SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 17, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1317

CA 11-01162

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

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY CITY OF ROCHESTER.

---------- MEMORANDUM AND ORDER

MITCHELL DUVALL, PETITIONER-APPELLANT;

CITY OF ROCHESTER, RESPONDENT-RESPONDENT.

ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 25, 2011. The order denied the application of petitioner to vacate a judgment of foreclosure and the tax foreclosure deed.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, to vacate and set aside a judgment of foreclosure and the tax foreclosure deed. Supreme Court properly denied the application. Until April 2010, petitioner was the owner of 135 Weld Street in Rochester and had resided continuously at the property since 1964 when he purchased the property with his late wife. On July 1, 2008, respondent levied the 2008-2009 city taxes on the property. In the fall of 2008 and the spring of 2009, respondent sent notices of nonpayment to petitioner by ordinary mail. In addition, when the 2009-2010 tax bill was issued in July 2009, the bill sent to petitioner by ordinary mail included a statement of the delinquent 2008-2009 taxes. Petitioner made partial payments for his taxes in April, July, October, and December 2009, as well as in January 2010, but a balance remained and no payments were made after January 2010. On December 16, 2009, respondent commenced a foreclosure action and sent notice thereof to petitioner by ordinary mail, in addition to publishing the notice. On February 26, 2010, respondent sent another notice to petitioner by ordinary mail informing him that his property would be sold or taken by respondent on March 19, 2010 in the event that it was not redeemed from foreclosure by March 18, 2010. After receiving no payment from petitioner, respondent sold the property on March 19, 2010, with respondent being the purchaser, and a tax foreclosure deed was recorded on April 29, 2010. On May 6, 2010,

petitioner was personally served with a 10-day notice to quit. When he was served with that notice, petitioner, who is illiterate, asked the process server to read the document to him. He then immediately took the document to his attorney. His attorney contacted respondent's attorney (corporation counsel) in an effort to allow petitioner to pay the back taxes and remain in his home, but corporation counsel informed petitioner's attorney that the foreclosure was final and there was nothing that could be done.

We reject petitioner's contention that he was deprived of due process based on respondent's failure to provide him with adequate notice of the foreclosure action. Pursuant to both the federal and state constitutions, a person may not be deprived of property without due process of law (*see* US Const 14th Amend; NY Const, art I, § 6; *Kennedy v Mossafa*, 100 NY2d 1, 8). "Due process does not require that a property owner receive actual notice before the government may take his [or her] property" (*Jones v Flowers*, 547 US 220, 226). Rather, due process is satisfied by "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314; *see Kennedy*, 100 NY2d at 9). "Due process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice" (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140; *see Walker v City of Hutchinson*, 352 US 112, 115; *Matter of County of Clinton [Bouchard]*, 29 AD3d 79, 83). "A balance must be struck between the [municipality's] interest in collecting delinquent property taxes and [that] of the property owner in receiving notice" (*Harner*, 5 NY3d at 140; *see Kennedy*, 100 NY2d at 10-11).

Here, petitioner does not dispute that respondent provided all of the statutorily required notices to him. All of those notices were sent to his address, where he was living. Petitioner's only defense is that he is illiterate and that representatives of respondent knew of his illiteracy, and respondent therefore should have provided alternative notice in order to fulfill its due process requirements. Although respondent contends that there is no evidence in the record that its representatives were aware of petitioner's illiteracy, we assume for the purpose of this appeal that petitioner's statements in his affidavit with respect to that issue are true (*see Covey v Town of Somers*, 351 US 141, 145-146).

"[U]nder most circumstances, notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy" (*Weigner v City of New York*, 852 F2d 646, 650, *cert denied* 488 US 1005). Petitioner relies on two United States Supreme Court cases in which the Court concluded that the notice sent to the property owner by ordinary mail was insufficient. In *Robinson v Hanrahan* (409 US 38), the property owner was arrested for armed robbery, and the State of Illinois (State) immediately began forfeiture proceedings against his automobile. The State mailed notice of the proceedings to the property owner's home, but he was being held in jail awaiting trial (*id.* at 38-39). The Court concluded

that the State knew that the property owner was not at his address and could not get there to retrieve the notice and, under those circumstances, the State failed to provide notice that was reasonably calculated to apprise him of the forfeiture proceedings (*id.* at 40). In *Covey* (351 US at 144-145), the Town of Somers (Town) instituted a foreclosure proceeding against a property owner known by the Town to be incompetent and without a conservator, but the Town nevertheless mailed notice of the foreclosure action to her address. A judgment of foreclosure was entered after she failed to answer and, less than two months later, she was declared of unsound mind and committed to a hospital for the insane (*id.* at 144). The Court concluded that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to" the requirement that notice be reasonably calculated, under all the circumstances, to apprise him or her of the pendency of the action (*id.* at 146).

Unlike the property owner in *Robinson*, here, petitioner received written notice of the foreclosure action. Although the property owner in *Covey* also received such notice, she did not have a guardian or other person available to ensure that she understood the notices that were sent to her. Petitioner, however, was not incompetent. We must balance the interests of petitioner as the property owner and respondent as the municipality and, "[i]n striking such balance, [we] may take 'into account the status and conduct of [petitioner] in determining whether notice was reasonable' " (*Harner*, 5 NY3d at 140, quoting *Kennedy*, 100 NY2d at 11). We conclude that respondent satisfied the requirements of due process by mailing the notices to petitioner. "Ownership carries responsibilities" (*Kennedy*, 100 NY2d at 11) and, "[a]s a property owner, [petitioner] is fairly 'charged with the knowledge that property taxes are regularly levied and that a default may result in a forfeiture' " (*Bouchard*, 29 AD3d at 84; *see Weigner*, 852 F2d at 651).

We sympathize with petitioner's situation, inasmuch as he has lived at the property since 1964 and has not abandoned it, he relies on limited income to pay his bills, and the amount of tax due was a small percentage of the market value of his property. Nevertheless, respondent established that petitioner's property was the subject of six prior tax foreclosure actions and submitted evidence that petitioner was aware of at least two of those actions. Petitioner admitted that either his daughter or his attorney read his mail to him, but in this instance neither of those individuals read the foreclosure notices to him. It was reasonable for respondent to believe that petitioner had someone read his mail to him. To hold that a municipality must provide notice other than by ordinary mail to persons it knows to be illiterate, or who it knows cannot read English, would place an unreasonable burden on the municipality. The burden that is placed on a municipality is a factor to consider in determining whether the municipality's efforts to provide notice to the property owner were reasonable (*see Matter of ISCA Enters. v City of New York*, 77 NY2d 688, 701, *rearg denied* 78 NY2d 952, *cert denied* 503 US 906). In *Matter of Smith* (52 NY 526, 530), a case involving publication of an ordinance before it was approved, the Court of Appeals determined that such notice may be sufficient inasmuch as the

property owner knows where to look for the notice, "and if he cannot read the language himself he may easily find [someone] who can."

Although a property owner's "ability to take steps to safeguard [his or her] interests does not relieve the [municipality] of its constitutional obligation" (*Mennonite Bd. of Missions v Adams*, 462 US 791, 799), we conclude that respondent's actions in mailing the notice to petitioner were "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the [foreclosure] action and afford [him] an opportunity to present [his] objections" (*Mullane*, 339 US at 314).

All concur except FAHEY and SCONIERS, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent and would reverse the order and grant petitioner's application seeking, inter alia, to vacate the judgment of foreclosure. At the outset, we conclude that Supreme Court erred in determining that it was "powerless" to vacate the judgment of foreclosure entered upon petitioner's default. The court has "the inherent authority to vacate the default judgment 'for sufficient reason and in the interests of substantial justice' " (*Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68). Here, the record establishes that petitioner is presently age 91 and owned the subject property from 1964 until April 2010. The record further establishes that petitioner is an illiterate widower who relies on limited income to pay his bills, and that the amount of tax due was a very small percentage of the market value of his property. In our view, respondent knew or should have known of petitioner's illiteracy and, given the circumstances of this case, the court improvidently exercised its discretion in denying petitioner's application (*see id.*). "We thus conclude 'that this [would be] an appropriate case in which to exercise our broad equity power to vacate [the] default judgment' " (*id.*).

We further conclude that the court erred in denying petitioner's application for the independent reason that petitioner was deprived of due process based on respondent's failure to provide him with adequate notice of the foreclosure action. To satisfy due process, notice must be " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action' " (*Jones v Flowers*, 547 US 220, 226, quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314). Generally, "notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy" (*Weigner v City of New York*, 852 F2d 646, 650, *cert denied* 488 US 1005). However, "[t]he means employed [to provide notice] must be such as one desirous of actually informing the [parties] might reasonably adopt to accomplish it" (*Mullane*, 339 US at 315). Thus, " 'notice required will vary with circumstances and conditions' " (*Jones*, 547 US at 227, quoting *Walker v City of Hutchinson*, 352 US 112, 115).

Where the government has "knowledge that notice pursuant to the normal procedure was ineffective[, there arises] an obligation on the government's part to take additional steps to effect notice" (*id.* at

230). Here, respondent was or should have been aware that petitioner was illiterate, and his illiteracy was a significant circumstance or condition that weighed against a "reasonabl[e] calculat[ion]" that the usual method of mailing the foreclosure notice would apprise petitioner of the foreclosure action (*id.* at 226). Put differently, "[n]o one 'desirous of actually informing' " the elderly, illiterate petitioner that his house was in foreclosure would reasonably think that sending him a letter would give him notice of the impending foreclosure (*id.* at 229). Consequently, under the particular circumstances of this case, we conclude that petitioner, who we note must pay his taxes and must be accountable for tax delinquency (*see id.* at 234), was not provided with adequate notice of the impending taking. We further conclude that, while it is not our responsibility to prescribe the form of notice to be provided to petitioner (*see id.*), we are confident that there were reasonable steps respondent could have taken to inform petitioner of his tax delinquency (*see id.* at 238).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

1450

CA 11-01138

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

CLAY LANGENSIEPEN, PLAINTIFF-APPELLANT,

V ORDER

DAVID KRUML, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered February 23, 2011. The order denied the amended motion of plaintiff for partial summary judgment, granted the cross motion of defendant for summary judgment and dismissed the complaint.

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

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

1451

CA 11-01139

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

CLAY LANGENSIEPEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID KRUML, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered February 17, 2011. The judgment dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying defendant's cross motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the significant disfigurement and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and granting that part of plaintiff's amended motion for partial summary judgment on the issue of negligence, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle driven by defendant and in which plaintiff was a passenger struck a tree. We conclude that Supreme Court properly granted those parts of defendant's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and 90/180-day categories of serious injury (*see* Insurance Law § 5102 [d]). Contrary to plaintiff's contention, defendant met his initial burden on the cross motion with respect to those categories and, in opposition to the cross motion, plaintiff failed to submit the requisite "objective proof of [his alleged] injury in order to satisfy the statutory serious injury threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350).

We agree with plaintiff, however, that the court erred in granting those parts of defendant's cross motion with respect to the significant disfigurement and significant limitation of use categories of serious injury. According to plaintiff, the scar on his hip constituted a significant disfigurement. We conclude that the issue

whether " 'a reasonable person viewing the plaintiff's [hip] in its altered state 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 (*Waldron v Wild*, 96 AD2d 190, 194; *see Savage v Delacruz*, 100 AD2d 707). We further conclude that the medical evidence submitted by plaintiff is sufficient to create an issue of fact with respect to the significant limitation of use category. We therefore modify the judgment by denying defendant's cross motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the significant disfigurement and significant limitation of use categories of serious injury.

We also agree with plaintiff that the court erred in denying that part of his amended motion for partial summary judgment on the issue of negligence. Defendant pleaded guilty to driving while intoxicated based on the one-vehicle accident at issue. Moreover, defendant did not oppose that part of plaintiff's amended motion on the issue of negligence. Thus, we conclude that plaintiff established his entitlement to judgment as a matter of law with respect to defendant's negligence (*see Kelsey v Degan*, 266 AD2d 843), and we therefore further modify the judgment accordingly.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL RUTTY, 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 (JAHARR S. PRIDGEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 3, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt 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 following a nonjury trial of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and affording appropriate deference to Supreme Court's credibility determinations (*see People v Hill*, 74 AD3d 1782, *lv denied* 15 NY3d 805), we conclude that the alleged deficiencies in the evidence are not so substantial as to render the verdict against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a nonjury verdict (*see People v Saxton*, 32 AD3d 1286).

Entered: February 17, 2012

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 11-01429

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

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

V MEMORANDUM AND ORDER

NUSHAWN WILLIAMS, ALSO KNOWN AS
SHYTEEK JOHNSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL J. CONNOLLY OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (John L. Michalski, A.J.), entered April 18, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order granted respondent's motion for a change of venue.

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

Memorandum: Petitioner appeals from an order granting respondent's motion for a change of venue in this Mental Hygiene Law article 10 proceeding. We note at the outset that we affirmed the order denying respondent's motion to dismiss the petition (*Matter of State of New York v Williams*, ___ AD3d ____ [Feb. 17, 2012]). The petition was originally filed in Supreme Court, Erie County, because respondent was confined in a correctional facility located therein and, following a hearing, the court concluded that there was probable cause to believe that respondent required civil management and pretrial detention (*see* § 10.06 [g]). Respondent moved for, inter alia, a change of venue from Erie County to Chautauqua County, the county in which he was convicted of the underlying offenses, on the ground that the case had "garnered unprecedented media coverage," and thus it was unlikely that he could receive a fair trial in Erie County. Petitioner did not oppose the change in venue. Supreme Court, Erie County, granted the motion and transferred the proceeding to Chautauqua County.

Respondent thereafter moved for a change of venue back to Erie County, on the same ground upon which his prior motion was based, i.e., that he cannot receive a fair trial in the county in question.

We conclude that Supreme Court, Chautauqua County, erred in granting respondent's motion. Mental Hygiene Law § 10.08 (e) authorizes a court to change the venue of the proceeding "to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses . . . ." To establish good cause for a change of venue, the party seeking such relief must set forth specific facts sufficient to demonstrate a sound basis for the transfer (*see Matter of State of New York v Zimmer* [appeal No. 2], 63 AD3d 1562). Conclusory statements unsupported by facts are insufficient to warrant a change of venue (*see id*.). Here, respondent failed to make any factual or evidentiary showing that he would be unable to obtain a fair trial in Chautauqua County or that a transfer was necessary for the convenience of the parties or witnesses.

Entered: February 17, 2012

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 11-01545

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

IN THE MATTER OF ROXANNE ADRIAN,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF
CITY OF NIAGARA FALLS AND CYNTHIA A. BIANCO,
IN HER CAPACITY AS SUPERINTENDENT OF SCHOOLS,
RESPONDENTS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated decision and order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 5, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, directed respondents to reinstate petitioner to her tenured position.

It is hereby ORDERED that said cross appeal is unanimously dismissed, the judgment is reversed on the law without costs and the petition is dismissed.

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

It is well established that a "domicile means living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250; *see Matter of Beck-Nichols v Bianco*, 89 AD3d 1405). The evidence presented to respondent Board of Education of the District (Board) was sufficient to establish that petitioner was not a domiciliary of the City. Although the record contains some support for petitioner's contention that she was domiciled in Niagara Falls, the determination of the Board that petitioner was actually domiciled in Williamsville was not arbitrary and capricious, and it therefore should not have been disturbed (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale &*

Mamaroneck, Westchester County, 34 NY2d 222, 230-231). Petitioner maintained a phone line at the Williamsville residence but not at the Niagara Falls residence, and records from the Department of Motor Vehicles indicated that she lived at the Williamsville address. In addition, a surveillance company observed petitioner on six separate occasions, during different time periods, and found that she never went to the Niagara Falls residence and always left from and returned to the Williamsville residence. Although petitioner presented some evidence demonstrating that the Niagara Falls residence may have been her domicile, e.g., her voter registration card, rent payment receipts, driver's license and cable statements, that evidence was not so overwhelming as to support the court's determination granting the petition (*see generally id.*).

Finally, petitioner's cross appeal must be dismissed because she is not aggrieved by the judgment on appeal, which granted the ultimate relief sought in the petition (*see generally Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). To the extent that petitioner contends as an alternative ground for affirmance that the District improperly failed to conduct a hearing before terminating her (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), we reject that contention inasmuch as such a hearing was not required by law (*see Matter of O'Connor v Board of Educ. of City School Dist. of City of Niagara Falls*, 48 AD3d 1254, *lv dismissed* 10 NY3d 928).

Entered: February 17, 2012

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 11-01729

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

TIMOTHY C. CLARK, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered December 3, 2010 in a medical malpractice action. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Contrary to defendant's contention, the Court of Claims did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "The court is vested with broad discretion to grant or deny [such an] application" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965). Although claimant failed to offer a reasonable excuse for his failure to serve the notice of claim within the 90-day statutory period (*see* § 50-e [1] [a]), that failure " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [defendant]' " (*Hale v Webster Cent. School Dist.*, 12 AD3d 1052, 1053; *see Matter of LaMay v County of Oswego*, 49 AD3d 1351, 1352, *lv denied* 10 NY3d 715). Here, defendant had actual notice of the facts constituting the claim by virtue of its possession of medical records pertaining to claimant's care and treatment while he was a patient of defendant (*see Kavanaugh v Memorial Hosp. & Nursing Home*, 126 AD2d 930, 931). The treatment provided by defendant forms the basis of the alleged malpractice, and the relevant facts are contained in defendant's own records (*see Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 152). Finally, we conclude that defendant

was not prejudiced as a result of the delay in the filing of a notice of claim.

Entered: February 17, 2012

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 11-01430

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

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

V MEMORANDUM AND ORDER

NUSHAWN WILLIAMS, ALSO KNOWN AS
SHYTEEK JOHNSON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL J. CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John L. Michalski, A.J.), entered May 6, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, denied the motion of respondent to dismiss the proceeding.

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

Memorandum: Respondent appeals from an order granting his motion for, inter alia, leave to reargue his prior motion to dismiss the petition in this Mental Hygiene Law article 10 proceeding and, upon reargument, adhering to the original decision denying the motion to dismiss. Respondent was convicted upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25) in Supreme Court, Bronx County, and, eight days later, he was convicted upon his plea of guilty of two counts of rape in the second degree (former § 130.30) and one count of reckless endangerment in the first degree (§ 120.25) in Chautauqua County Court. Respondent was sentenced to concurrent indeterminate terms of imprisonment of 2 to 6 years on the rape convictions and an indeterminate term of imprisonment of 2 to 6 years on the reckless endangerment conviction in Chautauqua County, to run consecutively to the sentences for rape. He was also sentenced to an indeterminate term of imprisonment of 2 to 6 years on the reckless endangerment conviction in Bronx County, to run concurrently with all Chautauqua County sentences. The convictions arose from a series of acts in which respondent had unprotected sex with multiple female victims without disclosing that he was HIV-positive.

Petitioner commenced this proceeding pursuant to Mental Hygiene Law § 10.06 (a) approximately four days before respondent’s maximum

release date and while he was still in the custody of the Department of Correctional Services (DOCS), alleging that respondent was a detained sex offender requiring civil management (*see* § 10.03 [g]). Respondent moved to dismiss the petition on the ground that he did not qualify as a "detained sex offender" pursuant to article 10. In support of the motion, respondent contended that the sentence for reckless endangerment in Chautauqua County ran consecutively to the sentences for rape and, at the time the proceeding was commenced, respondent was serving only the sentence for reckless endangerment, which is not a covered offense pursuant to article 10. Petitioner opposed the motion, contending that respondent was serving a sentence for a "related offense" pursuant to section 10.03 (g) (1) when it commenced the proceeding and that respondent was still in the custody of DOCS on the sex offenses at that time because the sentences for rape and reckless endangerment had merged pursuant to Penal Law § 70.30 (1) (b). Supreme Court, Chautauqua County, denied the motion.

Respondent thereafter moved for reconsideration of the motion to dismiss on the ground that the court was required to follow the decision of the First Department in *Matter of State of New York v Rashid* (68 AD3d 615, *affd* 16 NY3d 1). In that case, the Court concluded that the respondent was not subject to civil management pursuant to Mental Hygiene Law article 10 because he had served his sentence for the sex offenses in question and was on parole for a nonsexual offense at the time the proceeding was commenced (*id.*). Before the Court of Appeals rendered its decision in the appeal from the First Department's decision in *Rashid*, Supreme Court adhered to its decision denying the motion to dismiss on the ground that *Rashid* was distinguishable and thus that it was not bound by that decision.

Following assignment of new counsel and after the Court of Appeals affirmed the decision of the First Department in *Rashid*, respondent moved for, inter alia, leave to reargue the motion to dismiss. The court implicitly granted reargument and, upon reargument, adhered to its original decision. The court determined that respondent was a " '[d]etained sex offender' " (Mental Hygiene Law § 10.03 [g]), inasmuch as he was convicted of sex offenses pursuant to article 10 and was currently serving a sentence for such offenses "or for a related offense" (§ 10.03 [g] [1]). We conclude that the court properly determined that respondent fell within the third category of related offenses, i.e., those "which are the bases of the orders of commitment received by [DOCS] in connection with an inmate's current term of incarceration" (§ 10.03 [l]). Unlike the situation in *Rashid* (68 AD3d 615), here, petitioner was in the custody of DOCS pursuant to the order of commitment entered in Chautauqua County at the time the petition was filed.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

40

CA 11-01546

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

IN THE MATTER OF KELI-KORAN LUCHEY,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF
THE CITY OF NIAGARA FALLS AND CYNTHIA A. BIANCO,
IN HER CAPACITY AS SUPERINTENDENT OF SCHOOLS,
RESPONDENTS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated decision and order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 5, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, directed respondents to reinstate petitioner to her tenured position.

It is hereby ORDERED that said cross appeal is unanimously dismissed (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488; *see also* CPLR 5511) and the judgment is affirmed without costs.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

43

CA 11-01621

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF FINAL ACCOUNT OF MANUFACTURERS AND TRADERS TRUST COMPANY (AS SUCCESSOR TO CENTRAL TRUST COMPANY), PETITIONER-RESPONDENT, AS THE TRUSTEE OF THE TRUST UNDER ARTICLES THIRD AND FOURTH OF THE LAST WILL AND TESTAMENT OF EVELYN B. MULVEY, DECEASED, FOR THE BENEFIT OF MARY HULL, ALSO DECEASED.

MEMORANDUM AND ORDER

EUGENE P. LABUE, GUARDIAN AD LITEM FOR DAVID A. LAWSON, RESPONDENT;

RICHARD I. MULVEY, APPELLANT.

RICHARD I. MULVEY, APPELLANT PRO SE.

EUGENE P. LABUE, ROCHESTER, RESPONDENT PRO SE.

Appeal from a decree of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered March 21, 2011. The decree, insofar as appealed from, awarded compensation to Eugene P. LaBue, guardian ad litem for David A. Lawson.

It is hereby ORDERED that the decree insofar as appealed from is unanimously reversed on the law without costs, the award of fees to respondent Eugene P. LaBue, guardian ad litem for David A. Lawson, is vacated and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings in accordance with the following Memorandum: Richard I. Mulvey, appearing pro se, appeals from that part of the decree that awarded compensation to Eugene P. LaBue (respondent), guardian ad litem for David A. Lawson. Petitioner, as trustee of a trust created by decedent Evelyn B. Mulvey, commenced this proceeding for judicial settlement of account after the death of the trust beneficiary. Respondent represented a potential remainder beneficiary and advocated for a specific interpretation of the trust, which was ultimately rejected by Surrogate's Court. Following the accounting, the Surrogate determined that the remainder beneficiary in question was entitled to $3,179 as his share of the trust principal. Respondent submitted an affirmation of services in which he asserted that he expended in excess of 42 hours on the matter. He also submitted a "Report and Recommendation" (hereafter, report) in which he identified 23 items of service to the remainder beneficiary, although there is no indication in the report with respect to how much time respondent expended for each service. Further, neither respondent's affirmation nor his report includes his usual hourly fee

or a recommendation of reasonable compensation for the time spent on the matter.

We conclude that the Surrogate erred in awarding respondent $12,000 in guardian ad litem fees. It is well settled that a guardian ad litem is entitled to a reasonable fee, and the reasonableness of the fee is determined based on the same factors used to determine the reasonableness of legal fees in general (*see generally Matter of Potts*, 213 App Div 59, 61-62, *affd* 241 NY 593). Those factors include "the nature, extent and necessity of the services, the actual time spent, the nature and complexity of the issues involved, the professional standing of counsel, and the results obtained" (*Matter of Slade*, 99 AD2d 668). Here, there is no basis in the record to ascertain whether the award to respondent was reasonable because he failed to submit time records that would "substantiate the conclusory allegation[s]" in his affirmation and report (*id.*). We therefore reverse the decree insofar as appealed from and vacate the award of guardian ad litem fees to respondent, and we remit the matter to Surrogate's Court to award respondent a reasonable fee based on the appropriate factors.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

74/10

KA 06-03433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN HUNTER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 18, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. The judgment was affirmed by order of this Court entered February 11, 2010 in a memorandum decision (70 AD3d 1343), and defendant on July 15, 2010 was granted leave to appeal to the Court of Appeals from the order of this Court (15 NY3d 774), and the Court of Appeals on June 2, 2011 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (17 NY3d 725).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of defendant's omnibus motion seeking to suppress evidence seized by the police from the apartment in which defendant was arrested is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: In a prior appeal, we affirmed the judgment convicting defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]) on the ground that Supreme Court properly refused to suppress the evidence seized from the apartment where he was arrested (*People v Hunter*, 70 AD3d 1343). Defendant had contended that the court erred in relying upon the doctrines of hot pursuit and exigent

circumstances in refusing to suppress the evidence, but we concluded that defendant "failed to establish that he had standing to challenge the search of the apartment in which he was arrested, and thus Supreme Court properly refused to suppress the evidence seized therefrom," i.e., the buy money seized from defendant's person in the apartment (*id.* at 1344). In reversing our order and remitting the matter to this Court to consider defendant's contentions raised but not addressed by us, the Court of Appeals concluded that "the People are required to alert the suppression court if they believe that the defendant has failed to meet his burden to establish standing" (*Hunter*, 17 NY3d 725, 727-728).

Upon remittitur, we agree with defendant that the court erred in refusing to suppress evidence seized by the police as a result of their entry into the apartment. The record of the suppression hearing establishes that an undercover officer purchased narcotics from defendant in front of a small apartment building in the City of Rochester. As the officer left that location, he signaled to a second officer who was nearby that the sale had been completed, and he provided the second officer with a description of the seller. Upon driving past the location where the sale took place, the second officer observed defendant, who matched the description of the seller provided by the undercover officer. The second officer then sent a radio broadcast of defendant's description and location to other officers. As those officers left their vehicle, defendant ran into the building, where the pursuing officers lost sight of him. The officers then set up a perimeter and began searching the interior of the building for defendant after the perimeter officers failed to indicate that he had exited the building. The officers were unable to find defendant upon a search of all but one of the apartments in the building, and they concluded that he must be in that apartment, i.e., apartment #2. They consulted the officer in charge, who authorized an entry into that apartment. Approximately 25 minutes after the sale, the officers forcibly entered and found defendant in the bathroom of that apartment. The buy money was recovered from defendant after he was placed in custody.

The warrantless intrusion into defendant's apartment was presumptively unreasonable and unconstitutional unless it was justified by one of the " 'carefully delineated' exceptions to the Fourth Amendment's Warrant Clause" (*People v Molnar*, 98 NY2d 328, 331; *see generally People v Mitchell*, 39 NY2d 173, 177-179, *cert denied* 426 US 953). At the suppression hearing, the prosecution contended that defendant's mother, the tenant of the apartment, consented to the police entry, and that the entry was justified pursuant to the doctrines of hot pursuit and exigent circumstances. The People failed to address in their brief on appeal any issues with respect to the mother's purported consent, and thus they are deemed to have abandoned any contentions with respect thereto (*see generally People v Butler*, 2 AD3d 1457, 1458, *lv denied* 3 NY3d 637). We agree with defendant that the doctrines of hot pursuit and exigent circumstances do not justify the warrantless entry into the apartment.

Under the doctrine of hot pursuit, "a suspect may not defeat an

arrest which has been set in motion in a public place, and is therefore proper under [*United States v Watson*, 423 US 411, *reh denied* 424 US 979], by the expedient of escaping to a private place" (*United States v Santana*, 427 US 38, 43; *see People v Levan*, 62 NY2d 139, 145). "On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of [defendant] from the scene of a crime" (*Welsh v Wisconsin*, 466 US 740, 753). To the contrary, the police did not know in which apartment, if any, defendant was located, and they forcibly entered apartment #2 as a last resort in an attempt to locate him. "There was certainly no evidence that the police were in hot pursuit of a fleeing felon" (*People v Ramos*, 206 AD2d 260, 261; *cf. People v Johnson*, 193 AD2d 35, 36, *affd* 83 NY2d 831; *People v Thomas*, 164 AD2d 874, *lv denied* 77 NY2d 883).

"In determining whether exigent circumstances are present, both the federal and state courts have applied a number of different factors. These factors include '(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause . . . to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry' " (*People v McBride*, 14 NY3d 440, 446, *cert denied* ___ US ___, 131 S Ct 327). Furthermore, "the ultimate inquiry a suppression court must make is 'whether in light of all the facts of the particular case there was an urgent need that justifies a warrantless entry' " (*id.*). Applying those factors to this case, we conclude that there was no such urgent need.

Although there was strong probable cause to believe that defendant committed the serious crime of criminal sale of a controlled substance in the third degree, all of the other factors lead to the conclusion that there were no exigent circumstances. No evidence was introduced at the hearing tending to establish that defendant had acted violently in this case, or that he had a history of violence. At least one of the perimeter officers did not take his position, which was behind the building, until after defendant entered the building, and thus there was no strong likelihood that he was still inside the building when the police entered the apartment. Conversely, the perimeter was fully established when the police entered the apartment, and thus there was virtually no chance that he would escape after that time. Further, the entry was not peaceful, and there was no evidence indicating that defendant was armed. Finally, "there was no testimony indicating that it would have been especially burdensome for the officers to have obtained a warrant before effecting the arrest on this weekday afternoon" (*Ramos*, 206 AD2d at 261-262).

Consequently, we conclude that the warrantless entry into the apartment was not justified by any exception, and thus the court erred in refusing to suppress the buy money. We therefore reverse the judgment, vacate the plea, grant the motion, and remit the matter to

Supreme Court for further proceedings on the indictment.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

78

KA 09-00184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL GOOSSENS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

CARL GOOSSENS, DEFENDANT-APPELLANT PRO SE.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered December 9, 2008. The judgment convicted defendant, upon a jury verdict, of attempted bribing a witness, conspiracy in the fifth degree and criminal solicitation in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted bribing a witness (Penal Law §§ 110.00, 215.00 [a]), conspiracy in the fifth degree (§ 105.05 [1]) and criminal solicitation in the fourth degree (§ 100.05 [1]). Defendant failed to preserve for our review his contention that County Court violated his right to present a defense by limiting his cross-examination of a witness (*see People v Angelo*, 88 NY2d 217, 222; *People v Schafer*, 81 AD3d 1361, 1363, *lv denied* 17 NY3d 861; *People v Dorn*, 71 AD3d 1523). In any event, defendant's contention is without merit (*see generally People v Corby*, 6 NY3d 231, 234-235; *People v Lester*, 83 AD3d 1578, *lv denied* 17 NY3d 818). Viewing the evidence in light of the elements of the crime of attempted bribing a witness as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's remaining contentions are raised in his pro se supplemental brief. Defendant contends that the court erred in denying his request to substitute assigned counsel because he demonstrated good cause for the substitution. We reject that contention. The court made the requisite " 'minimal inquiry' " into

defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100; *see People v Adger*, 83 AD3d 1590, 1591-1592, *lv denied* 17 NY3d 857; *People v Russell*, 55 AD3d 1314, *lv denied* 11 NY3d 930), and defendant " 'did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]' " (*Adger*, 83 AD3d at 1591). We note that the court had previously granted defendant's request to substitute counsel, and that " '[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option' " (*People v Ward*, 27 AD3d 1119, 1120, *lv denied* 7 NY3d 819, 871, quoting *People v Sides*, 75 NY2d 822, 824). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see generally People v Flores*, 84 NY2d 184, 187; *People v Baldi*, 54 NY2d 137, 147). We reject the further contention of defendant that the court abused its discretion in denying his request for a missing witness charge with respect to two witnesses. The two witnesses were unavailable and, in any event, the People established that their testimony would have been cumulative (*see generally People v Savinon*, 100 NY2d 192, 196-197; *People v Gonzalez*, 68 NY2d 424, 427-428).

Defendant contends that the court erred in failing to conduct a post-trial hearing to determine whether he was denied a fair trial when jurors allegedly observed him being escorted in shackles from the courthouse on the first day of trial. That contention is unpreserved for our review "inasmuch as defendant merely noted [that the jurors had observed him in shackles] for the record and neither formally objected nor requested any relief" with respect to that issue (*People v Johnston*, 43 AD3d 1273, 1274, *lv denied* 9 NY3d 1007; *see People v Abron*, 37 AD3d 1163, *lv denied* 8 NY3d 980). In any event, there is no indication in the record that the alleged "brief and . . . inadvertent" observation by the jurors prejudiced defendant (*People v Harper*, 47 NY2d 857, 858; *see People v Montgomery*, 1 AD3d 984, *lv denied* 1 NY3d 631).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

83

KA 08-00281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL GOOSSENS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered January 9, 2007. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]). We reject defendant's contention that his waiver of the right to appeal was invalid (*see generally People v Lopez*, 6 NY3d 248, 256). Although defendant's further contention that his plea was not knowingly, voluntarily and intelligently entered survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review (*see People v Davis*, 45 AD3d 1357, *lv denied* 9 NY3d 1005; *People v Jones*, 42 AD3d 968). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602; *see Jones*, 42 AD3d 968). Defendant's valid waiver of the right to appeal encompasses his further contention that County Court failed to afford him sufficient time to retain a new attorney (*see People v La Bar*, 16 AD3d 1084, *lv denied* 5 NY3d 764; *People v Morgan*, 275 AD2d 970, *lv denied* 96 NY2d 761) and, in any event, defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]). Finally, the challenge by defendant to the court's suppression ruling is also encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v*

Bell, 89 AD3d 1518).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

84

CAF 11-00032

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

IN THE MATTER OF THE ADOPTION OF COLLIN.

ALICIA P., PETITIONER-APPELLANT; MEMORANDUM AND ORDER

ROBIN C. AND JOSEPH C., RESPONDENTS-RESPONDENTS.

ROBERT J. GALLAMORE, OSWEGO, FOR PETITIONER-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENTS-RESPONDENTS.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, WATERTOWN, FOR COLLIN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 16, 2010 in a proceeding pursuant to Domestic Relations Law article 7. The order determined that it was in the subject child's best interests to reside with respondents and that petitioner's revocation of extrajudicial consent to adoption would not be given effect.

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

Memorandum: In this adoption proceeding pursuant to Domestic Relations Law article 7, petitioner appeals from an order determining that the adoption by respondents is in the best interests of the subject child. On the day following the child's birth, petitioner signed an extrajudicial consent to allow respondents to adopt the child. Less than 24 hours after signing the consent, but after respondents had taken the child home, petitioner executed a revocation of extrajudicial consent. Respondents filed a timely notice of opposition to the revocation. After a best interests hearing, Family Court determined that respondents were "better able to provide parental guidance" and provide for the child's emotional and intellectual development and that, although petitioner had the potential to become a good parent, respondents had "proven themselves to be exceptional parents." Petitioner contends that the court should not have conducted a best interests hearing inasmuch as she had revoked consent and that the court did not properly apply the best interests standard in making its determination after the hearing. We reject those contentions.

Pursuant to Domestic Relations Law § 115-b (6) (d) (i), in the event that the adoptive parents oppose the biological parent's revocation of consent, the court must, "if necessary, hear and determine what disposition should be made with respect to the custody

of the child." The biological parent "shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the [biological] parent . . . [is] fit, competent and able to duly maintain, support and educate the child" (§ 115-b [6] [d] [v]). Custody "shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interest will be promoted by any particular custodial disposition" (*id.*).

"[T]here [must] be some overt manifestation [by the biological parent] to a third person for an extrajudicial consent to be operative" (*Matter of Samuel*, 78 NY2d 1047, 1048). Here, petitioner signed the consent one day after the child was born, and respondents took physical custody of the child the next day. Although petitioner revoked her consent within 24 hours of its execution, we conclude that she "overtly manifested her intent that the consent become operative by[, inter alia,] permitting [respondents] to take physical custody of the child the day after he was born" (*Matter of Jarrett*, 224 AD2d 1029, 1031, *lv dismissed* 88 NY2d 960; *cf. Samuel*, 78 NY2d at 1048-1049). Inasmuch as respondents thereafter opposed the revocation of consent, the court properly conducted a best interests hearing pursuant to Domestic Relations Law § 115-b (6) (d).

We reject petitioner's further contention that the court erred in determining that it was in the child's best interests to be adopted by respondents. That determination "is entitled to great deference and will not be disturbed where, as here, it is based on careful weighing of the appropriate factors . . ., including the court's firsthand assessment of the character and credibility of the parties and their witnesses" (*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1114; *see also Matter of Michael G. v Letitia M.B.*, 45 AD3d 1405, *lv denied* 10 NY3d 715).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

85

CAF 10-02047

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

IN THE MATTER OF IYISHA F. AND IYLEAH F.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

SONIA A.F., RESPONDENT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR IYISHA F. AND IYLEAH F.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered September 24, 2010. The order denied respondent's motion seeking, inter alia, to vacate an order entered January 22, 2008 terminating her parental rights.

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

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

95

CA 11-00894

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

YVONNE HANDEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS P. HANDEL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ENOS AND ENOS, ROCHESTER (CHRISTOPHER J. ENOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (MICHAEL J. PERSONTE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered August 3, 2010. The order, among other things, denied plaintiff's motion seeking permission to relocate with the parties' child to the State of Florida.

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

Memorandum: In appeal No. 1, plaintiff mother appeals from an order that, inter alia, denied her motion seeking permission for the parties' child to relocate with her to Boca Raton, Florida. We affirm. Supreme Court properly applied the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of demonstrating that the proposed relocation was in the best interests of the child. Inasmuch as the court's determination has a sound and substantial basis in the record, we decline to disturb it (*see Matter of Rauch v Keller*, 77 AD3d 1409; *Matter of Cunningham v Sudduth*, 50 AD3d 1623).

Following the order in appeal No. 1, the mother moved for leave to renew her prior motion pursuant to CPLR 2221 (e). By the order in appeal No. 2, the court treated that motion as one to vacate the order in appeal No. 1 pursuant to CPLR 5015 (a) (2) and denied the motion. We affirm. The mother's contention that the court erred in treating her motion as one to vacate the prior order is unpreserved for our review inasmuch as she failed to object with respect to that issue during oral argument on the motion (*see generally* CPLR 4017). Further, the court did not abuse its discretion in denying the mother's motion for leave to vacate the prior order (*see generally*

Maddux v Schur, 53 AD3d 738, 739).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

96

CA 11-00897

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

YVONNE HANDEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS P. HANDEL, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ENOS AND ENOS, ROCHESTER (CHRISTOPHER J. ENOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (MICHAEL J. PERSONTE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered March 17, 2011. The order treated plaintiff's motion for leave to renew her prior motion as a motion to vacate the order denying that prior motion and denied the motion to vacate.

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

Same Memorandum as in *Handel v Handel* ([appeal No. 1] ___ AD3d ___ [Feb. 17, 2012]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

114

CA 11-01790

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

ANNE E. DOLANSKY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD A. FRISILLO AND NANCY G. FRISILLO,
DEFENDANTS-APPELLANTS.

RALPH W. FUSCO, UTICA, FOR DEFENDANTS-APPELLANTS.

FOLEY LAW FIRM, LLC, OLD FORGE (TIMOTHY D. FOLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered May 16, 2011. The order granted the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion for summary judgment on the complaint and vacating the award of damages and as modified the order is affirmed without costs.

Memorandum: In May 2007, defendants entered into a contract with plaintiff to purchase real property for $200,000. Defendants' deposit in the amount of $2,000 was held in escrow. The sale did not close, and plaintiff sold the property to a third party for $180,000 in October 2007. Plaintiff thereafter commenced this breach of contract action seeking damages in the amount of $20,000, i.e., the difference in the purchase price of the property paid by the third party and the contract price. Supreme Court granted that part of plaintiff's motion for summary judgment on the complaint, ordered that the $2,000 deposit held in escrow be delivered to plaintiff, and awarded plaintiff judgment in the sum of $18,000 plus interest. In addition, the court granted the remainder of plaintiff's motion, seeking summary judgment dismissing the counterclaim, for fraudulent misrepresentation.

We agree with defendants that the court erred in granting that part of plaintiff's motion for summary judgment on the complaint inasmuch as there are triable issues of fact whether the parties orally agreed to cancel the contract. We therefore modify the order accordingly. It is well settled that "parties to a written contract may mutually agree to cancel and rescind it" (*Strychalski v Mekus*, 54 AD2d 1068, 1068; *see Day One Express Corp. v Gracepat Corp.*, 55 AD3d 366; *Jones v Trice*, 202 AD2d 394). "[W]hether a contract has been terminated or cancelled by mutual agreement is generally a question of fact for the jury where the evidence is conflicting" (*Strychalski*, 54

AD2d at 1069; *see Lucenti v Cayuga Apts.*, 59 AD2d 438, 442, *affd* 48 NY2d 530). Here, although plaintiff met her initial burden on that part of the motion with respect to the complaint (*see generally Karo v Paine*, 55 AD3d 679, 679-680; *Ryan v Corbett*, 30 AD3d 1062, 1063), defendants raised an issue of fact concerning oral cancellation of the contract in opposition to the motion. In their respective affidavits, both defendants averred that plaintiff orally agreed to cancel the contract in exchange for retaining the $2,000 deposit, and defendants noted that the deposit was not in fact returned. Thus, the conflicting statements in the parties' affidavits raise an issue of credibility that cannot be resolved by a motion for summary judgment (*see generally Godlewski v Carthage Cent. School Dist.*, 83 AD3d 1571, 1572; *Burgio v Ince*, 79 AD3d 1733, 1735-1736).

Contrary to the contention of plaintiff, neither the statute of frauds nor the contract itself prohibits the oral cancellation of the contract. Although contracts for the conveyance of real property are required by the statute of frauds to be in writing (*see* General Obligations Law § 5-703), "a parol discharge of a contract for the sale of land is valid" (*Strychalski*, 54 AD2d at 1068; *see Lucenti*, 59 AD2d at 441-442). Nonetheless, "[an] executory contract which contains a provision that it cannot be cancelled orally may not be terminated effectively unless the cancellation or discharge is in writing and signed by the party against whom the cancellation is sought to be enforced" (*Strychalski*, 54 AD2d at 1068-1069; *see* § 15-301 [2]; *see e.g. Kypreos v Spiridellis*, 124 AD2d 786, 788). Here, however, the contract does not require that termination of the contract be in writing; rather, it contains a provision that the contract "may only be *changed* in writing, signed by all parties" ([emphasis added]; *see* § 15-301 [1], [2]; *cf. Kypreos*, 124 AD2d at 788). Here, we conclude that the term "changed" does not include cancellation or termination (*see Strychalski*, 54 AD2d at 1068-1069). Indeed, the General Obligations Law contains separate subdivisions concerning oral *changes* made to a contract and oral *terminations* of a contract (*see* § 15-301 [1], [2]). We reject defendants' contention, however, that the court erred in granting that part of plaintiff's motion for summary judgment dismissing the counterclaim, inasmuch as we conclude that defendants' allegations of fraud on the part of plaintiff are insufficient to raise an issue of fact precluding summary judgment (*see e.g. Kypreos*, 124 AD2d at 787-788). Although defendants contend that plaintiff misrepresented her knowledge of the condition of the garage when she indicated that it was "unknown" whether the garage had structural defects, there is no competent evidence that plaintiff misrepresented her knowledge of the condition of the garage when the parties entered into the contract (*see Devine v Meili*, 89 AD3d 1255). The affidavit of Edward A. Frisillo (defendant husband) merely states in a conclusory manner that "it is inconceivable" that plaintiff was unaware of the defects when a contractor estimated that it would cost $44,000 to repair the garage (*see id.* at 1256).

In any event, even assuming, arguendo, that plaintiff or her broker misrepresented the condition of the garage, we conclude that defendants' allegations of fraud on the part of plaintiff are

insufficient to preclude an award of summary judgment dismissing the counterclaim. Defendants failed to raise a triable issue of fact with respect to whether they justifiably relied on the alleged misrepresentations, which is "a necessary element of any fraud claim" (*Dyke v Peck*, 279 AD2d 841, 843; *see Bennett v Citigroup Mtge., Inc.*, 8 AD3d 1050). There is no justifiable reliance " '[w]here a party has the means to discover [a falsehood] by the exercise of ordinary intelligence, and fails to make use of those means' " (*Tanzman v La Pietra*, 8 AD3d 706, 707; *see Pettis v Haag*, 84 AD3d 1553, 1554-1555). Here, plaintiff set forth in the statutory disclosure form that the garage had water and rot damage and that she did not know whether there were structural defects in the garage. Thus, defendants were given specific notice of possible defects in the garage, and "[t]here is nothing which demonstrates that [defendants were] in any way barred from making an adequate physical inspection of the [garage]" (*Dyke*, 279 AD2d at 843). Further, defendant husband's own affidavit belies defendants' contention that they relied on the broker's alleged misrepresentation. In particular, defendant husband averred that he found it "very confusing" for the broker to represent that the garage did not have structural defects while the seller set forth in the statutory disclosure form that it was "unknown" whether there were structural defects, and he therefore wanted to obtain an inspection prior to closing to determine whether the garage was sound.

Further, defendants' allegations of fraud are insufficient to preclude summary judgment on the counterclaim because the contract specifically "extinguished" any such claims (*85-87 Pitt St., LLC v 85-87 Pitt St. Realty Corp.*, 83 AD3d 446; *see Tarantul v Cherkassky*, 84 AD3d 933, 934-935; *Mosca v Kiner*, 277 AD2d 937, 939). In particular, " 'alleg[ations of] fraudulent inducement may not be maintained if[, such as here,] specific disclaimer provisions in the contract of sale disavow reliance upon oral representations' " (*Tarantul*, 84 AD3d at 934; *see Mosca*, 277 AD2d at 939). Here, the contract provided that defendants had inspected the property and that they agreed to purchase it " 'as is' " (*see Tarantul*, 84 AD3d at 934-935; *Mosca*, 277 AD2d at 939). The contract further provided that "there are no other promises . . . warranties, representations or statements other than contained [in the contract]" (*see Tarantul*, 84 AD3d at 934-935; *Mosca*, 277 AD2d at 939).

In light of our determination, there is no need to address defendants' remaining contentions.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

174

KA 11-01548

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JON P. ENGELSEN, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR APPELLANT.

FIANDACH & FIANDACH, ROCHESTER (EDWARD L. FIANDACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered May 9, 2011. The order, among other things, granted in part defendant's motion to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, defendant's omnibus motion is denied in its entirety and counts two and four of the indictment are reinstated.

Memorandum: The People appeal from an order granting those parts of defendant's omnibus motion seeking to dismiss counts two and four of the indictment, charging defendant with endangering the welfare of a child (Penal Law § 260.10 [1]). Upon our review of the sealed grand jury minutes, we agree with the People that the evidence before the grand jury was legally sufficient to support a prima facie case of endangering the welfare of a child. "A person is guilty of [that crime] when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (*id*.). "Actual harm to the child need not result for criminal liability [to be imposed. Rather,] it is 'sufficient that the defendant act in a manner which is *likely* to result in harm to the child, *knowing* of the likelihood of such harm coming to the child' " (*People v Johnson*, 95 NY2d 368, 371, quoting *People v Simmons*, 92 NY2d 829, 830 [emphasis added]).

Even assuming, arguendo, that the evidence before the grand jury, viewed in the light most favorable to the People (*see People v Manini*, 79 NY2d 561, 568-569; *People v Pelchat*, 62 NY2d 97, 105), does not establish that defendant's conduct was likely to be injurious to the physical welfare of the subject children (*see generally People v Chase*, 186 Misc 2d 487, 488-489, *lv denied* 95 NY2d 962; *cf. People v D'Ambrosia*, 192 Misc 2d 560, 561-562), we conclude that the evidence established that defendant's conduct was likely to be injurious to

their mental or moral welfare. We note that defendant's alleged conduct is not limited to operating a motor vehicle while intoxicated and with the children in the vehicle as passengers.

We reject defendant's contention that his intoxication rendered him incapable of "knowingly" acting in a manner that would place the children at risk (Penal Law § 260.10 [1]). Although "evidence of intoxication . . . may be offered by the defendant whenever it is relevant to negat[e] an element of the crime charged," intoxication "is not, [in itself], a defense to a criminal charge" (§ 15.25), and an intoxicated person may be capable of forming criminal intent (*see People v Scott*, 111 AD2d 45). The question whether defendant's intoxication destroyed his ability to form the requisite intent is one for the jury to resolve at trial (*see id.*; *People v Leary*, 64 AD2d 825).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

175

KA 11-00329

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT P. FARRELLY, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (DIANE M. ADSIT OF COUNSEL), FOR RESPONDENT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), IN HIS STATUTORY CAPACITY UNDER EXECUTIVE LAW § 71.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 1, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony and unlawful fleeing a police officer in a motor vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [ii]) and unlawful fleeing a police officer in a motor vehicle in the third degree (Penal Law § 270.25). We reject defendant's contention that the restitution order in favor of one of the victims does not correspond with the conditions of restitution set at sentencing. County Court assured defendant at sentencing that he would not have to pay restitution twice in the event that the victim recovered insurance proceeds for the damage defendant caused to his house, and the restitution order does not conflict with that statement. Defendant's further contention that the court erred in ordering restitution in excess of the statutory cap is without merit inasmuch as defendant consented to the amount of restitution (*see* § 60.27 [5] [a]).

Defendant contends that he should not have been sentenced to a period of probation with an ignition interlock device requirement following his sentence of incarceration. He contends that only aggravated DWI offenders (*see* Vehicle and Traffic Law § 1192 [2-a]) are subject to the mandatory supervision and ignition interlock device requirements set forth in, inter alia, Vehicle and Traffic Law § 1198 for crimes committed prior to August 15, 2010 and that non-aggravated

DWI offenders such as himself are subject to those requirements only for offenses committed on or after August 15, 2010. We reject those contentions and conclude that defendant misreads the relevant statutes. Pursuant to L 2009, ch 496, § 15, the amendments to, inter alia, Vehicle and Traffic Law § 1198, are applicable to defendant inasmuch as he was sentenced after they took effect, i.e., after August 15, 2010. Defendant failed to preserve for our review his further contentions that those amendments are unconstitutional in several respects (*see generally People v Rivera*, 9 NY3d 904, 905; *People v Davidson*, 98 NY2d 738, 739-740; *People v Korber*, 89 AD3d 1543), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

178

KA 10-02503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY C. MUNZERT, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (Penal Law § 145.05), arising from an incident in which defendant caused $1,895.42 in property damage to the Orleans Correctional Facility, where he was an inmate. Prior to the plea proceeding, defendant sent three pro se letters to the County Court Judge who later accepted his plea and sentenced him. In those letters, defendant requested new counsel, accused assigned defense counsel of having a relationship that was one of "over-familiarity" with the Assistant District Attorney (ADA) and the police and threatened a civil action against the Judge, defense counsel and the ADA for alleged wrongs defendant had suffered during this action.

Defendant contends that the court failed to consider his pro se "motions," i.e., the three letters. We conclude that "defendant abandoned his request for a substitution of counsel [contained in the first letter by] plead[ing] guilty while still being represented by the same attorney" (*People v Hobart*, 286 AD2d 916, 916, *lv denied* 97 NY2d 683). In any event, defendant did not make a " 'seemingly serious request[]' " containing the requisite specific factual allegations that would have triggered the court's duty to consider such a request (*People v Porto*, 16 NY3d 93, 100, quoting *People v Sides*, 75 NY2d 822, 824). Furthermore, defendant's "vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense" were insufficient to demonstrate good cause for substitution (*People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d

866, 11 NY3d 790). We have considered defendant's remaining contentions with respect to the pro se letters and conclude that they are without merit.

Defendant's further contention that he was denied effective assistance of counsel does not survive his guilty plea inasmuch as defendant "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Maracle*, 85 AD3d 1652, 1653, *lv denied* 17 NY3d 860 [internal quotation marks omitted]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

184

CAF 11-00647

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

IN THE MATTER OF TIN TIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THAR KYI, RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

NORMAN P. DEEP, ATTORNEY FOR THE CHILDREN, ROME, FOR ALI T. AND CHIT M.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 9, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the parties' children to petitioner.

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

Memorandum: Respondent father appeals from an order granting custody of the parties' two children to petitioner mother, with visitation to the father as the parties agree. We reject the father's contention that there was not a sufficient evidentiary basis in the record for Family Court to determine that an award of custody to the mother was in the best interests of the children. The court conducted a fact-finding hearing at which the mother testified without contradiction that the father had physically and verbally abused her and that he had physically abused one of the children. The mother further testified that the father threatened her life shortly before the hearing. The father did not testify at the hearing and called no witnesses. In its findings of fact, the court stated that it found the mother to be credible. We therefore conclude that there was a sufficient evidentiary basis for the court to award custody of the children to the mother (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174). "Evidence of the [father's] acts of domestic violence demonstrates that [he] possesses a character [that] is ill-suited to the difficult task of providing [his] young child[ren] with moral and intellectual guidance" (*Matter of Moreno v Cruz*, 24 AD3d 780, 781, *lv denied* 6 NY3d 712; *see Costigan v Renner*, 76 AD3d 1039, 1040, *lv denied* 17 NY3d 704, *rearg denied* 17 NY3d 891; *Matter of Julie v Wills*, 73 AD3d 777). We further conclude that the court sufficiently "state[d] the facts it deem[ed] essential" to its decision (CPLR 4213 [b]; *see* Family Ct Act § 165 [a]; *Matter of Rocco v Rocco*, 78 AD3d

1670).

Finally, contrary to the father's contention, we conclude that the court had subject matter jurisdiction over the custody proceeding pursuant to Domestic Relations Law § 76-c, based on evidence that the father had committed acts of physical violence against the mother and one of the children (*see Matter of Callahan v Smith*, 23 AD3d 957, 958). Although emergency jurisdiction is generally temporary, the court was authorized to make a permanent custody award because no other custody proceeding had been instituted in a competing forum and New York had become the children's home state following commencement of the proceeding (*see* § 76-c [2]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

186

CA 11-00985

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

MICHAEL REW, PLAINTIFF-RESPONDENT,

V ORDER

VALEO, INC. AND VALEO ENGINE COOLING, INC.,
DEFENDANTS.

VALEO, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

DIVERSIFIED ERECTION SERVICES, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WENDY A. SCOTT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 22, 2010 in a personal injury action. The amended order, among other things, denied in part third-party defendant's motion for summary judgment.

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

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

189

CA 11-00242

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

KIMBERLY B. ROONEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. ROONEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered April 21, 2010 in a divorce action. The order determined the parties' disputed economic issues.

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

Same Memorandum as in *Rooney v Rooney* ([appeal No. 3] ___ AD3d ___ [Feb. 17, 2012]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

190

CA 11-00529

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

KIMBERLY B. ROONEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. ROONEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered June 15, 2010 in a divorce action. The amended order amended an order entered April 21, 2010.

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

Same Memorandum as in *Rooney v Rooney* ([appeal No. 3] ___ AD3d ___ [Feb. 17, 2012]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

191

CA 11-00530

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

KIMBERLY B. ROONEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. ROONEY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered November 4, 2010 in a divorce action. The judgment, inter alia, granted plaintiff a divorce, equitably distributed the parties' property and directed defendant to pay maintenance and support to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by adding a paragraph indicating that defendant is entitled to claim the parties' children as dependents for tax purposes, provided that he remains current in his child support and maintenance obligations and as modified the judgment is affirmed without costs.

Memorandum: In appeal Nos. 1 and 2, defendant appeals from orders entered prior to the judgment of divorce. In appeal No. 3, defendant appeals from the judgment of divorce, and in appeal No. 4, defendant appeals and plaintiff cross-appeals from a subsequent order requiring that defendant pay a portion of plaintiff's attorneys' fees with respect to the appeals in this action. We note at the outset that appeal Nos. 1 and 2 must be dismissed inasmuch as the orders in those appeals are subsumed in the final judgment of divorce (*see Huther v Sickler*, 21 AD3d 1303; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988).

With respect to the judgment in appeal No. 3, we reject defendant's contention that the Referee erred in setting the term and amount of maintenance. "[T]he amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Boughton v Boughton*, 239 AD2d 935, 935), based upon the court's consideration of the factors set forth in Domestic Relations Law § 236 (B) (6) (a). In light of the long duration of the marriage and the disparity in the parties' earning capacities, it cannot be said that

the Referee abused his discretion in awarding plaintiff maintenance of $2,500 per month for approximately 11 years. Given plaintiff's undisputed health issues, which may necessitate further surgery, we reject defendant's contention that, for purposes of calculating both maintenance and child support, the Referee should have imputed full-time minimum wage income to plaintiff.

Defendant further contends in appeal No. 3 that the Referee erred in calculating the amount of maintenance arrears. That contention is not properly before us inasmuch as the Referee declined to award maintenance arrears to plaintiff, and defendant therefore is not aggrieved by that portion of the Referee's determination (*see Flynn v Flynn*, 244 AD2d 993). We also reject defendant's contention in appeal No. 3 that, in calculating the amount of child support, the Referee erred in failing to impute income to plaintiff based on cash gifts that she received from her mother (*see* Domestic Relations Law § 240 [1-b] [b] [5] [iv] [D]). The evidence at trial supported the Referee's finding that the cash gifts were sporadic in nature, rather than regular and expected (*see Rostropovich v Guerrand-Hermes*, 18 AD3d 211). We agree with defendant, however, that he should be allowed to claim the parties' children as dependents for tax purposes, provided that he remains current in his child support and maintenance obligations. We therefore modify the judgment accordingly.

Contrary to defendant's contention in appeal Nos. 3 and 4 and plaintiff's contention on her cross appeal in appeal No. 4, Supreme Court properly ordered defendant to pay a portion of plaintiff's attorneys' fees incurred in the trial of this action and on appeal. In light of the gross disparity in the parties' income, the awards of fees to plaintiff were appropriate (*see* Domestic Relations Law § 237 [a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881). " 'The evaluation of what constitutes reasonable [attorneys'] fees is a matter within the sound discretion of the trial court' " (*Benzaken v Benzaken*, 21 AD3d 391, 392), and we conclude that the court did not abuse its discretion in this case.

Contrary to defendant's further contention in appeal No. 3, we conclude that the Referee properly denied on procedural grounds his post-trial motion seeking, inter alia, to "correct[ ]" various alleged errors in the Referee's decision. Inasmuch as defendant's contention that the Referee should have directed plaintiff to remove defendant's name from the loans against the former marital residence was raised only in that post-trial motion, that contention is not properly before us. In any event, we conclude that it is without merit.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court

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

192

CA 11-01357

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

KIMBERLY B. ROONEY,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JOHN E. ROONEY,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 4.)

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

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (John M. Owens, J.), entered June 27, 2011 in a divorce action. The order directed defendant to pay to plaintiff $3,500 for counsel fees related to her defense on her appeals.

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

Same Memorandum as in *Rooney v Rooney* ([appeal No. 3] ___ AD3d ___ [Feb. 17, 2012]).

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court