY OF NIAGARA, DEFENDANT-RESPONDENT-APPELLANT,
AND FOIT-ALBERT ASSOCIATES, ARCHITECTURE,
ENGINEERING AND SURVEYING, P.C.,
DEFENDANT-RESPONDENT.

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT J. MULLINS, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 12, 2013. The order, among other things, denied the motion of defendant County of Niagara for summary judgment and granted the motion of defendant Foit-Albert Associates, Architecture, Engineering and Surveying, P.C. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant County of Niagara and dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-4.2 (h) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for leg injuries he sustained when he stepped into a hole in the ground while working for the general contractor at a construction site owned by defendant County of Niagara (County). The construction project involved the widening of a County road and the installation of new drainage lines along the road. According to plaintiff, he stepped into the hole, which he described as three or four feet deep and filled with rainwater, while carrying a pipe that he and coworkers intended to install in a trench.

The complaint, as amplified by the bill of particulars, alleges that the County and its architect/engineer, defendant Foit-Albert Associates,

Architecture, Engineering and Surveying, P.C. (Foit-Albert), violated Labor Law §§ 200, 240 (1) and 241 (6), and that they were negligent in failing to provide him with a safe place to work. Following discovery, the County and Foit-Albert moved separately for summary judgment dismissing the complaint against them, and plaintiff cross-moved for partial summary judgment on liability on his section 240 (1) and 241 (6) claims. Supreme Court granted Foit-Albert's motion and dismissed the complaint against it, and denied the County's motion and plaintiff's cross motion, finding issues of fact for trial. Plaintiff appeals from the order insofar as it granted Foit-Albert's motion, and the County cross-appeals from the order insofar as it denied its motion.

We conclude with respect to plaintiff's appeal that the court properly granted Foit-Albert's motion. Addressing first Labor Law §§ 240 (1) and 241 (6), it is well settled that the duties of those sections "apply only to '[general] contractors and owners and their agents' " (*Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318). Here, Foit-Albert met its burden of establishing that it was not liable as an agent of the County, i.e., it did not have sufficient supervision or control over the activity that caused plaintiff's injury, or over the safety procedures employed at the site (*see Lopez v Dagan*, 98 AD3d 436, 437, *lv denied* 21 NY3d 855; *Baker v Town of Niskayuna*, 69 AD3d 1016, 1018; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341). Indeed, professional engineers, architects, and landscape architects who "do not direct or control the work for activities other than planning or design" are specifically immune from liability under Labor Law §§ 240 (1) and 241 (6) (*see* §§ 240 [1]; 241 [9]; *Harvey v Sear-Brown Group*, 262 AD2d 1006, 1006; *Carter v Vollmer Assoc.*, 196 AD2d 754, 754). Plaintiff failed to raise a triable issue of fact in opposition to those parts of the motion (*see Fecht v City of New York*, 244 AD2d 315, 315-316; *cf. Gonnerman v Huddleston*, 48 AD3d 516, 517).

Because Foit-Albert "exercised no control or supervision over either plaintiff's work or plaintiff's work site, and thus was not 'responsible for providing plaintiff with a safe workplace' " (*Severino v Hohl Indus. Servs.*, 300 AD2d 1049, 1050; *see Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195), Foit-Albert was also entitled to dismissal of the Labor Law § 200 claim against it. Further, the court properly granted that part of Foit-Albert's motion with respect to the common-law negligence cause of action inasmuch as there was no showing that it "failed to use due care in the exercise of its professional services" (*Lopez v Dagan*, 98 AD3d 436, 439, *lv denied* 21 NY3d 855; *see Torres v CTE Engrs., Inc.*, 13 AD3d 359, 359-360; *Hernandez v Yonkers Contr. Co.*, 306 AD2d 379, 380).

We further conclude, however, that the court erred in denying that part of the County's motion seeking summary judgment dismissing the Labor Law § 240 (1) claim against it, and we therefore modify the order accordingly. Where, as here, a plaintiff falls into a hole while walking at ground level, the plaintiff's injury "[is] not caused by [defendants'] failure to provide or erect necessary safety devices in response to 'elevation-related hazards,' and, accordingly, the protections of Labor Law § 240 (1) do not apply" (*Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94; *see Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422, *lv dismissed* 97

NY2d 749; *see also Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 580, *lv denied* 100 NY2d 516; *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 766, *lv denied* 95 NY2d 765). The cases relied upon by plaintiff are factually distinguishable because they involve falls into excavated areas, as opposed to mere holes in the ground such as the one here (*see Covey v Iroquois Gas Transmission Sys.*, 89 NY2d 952, 953-954; *Wild v Marrano/Marc Equity Corp.*, 75 AD3d 1099, 1099; *Congi v Niagara Frontier Transp. Auth.*, 294 AD2d 830, 830; *Jiminez v Nidus Corp.*, 288 AD2d 123, 123). Unlike the excavation cases, this is not a case where protective devices enumerated in Labor Law § 240 (1), e.g., "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes" were designed to apply (*see Alvia*, 287 AD2d at 422).

The court also erred in denying that part of the County's motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the County's alleged violation of 12 NYCRR 23-4.2 (h). We therefore further modify the order accordingly. Pursuant to that regulation, "[a]ny open excavation adjacent to a sidewalk, street, highway or other area lawfully frequented by any person shall be effectively guarded [or covered]." Although that regulation is sufficiently specific to support his claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661, *lv dismissed* 5 NY3d 849), we agree with the County that plaintiff, as an employee at the work site, did not fall within the class of people intended to be protected by 12 NYCRR 23-4.2 (h) (*see Ruland v Long Is. Power Auth.*, 5 AD3d 580, 581; *Lamela v City of New York*, 560 F Supp 2d 214, 226-227, *affd* 332 Fed Appx 682 [2d Cir]; *cf. Scarso*, 16 AD3d at 661). As the District Court stated in *Lamela*, the State Commissioner of Labor, by applying 12 NYCRR 23-4.2 (h) to areas "lawfully frequented by any person," specifically "chose not to include the disjunctive class of 'persons employed therein' " (*id.* at 227).

The court properly denied that part of the County's motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), which provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing." That regulation is sufficiently specific to support a section 241 (6) violation (*see Scarso*, 16 AD3d at 661), and we have held that it applies to any " 'hazardous opening into which a person may step or fall . . . provided that [it is] one of significant depth and size' " (*Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1221; *see Pilato v Nigel Enters., Inc.*, 48 AD3d 1133, 1134-1135; *cf. Farrell v Dick Enters.*, 227 AD2d 956, 956). We agree with the court that there is a triable issue of fact whether the County violated that regulation.

Finally, we conclude that the court properly found issues of fact that preclude an award of summary judgment to the County on plaintiff's Labor Law § 200 claim and common-law negligence cause of

action.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

712

CA 13-01497

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

NICK'S GARAGE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAFFE & ASHER LLP, NEW YORK CITY (MARSHALL T. POTASHNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 10, 2013. The order denied the motion of defendant to dismiss in part plaintiff's second amended complaint.

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

Memorandum: Plaintiffs in these two appeals operate automobile repair shops, and they commenced these actions to recover payment for repairs performed on behalf of various assignors, including persons involved in accidents with defendant's insureds (*see generally* 11 NYCRR 216.7 [a] [2]). Insofar as relevant in each appeal, plaintiffs asserted causes of action for quantum meruit and the violation of General Business Law § 349, which prohibits deceptive business practices. In appeal Nos. 1 and 2, defendant moved to dismiss those causes of action in the second amended complaint and the amended complaint, respectively, on the ground that plaintiffs lacked standing under Insurance Law § 3420 because their assignors were strangers to the underlying insurance policies. Supreme Court denied both motions. We now affirm.

When the plaintiff is a stranger to the underlying insurance policy, "Insurance Law § 3420 . . . grants [him or her] a right to sue the tortfeasor's insurer, but only under limited circumstances—[he or she] must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with th[o]se requirements is a condition precedent to a direct action against the insurance company" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354). That condition precedent, however, applies only when the direct action seeks relief "under the terms of the [insurance] policy or contract" (§ 3420 [a] [2]).

Here, the causes of action for quantum meruit and deceptive business practices do not seek relief "under the terms of the [insurance] policy or contract." Rather, those causes of action raise distinct legal theories that are independent of the policy terms. Thus, contrary to defendant's contention in both appeals, Insurance Law § 3420 does not bar plaintiffs' causes of action for quantum meruit and deceptive business practices, and the court therefore properly denied the motions to dismiss insofar as they were premised on that ground (*see Nick's Garage, Inc. v State Farm Gen. Ins. Co.*, 2013 WL 718323, *10; *see generally First State Ins. Co. v J & S United Amusement Corp.*, 67 NY2d 1044, 1046 n; *McNamara v Allstate Ins. Co.*, 3 AD2d 295, 298).

Defendant's remaining contentions in each appeal were raised for the first time in its reply papers, and it is "well settled that contentions raised for the first time in reply papers are not properly before [us]" (*Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

713

CA 13-01498

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

JEFFREY'S AUTO BODY, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAFFE & ASHER LLP, NEW YORK CITY (MARSHALL T. POTASHNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 10, 2013. The order denied the motion of defendant to dismiss in part plaintiff's amended complaint.

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

Same Memorandum as in *Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Aug. 8, 2014]).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

715

CA 13-01413

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

KAREN MCGRATH AND STEVEN K. FOLEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF IRONDEQUOIT, DEFENDANT-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN P. LOMENZO, JR., PENFIELD, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 8, 2013. The order granted the motion of plaintiffs for leave to serve a second amended complaint and to vacate the note of issue and certificate of readiness.

It is hereby ORDERED that said appeal from the order insofar as it concerns the note of issue and certificate of readiness is unanimously dismissed and the order is affirmed without costs.

Memorandum: This action arises from a landslide that occurred on a steeply-sloped parcel of real property owned by defendant, and which allegedly caused part of plaintiffs' adjacent property to subside. Plaintiffs seek damages for diminution of value and the cost of repairs to their property, asserting that defendant created and negligently maintained a private nuisance resulting in the landslide. Supreme Court granted plaintiffs' motion for an order vacating the note of issue and certificate of readiness and for leave to serve a second amended complaint.

We note at the outset that we dismiss the appeal from the order insofar as it granted that part of plaintiffs' motion seeking to vacate the note of issue and certificate of readiness. On appeal, defendant seeks, inter alia, reinstatement of the note of issue and certificate of readiness, but a postargument submission by plaintiffs' attorney establishes that a new note of issue and certificate of readiness have been filed. Consequently, "we conclude that the rights of the parties cannot be affected by the determination of [that part of the] appeal[,] and it is therefore moot" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714; *see generally Matter of Anonymous v New York City Health & Hosps. Corp.*, 70 NY2d 972, 974, *rearg denied* 71 NY2d 994).

Contrary to defendant's contention, we also conclude that the court properly granted that part of the motion seeking leave to serve a second

amended complaint. "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324 [internal quotation marks omitted]; *see* CPLR 3025 [b]). Although plaintiffs did not make the motion promptly after service of the note of issue and certificate of readiness, it is well settled that " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:5, p 477). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365). Here, defendant failed to establish any prejudice arising from plaintiffs' lateness, and thus the court properly granted plaintiffs leave to serve a second amended complaint.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

724

KA 10-01033

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARSHALL D. MYHAND, ALSO KNOWN AS MARSHALL MAYHAND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 17, 2010. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), defendant contends that County Court erred in refusing to suppress evidence obtained as a result of the execution of a search warrant at defendant's residence. Specifically, defendant contends that the search warrant was not supported by the requisite probable cause. We reject that contention.

"Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423). While New York has not adopted the "totality-of-the-circumstances analysis" adopted by the United States Supreme Court in *Illinois v Gates* (462 US 213, 238, *reh denied* 463 US 1237; *see People v Griminger*, 71 NY2d 635, 639), the Court of Appeals has held that "[t]he legal conclusion [concerning the existence of probable cause] is to be made after considering all of the facts and circumstances together. Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found" (*Bigelow*, 66 NY2d at 423). In our view, this is one of those situations where the pieces of the puzzle fit in such a manner as to support a finding of probable cause.

In support of the application for a search warrant, the authoring officer noted that defendant had two prior convictions of possession of illegal substances, one of which was a 2002 conviction of criminal possession of a controlled substance in the third degree, i.e., possession with intent to sell (Penal Law § 220.16 [1]). The officer then summarized his prior experience with a particular confidential informant (CI-1), establishing that he had used CI-1 in previous investigations that led to successful prosecutions. Police officers used CI-1 to make a controlled purchase of cocaine from defendant at his former residence. Before and after the purchase, the officers searched CI-1 and his vehicle to ensure that CI-1 was not in possession of any cocaine, and they provided CI-1 with buy money. Immediately after observing CI-1 enter and exit defendant's former residence, the officers searched CI-1 again, recovering a substance that tested positive for cocaine. CI-1 informed the officers that defendant had sold CI-1 the cocaine. The circumstances of that sale are not challenged by defendant.

Following defendant's relocation to a different residence, officers placed that residence under surveillance. The officer who authored the search warrant application described the circumstances of a second purchase of cocaine. The officer and another officer met with CI-1, and they searched CI-1 as well as CI-1's vehicle to ensure that CI-1 was not in possession of cocaine. CI-1 was provided with buy money, and a plan was developed for CI-1 to pick up an "unwitting participant" (UP) who would make the actual purchase. Officers kept CI-1 under observation while CI-1 met with UP, a black male, who entered CI-1's vehicle. Officers continued to keep that vehicle under surveillance as it traveled to an area near defendant's new residence. UP exited the vehicle, walking in the direction of defendant's residence. He returned approximately 15 minutes later, and he entered and then subsequently exited CI-1's vehicle, which was under surveillance by the officers. The officers then met with CI-1, who was found to be in possession of a substance that tested positive for cocaine. CI-1 informed the officers that, in CI-1's presence, UP had telephoned "Dog," i.e., defendant. When the call ended, UP told CI-1 that "Dog" was ready and directed CI-1 to the area near defendant's new residence.

A similar plan was developed for a third purchase of cocaine. The officer who authored the search warrant application and another officer met with CI-1, and they searched CI-1 and CI-1's vehicle to ensure that CI-1 was not in possession of any cocaine. They also again provided CI-1 with a predetermined amount of buy money. CI-1 was observed meeting the same UP used in sale number two. After that meeting, officers observed UP travel in his vehicle to an area near defendant's residence. Officers further observed UP exit his vehicle, enter defendant's residence, and exit that residence with defendant 11 minutes later. While still under observation, UP entered his vehicle and traveled to rendevous with CI-1. After UP left the area, the officers met with CI-1, who informed the officers that, when CI-1 met UP, he told CI-1 that "Dog" was ready. CI-1 told the officers that he gave the buy money to UP, who then drove off in his own vehicle. CI-1 also told the officers that, when UP returned, he handed CI-1 a knotted sandwich bag that he told CI-1 he had received from "Dog." The substance in the bag tested positive for cocaine.

Based on the aforementioned facts, the authoring officer applied

for a search warrant to search defendant's new residence. The application did not seek permission to search any particular person. The issue before us thus is whether the aforementioned information provided the requisite probable cause for the issuance of the search warrant, i.e., was it "sufficient to support a reasonable belief . . . that evidence of a crime may be found" inside defendant's new residence (*Bigelow*, 66 NY2d at 423). We conclude that it was sufficient.

As a preliminary matter, we conclude that the search warrant application was sufficient without resorting to any hearsay from either CI-1 or UP. With respect to the first sale, officers confirmed that CI-1 was not in possession of any drugs, at which point they provided CI-1 with buy money. The officers then observed CI-1 enter defendant's residence and then exit that residence shortly thereafter. At that time CI-1 was in possession of cocaine but no longer in possession of the buy money. That evidence stands independent of any hearsay information from CI-1. Hearsay information would be required only if the issue before us concerned the identity of the person in that residence who sold the cocaine to CI-1.

The officers then confirmed that defendant relocated to a new residence. With respect to the second sale, the officers determined that CI-1 was not in possession of any cocaine before CI-1 met with UP, who was then observed by officers going to the area of defendant's new residence. Officers observed UP return to CI-1, after which the officers confirmed that CI-1 was in possession of cocaine. Again, none of that information requires resort to hearsay from either CI-1 or UP. It is based solely on the personal observations of the officers.

Finally, with respect to the third sale, the officers determined that CI-1 was not in possession of cocaine before CI-1 met with UP for a second time. The officers then observed UP drive his own vehicle to defendant's new residence. They further observed UP enter and remain inside defendant's residence for 11 minutes, after which they observed him exiting the residence with defendant. While under continual observation, UP met CI-1 and then drove away. Immediately thereafter, CI-1 was in possession of cocaine.

As defendant correctly contends, we cannot ignore the remote possibility that UP had cocaine on his person or in his vehicle before ever going near or inside defendant's new residence. That possibility, however, is not fatal to our analysis. Although "[h]uman imagination might conjure up possible innocent behavior [by the defendant,] . . . that cannot be the test of probable cause . . . Probable cause does not require proof to a mathematical certainty, or proof beyond a reasonable doubt. Based on the articulated, objective facts before [the issuing Judge], and the reasonable inferences to be drawn therefrom, it was 'more probable than not' that criminal activity was taking place inside" defendant's new residence (*People v Mercado*, 68 NY2d 874, 877, *cert denied* 479 US 1095). In our view, it is more probable than not that the cocaine given to CI-1 was obtained from defendant's residence because, otherwise, UP would have simply sold the cocaine to CI-1 himself.

Even assuming, arguendo, that the search warrant application was

not sufficient without resorting to any hearsay evidence provided by CI-1 and UP, we conclude that the hearsay information contained in the search warrant application passed the *Aguilar-Spinelli* test and could thus be used to establish probable cause for the search warrant. It is well established that "[p]robable cause may be supplied, in whole or part, through hearsay information . . . New York's present law applies the *Aguilar-Spinelli* rule for evaluating secondhand information and holds that if probable cause is based on hearsay statements, the police must establish that the informant had some basis for the knowledge he [or she] transmitted to them and that he [or she] was reliable" (*Bigelow*, 66 NY2d at 423; *see Griminger*, 71 NY2d at 639). "Notably, where the information is based upon double hearsay, the foregoing requirements must be met with respect to each individual providing information" (*People v Mabeus*, 63 AD3d 1447, 1450, citing *People v Ketcham*, 93 NY2d 416, 421 and *People v Parris*, 83 NY2d 342, 347-348).

" 'If the affidavit rests on hearsay--an informant's report--what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) *that his information is hearsay, but there is good reason for believing it*' " (*Parris*, 83 NY2d at 347, quoting *Spinelli v United States*, 393 US 410, 425).

We conclude that the application established the reliability and basis of knowledge of CI-1. Reliability was established by the fact that CI-1 "ha[d] come forward with accurate information in the past" (*People v Rodriguez*, 52 NY2d 483, 489). Furthermore, the application also established CI-1's basis of knowledge. With respect to the basis of knowledge prong, "there is no requirement that the information furnished by [the informant] had to be the product of his [or her] personal observations of criminal activity . . . 'What is required is information of such quality, considering its source and the circumstances in which it came into possession of the informant, that a reasonable observer would be warranted in determining that the basis of the informant's knowledge was such that it led logically to the conclusion that a crime had been . . . committed' " (*People v Greene*, 153 AD2d 439, 443-444, *lv denied* 76 NY2d 735, *cert denied* 498 US 947). "[T]he basis of knowledge test is . . . intended to weed out, as not of sufficient quality, data received by the informant from others who have not themselves observed facts suggestive of criminal activity" (*People v Elwell*, 50 NY2d 231, 237). Inasmuch as CI-1 received data from someone who had himself observed criminal activity, the goal of the basis of knowledge test has been met (*see Greene*, 153 AD2d at 443-444; *cf. People v Rosenholm*, 222 AD2d 909, 910, *lv denied* 88 NY2d 884). Although CI-1 did not personally observe any alleged illegality inside or near defendant's new residence, the information provided by CI-1 to the officers was " 'of such quality. . . that a reasonable observer would be warranted in determining that the basis of [CI-1's] knowledge was such that it led logically to the conclusion that a crime had been . . . committed' " (*Greene*, 153 AD2d at 444). Notably, UP's identity was known to CI-1 (*see id.; see also Rosenholm*, 222 AD2d at 910).

We further conclude that the application established the reliability

and basis of knowledge of UP. Addressing first UP's basis of knowledge, we note that it is largely undisputed that UP had the requisite basis of knowledge due to his "personal knowledge of the criminal enterprise" (*Mabeus*, 63 AD3d at 1450), and his "personal observations of defendant's possession and sale . . . of cocaine" (*People v Peterson*, 269 AD2d 788, 789, *lv denied* 94 NY2d 951). Moreover, unlike the situation in *People v Mercado* (45 AD2d 699, 700), the officers' observations of UP both before and after the second and third sales "had [a] bearing on whether [UP] had actually been in [defendant's residence] and made the observation[s] he alleged or that he obtained the [cocaine] from this defendant."

We reject defendant's contention that nothing in the search warrant established UP's reliability. While an informant's reliability is often established by the fact that the informant had provided reliable information in the past, "there are, of course, other circumstances demonstrating his [or her] probable reliability. For instance, [the Court of Appeals] . . . [has] noted that a magistrate may rely upon the fact that the information was given under oath, *that the statements were against the informant's penal interest* and that two or more informants tended to confirm the information which each gave" (*People v Wheatman*, 29 NY2d 337, 345 [emphasis added]). In addressing the use of statements against penal interest as a basis to establish an informant's reliability, the Court of Appeals wrote that, "[w]hile admissions against penal interest may be sufficient to support a finding of probable cause . . . , '[s]uch admissions are not guarantees of truthfulness and they should be accepted only after careful consideration of all the relevant circumstances of the case indicates that there exists a basis for finding reliability' " (*People v Chisholm*, 21 NY3d 990, 992-993).

After careful consideration of all the relevant circumstances of the case, we conclude that " '*there [was] good reason for believing*' " the information supplied by UP to CI-1 (*Parris*, 83 NY2d at 347; *cf. People v Burks*, 134 AD2d 604, 605-606). First, UP's statement that he obtained the drugs from defendant was a "significant declaration[] against penal interest" (*People v Stroman*, 293 AD2d 350, 350, *lv denied* 98 NY2d 702), i.e., the statements admitting to the purchase and possession of cocaine would have subjected him to criminal liability (*see Greene*, 153 AD2d at 444; *see generally People v James*, 93 NY2d 620, 643). Moreover, UP knew, at the time of his statement, that the statement was against his penal interest (*see People v Harvey*, 270 AD2d 959, 960, *lv denied* 95 NY2d 835, *lv dismissed* 95 NY2d 853; *see generally People v Brensic*, 70 NY2d 9, 15, *remittitur amended* 70 NY2d 722; Jerome Prince, Richardson on Evidence § 8-411 [Farrell 11th ed 1995]), and his statement was a specific statement about a just-completed purchase (*compare People v Comforto*, 62 NY2d 725, 727, *with Burks*, 134 AD2d at 605). In *Burks*, a case relied upon by defendant, the informant's statement was only that "he had, on some unspecified past occasions, purchased cocaine from the defendant" (134 AD2d at 605). The Second Department in *Burks* deemed that statement "not sufficiently contrary to the informant's penal interest to establish reliability" (*id.*).

We likewise reject defendant's contention that UP's statements to CI-1 cannot satisfy the *Aguilar-Spinelli* test because UP's statements were

made only to CI-1 and thus were not made with the knowledge that they were against his penal interest, i.e., UP "thought he was speaking in confidence to a confederate and had no idea there was any risk that the statement would be used against him" (*People v Schmotzer*, 87 AD2d 792, 794). The First Department dispensed with such a contention, writing that, to reject statements against penal interest on that ground, which is "the most probable situation in which a declaration against penal interest would be truthful," would "almost make the possibility of inculpatory use of declarations against penal interest a merely academic exercise without any real situation in which it could be applied" (*id.*). Indeed, in a strikingly similar case, the First Department held that a statement to a friend, "trusted by the declarant not to reveal it to the police," can qualify as a declaration against penal interest (*People v Thomas*, 264 AD2d 691, 692, *lv denied* 94 NY2d 867; *see also James*, 93 NY2d at 643; *People v Ivy*, 217 AD2d 948, 949, *lv denied* 86 NY2d 843).

As further support for our conclusion that " '*there [was] good reason for believing*' " the information supplied by UP to CI-1 (*Parris*, 83 NY2d at 347), we note that the declaration against penal interest was "amply corroborated by 'information obtained from a source other than [UP's] statement' " (*Stroman*, 293 AD2d at 350; *see Ivy*, 217 AD2d at 949). Importantly, the actions of UP and some of his dealings with defendant were personally observed by police officers (*cf. Burks*, 134 AD2d at 605-606). In *Burks*, the Court recognized that "[t]he corroborated details need not be criminal in nature . . . ; however, they must establish 'good reason to believe' that the informant was telling the truth" (*id.* at 606, quoting *Rodriguez*, 52 NY2d at 489). Here, the officers actually observed UP interacting with defendant at defendant's new residence, which corroborated significant details of his statements to CI-1 (*cf. id.* at 605). Significantly, following both the second and third sales and CI-1's meetings with UP, the officers, who had confirmed that CI-1 had not been in possession of cocaine before meeting with UP, obtained cocaine from CI-1.

We thus conclude that "[t]he court properly found that the drug runner who provided the police confidential informant with information was both reliable and had a basis of knowledge for such information. The drug runner's basis of knowledge was established by personal observation of criminal activity[,] . . . [and the] drug runner's reliability was established by the fact that the statements the runner made to the confidential informant were against the runner's penal interest in that the runner implicated himself in the crime" (*Thomas*, 264 AD2d at 692).

We again emphasize that the issue here is not whether there was probable cause to believe that defendant himself was selling cocaine. He was never charged with selling cocaine. Rather, the issue is whether the information contained in the search warrant application was "sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*Bigelow*, 66 NY2d at 423). Based on the information provided by CI-1 and UP, as well as the officers' personal observations, the search warrant application established probable cause to believe that cocaine would be found inside defendant's new residence.

Defendant further contends that the court erred in refusing to conduct a *Darden* hearing with respect to UP. Inasmuch as defendant does not challenge the existence of UP and indeed was able to identify UP, there was no basis for a *Darden* hearing (*see People v Brown*, 2 AD3d 1423, 1424, *lv denied* 1 NY3d 625).

We thus conclude that the court properly refused to suppress the evidence obtained as a result of the execution of the search warrant.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

739

CA 13-02181

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

RICHARD A. WICKS, JR., MARY ANN WICKS, KAREN M. CAPUCILLI, KRISTINA M. CAPUCILLI AND JONATHAN J. WICKS, AS CO-TRUSTEES OF THE RICHARD A. WICKS, JR. AND MARYANN WICKS TRUST, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL J. KELLY AND KATHLEEN Q. KELLY, DEFENDANTS-RESPONDENTS.

CARROLL & CARROLL LAWYERS, P.C., SYRACUSE (JOHN BENJAMIN CARROLL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 25, 2013. The order denied the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion in part and dismissing the counterclaims and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to resolve an alleged dispute over the ownership of a portion of their driveway, as well as the driveway shoulder to the south of their driveway, which is where plaintiffs' and defendants' properties abut each other. In their complaint, plaintiffs allege they have sole title to their driveway and driveway shoulder by deed and/or adverse possession since 1964 and that, beginning in or about October 2011, defendants entered their driveway and driveway shoulder and interfered with their use and enjoyment of the property by placing permanent structures thereon. In their answer, defendants asserted three counterclaims. In the first counterclaim, defendants allege that extensive changes made by plaintiffs to their property in 2010, including the removal of both a shed from their property and a stone barrier between the properties, changed the "contour of the land" and led to water runoff to defendants' property, resulting in water damage to their side yard and basement. They allege in the second counterclaim that plaintiffs have repeatedly trespassed on their property and are wrongfully denying defendants access to their own property. In the third counterclaim, defendants allege that plaintiffs encroached on their property when plaintiffs' driveway construction extended 8 to 10

inches beyond the southern boundary of plaintiffs' property, and defendants seek an order directing plaintiffs to remove the encroachment and to compensate defendants for the resulting damages.

Plaintiffs moved for summary judgment on the complaint and for summary judgment dismissing defendants' counterclaims. In support of the motion, plaintiffs submitted the affidavit of a former owner of defendants' property who stated that, from 1966 through 1979, "the [plaintiffs] solely, openly used, occupied, improved, mowed, made plantings, weeded, and maintained the premises at suit as sole owners." Plaintiffs also submitted the affidavit of an engineer who stated that, in his opinion, plaintiffs' property has not contributed to any drainage issues on defendants' property. In opposition to the motion, defendants submitted an affidavit in which they asserted that they "do not dispute that the boundary of our two properties is along the southern edge of [plaintiffs'] driveway" and that defendants' surveyor "puts our boundary line . . . at the same place as" plaintiffs' surveyor. They further asserted, however, that the drainage materials they placed next to plaintiffs' driveway are "clearly within the settled boundary according to the two surveyors and by Plaintiffs' own admissions," and that "[d]rainage became an issue on [defendants'] property after the Plaintiffs changed the structures and contour of their property." Defendants also note that, "[a]lthough . . . [plaintiffs'] driveway encroaches slightly onto our land in some places, we do not claim it." Supreme Court denied plaintiffs' motion in its entirety, determining that there are issues of fact "regarding the property line and the parties' use of all property."

Contrary to plaintiffs' contention, the court properly denied that part of their motion for summary judgment on the complaint. Because plaintiffs are claiming that they obtained title to the disputed property in 1964, plaintiffs' adverse possession contention falls under the prior version of RPAPL 522 (*see Franza v Olin*, 73 AD3d 44, 46; *see also West v Hogan*, 88 AD3d 1247, 1248, *affd* 19 NY3d 1073; *Hammond v Baker*, 81 AD3d 1288, 1290-1291). We conclude that they failed to meet their initial burden of proof of establishing title by deed or adverse possession, however, because they failed to submit any evidence of the parameters or measurements of the property in dispute. Thus, we conclude that the court's finding of a factual question "regarding the property line," i.e., the actual dimensions of the disputed property, is supported by the record (*see generally Hammond*, 81 AD3d at 1290).

We agree with plaintiffs, however, that the court erred in denying that part of their motion for summary judgment dismissing defendants' counterclaims. We therefore modify the order accordingly. With respect to defendants' first and second counterclaims, it is well established that a party "seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the [abutting property owner's] land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the [abutting owner's] property" (*Mount Zion Ministries Church, Inc. v Hines Color, Inc.*, 19 AD3d 1060, 1060, *lv denied* 5 NY3d 711; *see Langdon v Town of Webster*, 238 AD2d 888, *lv denied* 90 NY2d 806).

Here, plaintiffs met their burden with respect to the first and second counterclaims by establishing that the "natural contour of their property, rather than improvements [or alterations] made by [plaintiffs] thereto, caused the diversion of surface water" onto defendants' property (*Mount Zion Ministries Church, Inc.*, 19 AD3d at 1060), and defendants failed to raise an issue of fact in that respect (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The record further establishes that the improvements on plaintiffs' property, including the driveway extension and the removal of a shed, were all made in good faith. Defendants' further contention that its first counterclaim "may reasonably be interpreted as one setting forth a cause of action for private nuisance" is raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Finally, with respect to defendants' third counterclaim, we conclude that defendants effectively abandoned that counterclaim by asserting in opposition to plaintiffs' motion that, "[a]lthough . . . [plaintiffs'] driveway encroaches slightly onto our land in some places, we do not claim it" (*see generally id.* at 984).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

749

CA 13-02081

PRESENT: SMITH, J.P., CENTRA, CARNI, AND WHALEN, JJ.

LONNIE GATES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENE H. LONGDEN AND SEARS, ROEBUCK AND CO.,
DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREENE & REID, PLLC, SYRACUSE (JAMES T. SNYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered April 19, 2013. The order, among other things, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motor vehicle accident when the vehicle he was driving was rear-ended by a vehicle operated by defendant Gene H. Longden and owned by defendant Sears, Roebuck and Co. According to plaintiff's bill of particulars, plaintiff sustained a serious injury under the significant disfigurement, permanent consequential limitation of use and significant limitation of use categories of serious injury (*see* Insurance Law § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the grounds that any injury sustained by plaintiff was not causally related to the accident and that, in any event, plaintiff did not sustain a serious injury, and plaintiff cross-moved for partial summary judgment on the issues of "liability, proximate cause and serious injury." Defendants appeal from an order denying their motion and granting that part of plaintiff's cross motion for partial summary judgment on the issue of negligence. We agree with defendants that the court erred in denying that part of their motion with respect to one of the three categories of serious injury allegedly sustained by plaintiff, i.e., the permanent consequential limitation of use category, and we therefore modify the order accordingly.

With respect to causation, defendants contend that the court abused its discretion in disregarding the opinion of their expert on the issue of injury causation and that, in view of that opinion, they established their entitlement to summary judgment dismissing the complaint because any negligence on their part was not a proximate cause of plaintiff's injuries. Contrary to defendants' contention, the court did not abuse its " 'sound discretion' " in refusing to consider the affidavit of defendants' expert (*Baity v General Elec. Co.*, 86 AD3d 948, 952; *see generally Werner v Sun Oil Co.*, 65 NY2d 839, 840). Defendants' biomechanical expert is an engineer, and is not a medical doctor, and thus the court properly determined that the expert did not possess "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered [regarding injury causation] is reliable" (*Matott v Ward*, 48 NY2d 455, 459; *cf. Cardin v Christie*, 283 AD2d 978, 979). Because the court did not consider the opinion of defendants' biomechanical expert on injury causation, we conclude that defendants failed to meet their burden of establishing that they were entitled to summary judgment dismissing the complaint on the ground that there was no injury causation (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Defendants' further contention that the court should have conducted a *Frye* hearing with respect to the admissibility of their expert's opinion is unpreserved for our review because defendants failed to request one (*see Parker v Mobil Oil Corp.*, 16 AD3d 648, 654, *affd* 7 NY3d 434, *rearg denied* 8 NY3d 828; *see generally Matter of York v Zullich*, 89 AD3d 1447, 1448).

The court properly denied that part of defendants' motion with respect to the significant disfigurement category of serious injury. Specifically, "the issue whether a reasonable person viewing the plaintiff's [lower back and scar] would regard the condition as unattractive, objectionable, or as the subject of pity or scorn presents an issue of fact that cannot be resolved by way of summary judgment" (*Langensiepen v Kruml*, 92 AD3d 1302, 1303 [internal quotation marks omitted]). We further conclude that the court properly denied that part of defendants' motion with respect to the significant limitation category of serious injury. A significant limitation of use of a body function or member does not require a showing of permanency, and "any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Lively v Fernandez*, 85 AD3d 981, 982 [internal quotation marks omitted]). Here, defendants submitted evidence in support of their motion indicating that plaintiff missed six weeks of work following his surgery and was confined to his home with medical restrictions, thus raising an issue of fact with respect to that category (*see generally Winegrad*, 64 NY2d at 853).

We conclude, however, that the court erred in denying that part of defendants' motion with respect to the permanent consequential limitation of use category of serious injury. Defendants met their initial burden by submitting evidence that plaintiff worked full-time since the accident, other than during the six weeks in which he was recovering from surgery. They also established that, as of the date of plaintiff's deposition on June 22, 2012, plaintiff had no medical restrictions. Defendants further

established that plaintiff has been able to fish, hunt and camp almost every weekend, and they submitted medical records stating that plaintiff had a moderate global loss in range of motion, but with no indication of permanency (*see Carfi v Forget*, 101 AD3d 1616, 1617-1618). Plaintiff failed to raise an issue of fact in opposition to defeat that part of the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), inasmuch as he failed to submit evidence of " 'a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part' " (*Matte v Hall*, 20 AD3d 898, 899, quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). In particular, plaintiff failed to submit objective proof of his injury and a
" 'designation of a numeric percentage of [his] loss of range of motion' " (*id.*, quoting *Toure*, 98 NY2d at 350).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

751

CA 13-01334

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

ROGER PASQUARELLA AND 2030 ELMWOOD AVENUE, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

1525 WILLIAM STREET, LLC, DEFENDANT-APPELLANT.

STEINER & BLOTNIK, BUFFALO (RICHARD J. STEINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 23, 2013. The order granted the motion of plaintiffs for summary judgment.

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

Memorandum: In this action arising from a contract for the sale of a parcel of real property, defendant appeals from an order granting plaintiffs' motion for summary judgment on their cause of action for specific performance. Plaintiffs negotiated intermittently over a two-year period to purchase the subject parcel from defendant, a limited liability corporation (LLC). All of the contractual negotiations were conducted by Zvi Sultan, who indicated to plaintiffs that he was president-principal of defendant, by plaintiff Roger Pasquarella as agent for the business that subsequently became plaintiff 2030 Elmwood Avenue, Inc. (2030 Elmwood), and by the attorneys for the parties. Throughout the negotiations, defendant's attorney acted as if Sultan had authority to negotiate on defendant's behalf. There were several lengthy breaks in the negotiations, but the parties eventually finalized the details of the contract, and, in April 2012, the contract was signed. Sultan, in executing the contract on behalf of defendant, indicated that he was defendant's manager, and defendant's attorney accepted plaintiffs' deposit of $7,500.00. When plaintiffs' attorney sought the documents that, pursuant to the contract, defendant was obligated to provide prior to closing, defendant declined to provide them and refused to schedule a closing date. Defendant sought to return plaintiffs' deposit after this action was commenced, using the services of a different attorney. Defendant contended that Sultan had no authority to bind defendant because, shortly before the contract was signed, Sultan sold a controlling interest in defendant to his son, and the operating agreement between the two

provided that a sale of corporate property must be approved by all members.

We agree with plaintiffs that, in support of their motion for summary judgment, they demonstrated that they "substantially performed [their] contractual obligations and w[ere] willing and able to perform [their] remaining obligations" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51, *lv dismissed* 3 NY3d 656, *lv denied* 3 NY3d 607; *see generally Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 530-531), and thus demonstrated that they were entitled to summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition, defendant failed to raise a triable issue of fact whether Sultan lacked apparent authority to bind defendant contractually. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent" (*Hallock v State of New York*, 64 NY2d 224, 231 [internal quotation marks omitted]; *cf. N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252 n 3). Here, we conclude that plaintiffs reasonably relied on, inter alia, their prior course of dealing with Sultan in his capacity as president, principal and manager of defendant (*see Benderson Dev. Co. v Schwab Bros. Trucking*, 64 AD2d 447, 456; *see also Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 46-47, *lv denied* 74 NY2d 604). In addition, the record establishes that defendant allowed its attorney to act in a manner consistent with Sultan's continued authority, and that defendant accepted the deposit that plaintiffs provided to that attorney in conjunction with the signing of the contract, thus "giv[ing] rise to the appearance and belief that [Sultan] possesse[d] authority to enter into [the] transaction" (*Hallock*, 64 NY2d at 231). Defendant therefore "allowed [Sultan] to represent that he had the requisite authority[,] and it may not now be denied" (*Benderson Dev. Co.*, 64 AD2d at 456; *cf. 56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134, 1134-1135).

Finally, we note that Limited Liability Company Law § 412 (a) provides that, "[u]nless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority." A nearly identical subsection provides that, where management of an LLC is vested in a manager, the acts of the manager are binding upon the LLC unless the manager at issue has in fact no authority to act for the LLC, and the person with whom he or she is dealing knows that the manager lacks

such authority (§ 412 [b] [2] [A], [B]). Thus, regardless whether Sultan was acting as a manager of defendant, as reflected by his signature on the contract, or as a member of defendant, as he and defendant's attorney previously had indicated to plaintiffs, he had apparent authority to act and his acts were binding upon defendant unless, inter alia, plaintiffs had "knowledge of the fact that [Sultan] ha[d] no such authority" (§ 412 [a] [i]; [b] [2] [B]). Here, defendant failed to tender any evidence indicating that plaintiffs had knowledge of the recent limitation of Sultan's authority. Consequently, defendant failed to raise a triable issue of fact whether Sultan lacked authority to enter into the contract and thereby bind defendant to perform it (*see Zuckerman*, 49 NY2d at 562).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

775

CA 13-02128

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

RONALD P. COLANGELO, SR. AND KEVLYNN M. COLANGELO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FREDERICK L. MARRIOTT, KRISTI L. SMITH, FORMERLY KNOWN AS KRISTI L. MARRIOTT, DONALD A. SHEPPARD, SR., DORCAS M. GRAHAM, GRAHAM'S REFUSE SERVICE, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (MARK G. MITCHELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS FREDERICK L. MARRIOTT AND KRISTI L. SMITH, FORMERLY KNOWN AS KRISTI L. MARRIOTT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (JOHN D. GOLDMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS DONALD A. SHEPPARD, SR., DORCAS M. GRAHAM AND GRAHAM'S REFUSE SERVICE, LLC.

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (ANTHONY J. BRINDISI OF COUNSEL), FOR PLAINTIFF-RESPONDENT KEVLYNN M. COLANGELO.

Appeals from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered February 20, 2013. The order, among other things, denied the motion of defendants Frederick L. Marriott and Kristi L. Smith, formerly known as Kristi L. Marriott, for summary judgment and denied the cross motion of defendants Donald A. Sheppard, Sr., Dorcas M. Graham, and Graham's Refuse Service, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion of defendants Donald A. Sheppard, Sr., Dorcas M. Graham, and Graham's Refuse Service, LLC, and dismissing the amended complaint against them and as modified the order is affirmed without costs.

Memorandum: This personal injury action arises out of a motor vehicle accident involving three vehicles that occurred on Erie Boulevard West, a four-lane road with a middle turning lane, in the town of Rome. Defendant Frederick L. Marriott (Marriott) was driving a pickup truck owned by defendant Kristi L. Smith, formerly known as Kristi L. Marriott (collectively, Marriott defendants) in the left eastbound lane. The vehicle traveling directly in front of Marriott in the eastbound left lane was a garbage truck owned by defendants Dorcas M. Graham and Graham's Refuse Service, LLC, and driven by defendant Donald A. Sheppard, Sr.

(collectively, Sheppard defendants). A minivan operated by plaintiff Kevlynn M. Colangelo, in which plaintiff Ronald P. Colangelo, Sr. was a passenger, was in the right eastbound lane. Just prior to the accident, a traffic light directly ahead of these vehicles had turned red, and plaintiffs' minivan had come to a stop in the right lane. The first collision occurred after the brakes on the pickup truck failed. Upon realizing that he had no working brakes, Marriott attempted to avoid rear-ending the garbage truck ahead of him by turning to the right in order to get off the road, whereupon the pickup truck rear-ended plaintiffs' minivan before leaving the road and entering a parking lot. The force of this collision spun plaintiffs' minivan around so that it partially entered the left eastbound lane. Upon entering the left lane, plaintiffs' minivan either struck or was struck by the garbage truck in the left lane, which either was stopping or had stopped for the red light. As relevant on appeal, the Sheppard defendants cross-moved and the Marriott defendants moved for summary judgment dismissing the amended complaint against them. Supreme Court denied the cross motion and motion, and these appeals ensued.

We agree with the Sheppard defendants that the court erred in denying their cross motion, and we therefore modify the order accordingly. Sheppard was approaching the red light and was either stopped or was braking in order to come to a stop when plaintiffs' minivan, which had been hit by Marriott's pickup truck, unexpectedly entered the left lane and the second collision occurred. We note that, while the Sheppard defendants assert, inter alia, that they are entitled to summary judgment based on the emergency doctrine (*see Lifson v City of Syracuse*, 17 NY3d 492, 497), the emergency doctrine is not essential to our analysis. When a vehicle turns in front of a vehicle with the right-of-way, the driver with the right-of-way is deemed free of negligence absent proof of speeding or some other act of negligence (*see e.g. Tyson v Nazarian*, 103 AD3d 1254, 1254; *Rogers v Edelman*, 79 AD3d 1803, 1804; *Guadagno v Norward*, 43 AD3d 1432, 1433). Here, viewing the evidence in the light most favorable to the nonmoving party (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502), we conclude that the garbage truck hit plaintiffs' minivan when it entered the left lane where Sheppard had been driving and was bringing the garbage truck to a stop. There is no evidence that Sheppard's operation of the garbage truck was negligent, and plaintiffs' contention that Sheppard could have avoided the collision by moving into the center turning lane is based on speculation (*see Wallace v Kuhn*, 23 AD3d 1042, 1043).

We further conclude, however, that the court properly denied the motion of the Marriott defendants. Those defendants contend that they are entitled to summary judgment based on the emergency doctrine because, inter alia, the brakes on their pickup truck failed without warning, thereby creating an emergency situation. We reject that contention. "The common-law emergency doctrine 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency' " (*Lifson*, 17 NY3d at 497, quoting *Caristo v Sanzone*, 96 NY2d 172, 174). It is also clear,

however, "that the emergency doctrine does not automatically absolve a person from liability for his or her conduct" (*Sossin v Lewis*, 9 AD3d 849, 851, *amended on rearg* 11 AD3d 1045). "The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Dalton v Lucas*, 96 AD3d 1648, 1649; *see Andrews v County of Cayuga*, 96 AD3d 1477, 1479). We conclude that there are issues of fact whether the Marriotts' maintenance of their pickup truck was adequate and thus whether the brake failure was truly unexpected and without any fault on their part. Moreover, it cannot be concluded as a matter of law that swerving to the right in order to avoid rear-ending the garbage truck was a reasonable reaction to the emergency created by the loss of brakes on the pickup truck.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

786

KA 13-00073

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KACIE MUNSON, DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered December 13, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was not knowing and voluntary (*see People v Jones*, 118 AD3d 1354, 1354). Defendant also failed to preserve for our review his contention that County Court improperly delegated to the prosecutor the authority to conduct a portion of the plea allocution (*see People v Swontek* [appeal No. 1], 289 AD2d 989, 989). This case does not fall within the narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666).

Finally, the sentence is not unduly harsh or severe.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

803

CA 14-00009

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

M.E., DEFENDANT-APPELLANT.

HIGBEE & ASSOCIATES, SALT LAKE CITY, UTAH (RAYMINH L. NGO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Chautauqua County Court (John T. Ward, J.), entered July 31, 2013. The order denied the motion of defendant for conditional sealing pursuant to CPL 160.58.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Opinion by WHALEN, J.:

The issue before us in this case of first impression at the appellate level is whether criminal records are eligible for conditional sealing under CPL 160.58 even if they relate to convictions that predate the statute. We conclude that they are eligible for conditional sealing.

I

In 1996, defendant pleaded guilty in County Court to criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09), a class C felony. She was sentenced to a three-year conditional discharge, which she served without incident. Defendant also successfully completed an inpatient drug treatment program in Pennsylvania. By all accounts, defendant has turned her life around since becoming drug-free. She is now married, a homeowner, and licensed as a registered nurse in both New York and Pennsylvania.

In 2013, defendant moved to "conditionally seal" her criminal records pursuant to CPL 160.58, a provision enacted as part of the 2009 Drug Law Reform Act (L 2009, ch 56, part AAA, § 3). Under CPL 160.58 (1), the specific subdivision at issue on appeal,

> "[a] defendant convicted of any offense defined in [Penal Law] article [220] . . . who has successfully

> completed a judicial diversion program under [CPL] article [216], or one of the programs heretofore known as drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision, and has completed the sentence imposed for the offense . . . , is eligible to have such offense . . . sealed pursuant to this section."[1]

The People took no position on the motion, noting only that defendant "is eligible for a Conditional Seal Order and the granting of the seal order is within the discretion of the court." The court denied the motion, however, reasoning that CPL 160.58 could not be invoked to seal criminal records relating to convictions entered prior to the 2009 effective date of that statute. Defendant appeals, and we conclude that the order should be reversed.

II

"Initially, we note that the authority for a direct appeal of this order is not set forth in Article 450 of the Criminal Procedure Law" (*People v Purley*, 297 AD2d 499, 501, *lv denied* 99 NY2d 503). Nevertheless, "a court's ruling on a [record-sealing] motion is a civil matter[,] 'for although it relates to a criminal matter, it does not affect the criminal judgment itself, but only a collateral aspect of it—namely, the sealing of the court record' " (*People v Anonymous*, 7 AD3d 309, 310, quoting *Matter of Hynes v Karassik*, 47 NY2d 659, 661 n 1; *see Matter of Katherine B. v Cataldo*, 5 NY3d 196, 201 n 1). As such, "the order [on appeal] was an exercise of the [motion] court's civil jurisdiction" (*Purley*, 297 AD2d at 501; *see* CPL 10.10 [7]; *see generally* NY Const art VI, § 11 [a], [b]) and, because defendant is an "aggrieved party" under these circumstances (CPLR 5511), her appeal is properly before us pursuant to CPLR 5701 (a) (2) (v) (*see e.g. Anonymous*, 7 AD3d at 310).

III

In determining that criminal records may not be conditionally sealed under CPL 160.58 if they relate to a conviction that predates the statute, the court reasoned that the application of CPL 160.58 to such records would constitute an improper "retroactive" application of the statute. We conclude, however, that applying CPL 160.58 under these circumstances "does not render [the] statute 'retroactive' in any true sense of that term" (*Forti v New York State Ethics Commn.*, 75 NY2d 596, 609). CPL 160.58 simply creates a mechanism for restricting future access to existing records. It does not contemplate any alteration of the underlying criminal judgment reflected in those records, nor does it potentially invalidate or rescind any prior disclosures thereof (*cf. Matter of County of Herkimer v Daines*, 60 AD3d 1456, 1457, *lv denied* 13 NY3d 707).

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[1] Conditional sealing is not automatic for any eligible criminal record, however. Rather, the ultimate decision is committed to the motion court's sound discretion (*see* CPL 160.58 [3] [listing several nonexclusive factors to consider in determining whether to grant conditional sealing]).

The fact that the records at issue here relate to events occurring prior to the statute's effective date is immaterial. As the Court of Appeals has repeatedly recognized, "[a] statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events" (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 57 [internal quotation marks omitted]; *see Matter of St. Clair Nation v City of New York*, 14 NY3d 452, 456-458; *Matter of Miller v DeBuono*, 90 NY2d 783, 790-791). "Thus, contrary to [the People's] arguments [and County Court's conclusion], the principles of statutory construction [that] require clear expression of a legislative intention to make a new provision retroactive . . . are inapplicable here" (*Forti*, 75 NY2d at 610).

Our conclusion is bolstered by the legislative history of CPL 160.58, which reveals that the legislature explicitly limited the operation of 12 other sections within the same part of the relevant enacting chapter "to offenses committed on or after the [effective] date . . . and . . . to offenses committed before such date provided that sentence upon conviction for such offense has not been imposed on or before such date" (L 2009, ch 56, part AAA, § 33 [f]). Section (3) of part AAA—the section that created CPL 160.58—is not among the 12 sections whose retroactive effect was specifically restricted in the legislation. Indeed, the legislation does not prescribe any particular retroactivity rule for section (3) nor would it; because section (3) regulates only future (i.e., post-effective date) access to existing criminal records, there was no potential retroactivity for the legislature to address.

Finally, nothing in the text of CPL 160.58 itself suggests that it does not apply to criminal records relating to antecedent convictions (*see generally Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583). Defendant *was* "convicted of an[] offense defined in [Penal Law] article [220]," she "has completed the sentence imposed for the offense," and there is no dispute that she "has successfully completed" a qualifying drug treatment program (CPL 160.58 [1]). Thus, under the plain text of the statute, defendant "is eligible to have such offense . . . sealed pursuant to this section" (*id.*; *see e.g. Matter of K.*, 35 Misc 3d 742).

IV

Accordingly, inasmuch as the records relating to defendant's 1996 drug conviction are facially eligible for conditional sealing under CPL 160.58 (1), we conclude that the order should be reversed and the matter should be remitted to County Court for its consideration of the

discretionary factors enumerated in CPL 160.58 (3).

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

808

KA 12-02287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BANGALY D. CHELLEY, ALSO KNOWN AS "AFRICA,"
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 13, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant, a noncitizen, 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]; *see* § 265.02 [1]). Defendant implicitly contends that the failure of Supreme Court to advise him that he could be subject to deportation if he pleaded guilty renders his plea involuntary (*see People v Peque*, 22 NY3d 168, 197). We conclude that defendant's contention is not preserved for our review (*see* CPL 470.05 [2]), and that, under the circumstances of this case, the narrow exception to the preservation doctrine does not apply (*cf. Peque*, 22 NY3d at 182-183). It is undisputed that the presentence report stated that there was an immigration detainer on file at the Erie County Holding Center and that it was expected that defendant would face deportation proceedings when released from incarceration. Thus, defendant failed to establish that he "did not know about the possibility of deportation during the . . . sentencing proceeding[], [and thus that] he had no opportunity to withdraw his plea based on the court's failure to apprise him of potential deportation" (*id.* at 183; *see generally* CPL 220.60 [3]; *People v Murray*, 15 NY3d 725, 726-727). Although the waiver of the right to appeal does not encompass defendant's contention that the bargained-for sentence is unduly harsh and severe (*see People v Maracle*, 19 NY3d

925, 928), we nevertheless reject that contention.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court

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

825

CA 12-01230

PRESENT: FAHEY, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ANTHONY D. AMAKER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

ANTHONY D. AMAKER, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 27, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking review of the determination denying his request to have documents relating to the 2006 arrest and prosecution of his mother removed from his inmate record. As a preliminary matter, we note that, contrary to respondent's contention, petitioner exhausted his administrative remedies with respect to the issues raised herein (*cf. Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1189).

Petitioner contends that the documents at issue were ordered sealed pursuant to CPL 160.50, and that Supreme Court therefore acted in an arbitrary and capricious manner in refusing to remove them from his inmate record. We reject that contention. The court properly concluded that the statutes relied upon by petitioner—CPL 160.50 and Executive Law § 296 (16)—do not require respondent to remove any information concerning the 2006 incident from petitioner's inmate record. Those statutes provide protection only to petitioner's mother, not to petitioner. Furthermore, with respect to CPL 160.50, the Unusual Incident (UI) report, which is one of the documents found in petitioner's inmate record relating to the 2006 incident, is not a document that arises from a "criminal action or proceeding" (*id.*). As properly noted by the court, the UI report is an internal document prepared and used by respondent for administrative purposes, and it is "independent of, and unrelated to, the 'arrest or prosecution' of the petitioner's mother" (*see generally Matter of Hearst*

Corp. v City of Albany, 88 AD3d 1130, 1131-1132).

We reject petitioner's further contention that the Due Process and Equal Protection Clauses of the State and Federal Constitutions mandate that the documents at issue be removed from his inmate record. "[I]n order to successfully assert a constitutional claim, the inmate must establish that the challenged information in his [record] is false" *(Matter of Scarola v Malone*, 226 AD2d 844), and petitioner has not done so here.

Entered: August 8, 2014

Frances E. Cafarell
Clerk of the Court