SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 22, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED DECEMBER 22, 2023

_____	606	CA 23 00003	MICHELLE R. LABRAKE V ANTHONY O. LABRAKE
_____	668	CAF 22 01971	STACEY PYNN V MATTHEW PYNN
_____	740	CA 22 01685	CHRISTINE L. H. V GEORGE A. GRAOVAC
_____	754	CAF 22 00511	Mtr of DAVID P. S.
_____	759	CA 22 00130	CHAD SLEIMAN V AMAL SLEIMAN
_____	762	CA 22 01759	LYNN ACHESON V MICHAEL PELLICCIA
_____	763	CA 22 01921	CELLINO LAW, LLP V LOONEY INJURY LAW PLLC
_____	766	KA 19 00536	PEOPLE V SEDETRICE WRIGHT
_____	768	KA 23 00267	PEOPLE V JACOB STAGLES
_____	779	CA 22 01926	ABLA MOHAMED V HANI ABUHAMRA
_____	780	CA 22 01936	ABLA MOHAMED V HANI ABUHAMRA
_____	781	CA 22 01937	ABLA MOHAMED V HANI ABUHAMRA
_____	788	CA 22 01089	ALI TUCKETT V STATE OF NEW YORK
_____	799	CAF 22 01265	ANTHONY L. COLLICHIO V LAURA A. BISHOP
_____	809	CA 22 01580	K. O. V YMCA BUFFALO NIAGARA
_____	810	CA 23 00124	PETER J. CEDRONE V CITY OF FULTON ASSESSOR'S OFFIC
_____	812	CA 20 01094	CHARLES GUTTMAN V COVERT TOWN BOARD
_____	816	KA 21 01445	PEOPLE V JIMA BROWN
_____	818	KA 20 00312	PEOPLE V AGUSTIN OCASIO
_____	826	CA 22 01943	KENT JEFFERY V THE FAYETTEVILLE-MANLIUS CENTRAL SC
_____	827	TP 23 00815	PATRICK SHEVLIN V ANTHONY ANNUCCI
_____	829	CA 22 01498	JOANNE C. LENTNER V UPSTATE FORESTRY AND DEVELOPME
_____	831	CA 22 01774	PATRICIA ARNOLD V TOWN OF CAMILLUS
_____	833	CA 22 02005	DELILAH DESSELLE V DAVID HILLS
_____	834	CA 23 00094	LEIGH VAN OSTRAND V PETER LATHAM

_____	841	KA 19 02341	PEOPLE V LAMARK NIXON
_____	843	CAF 22 00530	Mtr of SHANIA R.
_____	852	CA 22 01984	RACHEL L. AMOIA V JONATHAN J. AMOIA
_____	868	CA 22 00967	MICHAEL L. LENGVARSKY In the Matter of AVA BURROWS
_____	874	TP 23 00715	JAMES LIVINGSTON V ANTHONY ANNUCCI
_____	877	CA 22 01896	ROBERT SHUTTLEWORTH V SANDRA CORY
_____	879	KA 22 01205	PEOPLE V TANYA M. LATONE
_____	886	CAF 22 01145	Mtr of ZANDER W.
_____	890	CA 23 00153	ROBERT DRUMM V THE VILLAGE MOBILE HOME PARK, LLC
_____	897	CA 23 01059	JOHN KESEL V JEFFREY HOLTZ
_____	901	KA 21 00437	PEOPLE V THOMAS AUGELLO
_____	902	KA 18 00607	PEOPLE V EUGENE S. HUTCHINGS
_____	904	KA 20 00925	PEOPLE V BRANDON L. BISH
_____	906	KA 21 00981	PEOPLE V ERIC EVERETT
_____	909	KA 16 00372	PEOPLE V TOMIAS SHAW
_____	911	CAF 22 01593	Mtr of HANALISE S.
_____	912	CAF 22 00321	Mtr of AHREN B.-N.
_____	914	CAF 22 01377	Mtr of LANDIN F.
_____	919	CA 23 00018	JEFFERSON COUNTY DIRECTOR OF COMMUNITY SERVICES V ALEXANDER J.
_____	921	CA 22 01572	EMRES NEW YORK, LLC V BROOKSTONE 8, LLC
_____	924	TP 22 01769	MARIA L. IMPERIAL V SORTIE MARBLE & GRANITE, INC.
_____	925	KA 19 01491	PEOPLE V RASHAUN CAMERON
_____	928	KA 22 01559	PEOPLE V CASEY J. HALSEY
_____	929	KA 21 01382	PEOPLE V DEMETRIUS CROSBY
_____	930	KA 20 00176	PEOPLE V JUSTIN JENKINS
_____	931	KA 21 00991	PEOPLE V JUSTIN JENKINS
_____	932	KA 20 00698	PEOPLE V KORANE K. WOMACK
_____	933	KA 22 01444	PEOPLE V KORANE WOMACK
_____	936	KA 17 00398	PEOPLE V JEFFREY M. MARTIN
_____	937	KA 09 00318	PEOPLE V DESHEQUAN L. NATHAN

_____	938	CAF 22 01142	Mtr of LYNDA M.
_____	940	CAF 22 01111	DENISE M. THURSTON V PAT J. BOMBARD
_____	941	CA 23 01129	COLE R. SMITH V CROUSE HEALTH HOSPITAL, INC.
_____	942	CA 23 00103	KERRI W. S., PSYD. V HOWARD A. ZUCKER
_____	943	CA 23 00600	CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC M&F, LLC
_____	946	CA 23 00997	ADIRONDACK BANK, N.A. V CBB REALTY, LLC
_____	946.1	KA 19 00817	PEOPLE V DARNELL WALLACE
_____	947	KA 21 00399	PEOPLE V ERIK J. WARREN
_____	949	KA 22 00978	PEOPLE V FIMBO KAKESA
_____	950	KA 22 00979	PEOPLE V FIMBO KAKESA
_____	967	CA 22 01721	WEST COAST SERVICING, LLC V GWENDOLYN WILLIAMS
_____	972	KA 22 01556	PEOPLE V SARAH M. KLINE
_____	973	KA 22 00343	PEOPLE V AARON LUCAS
_____	975	KA 20 00968	PEOPLE V JULIO RESTO
_____	977	KA 23 00571	PEOPLE V BRIAN R. BUSSOM
_____	978	KA 19 02220	PEOPLE V COREY CLINTON
_____	980	KA 22 01196	PEOPLE V JEFFREY R. HICKEY
_____	982	CAF 23 00117	BRANDON P. V JENNIFER M. C.
_____	983	CAF 22 00797	Mtr of KAMERON R.
_____	984	CAF 22 00798	Mtr of KAMERON C. R.
_____	985	CAF 22 01792	Mtr of CLARISSA F.
_____	989	CA 22 01667	2006905 ONTARIO INC. V GOODRICH AEROSPACE CANADA,
_____	990	CA 22 01763	GAYLE BUNN V FAXTON-ST. LUKE'S HEALTH CARE
_____	996	CA 23 00886	65 LAKE AVENUE, LLC V LENDER CONSULTING SERVICES,
_____	998	KA 21 01425	PEOPLE V COREY A. GAMLEN
_____	1002	KA 23 01039	PEOPLE V JOHN MOTELL, IV
_____	1005	KA 20 00417	PEOPLE V BENJAMIN SANTIAGO, JR.
_____	1008	CAF 23 00628	Mtr of LEONARD P.
_____	1009	CAF 23 00629	Mtr of KEVIN P.
_____	1010	CAF 23 00630	Mtr of MICHAEL M.

_____	1011	CAF 22 01033	Mtr of DORIKA S.
_____	1012	CAF 22 01034	Mtr of JIBU M.
_____	1013	CAF 22 01035	Mtr of SALAMA M.
_____	1014	CAF 22 01036	Mtr of MUNEZERO L.
_____	1015	CAF 22 01037	Mtr of ELIZABETH M.
_____	1016	CAF 22 00306	Mtr of AMELIA D.
_____	1017	CAF 21 00902	ANDREW HERRNECKAR V MELISSA WIGGINS
_____	1018	CAF 23 00159	Mtr of LATORIA B.
_____	1019	CAF 22 01730	LAVAUGHN QUARLES, SR. V IESHA LAURENT
_____	1025.1	CA 23 00927	MARK M. V STATE OF NEW YORK
_____	1027	KA 22 01861	PEOPLE V DWIGHT MOSS
_____	1029	KA 22 01810	PEOPLE V JOSHUA ORTIZ
_____	1039	CAF 22 00517	JEAN C. SEVILLA V ROCHELLE TORRES
_____	1061	CAF 22 01283	BRANDI SEXTON V JOSHUA LEE
_____	1062	CA 23 00746	NEWCO CAPITAL GROUP VI LLC V HOPE HOSPICE CARE, I

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

606

CA 23-00003

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND DELCONTE, JJ.

MICHELLE R. LABRAKE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY O. LABRAKE, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered June 6, 2022. The order, among other things, awarded defendant $1,500 in attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: In this post-divorce action, defendant husband moved for an order, inter alia, holding plaintiff wife in contempt for failure to comply with the equitable distribution provisions of the judgment of divorce, directing plaintiff to produce items of personal property, and awarding defendant attorney's fees. As relevant here, the parties' final judgment of divorce provided that defendant would "retain his ladder and tools that are in the shed on the [marital] property."

Defendant alleged that, when he went to pick up those items, he was not allowed access to the shed and was provided with only some of his personal property. Defendant submitted in support of his motion a list of personal property that he sought to be returned. Notably, that list appears to have been created when the parties anticipated trial. In opposition, plaintiff denied that she failed to comply with the judgment of divorce and asserted that the judgment did not mention a list of items that she was required to return other than "a ladder and tools," which had already been provided to defendant. Following an appearance in March 2022, Supreme Court entered an interim order that, inter alia, directed plaintiff to comply with the judgment of divorce and return property awarded to defendant within 30 days. The order further scheduled a conference to confirm compliance with the order. When the parties returned roughly two months later, plaintiff told the court that she had none of the items on the list.

The court subsequently ordered that, if plaintiff located any items on the list submitted by defendant, she was to immediately turn

the items over to defendant and awarded defendant $1,500 in attorney's fees on the ground that plaintiff caused "unnecessary delay." Plaintiff now appeals from that order.

Initially, we note that the court did not find plaintiff in contempt, but rather directed her to act "if" she located "item(s) on the attached list." We see no basis to disturb that part of the order inasmuch as it is conditional (*see generally Soggs v Crocco*, 247 AD2d 887, 889 [4th Dept 1998]).

We, however, agree with plaintiff that the court erred in imposing $1,500 in attorney's fees under the circumstances, and we therefore modify the order accordingly. "[T]he decision to award . . . attorney[']s fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[ ]" (*Caricati v Caricati*, 181 AD3d 1279, 1281 [4th Dept 2020] [internal quotation marks omitted]). In awarding such fees, "[a] court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation" (*Wilson v Wilson*, 128 AD3d 1326, 1327 [4th Dept 2015] [internal quotation marks omitted]; *see Silvers v Silvers*, 197 AD3d 1195, 1199 [2d Dept 2021]). Here, as noted, the parties' judgment of divorce stated that defendant is entitled to "his ladder and tools that are in the shed," without any reference to an external list of recoverable items, and that "[a]ny remaining items in the shed will" belong to plaintiff. There is nothing in the record to support the conclusion that defendant's list of items was set forth or incorporated in the judgment of divorce (*see Latterman v Latterman*, 174 AD3d 518, 519 [2d Dept 2019]; *see generally Pilato v Pilato*, 206 AD2d 929, 929 [4th Dept 1994]). Consequently, it cannot be said that any misconduct on plaintiff's part caused defendant to have to take legal action in the form of the motion for contempt. We likewise cannot conclude that the interim order provides a basis to impose attorney's fees inasmuch as it merely references the shed as a place defendant's items may likely be found and did not expressly direct plaintiff to give defendant access to the shed. As a result, we cannot conclude that plaintiff's actions were the cause of any unnecessary litigation or delay in the resolution of defendant's motion.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

668

CAF 22-01971

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF STACEY PYNN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW PYNN, RESPONDENT-RESPONDENT.

STACEY PYNN, PETITIONER-APPELLANT PRO SE.

MATTHEW PYNN, RESPONDENT-RESPONDENT PRO SE.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (Keith D. Kibler, A.J.), dated November 28, 2022, in proceedings pursuant to Family Court Act article 8. The order dismissed the petitions and precluded petitioner from filing any request for relief in Family Court, Niagara County, without permission of the Court or without an attorney.

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

Memorandum: Petitioner commenced these two family offense proceedings in September 2022 and November 2022, respectively, alleging that respondent committed numerous family offenses (*see generally* Family Ct Act § 812). Respondent moved, inter alia, to dismiss the petitions. Petitioner, pro se, now appeals from an order that, inter alia, granted respondent's motion to that extent without a hearing. We affirm.

"Family Court has jurisdiction to adjudicate family offense petitions concerning acts that constitute certain violations of the Penal Law" (*Matter of Tammy TT. v Charles TT.*, 204 AD3d 1336, 1336-1337 [3d Dept 2022]). It is well settled that "[a] family offense petition may be dismissed without a hearing where the petition fails to set forth factual allegations which, if proven, would establish that the respondent has committed a qualifying family offense" (*Matter of Brown-Winfield v Bailey*, 143 AD3d 707, 708 [2d Dept 2016]; *see Matter of Rohrback v Monaco*, 173 AD3d 1774, 1774 [4th Dept 2019]).

With respect to petitioner's September 2022 family offense petition, petitioner has not challenged on appeal the court's dispositive determination that the petition was conclusory and devoid

of specificity and, therefore, failed to state a cause of action. Thus, affirmance of that part of the order concerning the September 2022 petition is warranted based on petitioner's " 'fail[ure] to address th[at] basis for the court's decision' " (*Papaj v County of Erie*, 211 AD3d 1617, 1619 [4th Dept 2022]). In any event, although petitioner has not addressed that basis for the court's decision, we likewise conclude that the September 2022 petition did not adequately allege conduct constituting a qualifying family offense (*see Matter of Jones v Rodriguez*, 209 AD3d 652, 653 [2d Dept 2022]; *Matter of Marino v Marino*, 110 AD3d 887, 887-888 [2d Dept 2013]).

With respect to the November 2022 proceeding, respondent sought dismissal of the petition therein on, inter alia, the ground that it failed to state a cause of action. Although that ground was not the basis for the court's dismissal of the November 2022 petition, respondent properly raises it as an alternative ground for affirmance with respect to the dismissal of that petition (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *York v Frank*, 209 AD3d 804, 806 [2d Dept 2022]; *Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038, 1044-1045 [4th Dept 2022]). We conclude that the November 2022 petition, like the September 2022 petition, failed to state a cause of action inasmuch as it did not set forth specific factual allegations that, if proven, would establish that respondent committed a qualifying family offense (*see Jones*, 209 AD3d at 653; *Marino*, 110 AD3d at 887-888).

Finally, we have considered petitioner's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

740

CA 22-01685

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

CHRISTINE L.H., AS PARENT AND NATURAL GUARDIAN OF J.H., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE A. GRAOVAC, DEFENDANT-APPELLANT, CHANDLER D. GIER AND JENNIFER J. KEANE, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

THE LAW OFFICES OF JOHN WALLACE, BUFFALO (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 19, 2022. The order granted the motion of defendants Chandler D. Gier and Jennifer J. Keane for summary judgment dismissing the complaint and cross-claims against them and granted plaintiff summary judgment on the issue of serious injury.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries her son sustained when he was a passenger in a vehicle owned by defendant Jennifer J. Keane and operated by defendant Chandler D. Gier (collectively, codefendants). Codefendants' vehicle, which was proceeding straight through an intersection with a flashing yellow light, collided with a vehicle owned and operated by defendant George A. Graovac (defendant). It is undisputed that defendant proceeded through a stop sign and flashing red light directly into the path of codefendants' vehicle. Following discovery, codefendants moved for summary judgment seeking dismissal of the complaint and defendant's cross-claims against them. Defendant opposed the motion, and plaintiff submitted papers supporting codefendants' motion and "request[ing]" summary judgment on the issue of serious injury. Supreme Court granted codefendants' motion and granted plaintiff's "motion" on the issue of serious injury.

Contrary to defendant's contention, we conclude that the court properly granted codefendants' motion dismissing the complaint and all cross-claims against them. Codefendants met their initial burden of establishing as a matter of law that defendant failed to yield the right-of-way to their vehicle at the intersection, and in response defendant failed to raise triable issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is well settled that [a] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way . . . Although a driver with the right-of-way has a duty to use reasonable care to avoid a collision . . . , a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision" (*Carpentieri v Kloc*, 213 AD3d 1314, 1315 [4th Dept 2023] [internal quotation marks omitted]; *see Gomez v Buczynski*, 213 AD3d 1312, 1313 [4th Dept 2023]; *Liskiewicz v Hameister*, 104 AD3d 1194, 1194-1195 [4th Dept 2013]).

Although there was some evidence that codefendants' vehicle had been speeding several miles before the intersection, there is no evidence in the record that codefendants' vehicle was speeding at the time it reached the intersection. Indeed, the only evidence in the record on appeal establishes that codefendants' vehicle was not speeding as it approached the intersection where the accident occurred.

Defendant further contends that the court erred in searching the record and granting summary judgment to plaintiff on the issue of serious injury. We agree. Plaintiff "request[ed]" summary judgment on serious injury in her papers supporting codefendants' motion, but it is undisputed that plaintiff did not actually move or cross-move for summary judgment. Although a court has authority to grant summary judgment to a nonmoving party, it may do so "only with respect to a cause of action or issue that is the subject of the motions [or cross-motions] before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430 [1996]; *see Diamond Roofing Co., Inc. v PCL Props., LLC*, 153 AD3d 1577, 1579 [4th Dept 2017]; *Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 901-902 [4th Dept 1993]). Inasmuch as neither defendant nor codefendants moved or cross-moved for summary judgment on the issue of serious injury, we conclude that the court erred in awarding plaintiff summary judgment on that issue (*see Bondanella v Rosenfeld*, 298 AD2d 941, 942-943 [4th Dept 2002]), and we modify the order accordingly.

In any event, as defendant correctly contends, even if plaintiff's "request[]" for summary judgment on the issue of serious injury were deemed a cross-motion, the request was untimely because "it was made more than 120 days after the note of issue was filed, and plaintiff[ ] did not seek leave to file a late motion or show good cause for [her] delay pursuant to CPLR 3212 (a)" (*Cracchiola v Sausner*, 133 AD3d 1355, 1356 [4th Dept 2015]), and there is no evidence that defendant waived his right to contest the timeliness of any CPLR 3212 motion (*cf. Lagattuta-Spataro v Sciarrino*, 191 AD3d

1355, 1356 [4th Dept 2021]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

754

CAF 22-00511

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF DAVID P.S. AND JAMES R.S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GRACE C.L., RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an amended order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 26, 2022, in a proceeding pursuant to Family Court Act article 10. The amended order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an amended order of fact-finding and disposition that, inter alia, adjudged the subject children to be neglected children. Initially, the mother did not appear at the fact-finding hearing and, although her attorney was present at the hearing, the attorney did not participate. Under the circumstances, we conclude that the mother's unexplained failure to appear constituted a default (*see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). " '[I]t is well settled that no appeal lies from an order that is entered upon the default of the appealing party' " (*Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]; *see Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). Further, even assuming, arguendo, that the mother raised an issue that was contested below and is thus reviewable on this appeal despite her default (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403 [4th Dept 2016]), we take judicial notice of the entry of a subsequent order terminating the mother's parental rights with respect to the subject children and that the time for the mother to appeal from that order has now passed (*see* Family Ct Act § 1113; *see Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1414 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]). Inasmuch as the order terminating the mother's parental rights to the subject children is final, the disposition renders moot

the appeal from the order entered in the neglect proceedings (*see John D., Jr.*, 199 AD3d at 1414).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

759

CA 22-00130

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

CHAD SLEIMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMAL SLEIMAN, DEFENDANT-RESPONDENT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered December 30, 2021, in a divorce action. The order, inter alia, denied the motion of plaintiff for summary judgment and granted the cross-motion of defendant to set aside a property settlement and separation agreement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross-motion to the extent that it seeks to invalidate the entire property settlement and separation agreement, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action for divorce and alleged that, pursuant to Domestic Relations Law § 170 (6), the parties had been living separately pursuant to a property settlement and separation agreement (separation agreement) filed almost two years earlier. Plaintiff moved for summary judgment, seeking, inter alia, enforcement of the separation agreement and defendant cross-moved for an order that would find certain provisions of the separation agreement to be unconscionable and the product of fraud, duress, coercion and plaintiff's lack of financial disclosure, and would set aside the entire separation agreement on that basis. Supreme Court, inter alia, denied plaintiff's motion and granted defendant's cross-motion to set aside the separation agreement on the ground that the entire agreement was unconscionable. In its written decision, the court determined that there were questions of fact on issues of fraud, duress, coercion, overreaching, and plaintiff's lack of financial disclosure, but that no hearing with respect to those issues was necessary in light of its determination that the entire separation agreement was unconscionable. Plaintiff appeals.

"Separation agreements are subject to closer judicial scrutiny than other contracts because of the fiduciary relationship between spouses" (*Tuzzolino v Tuzzolino*, 156 AD3d 1402, 1403 [4th Dept 2017]; *see Christian v Christian*, 42 NY2d 63, 72 [1977]). A separation agreement should be set aside as unconscionable where it is "such as no [person] in [their] senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other . . . , the inequality being so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*Christian*, 42 NY2d at 71 [internal quotation marks omitted]; *see Dawes v Dawes*, 110 AD3d 1450, 1451 [4th Dept 2013]; *Skotnicki v Skotnicki*, 237 AD2d 974, 975 [4th Dept 1997]). "[T]he unconscionability or inequality of a separation agreement may be the result of overreaching by one party to the detriment of another" (*Tuzzolino*, 156 AD3d at 1403; *see Tchorzewski v Tchorzewski*, 278 AD2d 869, 870 [4th Dept 2000]).

Here, at the time the parties entered into the separation agreement, plaintiff, the monied spouse, was represented by counsel but defendant was not. While that factor alone is not dispositive, "it is a significant factor for us to consider" (*Tuzzolino*, 156 AD3d at 1403; *see Tchorzewski*, 278 AD2d at 870; *Skotnicki*, 237 AD2d at 975). Another factor to consider is that neither the separation agreement nor pretrial discovery included full disclosure of plaintiff's finances (*see Tchorzewski*, 278 AD2d at 870-871). The value of plaintiff's business was not evaluated in the separation agreement or during pretrial discovery, yet the agreement required that defendant relinquish her equitable share in almost all of the marital property, including any interest in plaintiff's business. The separation agreement did not provide defendant with any child support for the parties' two minor children, did not provide maintenance for defendant, and recited that, if defendant was to become engaged or remarry, plaintiff would automatically obtain full custody of the parties' children. Considering those terms as examples of the tenor of the separation agreement, we conclude that the court did not err in finding that certain terms of the agreement are unconscionable and are the product of overreaching by plaintiff (*see Tuzzolino*, 156 AD3d at 1403; *Dawes*, 110 AD3d at 1451; *Tchorzewski*, 278 AD2d at 871).

Nonetheless, we agree with plaintiff that, because the separation agreement contains a severability clause, not every part of the separation agreement is necessarily unenforceable, and the court therefore erred in granting that part of the cross-motion seeking to set aside the entire separation agreement without first holding a hearing on the issue of severability. "[W]hether the provisions of a contract are severable depends largely upon the intent of the parties as reflected in the language they employ and the particular circumstantial milieu in which the agreement came into being" (*Matter of Wilson*, 50 NY2d 59, 65 [1980]; *see Christian*, 42 NY2d at 73). Therefore, we modify the order by denying the cross-motion to the extent that it sought to invalidate the entire separation agreement, and we remit the matter to Supreme Court for a hearing with respect to the applicability of the severability clause, as well as the triable issues of fact whether fraud, duress, coercion, overreaching, and

plaintiff’s lack of financial disclosure render the entire separation agreement unenforceable.

We have considered plaintiff’s remaining contentions and conclude that they are without merit.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

762

CA 22-01759

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

LYNN ACHESON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL PELLICCIA, DEFENDANT-RESPONDENT.

VAN LOON LAW, LLC, ROCHESTER (NATHAN A. VAN LOON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RICHARD C. BRISTER, ESQ., PITTSFORD (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered August 29, 2022. The order and judgment granted the motion of defendant for summary judgment and dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for fraud and breach of contract arising from her purchase of a home from defendant, alleging that defendant intentionally misrepresented in the property condition disclosure statement required by Real Property Law § 462 that there was no asbestos on the property and no material defects in the sewage system. Several months after closing on the home, plaintiff discovered asbestos in the siding and interior duct insulation. A year and a half after that, the sewer line backed up, and plaintiff was advised by the Town of Irondequoit Department of Public Works that the line needed to be replaced. Following discovery, defendant moved for summary judgment on the grounds that the purchase and sale contract provided that the property was sold in "as is" condition, that he did not prevent plaintiff from inspecting the home and, because he did not know that there was asbestos or material defects in the sewage system in the home, the representations he made in the disclosure statement were true to the best of his knowledge. Supreme Court granted the motion and dismissed the amended complaint. We affirm.

We reject plaintiff's sole contention on appeal, that, in granting the motion with respect to the fraud cause of action, the court improperly evaluated defendant's credibility with respect to his representations on the disclosure statement that he had no knowledge of asbestos on the property or material defects in the sewage system.

" 'Although New York traditionally adheres to the doctrine of caveat emptor in an arm's length real property transfer . . . , Real Property Law article 14 codifies a seller's disclosure obligations for certain residential real property transfers,' " such as the transaction at issue here (*Sample v Yokel*, 94 AD3d 1413, 1415 [4th Dept 2012]; *see Klafehn v Morrison*, 75 AD3d 808, 810 [3d Dept 2010]). "False representation in a property condition disclosure statement mandated by Real Property Law § 462 (2) may constitute active concealment in the context of fraudulent nondisclosure . . . , [but] to maintain such a cause of action, the buyer[ ] must show, in effect, that the seller thwarted the buyer['s] efforts to fulfill the buyer['s] responsibilities fixed by the doctrine of caveat emptor" (*Sample*, 94 AD3d at 1415 [internal quotation marks omitted]; *see Klafehn*, 75 AD3d at 810). A defendant will meet the "initial burden on that part of the motion with respect to the fraud cause of action by submitting evidence that [the defendant] did not knowingly fail to disclose any defects in the property" (*Sample*, 94 AD3d at 1415).

Here, defendant met his initial burden on the motion with respect to the fraud cause of action by submitting his deposition testimony and affidavit averring that he did not know there was any asbestos in the home or material defects in the sewage system when he completed the disclosure statement (*see id.*), thereby shifting the burden to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff failed to raise a triable issue of fact in opposition. The only evidence offered by plaintiff was the fact that, since 1985, defendant lived in and made various improvements to the home. Plaintiff's "mere conclusions" and "unsubstantiated allegations" that living in the home and making improvements thereon during that period could have given rise to defendant knowing about asbestos or material defects in the sewage system in the home are insufficient to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and do not create a "bona fide issue with respect to [defendant's] credibility" (*Tronolone v Praxair, Inc.*, 22 AD3d 1031, 1033 [4th Dept 2005] [internal quotation marks omitted]). The court, therefore, properly granted defendant's motion with respect to the fraud cause of action (*see Sample*, 94 AD3d at 1415; *Meyers v Rosen*, 69 AD3d 1095, 1098 [3d Dept 2010]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

763

CA 22-01921

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, AND DELCONTE, JJ.

CELLINO LAW, LLP, AND CELLINO & BARNES P.C.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LOONEY INJURY LAW PLLC, AND JOHN W. LOONEY, ESQ.,
DEFENDANTS-APPELLANTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 2, 2022. The order denied the motion of defendants to, inter alia, dismiss the complaint.

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

Memorandum: This appeal relates to disputes between law firms over attorneys' fees arising from legal services provided to plaintiffs in multiple personal injury actions. Defendants appeal from an order that denied their motion seeking dismissal of the complaint and in the alternative, inter alia, disqualification of the Justice assigned to this case. We affirm.

Defendants contend that Supreme Court erred in denying the motion insofar as it sought to dismiss the complaint on the ground that plaintiffs improperly commenced the underlying matter as a plenary action by summons and complaint, rather than a special proceeding by petition (*see generally* Judiciary Law § 475). While this appeal was pending, however, the court entered a subsequent order granting plaintiffs' cross-motion to convert the action into a special proceeding pursuant to CPLR 103 (c) (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 55 at 2), of which we take judicial notice (*see HoganWillig PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1371 [4th Dept 2022]). Consequently, we conclude that defendants' contention that the court should have granted the motion insofar as it sought to dismiss the complaint on the ground that the underlying matter was commenced in the improper form is moot inasmuch as the subsequent order afforded defendants all the relief they seek in that regard (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980];

Deering v State of New York, 111 AD3d 1368, 1368 [4th Dept 2013]), and we further conclude that the exception to the mootness doctrine does not apply to this case (*see Hearst Corp.*, 50 NY2d at 714-715).

To the extent our dissenting colleague concludes that defendants' contention is not moot and that the court lacked authority to convert the action into a special proceeding under CPLR 103 (c), we note that the propriety of that subsequent order is not properly before us on this appeal. Furthermore, we note that the dissent's specific grounds for reversal are not properly before us inasmuch as they were not raised by defendants on appeal (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]).

We further conclude that the court did not abuse its discretion in denying the motion insofar as it sought disqualification of the Justice assigned to the case. Where, as here, there is no "legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal . . . , and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion" (*Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021] [internal quotation marks omitted]; *see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Matter of Indigo S. [Rajea S.T.]*, 213 AD3d 1205, 1205-1206 [4th Dept 2023]). On this record, we conclude that there is nothing demonstrating "any bias on the court's part [that] unjustly affected the result to the detriment of [defendants] or that the court [had] a predetermined outcome of the case in mind" (*Matter of Cameron ZZ. v Ashton B.*, 183 AD3d 1076, 1081 [3d Dept 2020], *lv denied* 35 NY3d 913 [2020] [internal quotation marks omitted]; *see Allison*, 199 AD3d at 1491-1492; *see generally* 22 NYCRR 100.3 [E] [1]). Thus, we perceive no abuse of discretion by the court in denying defendants' motion insofar as it sought disqualification (*see Matter of Cellino Law, LLP v Looney Injury Law PLLC*, 219 AD3d 1669, 1669-1670 [4th Dept 2023]; *Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669-1670 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]).

We have reviewed defendants' remaining contention and conclude that it does not warrant reversal or modification of the order.

All concur except DelConte, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and vote to reverse the order, grant defendants' motion, and dismiss the complaint without prejudice to plaintiffs to file separate special proceedings to enforce the charging liens in the proper courts.

Preliminarily, I respectfully disagree with the majority's conclusion that defendants' contention that Supreme Court erred in denying the motion insofar as it sought to dismiss the complaint is moot. In my view, "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the [order]" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Specifically, defendants seek dismissal of the action pursuant to CPLR 3211, and not, as the majority states, conversion of the action to a special proceeding pursuant to CPLR 103 (c), and thus the subsequent order converting the

action to a special proceeding does not give defendants all the relief they seek.

I respectfully further disagree with the majority insofar as it tacitly concludes, with respect to the merits of defendants' contention, that the court had authority to convert the action to a special proceeding under the circumstances. Plaintiffs were discharged without cause by their clients in 28 separate personal injury actions, and now seek to enforce charging liens against the settlement proceeds ultimately obtained by defendants–the successor attorneys–in each of those actions. Charging liens, as authorized under Judiciary Law § 475, permit an "attorney to exercise control over property which [the attorney] does not possess[, i.e., the settlement proceeds] and secure payment of [the attorney's] fee in the particular litigation by satisfying it from the fund created by his efforts" (*Matter of Desmond v Socha*, 38 AD2d 22, 24 [3d Dept 1971], *affd* 31 NY2d 687 [1972]). "[E]nforcement of a charging lien is founded upon the equitable notion that the proceeds of a settlement are ultimately under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done to its own officers" (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 187 [3d Dept 2002] [internal quotation marks omitted]). Pursuant to section 475, an application to recover a charging lien must be made by means of an expedited special proceeding "designed to attach only the specific proceeds of the judgment or settlement in the action where the attorney appeared" (*Haser v Haser*, 271 AD2d 253, 255 [1st Dept 2000]).

Here, at least ten different supreme court justices in five different counties across two judicial districts presided over the 28 underlying personal injury actions at issue, and, most importantly, each court "retained jurisdiction over the fee dispute between the attorneys based on a charging lien" (*Russo v City of New York*, 48 AD3d 540, 541 [2d Dept 2008]). Thus, the matter now before this Court is not a single special proceeding to collect fees secured by a single charging lien that was improperly filed as a plenary action in the correct court but, rather, over two dozen separate special proceedings that were improperly filed as a single plenary action in the incorrect court. While CPLR 103 (c) authorizes the conversion of a plenary action into a special proceeding, or vice versa, where the "sole[ ]" defect is that it was "not brought in the proper form" (CPLR 103 [c]; *see generally Pirro & Sons, Inc. v Thomas J. Pirro, Jr. Funeral Home*, 137 AD3d 1609, 1610 [4th Dept 2016]), it does not authorize, as is the case here, the removal of a matter from the continuing jurisdiction of a coordinate court (*see* CPLR 325 [a]) or the consolidation of multiple actions (*see* CPLR 602 [b]). Moreover, even if CPLR 103 (c) did grant that authority in the context of correcting errors in form, I would nonetheless conclude that conversion would be an improvident exercise of discretion here inasmuch as "[t]he issue of apportionment of an attorney's fee is controlled by the circumstances and equities of each particular case, and the trial court is in the best position to assess

such factors" (*Mazza v Marcello*, 20 AD3d 554, 554 [2d Dept 2005]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

766

KA 19-00536

PRESENT: WHALEN, P.J., SMITH, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEDETRICE WRIGHT, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered January 28, 2019. The appeal was held by this Court by order entered February 3, 2023, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (213 AD3d 1196 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting her after a jury trial of two counts each of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and assault in the second degree (§ 120.05 [2], [6]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to rule on that part of defendant's motion seeking a trial order of dismissal on the ground that the evidence is legally insufficient to support the conviction with respect to count four, for assault in the second degree under Penal Law § 120.05 (6) (*People v Wright*, 213 AD3d 1196, 1197 [4th Dept 2023]). Upon remittal, the court denied the motion. We now affirm.

Defendant contends that the evidence is legally insufficient with respect to count four because the crime of criminal possession of a weapon in the second degree cannot serve as the predicate felony for a conviction of assault in the second degree under Penal Law § 120.05 (6). We reject that contention, and conclude that the evidence at trial established that defendant shot the complainant in furtherance of the underlying crime of criminal possession of a weapon in the second degree (*see* § 120.05 [6]; *cf. People v Thomas*, 87 AD3d 867, 867 [1st Dept 2011], *lv denied* 17 NY3d 956 [2011]; *see generally People v Henderson*, 25 NY3d 534, 541 [2015]). Further, viewing the evidence in

light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

768

KA 23-00267

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB STAGLES, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, PLLC, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN, FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered January 23, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant appeals from an order classifying him as a level two risk. We agree with defendant that County Court erred in applying a clear and convincing evidence standard rather than the preponderance of the evidence standard to his request for a downward departure from his presumptive risk level and in denying that request (*see People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). "Inasmuch as the record is sufficient for us to make our own findings of fact and conclusions of law [under the proper standard], however, remittal is not required" (*People v Snyder*, 218 AD3d 1356, 1356 [4th Dept 2023]; *see People v Wright*, 215 AD3d 1258, 1259 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023]; *Loughlin*, 145 AD3d at 1427-1428).

Defendant became subject to registration as a sex offender when he pleaded guilty to a superior court information charging him with one count of possessing an obscene sexual performance by a child (Penal Law § 263.11). The charge arose from the discovery by the police of eight photographs and one video on defendant's cell phone depicting children engaging in sexual acts. At the time, defendant was 19 years old and had never before been arrested. There being no indication or allegation that defendant had ever sexually abused

anyone, the court, with the People's approval, sentenced defendant to a term of probation.

The People thereafter prepared a risk assessment instrument (RAI) that assessed 90 points against defendant, making him a presumptive level two risk. Thirty points were assessed under risk factor 3 for having three or more victims, and 20 points were assessed under risk factor 7 because the victims were strangers. Although defendant opposed an assessment of points under those two risk factors, he requested in the alternative a downward departure based, inter alia, on the fact that "scoring points under factors 3 and 7 may overestimate the risk of reoffense and danger to the public posed by quite a few child pornography offenders," a concern that should be addressed "through the departure process" (*People v Gillotti*, 23 NY3d 841, 860 [2014]). The court assessed 90 points against defendant and determined that he failed to establish any mitigating factors that would warrant a downward departure. The court erred in determining that defendant failed to establish a mitigating factor and in denying defendant's request for a downward departure. We therefore modify the order accordingly.

As the Court of Appeals has stated, "in deciding a child pornography offender's application for a downward departure, a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration" (*id.*). "The departure process is the best way to avoid potentially 'anomalous results' for some child pornography offenders that 'the authors of the Guidelines may not have intended or foreseen' " (*People v Fernandez*, 219 AD3d 760, 762 [2d Dept 2023], quoting *People v Johnson*, 11 NY3d 416, 418, 421 [2008]).

Here, defendant established by a preponderance of the evidence that there are mitigating factors "not otherwise adequately taken into account by the guidelines" (*People v Santiago*, 20 AD3d 885, 886 [4th Dept 2005] [internal quotation marks omitted]). The mitigating factors include the fact that defendant was assessed points under risk factors 3 and 7, without which he would have scored as a level one risk. Further, weighing the mitigating factors against any aggravating factors, we conclude that the totality of the circumstances warrants a downward departure to risk level one to avoid an over-assessment of "defendant's dangerousness and risk of sexual recidivism" (*Gillotti*, 23 NY3d at 861; *see People v Morana*, 198 AD3d 1275, 1276-1277 [4th Dept 2021]).

Defendant has no prior criminal record, was never accused of engaging in the sexual abuse of a child or any other victim, was cooperative with the police, and readily admitted his guilt. He also was not arrested during the 2½ years between his arrest for the crime at issue and the SORA hearing. Significantly, there is no indication that defendant shared the child pornography images or video with anyone else, and he deleted the images and video "months before he was contacted by" law enforcement. Indeed, the fact that the People

offered defendant a probationary sentence as part of the plea agreement indicates that they considered him to be a relatively low risk to the public as compared to other sex offenders. Moreover, defendant did not possess anywhere near the number of images that were possessed by defendants in other child pornography cases where we affirmed the denial of requests for downward departures (*see People v Mack*, 187 AD3d 1648, 1649-1650 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]; *People v Bernecky*, 161 AD3d 1540, 1540-1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]).

We therefore exercise our discretion to grant defendant a downward departure to risk level one (*see People v Sestito*, 195 AD3d 869, 870 [2d Dept 2021]; *People v Gonzalez*, 189 AD3d 509, 510-511 [1st Dept 2020]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

779

CA 22-01926

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

ABLA MOHAMED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES P. RENDA, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN L. WHITCOMB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Lynn W. Keane, J.), entered July 14, 2022, in a divorce action. The judgment, inter alia, equitably distributed marital property of the parties.

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

Memorandum: These appeals arise out of an action for divorce commenced by plaintiff (wife). Following a trial, Supreme Court issued the judgment in appeal No. 1 that inter alia, equitably distributed some of the marital property of the parties and awarded maintenance and child support to the wife. The court thereafter issued the order in appeal No. 2, effectively granting in part the application of the wife seeking attorneys' fees for her attorneys from The Legal Aid Bureau of Buffalo, Inc. (Legal Aid). The parties waived a hearing, and thus the court determined the issue of attorneys' fees on the papers and issued the judgment in appeal No. 3. Inasmuch as the order in appeal No. 2 was subsumed into the final monetary judgment in appeal No. 3, we dismiss appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Defendant (husband) raises numerous challenges to the judgment in appeal No. 1 insofar as it imputed income to him, awarded the wife nondurational maintenance and, in his view, inequitably distributed marital assets. He also challenges the judgment in appeal No. 3, contending that the court erred in awarding attorneys' fees to the wife's attorneys. Important to any analysis related to the financial determinations of the court are the numerous questionable acts committed by the husband before and after the divorce action was commenced.

As the husband's counsel conceded at oral argument, the husband violated orders restraining him from transferring assets or accessing various safety deposit boxes, rendering it difficult to accurately discern the value of those marital assets. He also transferred ownership of his various businesses to his brother and a long-term employee/friend. Although some of those transfers occurred before the divorce action was filed, the husband made those transfers when he was facing a lengthy prison sentence (*People v Abuhamra*, 107 AD3d 1630 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]; 107 AD3d 1632 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]). Nevertheless, even from prison, the husband maintained control of his businesses. Upon his release from prison, the husband continued that control.

By the time this divorce action was commenced, the husband had conducted numerous transactions to make it appear as if he had no assets, attempting to establish that his multi-million dollar businesses were no longer his and that he was earning only around $12,500 a year. The husband's financial maneuvering prompted the wife to commence an RPAPL action (*Mohamed v Abuhamra*, 207 AD3d 1121 [4th Dept 2022]), which then prompted the transferees of the businesses, i.e., the brother, the employee/friend and their newly acquired businesses, to seek to intervene in this divorce proceeding. The court denied the motion to intervene, and we affirmed that order (*Mohamed v Abuhamra*, 193 AD3d 1368 [4th Dept 2021]).

"Giving due deference to the court's credibility determinations" (*Iannazzo v Iannazzo* [appeal No. 2], 197 AD3d 959, 961 [4th Dept 2021]), we reject most of the husband's contentions.

Contrary to the husband's contentions in appeal No. 1, the court did not err in imputing income to the husband. Given the husband's conduct, the determination of his exact income was impossible, and the last concrete measure of his income was set forth on his 2008 tax return. Under the circumstances of this case, the court properly used that last known measure of income, and we conclude that the court's determination to impute that income to the husband was appropriate (*see generally Carney v Carney*, 160 AD3d 218, 227 [4th Dept 2018]; *Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397 [4th Dept 2014]). "It is well settled that '[i]ncome may be imputed based on a party's earning capacity, as long as the court articulates the basis for imputation and the record evidence supports the calculations' " (*Anastasi v Anastasi*, 207 AD3d 1131, 1132 [4th Dept 2022]; *see Belkhir*, 118 AD3d at 1398; *Sharlow v Sharlow*, 77 AD3d 1430, 1431 [4th Dept 2010]). Inasmuch as the court articulated the basis for its determination and the record evidence supports that determination, this Court will not disturb the court's determination.

The husband contends in an issue heading and his conclusory paragraph in appeal No. 1 that the court erred in awarding the wife nondurational maintenance, but he did not actually brief that issue on appeal. Assuming, arguendo, that the husband's contention is properly before us, we conclude that the award of nondurational maintenance was appropriate under the circumstances of this case (*see Summer v Summer*, 85 NY2d 1014, 1016 [1995], *rearg denied* 86 NY2d 886 [1995];

Kirschenbaum v Kirschenbaum, 264 AD2d 344, 345 [1st Dept 1999]; *see also* Domestic Relations Law § 236 [B] [6] [f] [2]).

Contrary to the husband's contention in appeal No. 1, the court appropriately credited him for temporary child support payments. We reject the husband's further contention in appeal No. 1 that he is entitled to credit for temporary maintenance and household expenses. The money that was paid for those expenses came from joint marital funds placed in an escrow account as opposed to voluntary individual payments made "toward 'the other party's share' " of expenses (*Antinora v Antinora*, 125 AD3d 1336, 1337 [4th Dept 2015]; *cf. Le v Le*, 82 AD3d 845, 846 [2d Dept 2011]).

The husband further contends in appeal No. 1 that the court erred in awarding the wife 100% of a second escrow account as equitable distribution. We again reject the husband's contention. In determining the equitable distribution of marital property, courts are required to consider various factors, which are set forth in Domestic Relations Law § 236 (B) (5) (d). Included in those factors are, inter alia, "the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession" (§ 236 [B] [5] [d] [10]), "the wasteful dissipation of assets by either spouse" (§ 236 [B] [5] [d] [12]), "any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration" (§ 236 [B] [5] [d] [13]), "whether either party has committed an act or acts of domestic violence . . . against the other party and the nature, extent, duration and impact of such act or acts" (§ 236 [B] [5] [d] [14]), and "any other factor which the court shall expressly find to be just and proper" (§ 236 [B] [5] [d] [16]).

In "egregious cases which shock the conscience of the court" (*O'Brien v O'Brien*, 66 NY2d 576, 589 [1985]; *see Howard S. v Lillian S.*, 14 NY3d 431, 435 [2010]), the court may consider one party's fault in fashioning a distribution award (*see Blickstein v Blickstein*, 99 AD2d 287, 292 [2d Dept 1984], *appeal dismissed* 62 NY2d 802 [1984]). This is one such egregious case. Based on its credibility determinations, the court wrote in its decision and order that, "[i]n response to this divorce action being filed, [the] husband hid bank accounts, transferred funds and emptied safe deposit boxes. [The husband] schemed with his brother and a friend to under report [the] husband's financial status and income." We conclude that "[t]he marital misconduct [was] 'so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship' " (*Socci v Socci*, 186 AD3d 1289, 1290 [2d Dept 2020], quoting *Blickstein*, 99 AD2d at 292; *see generally Howard S.*, 14 NY3d at 436). Moreover, the husband made it impossible for the court to determine the value of his businesses as well as the true amount of marital assets (*see Braun v Braun*, 11 AD3d 423, 423 [2d Dept 2004], *lv denied* 4 NY3d 702 [2005]). Given the evidence that the husband secreted marital funds and disregarded court orders to preserve marital assets, we conclude that the court's determination to award the wife 100% of the *known* marital assets should not be disturbed.

Even assuming, arguendo, that the husband correctly contends in

appeal No. 1 that the court erred in refusing to admit in evidence an exhibit purporting to be a contract for the sale of one of the husband's businesses, we conclude that reversal is not required. Any error with respect to refusing to admit that evidence is harmless (*see Sheridan v Sheridan*, 129 AD3d 1567, 1567 [4th Dept 2015]; *Matter of Emmitt-Klinger v Klinger*, 48 AD3d 992, 993 [3d Dept 2008]).

Finally, in appeal No. 3, the husband contends that the court erred in awarding attorneys' fees to the wife's counsel, i.e., Legal Aid. We agree. The court lacked authority to award attorneys' fees to Legal Aid inasmuch as the wife did not *pay* for any legal services aside from the $45 retainer fee and did not owe any additional fees to Legal Aid. Domestic Relations Law § 237 (a) limits awards of attorneys' fees to the amounts "paid and still owing" to the attorneys (*see generally* 22 NYCRR 202.16 [k] [3]; *Gass v Gass*, 91 AD3d 557, 558 [1st Dept 2012]). Here, it is undisputed that the wife did not pay or owe Legal Aid anything beyond the $45 retainer fee. Indeed, the wife's retainer agreement specifically provided that, although Legal Aid reserved the right "[t]o seek and retain attorney fees and statutory costs from the opposing party," the wife was never actually obligated to pay those amounts. Instead, the wife's agreement with Legal Aid states that the wife had the right "[t]o receive legal services without paying for a lawyer." Inasmuch as recovery is limited to amounts actually paid or owing to an attorney, the fact that the wife was never obligated to pay Legal Aid anything beyond the $45 retainer fee makes it improper for the court to have awarded Legal Aid attorneys' fees. Where, as here, one party is not obligated to pay the attorneys' fees, an award to the attorney does nothing to fulfill the ultimate goal of the statute, which is "to redress the economic disparity between the monied spouse and the non-monied spouse" (*O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]; *see Decker v Decker*, 91 AD3d 1291, 1291 [4th Dept 2012]). We therefore vacate the judgment in appeal No. 3 and reverse the order in appeal No. 2.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

780

CA 22-01936

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

ABLA MOHAMED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES P. RENDA, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN L. WHITCOMB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered May 6, 2022, in a divorce action. The order, inter alia, awarded attorneys' fees to plaintiff's attorneys.

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

Same Memorandum as in *Mohamed v Abuhamra* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

781

CA 22-01937

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

ABLA MOHAMED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

JAMES P. RENDA, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN L. WHITCOMB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Lynn W. Keane, J.), entered June 29, 2022, in a divorce action. The judgment awarded attorneys' fees to plaintiff's attorneys.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered May 6, 2022 is reversed on the law without costs and plaintiff's application for attorneys' fees is denied in its entirety.

Same memorandum as in *Mohamed v Abuhamra* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

788

CA 22-01089

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

ALI TUCKETT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129488.)

NEUFELD SCHECK & BRUSTIN, LLP, NEW YORK CITY (KATIE MCCARTHY OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Debra A. Martin, J.), entered June 24, 2022. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this action pursuant to Court of Claims Act § 8-b seeking damages based on allegations that he was wrongfully convicted in 2011 of, inter alia, two counts each of criminal sexual act in the first degree (Penal Law § 130.50 [1], [4]) and sexual abuse in the first degree (§ 130.65 [1], [3]) and subsequently imprisoned by defendant, State of New York. Claimant's conviction stemmed from accusations by his cousin (complainant) that claimant sexually abused him in the summer of 2009 when the complainant was 10 years old. In 2014, the complainant met with the prosecutor and recanted the accusations. In June 2015, County Court (Argento, J.) granted claimant's CPL 440.10 motion and vacated the conviction. After a bench trial on claimant's section 8-b claim, the Court of Claims dismissed the claim. We affirm.

Claimant contends that the court improperly relied on documents and facts that were not in evidence in rendering its decision. Claimant first notes that the complainant's aunt never testified and asserts that it was therefore improper for the court to state that the aunt witnessed, testified about, and was disturbed by an incident where the complainant had been alone in the bedroom with claimant and ran out of the room crying. But both the complainant and claimant testified that the aunt saw the complainant coming out of the room crying, and claimant testified that, at the criminal trial, the aunt may have given such testimony. There was therefore admissible evidence to support the court's finding regarding the aunt (*see*

generally E.W. Tompkins Co., Inc. v State of New York, 9 AD3d 755, 755 [3d Dept 2004]; *Marshall v State of New York*, 252 AD2d 852, 853-854 [3d Dept 1998]).

Claimant also notes that the complainant's grand jury and criminal trial testimony were not admitted in evidence, and thus there was no basis for the court to refer to an incident of abuse that happened a week before the complainant's birthday party and to state that the complainant "consistently" testified before the grand jury and at the criminal trial with the same story. However, the complainant testified that the incident where he left the room crying occurred one week before his birthday party, which claimant acknowledged during his deposition that was admitted in evidence, and the record therefore supports the court's finding (*see generally E.W. Tompkins Co., Inc.*, 9 AD3d at 755; *Marshall*, 252 AD2d at 853-854).

Claimant further contends that the court mischaracterized the evidence by stating that claimant sat with the complainant in church, let the complainant use his phone, and showed the complainant photos of naked women and people having sex. The complainant testified that claimant and he frequently sat together at church and claimant allowed him to use his phone while they were in church, but he denied seeing pictures of naked women. He also testified that he recalled previously testifying that he had seen naked people having sex on claimant's phone. He then explained that he had merely stumbled upon such pictures while looking through the phone. Claimant testified at this trial, the criminal trial, and at his deposition that he had pictures of naked women on his cell phone. He also admitted at the criminal trial that he would allow the complainant to use his phone at church, and he saw the complainant scrolling through his phone. The evidence at the trial and the reasonable inferences therefrom support the court's findings (*see generally Gristwood v State of New York*, 119 AD3d 1414, 1416 [4th Dept 2014]; *Przesiek v State of New York*, 118 AD3d 1326, 1327 [4th Dept 2014]; *Marrow v State of New York*, 105 AD3d 1371, 1373-1374 [4th Dept 2013]).

Claimant also contends that there was no basis for the court to conclude that family members observed "grooming behaviors," but there was testimony at this trial that claimant, who was 35 years old at the time, spent hours with the complainant playing video games in the complainant's bedroom, sometimes with the door closed. There was also testimony that claimant paid more attention to the complainant than the other cousins and would often tease him and wrestle with him in front of other family members; the complainant's mother testified that she believed that claimant "targeted" the complainant and would tell claimant to "stop messing with him." That testimony, together with the inference that claimant allowed the complainant to see the photos of naked women on his cell phone, supports the court's conclusion regarding grooming behaviors (*see generally Gristwood*, 119 AD3d at 1416; *Przesiek*, 118 AD3d at 1327; *Marrow*, 105 AD3d at 1373-1374).

Claimant further contends that the court erred by relying on hearsay evidence consisting of the complainant's statements to the police and the prosecutor that he "felt better" after revealing the

abuse and expressed concerns about his health and anatomy because of the abuse. Although we agree with claimant that the evidence constituted hearsay, reversal is not required based on the court's error (*see generally Eisenberg v State of New York*, 79 AD3d 795, 795-796 [2d Dept 2010]; *Rinaldi v State of New York*, 300 AD2d 1141, 1141-1142 [4th Dept 2002]). The improper hearsay testimony was not relied upon by the court in determining that the complainant's recantation was unconvincing and that claimant was essentially not credible. The court found that the complainant's recantation was unconvincing because, inter alia, he offered little explanation about what prompted it and the complainant's mother waited months before bringing the complainant's recantation to the prosecutor. The court also relied upon the complainant's "shockingly flat affect when testifying to his remorsefulness and the alleged guilt he felt" in finding his recantation unconvincing. In short, the court found the relevant testimony of both claimant and the complainant to be unworthy of belief, and it gave numerous and detailed reasons based on admissible evidence for making those credibility determinations.

Viewing the "record in the light most favorable to sustain the judgment," and giving deference to the "court's evaluation of the credibility of the witnesses and quality of proof" (*Ramulic v State of New York*, 179 AD3d 1494, 1495 [4th Dept 2020] [internal quotation marks omitted]), we perceive no basis to set aside the court's determination that claimant failed to establish by clear and convincing evidence that he did not commit the acts of sexual abuse (*see* Court of Claims Act § 8-b [5] [c]; *see generally Reed v State of New York*, 78 NY2d 1, 11 [1991]).

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

All concur except MONTOUR and DELCONTE, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent inasmuch as we agree with claimant that the Court of Claims erred in considering the grand jury and trial testimony of claimant's cousin (complainant), as well as the trial testimony of complainant's mother and aunt, each of which had been marked for identification, but had not been introduced in evidence (*see Matter of American Fid. Fire Ins. Co. [Regent Hotel Corp.-New York State Supt. of Ins.]*, 208 AD2d 830, 831-832 [2d Dept 1994]). Additionally, we conclude that it is clear from the court's decision that the improperly considered and prejudicial evidence "substantially affected the verdict" (*Razza v Sanchez-Roda*, 173 AD2d 594, 595 [2d Dept 1991]; *see generally Rivera v East Madison St.*, 37 AD2d 809, 809 [1st Dept 1971]). We further agree with claimant that the court erred in considering hearsay statements made by complainant to the Assistant District Attorney who had prosecuted the criminal matter. We conclude that "[t]he claim that the statement[s] did not constitute hearsay is without merit, as [they were] plainly offered in evidence to prove the truth of the matter asserted in the statement[s]" (*People v Pascuzzi*, 173 AD3d 1367, 1377 [3d Dept 2019], *lv denied* 34 NY3d 953 [2019] [internal quotation marks omitted]). Inasmuch as the court expressly relied upon the statements as evidence of the credibility of

complainant's original accusations, the error cannot be deemed harmless (*see Carr v Burnwell Gas of Newark, Inc.*, 23 AD3d 998, 1000 [4th Dept 2005]; *see also Chwojdak v Schunk*, 213 AD3d 1310, 1312 [4th Dept 2023]).

We would therefore reverse the judgment, reinstate the claim, and grant a new trial.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

799

CAF 22-01265

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF ANTHONY L. COLLICHIO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LAURA A. BISHOP, RESPONDENT-RESPONDENT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 17, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied petitioner's request for expanded visitation and scheduled supervised visitation for petitioner with respect to the subject child.

It is hereby ORDERED that the appeal from the order insofar as it directs that petitioner's visitation be supervised is unanimously dismissed and the case is held, the decision is reserved and the matter is remitted to Family Court, Orleans County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior order of custody and visitation pursuant to which the father was granted three hours of supervised visitation per week. In his petition, the father sought expanded, unsupervised visitation. Prior to a hearing on the petition, however, the father advised Family Court that he was no longer seeking to have the visitation be unsupervised. The father now appeals from an order that, inter alia, denied the father's request for expanded visitation with the child. Preliminarily, we note that, to the extent that the father challenges that part of the order directing that his visitation be supervised, the appeal must be dismissed (*see Matter of Braun v Decicco*, 117 AD3d 1453, 1453 [4th Dept 2014], *lv dismissed in part & denied in part* 24 NY3d 927 [2014]; *see generally Matter of Geddes v Montpetit*, 15 AD3d 797, 797 [3d Dept 2005], *lv dismissed* 4 NY3d 869 [2005]; *Matter of Cherilyn P.*, 192 AD2d 1084, 1084 [4th Dept 1993], *lv denied* 82 NY2d 652 [1993]).

Contrary to the contentions of respondent mother and the attorney for the child, the record does not establish that the father agreed to

forgo his request for expanded visitation. However, the court did not make an express determination whether the father established a change in circumstances sufficient to warrant an inquiry into the child's best interests (*see Matter of Hendershot v Hendershot*, 187 AD3d 1584, 1584-1585 [4th Dept 2020]; *Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1265 [4th Dept 2019]). Under the circumstances presented, we decline to exercise our power "to independently review the record to ascertain whether the requisite change in circumstances existed" (*Matter of Austin v Wright*, 151 AD3d 1861, 1862 [4th Dept 2017]). We therefore hold the case, reserve decision, and remit the matter to Family Court to make that determination and, if a sufficient change in circumstances has been established, for a new hearing on whether modification of the parties' visitation arrangement is in the child's best interests (*see id.*; *see e.g. Matter of Joseph F. v Patricia F.*, 32 AD3d 938, 939-940 [2d Dept 2006]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

809

CA 22-01580

PRESENT: WHALEN, P.J., MONTOUR, OGDEN, AND NOWAK, JJ.

K.O., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

YMCA BUFFALO NIAGARA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

HERMAN LAW, P.A., NEW YORK CITY (STUART S. MERMELSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (RYAN A. LEMA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered March 28, 2022. The order granted the motion of defendant YMCA Buffalo Niagara to dismiss the complaint against it without prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant YMCA Buffalo Niagara insofar as it alleges that defendant Lockport Family YMCA was an agent of YMCA Buffalo Niagara and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually assaulted by employees of defendant Lockport Family YMCA (YMCA Lockport) while attending a youth swimming program from 1967 to 1977. Defendant YMCA Buffalo Niagara (YMCA Buffalo) moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (1) and (7), arguing that it was a separate and distinct entity from YMCA Lockport and that it was not liable for the alleged torts of YMCA Lockport's employees during the relevant time period. In response, plaintiff argued that YMCA Buffalo failed to establish that YMCA Lockport was not its agent at the time plaintiff was injured or that YMCA Buffalo was not liable as a successor entity following its de facto merger with YMCA Lockport. Supreme Court determined that YMCA Buffalo's documentary evidence established that it did not assume the liabilities of YMCA Lockport and that the complaint failed to state a cause of action on a theory of successor liability. The court thus granted the motion and dismissed the complaint against YMCA Buffalo without prejudice. Plaintiff appeals.

Plaintiff contends that the court erred in granting that part of the motion seeking dismissal of the complaint against YMCA Buffalo pursuant to CPLR 3211 (a) (1) insofar as the complaint alleges that YMCA Buffalo is liable for the negligence of YMCA Lockport because YMCA Buffalo failed to establish via documentary evidence that YMCA Lockport was not its agent at the time of the alleged abuse. We agree, and we therefore modify the order accordingly. In support of its motion, YMCA Buffalo submitted the deeds to the property at which the alleged abuse occurred, the certificates of incorporation for both YMCA Buffalo and YMCA Lockport, and the affidavit of its President and Chief Executive Officer. The deeds and certificates of incorporation do not conclusively establish the absence of a principal-agent relationship between YMCA Buffalo and YMCA Lockport (*see J.A.F. v Roman Catholic Archdiocese of N.Y.*, 216 AD3d 454, 454-455 [1st Dept 2023]; *J.D. v Archdiocese of N.Y.*, 214 AD3d 561, 561 [1st Dept 2023]; *see generally Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Further, the affidavit "does not constitute sufficient documentary evidence for the purpose of a pre-answer CPLR 3211 (a) (1) motion" (*J.D.*, 214 AD3d at 561).

Plaintiff further contends that the court erred in determining that the complaint failed to adequately allege that YMCA Buffalo is liable as a successor entity based on its de facto merger with YMCA Lockport. We reject that contention. Generally, "a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038, 1039 [4th Dept 2022] [internal quotation marks omitted]). A corporation may, however, be held liable for the torts of its predecessor where, as relevant here, "there was a consolidation or merger of seller and purchaser" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 246 [1983]), including where the transaction between the seller and purchaser constitutes a de facto merger (*see Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]; *Sweatland v Park Corp.*, 181 AD2d 243, 245 [4th Dept 1992]). "Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland*, 181 AD2d at 245-246).

Here, even "accept[ing] the facts as alleged in the complaint as true [and] accord[ing] plaintiff[ ] the benefit of every possible favorable inference" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the complaint does not allege the existence of a de facto merger between the entities. Not only does the complaint "fail[ ] to allege a majority of the hallmarks of a de facto merger," it fails to allege *any* of the hallmarks of a de facto merger (*Zinbarg v Professional Bus. Coll.*,

Inc., 179 AD3d 607, 607 [1st Dept 2020]; *cf. Dutton*, 207 AD3d at 1045).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

810

CA 23-00124

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF PETER J. CEDRONE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF FULTON ASSESSOR'S OFFICE,
RESPONDENT-RESPONDENT.

PETER J. CEDRONE, PETITIONER-APPELLANT PRO SE.

COUGHLIN & GERHART, LLP, BINGHAMTON (NICHOLAS S. CORTESE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered November 16, 2022, in a proceeding pursuant to CPLR article 78 and RPTL article 7. The judgment granted the objections of respondent and dismissed the petition.

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

Memorandum: Petitioner owns two parcels of real property, a smaller parcel that contains his residence (occupied parcel) and a larger parcel that is undeveloped (vacant parcel). In 2022, petitioner was notified that the assessed value of the parcels had increased. As relevant here, petitioner commenced small claims assessment review (SCAR) proceedings seeking to reduce the assessment on each parcel (*see* RPTL 730). The Hearing Officer in the SCAR proceedings denied the petition to reduce the assessment on the occupied parcel and disqualified the petition to reduce the assessment on the vacant parcel. Petitioner thereafter commenced this hybrid CPLR article 78 and RPTL article 7 proceeding seeking, inter alia, to annul the determinations of the Hearing Officer in the SCAR proceedings (*see* RPTL 736 [2]; CPLR art 78) and review of the 2022 real property tax assessment on the vacant parcel (*see* RPTL art 7, title 1). Petitioner appeals from a judgment granting respondent's objections in point of law and dismissing the petition. We affirm.

Initially, with respect to the occupied parcel, we conclude that Supreme Court properly dismissed the petition insofar as it sought to annul the Hearing Officer's determination in the SCAR proceeding on the merits. "When such a determination is contested, the court's role is limited to ascertaining whether there was a rational basis for that determination" (*Matter of Garth v Assessors of Town of Perinton*, 87

AD3d 1306, 1307 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Dodge v Krul*, 99 AD3d 1218, 1219 [4th Dept 2012]). Here, the evidence presented during the SCAR proceedings, including the evidence of comparable sales and assessments, provided a rational basis for the Hearing Officer's determination that no change to respondent's assessment of the occupied parcel was necessary (*see Matter of Bassett v Manlius*, 145 AD3d 1636, 1636 [4th Dept 2016], *lv denied* 29 NY3d 907 [2017]; *see generally Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984], *rearg denied* 62 NY2d 943 [1984]).

We further conclude that the court properly dismissed the petition insofar as it sought to annul, pursuant to CPLR article 78, the Hearing Officer's determination disqualifying the SCAR petition challenging the assessment of the vacant parcel. A vacant parcel qualifies for SCAR where, inter alia, "the property is unimproved and is not of sufficient size as determined by the assessing unit or special assessing unit to contain a one, two or three family residential structure" (RPTL 730 [1] [b] [ii]). Here, the vacant parcel was over 1.7 acres in size, well in excess of the minimum lot size of 15,000 square feet and, we note, substantially larger than the parcel on which petitioner's residence was located. The court therefore properly determined that the vacant parcel did not qualify for SCAR and that it could be reviewed only pursuant to title 1 of RPTL article 7 (*see generally Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991], *rearg denied* 78 NY2d 1008 [1991]; *Matter of Cayuga Grandview Beach Coop. Corp. v Town Bd. of Town of Springport*, 51 AD3d 1364, 1364 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008]).

We agree with petitioner that the court erred in dismissing as untimely that part of the petition seeking review, pursuant to title 1 of RPTL article 7, of the 2022 real property tax assessment on the vacant parcel. The record establishes that petitioner commenced this proceeding "within [30] days after having been served with a certified copy of the [SCAR] decision" pertaining to the vacant parcel (RPTL 733 [3]; *see* RPTL 736 [1]). Nonetheless, we conclude that the court properly dismissed that part of the petition seeking review of the 2022 assessment on the vacant parcel on the ground that petitioner failed to mail a copy of the notice of petition and petition to the superintendent of the Fulton City School District, as required by RPTL 708 (3) (*see Matter of DP Fuller Family LP v City of Canandaigua*, 207 AD3d 1220, 1222-1223 [4th Dept 2022]; *see generally Matter of Westchester Joint Water Works v Assessor of the City of Rye*, 27 NY3d 566, 570 [2016]). Mailing to any other official is insufficient to satisfy the statutory requirement and requires dismissal of the petition unless petitioner shows good cause for the failure to comply (*see DP Fuller Family LP*, 207 AD3d at 1222-1223; *Matter of Gatsby Indus. Real Estate, Inc. v Fox*, 45 AD3d 1480, 1481 [4th Dept 2007]). We conclude that, on the record before us, petitioner has not shown good cause for his failure to mail the required documents to the superintendent pursuant to RPTL 708 (3). Mere good faith efforts to comply with the mailing requirement are insufficient (*see DP Fuller*

Family LP, 207 AD3d at 1227-1228).

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

812

CA 20-01094

PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND MONTOUR, JJ.

IN THE MATTER OF CHARLES GUTTMAN AND
SHIRLEY LADD,
PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

COVERT TOWN BOARD, RESPONDENT-RESPONDENT,
PAUL MIKESKA AND HEIDI MIKESKA,
RESPONDENTS-RESPONDENTS-APPELLANTS.

THE CROSSMORE LAW OFFICE, ITHACA (ANDREW P. MELENDEZ OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

SHARON M. SULIMOWICZ, ITHACA, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

PATRICK J. MORRELL, SENECA FALLS, FOR RESPONDENT-RESPONDENT.

Appeal and cross-appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered May 15, 2020, in a proceeding pursuant to CPLR article 78. The appeal was held by this Court by order entered March 24, 2023, decision was reserved and the matter was remitted to respondent Covert Town Board for further proceedings (214 AD3d 1464 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the motion in its entirety, dismissing the petition, and vacating the third decretal paragraph, and as modified the judgment is affirmed without costs.

Memorandum: This CPLR article 78 proceeding arising from a land use and zoning dispute returns to us after having been held and remitted for respondent Covert Town Board (Board) to properly set forth its findings of fact (*Matter of Guttman v Covert Town Bd.*, 214 AD3d 1464 [4th Dept 2023]; *Matter of Guttman v Covert Town Bd.*, 197 AD3d 1009 [4th Dept 2021]). Petitioners appeal and Paul Mikeska and Heidi Mikeska (respondents) cross-appeal from a judgment that, among other things, effectively granted that part of respondents' motion seeking to dismiss the petition insofar as it sought to annul the determination of the Board that respondents' addition of a second-story deck to the main cottage on their property did not violate the setback requirements of the Town of Covert Land Management Ordinance (LMO) and granted the petition insofar as it sought to annul the determination of the Board that respondents' improvements to a

bunkhouse on their property did not violate the prohibition in the LMO against having a second dwelling structure on a parcel.

As a preliminary matter, we note that Supreme Court rendered the judgment on appeal following respondents' pre-answer motion to dismiss, which was formally joined by the Board. To the extent that petitioners contend that the court's review was limited to determining whether, upon accepting the allegations as true and according petitioners every favorable inference, the petition contained cognizable legal theories, we reject that contention under the circumstances of this case.

A CPLR article 78 proceeding is a special proceeding (*see* CPLR 7804 [a]) and, as such, "may be summarily determined 'upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised' " (*Matter of Battaglia v Schuler*, 60 AD2d 759, 759 [4th Dept 1977], quoting CPLR 409 [b]; *see Matter of Hudson v Town of Orchard Park Zoning Bd. of Appeals*, 218 AD3d 1380, 1382 [4th Dept 2023]). "Consequently, even if a respondent in a CPLR article 78 proceeding d[oes] not file an answer, where . . . it is clear that no dispute as to the facts exists and no prejudice will result, [a] court can, upon a . . . motion to dismiss, decide the petition on the merits" (*Hudson*, 218 AD3d at 1382 [internal quotation marks omitted]; *see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 [1984]).

Here, "given the numerous evidentiary submissions by the parties related to the [Board's] determination," we conclude that " 'the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result' from a summary determination in the CPLR article 78 proceeding" (*Hudson*, 218 AD3d at 1382, quoting *Nassau BOCES Cent. Council of Teachers*, 63 NY2d at 102; *see Matter of 22-50 Jackson Ave. Assoc., L.P. v County of Suffolk*, 216 AD3d 939, 942 [2d Dept 2023]; *Fiore v Town of Whitestown*, 125 AD3d 1527, 1528 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *cf. Matter of Bihary v Zoning Bd. of Appeals of City of Buffalo*, 206 AD3d 1575, 1576 [4th Dept 2022]; *Matter of Mintz v City of Rochester*, 200 AD3d 1650, 1653 [4th Dept 2021]; *Matter of Town of Geneva v City of Geneva*, 63 AD3d 1544, 1544 [4th Dept 2009]).

As a further preliminary matter, we note that, "[w]hile as a general rule courts will not defer to administrative agencies in matters of 'pure statutory interpretation' . . . , deference is appropriate 'where the question is one of specific application of a broad statutory term' " (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]; *see Matter of Peyton v New York City Bd. of Stds. & Appeals*, 36 NY3d 271, 281 [2020]). Here, we conclude that the Board, acting in the place of a zoning board, was charged with considering "how to view the [additions to the deck and the bunkhouse] under the zoning code" and, "[i]nasmuch as the interpretation that followed was rendered upon the facts of [those improvements] and was not an issue . . . of pure legal interpretation, it is afforded deference and will only be disturbed if irrational or unreasonable" (*Matter of Catskill Heritage*

Alliance, Inc. v Crossroads Ventures, LLC, 161 AD3d 1413, 1416 [3d Dept 2018] [internal quotation marks omitted]; *see Matter of Blanchfield v Town of Hoosick*, 149 AD3d 1380, 1383 [3d Dept 2017]; *Matter of Lumberjack Pass Amusements, LLC v Town of Queensbury Zoning Bd. of Appeals*, 145 AD3d 1144, 1145 [3d Dept 2016]; *see generally Peyton*, 36 NY3d at 279-283; *O'Brien*, 7 NY3d at 242).

Petitioners contend on their appeal that the interpretation adopted by the Board—i.e., that the setback requirement was measured by the footprint of the building and that the second-story deck did not alter the setback—is irrational and not supported by substantial evidence. We reject that contention.

"Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure . . . A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). " 'It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them' " (*Pecoraro*, 2 NY3d at 613). "Thus, [a] reviewing court may not substitute its judgment for that of a local zoning board . . . , even if there is substantial evidence supporting a contrary determination" (*Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017] [internal quotation marks omitted]). Indeed, "[w]hen reviewing the determinations of a [z]oning [b]oard, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the . . . determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *see Expressview Dev. Inc.*, 147 AD3d at 1429).

Here, the LMO provides, in pertinent part, that "[a]ll buildings shall be set back a minimum of 20 feet from each side and rear lot line" (LMO § 3 [A] [5]). The Board, after discussion and deliberation, adopted the interpretation of the town code enforcement officer that the new construction of the second-story deck did not alter the footprint of the original structure within the setback area. The Board reasoned that, prior to the new construction, the cottage included a covered porch that extended into the setback area of the north side lot line. The Board found that respondents then converted the roof of the covered porch into a second-story deck, which did not alter the setback of the building from the north lot line. In light of the deference afforded to the Board in the specific application of the ordinance to the property at issue, it cannot be said that the Board's determination was irrational. We conclude that the Board reasonably determined that the existing covered porch on the first level of the cottage was already nonconforming inasmuch as it extended into the setback area, and that the addition of the second-story deck did not alter the setback of the building as measured by the footprint

thereof (*see Matter of Martens v Zoning Bd. of Appeals of Vil. of Marcellus*, 195 AD2d 974, 974-975 [4th Dept 1993]; *see also Matter of Marro v Libert*, 40 AD3d 1100, 1102 [2d Dept 2007]; *Matter of Sposato v Zoning Bd. of Appeals of Vil. of Pelham*, 287 AD2d 639, 640 [2d Dept 2001]).

Respondents contend on their cross-appeal that the court erred in rejecting the Board's finding that the bunkhouse did not constitute a dwelling and that the court therefore erred in granting the petition insofar as it sought to annul the determination of the Board that respondents' improvements to the bunkhouse did not violate the prohibition in the LMO against having a second dwelling structure on a parcel. We agree with respondents, and we therefore modify the judgment accordingly.

The LMO imposes "a limit of one dwelling structure per parcel" (LMO § 3 [A] [9]). It defines the term "dwelling" as a "[b]uilding, or part thereof, used as living quarters for one family" (LMO § 3 [B] [1] [a]) and the term "family" as "[o]ne . . . or more persons living, sleeping, cooking or eating on the same premises as a single housekeeping unit" (LMO § 3 [B] [1] [e]). Consequently, as relevant here, the bunkhouse would qualify as a "dwelling" if it constituted a building that was used as living quarters for one or more people who were living, sleeping, cooking, or eating on the same premises as a single housekeeping unit (*see* LMO § 3 [B] [1] [a], [e]). Certain types of buildings or structures are categorically included or excluded from the definition of "dwelling" (LMO § 3 [B] [1] [a]). In particular, the term "dwelling" *does not* include "a motel, hotel, boarding house, tourist home, single-wide mobile home, or similar structure" but *does* include "modular homes and double-wide mobile homes" (LMO § 3 [B] [1] [a]). The term "dwelling" also includes "a seasonal dwelling, which is not used, or intended for permanent residence and which is not occupied for more than 6 months in each year" (LMO § 3 [B] [1] [a]).

The question before the Board was thus whether respondents' improvements to the bunkhouse rendered that building a dwelling as defined by the LMO, thereby placing respondents in violation of the one-dwelling limitation. The Board determined that the bunkhouse did not constitute an improper second dwelling on the parcel because the lack of kitchen facilities would preclude a family from living independently in the bunkhouse as a separate housekeeping unit. The Board also found that the bunkhouse was similar to the types of structures listed in the LMO that were not included in the definition of dwelling. Upon affording the Board the requisite deference, we conclude that it cannot be said that the determination was irrational.

First, we agree with respondents that, although the LMO references cooking, the amenities in the structure do not determine whether it constitutes a dwelling; rather, inquiry must be made into how the structure was used. Indeed, the relevant plain language of the ordinance defines a "dwelling" as a building "*used as* living quarters" (LMO § 3 [B] [1] [a] [emphasis added]) for one or more people performing certain tasks "on the same premises *as a single*

housekeeping unit" (LMO § 3 [B] [1] [e] [emphasis added]). Thus, contrary to the interpretation advocated by petitioners, which would improperly disregard the LMO's language regarding usage, we conclude that the use of the building as living quarters for a single housekeeping unit is central to whether the building meets the definition of "dwelling" (*see Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1578 [4th Dept 2019]). Considering the Board's determination in view of a proper interpretation of the LMO, we further conclude that the Board rationally determined that the bunkhouse, which lacked kitchen facilities, could not be used as living quarters for a family operating independently—i.e., as a single housekeeping unit—from those occupying the cottage (*see Matter of Libolt v Town of Irondequoit Zoning Bd. of Appeals*, 66 AD3d 1393, 1394 [4th Dept 2009]).

Second, we agree with respondents that the Board rationally found that the bunkhouse was similar to the types of structures expressly excluded from the LMO's definition of "dwelling." Buildings that do not constitute a dwelling for purposes of the LMO include a motel, hotel, boarding house, tourist house, or "similar structure" (LMO § 3 [B] [1] [a]). The record here supports the determination that, similar to the transient accommodations provided by boarding or tourist houses, the bunkhouse was used as sleeping quarters for overnight guests, rather than as a permanent or seasonal residence.

In light of the foregoing, we conclude that there is no basis on which to annul the Board's determinations.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

816

KA 21-01445

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMA BROWN, DEFENDANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE, FRANK H. HISCOCK LEGAL AID SOCIETY (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered September 22, 2021. The judgment convicted defendant upon a jury verdict of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]). Defendant contends that the People's original certificate of compliance, filed in January 2020, was illusory because the People had not disclosed disciplinary records for each law enforcement official the People intended to call as a trial witness, and County Court therefore should have granted his motion seeking to vacate that certificate of compliance. We reject that contention. CPL article 245 requires the People to automatically disclose to defendant "all items and information that relate to the subject matter of the case" that are in the People's "possession, custody or control" (CPL 245.20 [1]; *see People v Johnson*, 218 AD3d 1347, 1350 [4th Dept 2023]). That includes evidence that tends to "impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]). At the time the People filed their original certificate of compliance, the disciplinary records of the law enforcement officials were shielded from disclosure by former Civil Rights Law § 50-a (*see generally Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 563-566 [2018]). To the extent that certain disciplinary records were disclosed by the People after the repeal of former Civil Rights Law § 50-a, such disclosures did not render the original certificate of compliance illusory. Contrary to defendant's further contention, we conclude that the supplemental certificate of compliance filed in June 2021, after the repeal of former Civil Rights Law § 50-a, did not invalidate the original certificate of compliance

inasmuch as defendant failed to establish a lack of good faith or due diligence by the prosecution (*see* CPL 245.50 [1], [1-a]).

Defendant failed to preserve for our review his contention that he was denied a fair trial when portions of a video were shown to the jury depicting him in handcuffs and shackles during police interrogation (*see generally People v Bradford*, 40 NY3d 938, 939 [2023], *rearg denied* 40 NY3d 974 [2023]; *People v German*, 145 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe. We have considered defendant’s remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

818

KA 20-00312

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AGUSTIN OCASIO, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

AGUSTIN OCASIO, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 20, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and attempted criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). The conviction arose from a long-term narcotics investigation involving physical surveillance and multiple eavesdropping warrants, including one for a cellular telephone referred to as "Ocasio Phone 2" that was identified as being "utilized by" defendant (Phone 2 warrant). In April 2019, a search warrant was issued based, in part, on evidence obtained from the Phone 2 warrant. During execution of the search warrant, a kilogram of cocaine and a loaded handgun were found in a heating duct in the basement of the multi-unit apartment house at which defendant resided.

Preliminarily, defendant contends in his main brief, and we agree, that, contrary to the People's assertion, the waiver of the right to appeal is invalid (*see generally People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The language in the written waiver is inaccurate and misleading insofar as it purports to waive "any and all rights to appeal," and Supreme Court's advisement during the oral colloquy that there are,

nonetheless, "certain issues that are always preserved for appeal[,] [c]onstitutional issues, jurisdictional issues," was not sufficient to counter that inaccuracy (*see People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Hunter*, 203 AD3d 1686, 1686 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]).

Defendant also contends in his main brief that the attempted criminal possession of a weapon count of which he was convicted should be dismissed because Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Inasmuch as defendant failed to raise a constitutional challenge to the statute during the proceedings in Supreme Court, any such challenge is not preserved for our review (*see People v Maddox*, 218 AD3d 1154, 1154 [4th Dept 2023]; *see also People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]), and we decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's contentions, his "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc*., 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, 2023 NY Slip Op 05968, *2-7 [2023]) and the mode of proceedings exception to the preservation requirement does not apply (*see People v David*, — NY3d —, 2023 NY Slip Op 05970, *3-4 [2023]; *People v Adames*, 216 AD3d 519, 520 [1st Dept 2023], *lv denied* 40 NY3d 949 [2023]).

Defendant contends in his pro se supplemental brief that the court erred in determining that he lacked standing to contest the search of the basement where the cocaine and handgun were found on the ground that the search exceeded the scope of the search warrant. We reject that contention. "In order to have standing to contest the search of a premises, [a] defendant must establish . . . a reasonable expectation of privacy in the area searched" (*People v Gonzalez*, 45 AD3d 696 [2d Dept 2007], *lv denied* 10 NY3d 811 [2008]; *see People v Leach*, 21 NY3d 969, 971 [2013]). As the People correctly asserted in opposition to that part of defendant's omnibus motion seeking to suppress the physical evidence recovered upon the search of the basement, defendant failed to allege that he had any reasonable expectation of privacy in the basement, a storage area that was not associated with his apartment. Thus, we conclude that the court "did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion" (*Fernandez*, 218 AD3d at 1258 [internal quotation marks omitted]).

Defendant additionally contends in his main brief that the court erred in refusing to suppress, prior to the entry of his plea, evidence obtained from the Phone 2 warrant on the ground that he did not have standing to challenge that warrant. We agree. While "[a] defendant seeking to suppress evidence, on the basis that it was obtained by means of an illegal search, must allege standing to challenge the search" (*People v Sylvester*, 129 AD3d 1666, 1666 [4th Dept 2015], *lv denied* 26 NY3d 1092 [2015] [internal quotation marks

omitted]), "the People are required to alert the . . . court if they believe that the defendant has failed to meet [the] burden to establish standing" (*People v Hunter*, 17 NY3d 725, 727-728 [2011]). If the People do not first object to the defendant's failure to allege standing, then " 'the court ha[s] no occasion to rule on that issue' " (*People v Johnson*, 94 AD3d 1529, 1531 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012], quoting *Hunter*, 17 NY3d at 727). Here, although defendant failed to allege that he had standing to challenge any of the eavesdropping warrants, the People did not object to that failure, but, instead, expressly conceded that defendant "ha[d] standing to challenge those warrants related to telephone numbers utilized by [him]," and they submitted a thumb drive containing, inter alia, 17 eavesdropping warrants, including the Phone 2 warrant. Thus, the issue of defendant's standing to challenge the Phone 2 warrant was not properly before the court. We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a determination on the merits of that part of defendant's omnibus motion seeking suppression of evidence obtained pursuant to the Phone 2 warrant.

In light of our determination, we do not address the remaining contentions in defendant's main and pro se supplemental briefs.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

826

CA 22-01943

PRESENT: SMITH, J.P., BANNISTER, NOWAK, AND DELCONTE, JJ.

KENT JEFFERY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION OF FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT, CRAIG J. TICE, SUPERINTENDENT OF FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT AND MARISSA JOY MIMS, VICE PRESIDENT OF THE BOARD OF EDUCATION OF THE FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS THE FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION OF FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT, AND CRAIG J. TICE, SUPERINTENDENT OF FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT.

HARRIS BEACH, PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR DEFENDANT-RESPONDENT MARISSA JOY MIMS, VICE PRESIDENT OF THE BOARD OF EDUCATION OF THE FAYETTEVILLE-MANLIUS CENTRAL SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 9, 2022. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this action against defendants, Fayetteville-Manlius Central School District (district); Board of Education of Fayetteville-Manlius Central School District (school board); Craig J. Tice, the district's superintendent; and Marissa Joy Mims, the vice president of the school board, asserting a single cause of action for defamation. The amended complaint alleged, inter alia, that Tice defamed plaintiff when, in a workshop session prior to a September 2016 school board meeting, Tice told the assembled school board members that he had "intel . . . from a very reliable source

that" plaintiff and his wife "bought their son [who had graduated from the district's high school in June 2016] a shotgun for graduation." The amended complaint further alleged that Tice did not respond when subsequently "asked by a school board member if he meant that the [p]laintiff had armed his son in preparation for an attack against the [s]chool [b]oard." Additionally, the amended complaint alleged that Mims responded to Tice's statement by telling the school board that she had "recently seen several posts about this situation . . . on the [district's] parent to parent website." Following discovery, Mims moved for summary judgment dismissing the amended complaint against her, and the other defendants filed a separate motion for summary judgment dismissing the amended complaint against them. Defendants contended in their motions, in relevant part, that the statements of Tice and Mims to the school board were covered by an absolute privilege. Supreme Court granted the motions, and plaintiff now appeals. We affirm.

"[I]t is well settled that government officials are absolutely immune for discretionary acts carried out in the course of official duties and that immunity attaches 'however erroneous or wrong [such conduct] may be, or however malicious even the motive which produced it' " (*Crvelin v Board of Educ. of City Sch. Dist. of City of Niagara Falls*, 144 AD3d 1649, 1650 [4th Dept 2016], quoting *East Riv. Gas-Light Co. v Donnelly*, 93 NY 557, 559 [1883]). The absolute privilege defense affords complete immunity from liability for defamation to " 'an official [who] is a principal executive of State or local government[,] or [who] is [otherwise] entrusted by law with administrative or executive policy-making responsibilities of considerable dimension' " (*Clark v McGee*, 49 NY2d 613, 617 [1980], quoting *Stukuls v State of New York*, 42 NY2d 272, 278 [1977]), "with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" (*Panek v Brantner*, 217 AD3d 1567, 1568 [4th Dept 2023] [internal quotation marks omitted]; *see Clark*, 49 NY2d at 617). The first prong of the test to determine the applicability of the absolute privilege defense requires an examination of "the personal position or status of the speaker," and the second prong "requires an examination of the subject matter of the statement and the forum in which it is made in the light of the speaker's public duties" (*Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist.*, 217 AD3d 1363, 1366 [4th Dept 2023] [internal quotation marks omitted]; *see Doran v Cohalan*, 125 AD2d 289, 291 [2d Dept 1986], *lv dismissed* 69 NY2d 984 [1987]).

Here, plaintiff does not dispute that Tice, as superintendent of the district, and Mims, as vice president of the school board, are government officials to whom the absolute privilege would apply, thus satisfying the first prong of the test (*see Sindoni*, 217 AD3d at 1366; *Matter of Board of Educ. of City of Buffalo [Buffalo Council of Supervisors & Adm'rs]*, 52 AD2d 220, 228 [4th Dept 1976]). With respect to the second prong, the question presented is whether Tice and Mims were acting within the scope of their public duties when, as alleged in the amended complaint, Tice told the assembled school board members during a workshop session that plaintiff had purchased a

firearm for his son, and Mims replied that she had seen social media posts commenting on the situation.

We conclude that, contrary to plaintiff's contention, defendants submitted undisputed evidence on their motions establishing as a matter of law that the statements of Tice and Mims were made during the course of the performance of their public duties. Specifically, the statements concerned rumors of a potential firearm-related threat to the safety of students, faculty, and board members and thus fell squarely within the scope of the duties and responsibilities of Tice and Mims as a school superintendent and a school board member, respectively. We reject plaintiff's contention that he submitted evidence creating a triable issue of fact whether the statements were false, or based upon rumors that Tice and Mims did not believe to be true, inasmuch as the absolute privilege defense affords complete immunity to defamation claims, regardless of their falsity or the speaker's state of mind or malicious intent (*see Panek*, 217 AD3d at 1568; *Crvelin*, 144 AD3d at 1650). Consequently, the statements were absolutely privileged, and the court therefore properly granted the motions on that basis. In light of our determination, we do not reach plaintiff's remaining contentions.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

827

TP 23-00815

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF PATRICK SHEVLIN, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 4, 2023) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an incarcerated individual rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

829

CA 22-01498

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

JOANNE C. LENTNER, PHILIP CARD AND MARILYN CARD,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UPSTATE FORESTRY AND DEVELOPMENT, LLC,
CHARLES NOWACK, DEFENDANTS-APPELLANTS,
MCDONOUGH HARDWOODS, LTD., MCDONOUGH LUMBER
COMPANY, MCDONOUGH LUMBER CORPORATION, JAMES
MCDONOUGH, DANIEL MCDONOUGH,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

GERBER CIANO KELLY BRADY LLP, BUFFALO (DAVID P. JOHNSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHENEY LAW FIRM, PLLC, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

WILLARD R. PRATT, III, SYLVAN BEACH, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered August 22, 2022. The order, among other things, denied the motion of defendants Upstate Forestry and Development, LLC, and Charles Nowack for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint against defendant Charles Nowack and dismissing the first, third, fourth, and fifth causes of action against defendant Upstate Forestry and Development, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiff Joanne C. Lentner owns an approximately 300-acre property (property), and plaintiffs Philip Card and Marilyn Card have a life estate in the property. In February 2015, Lentner entered into a timber sale contract (contract) with defendant Upstate Forestry and Development, LLC (Upstate), whereby Lentner agreed to sell to Upstate "[a]ll species 16[inches] on stump" for $15,500. The contract was to expire one year later, in February 2016. Upstate assigned its rights in the contract to defendant McDonough Hardwoods, Ltd. (McDonough). Philip Card signed a receipt acknowledging payment of $15,500, and McDonough began logging the property. Before the contract expired, however, plaintiffs ordered McDonough to stop

operations and leave the property. Plaintiffs commenced this action against, among others, Upstate and its owner, defendant Charles Nowack (collectively, defendants), and McDonough for breach of contract, fraud, violation of RPAPL 861, conversion, and unjust enrichment. Defendants moved for summary judgment dismissing the complaint and all cross-claims against them, and for summary judgment on their cross-claim for contractual indemnification against McDonough. Supreme Court denied the motion, and defendants now appeal.

Initially, we agree with defendants that the court erred in denying that part of their motion seeking summary judgment dismissing the complaint against Nowack, and we therefore modify the order accordingly. Defendants met their initial burden of establishing that Nowack was acting on behalf of Upstate at all relevant times (*see Rose v Different Twist Pretzel, Inc.*, 175 AD3d 597, 598 [2d Dept 2019], *appeal dismissed* 37 NY3d 1172 [2022]; *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]; *see generally Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1242 [4th Dept 2016]). Plaintiffs failed to raise a triable issue of fact whether Nowack "engaged in acts amounting to an abuse or perversion of the corporate form" such that the corporate veil should be pierced (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]; *see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]).

We also agree with defendants that the court erred in denying that part of their motion seeking summary judgment dismissing the first cause of action, for breach of contract, against Upstate, and we thus further modify the order accordingly. It is well settled that " '[a] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Marin v Constitution Realty, LLC*, 28 NY3d 666, 673 [2017], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "The parol evidence rule generally operates to preclude evidence of a prior or contemporaneous communication during negotiations of an agreement that contradicts, varies, or explains a written agreement which is clear and unambiguous in its terms and expresses the parties' entire agreement and intentions" (*Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 608 [2d Dept 2017]; *see Braten v Bankers Trust Co.*, 60 NY2d 155, 161-162 [1983], *rearg denied* 61 NY2d 670 [1983]; *Thomas v Scutt*, 127 NY 133, 137 [1891]). "Where, as here, there is no merger clause, the court must examine the surrounding circumstances and the writing itself to determine whether the agreement constitutes a complete, integrated instrument" (*Hoeg Corp.*, 153 AD3d at 608; *see Braten*, 60 NY2d at 162). "A completely integrated contract precludes extrinsic proof to add to or vary its terms" (*Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 600 [1997]; *see W.W.W. Assoc.*, 77 NY2d at 162; *cf. Buffalo Newspress, Inc. v Coleman Communications Corp.*, 8 AD3d 969, 969-970 [4th Dept 2004]).

Defendants met their initial burden of establishing that the timber sale contract is a complete written instrument, and plaintiffs

failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The contract sets forth the parties, the address of the property, the contract period, the payment terms, and a description of the items sold (*see Battista v Radesi*, 112 AD2d 42, 42 [4th Dept 1985]). There is no reference to any other document or map (*see Manufacturers Hanover Trust Co. v Margolis*, 115 AD2d 406, 407 [1st Dept 1985]). Inasmuch as the contract constituted a complete, integrated agreement, plaintiffs may not rely on an alleged oral agreement to permit logging on the southernmost section of the property, permit logging on the middle section of the property only upon additional payment, and prohibit logging on the northernmost section of the property, to vary the terms of the contract. Indeed, one would expect the contract to embody any such restrictions on logging, and "[s]uch a collateral agreement cannot be separately enforced" (*Braten*, 60 NY2d at 162).

Inasmuch as the court should have granted that part of the motion seeking summary judgment dismissing the breach of contract cause of action against Upstate, we further conclude that the court should have granted those parts of the motion seeking summary judgment dismissing against Upstate the third, fourth, and fifth causes of action for, respectively, violation of RPAPL 861, conversion, and unjust enrichment. Those causes of action are all grounded in Upstate's alleged unauthorized logging operations. We therefore further modify the order accordingly.

Contrary to defendants' contention, however, the court properly denied that part of their motion seeking summary judgment dismissing the second cause of action, for fraud, against Upstate. We reject defendants' contention that the fraud cause of action was merely duplicative of the cause of action for breach of contract. "Where a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). Here, plaintiffs alleged that Upstate's agents made certain representations to plaintiffs in order to secure permission to log timber on the property, i.e., representations regarding the northernmost and middle sections of the property, that those representations were false and known by the agents to be false at the time they were made inasmuch as Upstate intended to log the entire property and not adequately compensate plaintiffs, and that plaintiffs relied upon those fraudulent misrepresentations to their detriment. The fraud cause of action was therefore not duplicative of the breach of contract cause of action (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Finally, we reject defendants' contention that the court erred in denying that part of their motion seeking summary judgment on their cross-claim for contractual indemnification. Fraud is an intentional tort (*see Simcuski v Saeli*, 44 NY2d 442, 451 [1978]; *Gomez v Cabatic*, 159 AD3d 62, 73 [2d Dept 2018]), and "[o]ne who intentionally injures another may not be indemnified for any civil liability thus incurred"

(*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 399 [1981]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

831

CA 22-01774

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, AND NOWAK, JJ.

PATRICIA ARNOLD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CAMILLUS, POLICE CHIEF THOMAS WINN, CAPTAIN JAMES NIGHTINGALE, TOWN SUPERVISOR MARY ANN COOGAN, DAVID CALLAHAN, JOY FLOOD, DICK GRIFFO, STEVEN JAMES, MIKE LAFLAIR, MARY LUBER, AND JOHN DOE(S) AND JANE DOE(S) IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS OFFICIALS, OFFICERS, AGENTS, EMPLOYEES, AND/OR REPRESENTATIVES OF TOWN OF CAMILLUS AND/OR THE CAMILLUS POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS.

BOSMAN LAW, L.L.C., BLOSSVALE (ROBERT J. STRUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KSENIYA PREMO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered January 7, 2022. The order denied the application of plaintiff seeking, among other things, leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by granting the application insofar as it sought leave to serve a late notice of claim with respect to the third and fourth causes of action, upon condition that the proposed notice of claim is served within 30 days of the date of entry of the order of this Court, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a police officer previously employed by defendant Town of Camillus (Town), commenced this action in October 2020 seeking to recover damages based on allegations that, inter alia, defendants violated the Human Rights Law (Executive Law § 290 *et seq.*) by discriminating against her on the basis of gender, subjecting her to a hostile work environment, constructively discharging her from employment, and retaliating against her after she complained about the alleged unlawful discriminatory practices. Plaintiff alleged, in pertinent part, that defendant Captain James Nightingale, who was her superior, subjected her to sexual harassment, including inappropriate

and uninvited touching, and disparate treatment based on her gender, and that defendant Police Chief Thomas Winn responded with hostility and failed to adequately address Nightingale's behavior after plaintiff repeatedly brought the discriminatory conduct to Winn's attention, all of which precipitated her resignation from the Town's police department in August 2019. Plaintiff moved, simultaneously with the filing of the complaint, for a "declaration" that she was not required to serve a notice of claim for her Human Rights Law claims asserted in the third and fourth causes of action, as well as for leave to serve a late notice of claim regarding her state law tort claims and, if required, her Human Rights Law claims. Supreme Court denied the motion, and plaintiff now appeals.

Plaintiff contends that she was not required to file a notice of claim for her Human Rights Law claims because the logic of the Court of Appeals' decision in *Margerum v City of Buffalo* (24 NY3d 721 [2015]), which adhered to the interpretations of Departments of the Appellate Division that a claim under the Human Rights Law does not require a notice of claim pursuant to General Municipal Law §§ 50-e and 50-i, applies equally to relieve her of the notice of claim requirement under Town Law § 67. Even assuming, arguendo, that plaintiff is not collaterally estopped from litigating that issue by virtue of prior orders that were entered while the action was removed to federal court (*see Arnold v Town of Camillus*, 2021 WL 3021946, *1-3, 2021 US Dist LEXIS 132601, *1-6 [ND NY, July 16, 2021, No. 5:20-CV-1364 (MAD/ML)]; *Arnold v Town of Camillus*, 2021 WL 326886, *1-6, 2021 US Dist LEXIS 18327, *1-15 [ND NY, Feb. 1, 2021, No. 5:20-CV-1364 (MAD/ML)]), we conclude for the reasons that follow that the court properly determined that Town Law § 67 required that plaintiff serve a notice of claim for her Human Rights Law claims.

"General Municipal Law § 50-e (1) (a) requires service of a notice of claim within 90 days after the claim arises '[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation' " (*Margerum*, 24 NY3d at 730). "General Municipal Law § 50-i (1) precludes commencement of an action against a city[, town, or certain other entities] 'for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city[, town, or certain other entities],' unless a notice of claim has been served in compliance with section 50-e" (*id.*). The Court of Appeals has concluded that, under those statutes, a notice of claim is not required for alleged violations of the Human Rights Law because "[h]uman rights claims are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i" (*id.*). In doing so, the Court of Appeals adhered to the determinations of Departments of the Appellate Division that "the General Municipal Law does not encompass a cause of action based on the Human Rights Law" and that " '[s]ervice of a notice of claim is therefore not a condition precedent to commencement of an action based on the Human Rights Law in a jurisdiction where General Municipal Law §§ 50-e and 50-i provide the only notice of claim criteria' " (*id.*, quoting *Picciano v Nassau County Civ. Serv.*

Commn., 290 AD2d 164, 170 [2d Dept 2001]).

As the parties recognize, however, the case before us does not involve "a jurisdiction where General Municipal Law §§ 50-e and 50-i provide the *only* notice of claim criteria" (*id.* at 730 [emphasis added]). Instead, Town Law § 67 provides in relevant part that "[a]ny claim . . . which may be made against [a] town . . . for damages for wrong or injury to person or property or for the death of a person, shall be made and served in compliance with [General Municipal Law § 50-e]" (Town Law § 67 [1]) and that "[e]very action upon such claim shall be commenced pursuant to the provisions of [General Municipal Law § 50-i]" (Town Law § 67 [2]). Plaintiff contends that the scope of Town Law § 67 is the same as that of General Municipal Law §§ 50-e and 50-i such that the reasoning in *Margerum* applies equally to each statute, thereby rendering a notice of claim unnecessary for her Human Rights Law claims. We conclude that the statutory text and precedent demonstrate that plaintiff's contention lacks merit.

Town Law § 67 broadly applies to any claim against a town defendant for damages in five categories: (1) for wrong to person; (2) for injury to person; (3) for wrong to property; (4) for injury to property; and (5) for the death of a person (*see* Town Law § 67 [1]). By contrast, General Municipal Law § 50-i requires a notice of claim only for those actions involving claims "for personal injury, wrongful death or damage to real or personal property" (General Municipal Law § 50-i [1]). Even if, as plaintiff posits, there is no meaningful distinction between a claim for "injury to person" (Town Law § 67 [1]) and a claim for "personal injury" (General Municipal Law § 50-i [1]), the language of Town Law § 67 is still broader than its General Municipal Law counterpart because it also includes any claim against a town defendant for damages for a "wrong . . . to person" (Town Law § 67 [1]). Consistent with the purpose of the Human Rights Law, unlawful discrimination and retaliation is undoubtably considered a *wrong* against a person (*see* Executive Law § 290 [3]). Thus, the plain, unambiguous text of Town Law § 67 directs that a notice of claim is required for an action alleging violations of the Human Rights Law.

Plaintiff nonetheless points to the title of Town Law § 67—"Presentation of claims for torts: actions against towns"—in support of her argument that the statute applies only to torts, which do not include Human Rights Law claims. Plaintiff's reliance on the title is unavailing because, "[w]hile a title or heading may help clarify or point the meaning of an imprecise or dubious provision, it may not alter or limit the effect of unambiguous language in the body of the statute itself" (*Squadrito v Griebsch*, 1 NY2d 471, 475 [1956]) and, here, the unambiguous language in the body of Town Law § 67 does not limit its coverage to tort actions only (*cf.* General Municipal Law § 50-e [1] [a]).

In considering the text of Town Law § 67, Departments of the Appellate Division have concluded that "[s]uch language is broad enough to include an employment discrimination claim based on Executive Law § 296" (*Picciano*, 290 AD2d at 170; *see Scopelliti v Town*

of New Castle, 210 AD2d 308, 309 [2d Dept 1994]; *see also Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458, 1460 [4th Dept 2013]). Contrary to plaintiff's assertion, the Court of Appeals' decision in *Margerum* did not alter the aforementioned case law. *Margerum* simply endorsed what Departments of the Appellate Division had already said, i.e., that service of a notice of claim is not a condition precedent to commencement of an action based upon the Human Rights Law in a jurisdiction where General Municipal Law §§ 50-e and 50-i provide the *only* notice of claim criteria (*see Margerum*, 24 NY3d at 730). Here, however, Town Law § 67 provides additional notice of claim criteria and contains different, broader language that covers causes of action based on the Human Rights Law (*see Picciano*, 290 AD2d at 170; *Scopelliti*, 210 AD2d at 309).

Plaintiff further contends that, even if she was required to serve a notice of claim regarding her Human Rights Law claims, she should be granted leave to serve a late notice of claim. We note that, as conceded by plaintiff's counsel at oral argument before this Court, plaintiff is not seeking leave to serve a late notice of claim with respect to her state law tort claims. We agree with plaintiff for the reasons that follow that she should be granted leave to serve a late notice of claim regarding her Human Rights Law claims.

As discussed above, "[a]ny claim . . . which may be made against [a] town . . . for damages for wrong or injury to person or property or for the death of a person, shall be made and served in compliance with [General Municipal Law § 50-e]" (Town Law § 67 [1]). "Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation . . . must serve a notice of claim on the prospective defendant 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [plaintiff] to serve a notice of claim" (*id.* at 460-461; *see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020]). "The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013], quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [public corporation] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [public corporation] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). "The presence or absence of any given factor is not determinative of the application and, moreover, the factors are 'directive rather than exclusive' " (*Matter of Gumkowski v Town of Tonawanda*, 156 AD3d 1481, 1481 [4th Dept 2017]). " 'While the

discretion of Supreme Court [in considering the application] will generally be upheld absent demonstrated abuse[,] . . . such discretion is ultimately reposed in [the Appellate Division]' " (*Dusch*, 184 AD3d at 1169; *see Matter of Stowe v City of Elmira*, 31 NY2d 814, 815 [1972]; *Matter of Kressner v Town of Malta*, 169 AD2d 927, 928 [3d Dept 1991]; *Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 153 [2d Dept 1985]; *Matter of Febles v City of New York*, 44 AD2d 369, 372 [1st Dept 1974]).

Preliminarily, even assuming, arguendo, that plaintiff's purported fear of continued retaliation by defendants even after she obtained employment with a police department in a different jurisdiction is not a reasonable excuse under the circumstances of this case, we note that "the failure of [plaintiff] to offer a reasonable excuse for her delay in serving a notice of claim . . . is not necessarily 'fatal to the application' " for leave to serve a late notice of claim (*Matter of Lindstrom v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303, 1304 [4th Dept 2005]; *see Dusch*, 184 AD3d at 1169; *Matter of Henderson v Town of Van Buren*, 281 AD2d 872, 873 [4th Dept 2001]; *see also Matter of Allende v City of New York*, 69 AD3d 931, 933 [2d Dept 2010]; *Matter of Hunt v County of Madison*, 261 AD2d 695, 696 [3d Dept 1999]).

We agree with plaintiff that great weight should be accorded to the fact that defendants, by virtue of plaintiff's various complaints about the harassment, discrimination, and retaliation and Nightingale's direct participation therein, had actual knowledge of the facts constituting the claim in a timely manner. Although the presence or absence of any given factor is not determinative, it is well settled that "[a] factor to be accorded great weight in determining whether to grant leave to serve a late notice of claim is whether the [public corporation] had actual knowledge of the facts underlying the claim, including knowledge of the injuries or damages" (*Dalton*, 107 AD3d at 1518-1519). Consequently, " '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)' " (*Turlington*, 143 AD3d at 1248). "[T]he [plaintiff] bears the burden of demonstrating that the [public corporation] had actual knowledge" (*Dalton*, 107 AD3d at 1519).

Here, as the court determined, there is no dispute that the Town and its officers had timely actual knowledge of the facts underlying the claim inasmuch as the record establishes that plaintiff repeatedly, and in detail, complained about Nightingale's behavior. Plaintiff first reported Nightingale's inappropriate conduct during a meeting with Winn in February 2018. Plaintiff met with Winn in January 2019 and again reported Nightingale's harassment and discrimination. Following that meeting, plaintiff submitted a written complaint to Winn in early February 2019 recounting six instances of sexual harassment by Nightingale and listing three witnesses to such behavior. Plaintiff's written complaint documented, in specific detail, six instances between April 2017 and January 2019 in which Nightingale singled plaintiff out for unnecessary touching.

Nightingale had actual knowledge of the facts underlying the claim inasmuch as he was the perpetrator of the conduct; the other defendants, including the members of the Town's board, had actual knowledge of the facts at varying points after plaintiff first complained; and the Town eventually hired a third party to investigate the issues within the Town's police department, including plaintiff's allegations of sexual harassment. Consequently, as the court properly determined, the record establishes that defendants had actual knowledge of the occurrences underlying the claim (*see Henderson*, 281 AD2d at 873; *see also Gurnett v Town of Wheatfield*, 90 AD3d 1656, 1656 [4th Dept 2011]; *Joyce P. v City of Buffalo*, 49 AD3d 1268, 1268 [4th Dept 2008]; *Matter of Trusso v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1302, 1303 [4th Dept 2005]; *Lindstrom*, 24 AD3d at 1304).

Defendants nonetheless assert that they lacked actual knowledge because they did not have notice of plaintiff's alleged injuries or damages. That assertion is belied by the record. In her written complaint, plaintiff expressly and repeatedly explained that Nightingale's incessant inappropriate touching made her uncomfortable and anxious and that she began to truly "dread" being around Nightingale in any capacity after an incident of unwanted touching in October 2018 during training at a firing range. Defendants were thus aware that Nightingale's conduct was causing plaintiff to suffer feelings of anxiety, discomfort, and dread, which are the same type of emotional injuries that plaintiff has alleged in the complaint. The fact that defendants may not have been apprised of the precise scope of plaintiff's injuries does not vitiate their actual knowledge of the facts underlying the claim, including knowledge of her alleged injuries (*see Fish v New York Mills Union Free School Dist.*, 151 AD2d 976, 976 [4th Dept 1989]).

We further agree with plaintiff that the prejudice factor favors granting her leave to serve a late notice of claim. On an application for leave to serve a late notice of claim, the applicant has the initial burden of showing that late notice will not substantially prejudice the public corporation, which requires the applicant to "present some evidence or plausible argument that supports a finding of no substantial prejudice" (*Newcomb*, 28 NY3d at 466). "Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that [it] will be substantially prejudiced if the late notice is allowed" (*id.* at 467).

Here, the record establishes that plaintiff met her initial burden by presenting "some evidence or plausible argument that supports a finding of no substantial prejudice" (*id.* at 466). Plaintiff's initial submissions and arguments, including her sworn affidavit, show that, following her complaints, Winn conducted an initial investigation and spoke with Nightingale, and that defendants eventually hired a third party to conduct a separate investigation into the Town's police department, including with respect to plaintiff's allegations (*see Matter of Rodriguez v City of New York*, 172 AD3d 556, 558 [1st Dept 2019]; *cf. Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980-981 [4th Dept 2020]).

The burden thus shifted to defendants to "respond with a *particularized evidentiary* showing that [they] will be substantially prejudiced if the late notice is allowed" (*Newcomb*, 28 NY3d at 467 [emphasis added]). Defendants assert that they established substantial prejudice because they were unable to obtain a timely medical examination of plaintiff. That assertion lacks merit because there is no evidence in the record to support it. Defendants submitted in opposition to the application only the affidavit of Winn, who merely asserted upon information and belief that plaintiff had been injured during her duties with her new police department. Defendants did not mention therein any desire to conduct a medical examination, let alone present particularized evidence of an inability to do so. To the extent that defendants raised the purported inability to conduct a medical examination in a memorandum of law written by their counsel and submitted in opposition to the application, we conclude that " '[t]he speculative assertions of [defendants'] counsel, unsupported by any record evidence, failed to satisfy [defendants'] burden to establish that late notice [would] substantially prejudice[ ] [their] ability to defend against [plaintiff's] claim[s]' " (*Matter of Antoinette C. v County of Erie*, 202 AD3d 1464, 1468 [4th Dept 2022]; *see Dusch*, 184 AD3d at 1171). Defendants therefore failed to meet their burden in opposition to plaintiff's showing that late notice would not substantially prejudice defendants (*see Dusch*, 184 AD3d at 1171).

Based on the foregoing, we modify the order in the exercise of our discretion by granting plaintiff leave to serve a late notice of claim with respect to the third and fourth causes of action (*see e.g. id.*; *Matter of Rudloff v City of Rochester*, 303 AD2d 1052, 1052-1053 [4th Dept 2003]; *Matter of Battaglia v Medina Cent. School Dist.*, 204 AD2d 997, 997-998 [4th Dept 1994]) upon condition that plaintiff shall serve the proposed notice of claim within 30 days of the date of the entry of the order of this Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

833

CA 22-02005

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

DELILAH DESSELLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID HILLS AND LETISHA JOHNSON,
DEFENDANTS-RESPONDENTS.

MCMAHON KUBLICK, P.C., SYRACUSE (W. ROBERT TAYLOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BAILEY, JOHNSON & PECK, P.C., ALBANY (THOMAS J. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 26, 2022. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she slipped and fell on snow and ice that had accumulated on the sidewalk adjacent to, or the driveway of, a certain residential property (property). Defendants moved to dismiss the complaint based on, inter alia, plaintiff's failure to effect proper service of the summons and complaint and thus to obtain personal jurisdiction over them (*see* CPLR 3211 [a] [8]). Plaintiff appeals from an order of Supreme Court granting the motion on that basis. We affirm.

We reject plaintiff's contention that service was properly made pursuant to CPLR 308 (2). Under that provision, the delivery of the summons and complaint must be made, as relevant here, at the party's "actual . . . dwelling place or usual place of abode" (*id.*). "A dwelling place is one at which the [party to be served] is actually residing at the time of delivery . . . [, and] [t]he usual place of abode is a place at which the [party] lives with a degree of permanence and stability and to which [they] intend[ ] to return" (*Matter of William A. [Jessica F.]*, 192 AD3d 1474, 1475 [4th Dept 2021] [internal quotation marks omitted]). Jurisdiction is not acquired pursuant to CPLR 308 (2) unless there has been strict compliance with, inter alia, that delivery requirement (*see William A.*, 192 AD3d at 1475).

"While the ultimate burden of proof rests with the party asserting jurisdiction, . . . [a] plaintiff[ ], in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the [court]" (*id.* [internal quotation marks omitted]; *see Constantine v Stella Maris Ins. Co., Ltd.*, 97 AD3d 1129, 1130 [4th Dept 2012]). Although " '[o]rdinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit' " (*Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]).

Here, defendants submitted on their motion the affidavits of plaintiff's process server, in which the process server averred, inter alia, that he personally served the summons and complaint with respect to each defendant on a person of suitable age and discretion at the property, that he thereafter mailed the summons and complaint to each defendant at the property, and that the property was defendants' dwelling place. We agree with plaintiff that those affidavits constitute prima facie evidence that defendants were validly served pursuant to CPLR 308 (2) (*see Cach, LLC v Ryan*, 158 AD3d 1193, 1194-1195 [4th Dept 2018]). However, defendants also submitted evidence rebutting the presumption of proper service (*see William A.*, 192 AD3d at 1476; *Cach, LLC*, 158 AD3d at 1195). Specifically, defendants submitted their own affidavits in which they each averred that they did not reside at the property during the relevant time periods. Rather, defendants averred that the property is a rental property and that, at all times relevant to this action, they resided at a different location. Plaintiff failed to submit any evidence demonstrating otherwise. Thus, we conclude that, inasmuch as plaintiff failed to serve defendants at their actual address as required by CPLR 308 (2), the court properly determined that plaintiff failed to effect proper service (*see Feinstein v Bergner*, 48 NY2d 234, 241 [1979]; *Alostar Bank of Commerce*, 153 AD3d at 1660; *see also William A.*, 192 AD3d at 1476).

We reject plaintiff's further contention that defendants should be estopped from challenging the improper service. Here, the record contains no evidence that defendants "engage[d] in conduct calculated to prevent plaintiff from learning [their] address" (*Olscamp v Fasciano*, 118 AD3d 1472, 1473 [4th Dept 2014] [internal quotation marks omitted]). We also reject plaintiff's contention that defendants failed to make a timely objection based upon improper service and thus waived any such objection. Contrary to plaintiff's contention, defendants were not subject to the time limitation set forth in CPLR 3211 (e) inasmuch as they did not serve an answer prior to making their motion (*cf. Woleben v Sutaria*, 34 AD3d 1295, 1296 [4th Dept 2006]).

In light of our determination, we need not consider plaintiff's

remaining contentions.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

834

CA 23-00094

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

LEIGH VAN OSTRAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PETER LATHAM, DEFENDANT-RESPONDENT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered November 30, 2022. The order granted the motion of defendant to dismiss the complaint "and/or" for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced an action for divorce against defendant in January 2019. In April 2021, plaintiff and defendant entered into a Divorce Settlement Agreement (Agreement), and a September 2021 judgment of divorce incorporated but did not merge the Agreement. In section XIV of the Agreement, defendant denied any financial wrongdoing "with regard to assets involving investments made over the course of the marriage, including but not limited to a total of 20 gold ingots which [defendant] represents were sold by him to finance the construction of an addition to the former marital residence." That section further provided that defendant "represents that 20 ingots was the total quantity purchased and no ingots remain."

In August 2022, plaintiff commenced this action seeking to set aside the Agreement. She alleged that the representation made by defendant in section XIV of the Agreement was fraudulent. She alleged that she obtained 53 invoices dated May 1996 through December 2002 that reflected purchases of 120 gold ingots by defendant during the marriage, despite his representation that only 20 gold ingots ever existed. Plaintiff further alleged that she obtained various financial records showing that certain marital funds that defendant had exclusive control over were not accounted for, and she set forth in detail six different instances of missing funds. As a first cause of action, plaintiff asserted that defendant committed fraud by making a material misrepresentation of an existing fact in section XIV of the Agreement. As a second cause of action, plaintiff asserted that

defendant's fraudulent concealment resulted in an agreement that was manifestly unjust. Defendant moved to dismiss the complaint "and/or" for summary judgment dismissing the complaint. Supreme Court, inter alia, granted defendant's motion and dismissed the complaint. We now affirm.

Initially, we agree with plaintiff, and defendant correctly concedes, that defendant's motion to the extent it sought summary judgment was improper inasmuch as issue had not been joined (*see* CPLR 3212 [a]; *Coolidge Equities Ltd. v Falls Ct. Props. Co.*, 45 AD3d 1289, 1289 [4th Dept 2007]). Defendant also moved, however, pursuant to CPLR 3211 to dismiss the complaint. On a motion to dismiss pursuant to CPLR 3211 (a) (7), we "must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference' " (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). "A movant contending that a pleading fails to state a cause of action pursuant to CPLR 3211 (a) (7) may submit affidavits and evidence to demonstrate conclusively that the plaintiff does not have a cause of action" (*Stuber v Stuber*, 209 AD3d 1297, 1297 [4th Dept 2022]; *see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 88-90 [4th Dept 2015]; *see also Simkin v Blank*, 19 NY3d 46, 52 [2012]).

It is well settled that "[m]arital settlement agreements are judicially favored and are not to be easily set aside" (*Simkin*, 19 NY3d at 52). "[A separation agreement] or stipulation of settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability" (*Johnson v Ranger*, 216 AD3d 925, 925 [2d Dept 2023] [internal quotation marks omitted]; *see Suchow v Suchow*, 157 AD3d 1015, 1016 [3d Dept 2018], *appeal* & *lv dismissed* 31 NY3d 1075 [2018]). In a cause of action for fraudulent inducement, the plaintiff must allege that "(1) [the defendant] made a representation or a material omission of fact which was false and the [defendant] knew to be false, (2) the misrepresentation was made for the purpose of inducing the [plaintiff] to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury" (*Shah v Mitra*, 171 AD3d 971, 975 [2d Dept 2019]; *see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

We conclude the court properly dismissed the complaint because defendant's evidentiary submissions and plaintiff's admissions to them conclusively established that she has no cause of action for fraud inasmuch as she could not have justifiably relied on the alleged fraudulent representations (*see generally Suchow*, 157 AD3d at 1016-1017; *cf. Kumar v Kumar*, 96 AD3d 1323, 1326 [3d Dept 2012]). With

respect to the alleged missing funds, plaintiff was aware before she entered into the Agreement that the financial records in her possession and the reports from the certified public accountant she retained showed that there was unaccounted-for money, specifically the six instances set forth in the complaint. With respect to the gold ingots, the invoices show that the ingots were purchased by the business jointly owned by plaintiff and defendant and not, as plaintiff alleged in the complaint, by defendant personally. In any event, plaintiff admitted that she was aware that there were at least 24 gold ingots at the time defendant represented that there were only 20. In addition, plaintiff admitted that she had access to the financial records during the marriage, and indeed filed all of them in "banker boxes" that were kept in the marital residence, which would include the 53 invoices showing the purchase of 120 ingots.

We have considered plaintiff's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

841

KA 19-02341

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMARK NIXON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered October 21, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Inasmuch as defendant failed to raise a constitutional challenge to the statute before Supreme Court, any such contention is not preserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]), and we decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's contentions, his "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, 2023 NY Slip Op 05968, *2-7 [2023]) and the mode of proceedings exception to the preservation requirement does not apply (*see People v Adames*, 216 AD3d 519, 520 [1st Dept 2023], *lv denied* 40 NY3d 949 [2023]).

Although defendant also contends that his waiver of the right to appeal is invalid, we note that resolution of that issue is of no moment inasmuch as his challenge with respect to the constitutionality

of Penal Law § 265.03 would survive even a valid waiver of the right to appeal (*see People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]; *see also People v Jordan*, 169 AD3d 1357, 1358 [4th Dept 2019]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

843

CAF 22-00530

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF SHANIA R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHANA R., RESPONDENT-APPELLANT.

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 7, 2021, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order entered after a fact-finding hearing determining that she neglected the subject child.

Contrary to the mother's contention, we conclude that Family Court properly determined that she neglected the child. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). Here, the evidence adduced at the fact-finding hearing established neglect by a preponderance of the evidence. Petitioner presented evidence that the mother drove to the grandmother's house with the intent of engaging in a physical altercation and brought the child with her. Thus, the child was in the mother's car and witnessed the mother intentionally drive her vehicle into the grandmother after the grandmother stabbed one of the mother's friends during a physical altercation. The child informed a caseworker that she was "crying"

for her grandmother and was scared. We conclude that the record demonstrated that the child's emotional and mental condition had been impaired, or was in imminent danger of becoming impaired, as a result of witnessing the mother run over the grandmother and "that the actual or threatened harm to the child [was] a consequence of the failure of [the mother] to exercise a minimum degree of care in providing the child with proper supervision or guardianship," i.e., by engaging in an act in which a reasonable and prudent parent would not have engaged (*Nicholson*, 3 NY3d at 368; *see Matter of Richard T.*, 12 AD3d 986, 987-988 [3d Dept 2004]; *see also Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1160 [4th Dept 2013]; *see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

852

CA 22-01984

PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, AND NOWAK, JJ.

RACHEL L. AMOIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN J. AMOIA, DEFENDANT-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered August 17, 2022. The order determined that the separation and settlement agreement of the parties was void and not enforceable.

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

Memorandum: Plaintiff wife commenced this action seeking to set aside a separation and settlement agreement (agreement). Defendant husband appeals from an order, following a bench trial, that, inter alia, determined that the agreement was void and not enforceable, and we affirm.

The parties were married in 2007 and have three children. Unbeknownst to the wife, the husband met with an attorney in late March 2020 and had the agreement drafted after learning of the wife's extramarital affair. On the morning of April 7, 2020, the husband's mother came to the marital home and picked up the children. Shortly thereafter, the husband's brother arrived at the marital home. The husband then presented the agreement for the wife to sign while the brother recorded the meeting on a laptop computer. The resulting video shows that the husband told the wife she had two options: in sum, the plan A option was to sign the agreement as is, that day, and the plan B option was to go to "war," with the husband filing for divorce. He told her that upon signing the agreement, she had to vacate the marital home because "[she could not] afford this house," and she would be supervised while packing her possessions. For just 20 minutes, the husband went over the agreement with the wife. Although he told her that she could have an attorney review it, he added, "[i]t doesn't matter, because I am not changing anything." He represented that the agreement was "equitable and how the courts will approve it." He explained that they would have joint custody of the

children, but for holidays he had "the first choice." He represented that for child support, he was giving her "more than [he was] supposed to give [her]." He told her that he would not pay her "anything specifically for the [marital home]" because of the "extra money" he was giving her for maintenance. When the wife expressed confusion and asked, "[a]limony is not required?," the husband responded, "[i]t's not required in our circumstances, no."

The video shows that the wife, upon the husband's insistence, then flipped through pages in the plan B folder that corresponded to the husband's "war" option, which contained text messages and pictures sent between the wife and her paramour. The husband represented that in a contested divorce, "you have to prove there's a fault," and that the wife was at fault because of her extramarital relationship. The husband stated that he would pursue "full custody" of the children and that a contested divorce would be more stressful for the wife and the children. He added that "everything" would become public information, including the contents of the plan B folder, i.e., the wife's affair and all its details. He told the wife that knowing all the details would "mess . . . up" the children, but "[t]hat's the risk that [she] took." He falsely claimed that the wife could go to jail as a result of her conduct with her paramour. The wife signed the agreement, stating upon the husband's prompting that she was not under duress in doing so. The husband arranged for a notary public to be present at the house and sign the agreement, and with the notary's departure the video ends.

" 'Judicial review [of separation agreements] is to be exercised circumspectly, sparingly and with a persisting view of the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions' " (*Skotnicki v Skotnicki*, 237 AD2d 974, 974 [4th Dept 1997]). "[A]n agreement between spouses may nevertheless be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct" (*Campbell v Campbell*, 208 AD3d 1050, 1051 [4th Dept 2022]; *see Cohen v Cohen*, 170 AD3d 948, 949 [2d Dept 2019]). We conclude that the agreement was properly set aside on the grounds of both unconscionability and duress.

Addressing first the issue of unconscionability, we note that "[a] separation agreement should be set aside as unconscionable where it is 'such as no person in [their] senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' " (*Tuzzolino v Tuzzolino*, 156 AD3d 1402, 1403 [4th Dept 2017]; *see Campbell*, 208 AD3d at 1052). Here, the husband presented the agreement, prepared by his attorney, to the wife for signing. Under the agreement, the wife would receive approximately $38,000 annually in child support and $22,000 annually in spousal support with no interest in the marital residence and its furnishings, no interest in the marital share of a business and real property, and no interest in a stock account worth approximately $178,000. Although it is not a dispositive factor, Supreme Court properly considered that the wife

was not represented by counsel when the agreement was signed (*see Campbell*, 208 AD3d at 1052). We further conclude that the court properly determined that the terms of the agreement would "shock the conscience and confound the judgment of any [person] of common sense" (*Tuzzolino*, 156 AD3d at 1403 [internal quotation marks omitted]; *see Dawes v Dawes*, 110 AD3d 1450, 1451 [4th Dept 2013]), in light of the husband's significant annual earnings and the fact that the wife was not employed.

Addressing next the issue of duress, we note that an agreement "is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of [that party's] free will" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971], *rearg denied* 29 NY2d 749 [1971]; *see Campbell*, 208 AD3d at 1051). The video shows that the husband did most of the talking, with the wife saying very little. The wife often appeared surprised, distraught, and emotional. The court properly concluded, on the basis of the husband's "threats of losing custody, the children learning of the [w]ife's indiscretions, [and] the publication of private, personal communications and pictures [sent by] the [w]ife to a male friend[,] together with threats of likely criminal prosecution," that his conduct deprived the wife of the exercise of her free will (*cf. Campbell*, 208 AD3d at 1051-1052; *Shah v Mitra*, 171 AD3d 971, 976-977 [2d Dept 2019]; *Lyons v Lyons*, 289 AD2d 902, 904 [3d Dept 2001], *lv denied* 98 NY2d 601 [2002]; *see generally Austin Instrument*, 29 NY2d at 130-131). Contrary to the husband's contention, he did not merely threaten to do what he had a legal right to do, i.e., file for divorce (*see generally Campbell*, 208 AD3d at 1051-1052; *Shah*, 171 AD3d at 976-977; *Lyons*, 289 AD2d at 904).

We have considered the husband's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

868

CA 22-00967

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF THE R.W. BURROWS GRANTOR FAMILY TRUST

MICHAEL L. LENGVARSKY, TRUSTEE OF THE R.W. BURROWS GRANTOR FAMILY TRUST, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

JI TING WANG-BURROWS, EVAN DREYFUSS, CAROLYN ZAKLUKIEWICZ, RESPONDENTS-RESPONDENTS;

AVA BURROWS AND AUDREY BURROWS, APPELLANTS.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (TIMOTHY M. FERGES OF COUNSEL), FOR PETITIONER-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR APPELLANTS.

MCCARTHY FINGAR LLP, WHITE PLAINS (ROBERT H. ROSH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Herkimer County (John H. Crandall, S.), entered May 24, 2022. The order, among other things, dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross-motion insofar as it sought summary judgment dismissing the petition, reinstating the petition, and vacating that part of the order that denied as moot the cross-motion insofar as it sought leave to serve an amended and supplemental answer, and as modified the order is affirmed without costs and the matter is remitted to Surrogate's Court, Herkimer County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to SCPA 2103 seeking discovery and delivery of certain assets that allegedly belong to the R.W. Burrows Grantor Family Trust (trust), which was established by R.W. Burrows (decedent) for the benefit of his daughters Ava Burrows and Audrey Burrows (beneficiaries) and was the subject of certain terms in the divorce settlement agreement between decedent and Marcia Burrows (Marcia), the guardian of the beneficiaries. Petitioner moved for, inter alia, partial summary judgment that a certain stock transaction did not constitute an equivalent exchange. By cross-motion, respondents subsequently sought, inter alia, leave to serve an amended and supplemental answer

to assert the affirmative defenses of ratification and judicial estoppel with respect to the transaction challenged by petitioner, as well as summary judgment dismissing the petition on the grounds that petitioner ratified the subject transaction and that the petition was barred by the doctrine of judicial estoppel. Surrogate's Court denied petitioner's motion, effectively granted respondents' cross-motion insofar as it sought summary judgment dismissing the petition, and denied as moot the cross-motion insofar as it sought leave to serve an amended and supplemental answer. Petitioner and the beneficiaries separately appeal. Even assuming, arguendo, that the Surrogate properly considered unpleaded defenses because respondents' reliance thereon neither surprised nor prejudiced petitioner (*see D&M Concrete, Inc. v Wegmans Food Mkts., Inc.*, 133 AD3d 1329, 1330 [4th Dept 2015], *lv denied* 27 NY3d 901 [2016]), we agree with petitioner and the beneficiaries for the reasons that follow that the Surrogate erred in granting the cross-motion insofar as it sought summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

" 'Ratification is the act of knowingly giving sanction or affirmance to an act that would otherwise be unauthorized and not binding' " (*Northland E., LLC v J.R. Militello Realty, Inc.*, 163 AD3d 1401, 1405 [4th Dept 2018] [emphasis omitted]). "Ratification requires 'full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language' " (*Rocky Point Props. v Sear-Brown Group*, 295 AD2d 911, 913 [4th Dept 2002]). Here, we conclude that respondents' own submissions failed to eliminate triable issues of fact whether petitioner ratified the transaction that allegedly caused the trust to lose value (*see generally Adirondack Bank v Midstate Foam & Equip., Inc.*, 159 AD3d 1354, 1356 [4th Dept 2018]) and, in any event, petitioner raised questions of fact in opposition to the cross-motion (*see generally Robbins v Tucker Anthony Inc.*, 233 AD2d 854, 855 [4th Dept 1996]).

Next, "[t]he doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because [the party's] interests have changed" (*Jones v Town of Carroll*, 177 AD3d 1297, 1298 [4th Dept 2019] [internal quotation marks omitted]). " 'The doctrine applies only where the party secured a judgment in [their] favor in the prior proceeding' " (*Borrelli v Thomas*, 195 AD3d 1491, 1494-1495 [4th Dept 2021]). We conclude that the Surrogate erred in applying the doctrine because, contrary to the Surrogate's determination that petitioner and Marcia each agreed to the subject valuation related to the transaction as part of the divorce settlement agreement, petitioner was not a party to the matrimonial action or divorce settlement agreement (*see Abramovich v Harris*, 227 AD2d 1000, 1001 [4th Dept 1996]) and, as a general rule, which is applicable here, " 'a settlement does not constitute a judicial endorsement of either party's claims or theories and thus does not provide the prior success necessary for judicial estoppel' " (*Matter of Costantino*, 67 AD3d 1412, 1413 [4th Dept 2009]).

We therefore modify the order by denying the cross-motion insofar as it sought summary judgment dismissing the petition and by reinstating the petition. In light of our determination, we further modify the order by vacating that part of the order that denied as moot the cross-motion insofar as it sought leave to serve an amended and supplemental answer, and we direct Surrogate's Court to determine that part of the cross-motion on the merits upon remittal (*see Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1495 [4th Dept 2019]). Finally, contrary to petitioner's contention, we conclude that the Surrogate did not err in denying his motion insofar as it sought partial summary judgment (*see generally Matter of Graeve*, 113 AD3d 983, 983-984 [3d Dept 2014]; *Matter of McGeogh*, 276 AD2d 700, 700-701 [2d Dept 2000]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

874

TP 23-00715

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF JAMES LIVINGSTON, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered April 17, 2023) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated incarcerated individual rules 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]), 113.11 (7 NYCRR 270.2 [B] [14] [ii] [altered item possession]), 113.23 (7 NYCRR 270.2 [B] [14] [xiii] [contraband possession]) and 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]). Contrary to petitioner's contention, the misbehavior report, "to/from memorandum," and testimony at the hearing constitute substantial evidence to support the determination that he violated those rules (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Edwards v Annucci*, 199 AD3d 1433, 1433 [4th Dept 2021]). Although petitioner did not have exclusive access to the areas where the contraband and weapon were found, a reasonable inference of possession arises from the fact that the contraband, found in an area in which petitioner worked, and the weapon, found in the cube next to petitioner's cube, were located in areas over which petitioner had control (*see Matter of Lee v Goord*, 244 AD2d 969, 970 [4th Dept 1997]; *Matter of Hay v Coombe*, 229 AD2d 1015, 1015 [4th Dept 1996], *lv denied* 88 NY2d 816 [1996]). Furthermore, petitioner's assertion that another inmate may have been responsible for the

contraband and weapon or that an officer set him up presented credibility issues for the Hearing Officer to resolve (*see Lee*, 244 AD2d at 970).

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

877

CA 22-01896

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

ROBERT SHUTTLEWORTH,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA CORY, DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 6, 2022. The order denied the motion of defendant Sandra Cory for summary judgment, and denied the cross-motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint against defendant Sandra Cory insofar as it alleges common-law negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was kicked by a horse owned by Sandra Cory (defendant). Defendant owned a horse farm and had approximately 13 horses, including two or three studs, in individual stalls in a barn. On the night of the incident, defendant called plaintiff, who was familiar with the horses, to say that two of the studs were fighting in the barn. Plaintiff arrived on the property and entered the barn, where he was kicked by one of the studs.

Defendant moved for summary judgment dismissing the complaint against her, and plaintiff cross-moved for summary judgment seeking, inter alia, an order determining that defendant was negligent and also had knowledge of the vicious propensities of the horse. Supreme Court denied the motion and cross-motion. Defendant appeals, and plaintiff cross-appeals.

Addressing first defendant’s appeal, we agree with defendant that plaintiff cannot maintain a cause of action for common-law negligence based on the injuries that were caused by the horse, and we therefore

modify the order by granting defendant's motion in part and dismissing the complaint against her insofar as it alleges common-law negligence. Agriculture and Markets Law § 108 (7) classifies horses as domestic animals, and " '[w]hen harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule' . . . of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities" (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009], quoting *Bard v Jahnke*, 6 NY3d 592, 599 [2006]; *see Krieger v Cogar*, 83 AD3d 1552, 1552-1553 [4th Dept 2011]). Contrary to plaintiff's contention, the exception to that rule set forth in *Hastings v Sauve* (21 NY3d 122, 125-126 [2013]) does not apply here, inasmuch as the horse did not stray from defendant's property (*see Bavifard v Capretto*, 169 AD3d 1402, 1402-1403 [4th Dept 2019]). Contrary to plaintiff's further contention, he may not maintain a negligence claim against defendant under the reasoning of *Hewitt v Palmer Veterinary Clinic, PC* (35 NY3d 541 [2020]). In that case, the Court of Appeals held that the *Bard* rule, set forth above, does not apply to a veterinary clinic (*see id.* at 547-548). The Court reasoned that the *Bard* "line of precedent concerning animal owners [was not] directly implicated" in *Hewitt* (*id.* at 548). By contrast, inasmuch as defendant was the owner of the horse that injured plaintiff, the *Bard* rule of strict liability applies here.

Next, to the extent defendant contends on her appeal that the complaint fails to plead a claim for strict liability, that contention is improperly raised for the first time on appeal (*see Ballard v Sin City Entertainment Corp.*, 188 AD3d 554, 555-556 [1st Dept 2020]; *see also McClelland v Mutual Life Ins. Co. of N.Y.*, 217 NY 336, 348 [1916]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Defendant on her appeal further contends that, even if the complaint pleads a strict liability claim, she is entitled to summary judgment dismissing that claim. Plaintiff on his cross-appeal contends that he is entitled to summary judgment on the issue of strict liability. We reject both contentions and conclude that neither party is entitled to summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Collier v Zambito*, 1 NY3d 444, 446 [2004], quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]). "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447). We conclude that triable issues of fact exist here, including how many studs were loose on the night of the incident, whether the stud that kicked plaintiff had previously escaped from his stall, whether that stud had previously exhibited dangerous behavior when loose and, if so, whether defendant was aware of that behavior, and whether that stud broke the stall door latch when he escaped (*cf.*

O'Hara v Holiday Farm, 147 AD3d 1454, 1455-1456 [4th Dept 2017]; *see generally Bavifard*, 169 AD3d at 1403).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

879

KA 22-01205

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TANYA M. LATONE, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered July 19, 2022. The judgment convicted defendant upon her plea of guilty of bail jumping in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of bail jumping in the second degree (Penal Law § 215.56), defendant contends that her plea was involuntarily entered and that her agreed-upon sentence is unduly harsh and severe. We affirm.

Defendant's challenge to the voluntariness of her plea is based largely on the alleged absence of certain information in the transcript of the combined plea and sentencing proceeding regarding her discussion of the plea offer with defense counsel that, in her view, gives rise to an inference that she did not understand the terms and conditions of the plea agreement. Defendant does not, however, specify on appeal what she did not understand when she pleaded guilty. We note that defendant stated during the plea colloquy that she had discussed the case with defense counsel and was satisfied with his representation of her, and that County Court set forth the terms and conditions of the plea agreement on the record before defendant entered her plea. To the extent that defendant's challenge to the voluntariness of her plea is based on matters outside the record on appeal, her contention must be raised by way of a motion to vacate the judgment pursuant to CPL 440.10 (*see People v Smith*, 214 AD3d 1339, 1339 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]; *People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]).

We reject, however, defendant's contention that her monosyllabic

responses to questions posed by the court establish that her plea is invalid (*see People v Brinson*, 192 AD3d 1559, 1560 [4th Dept 2021]; *People v Bullock*, 78 AD3d 1697, 1698 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011]).

Finally, we conclude that defendant's agreed-upon sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Fuller*, 147 AD3d 1344, 1344 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

886

CAF 22-01145

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF ZANDER W.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA M., RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRIAN P. DEGNAN, BATAVIA, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 27, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. We affirm.

We reject the mother's contention that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i])

that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner provided appropriate referrals to the mother for mental health counseling and parenting classes. In addition, petitioner scheduled regular visitation between the mother and the child, during which petitioner provided several different therapists to give medically necessary services to the child and, at the same time, educate the mother as to the child's needs (*see Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]; *Matter of Dagan B. [Calla B.]* [appeal No. 3], 192 AD3d 1458, 1459 [4th Dept 2021], *appeal dismissed* 37 NY3d 977 [2021]; *Matter of Asianna NN. [Kansinya OO.]*, 119 AD3d 1243, 1245 [3d Dept 2014], *lv denied* 24 NY3d 907 [2014]).

Contrary to the further contention of the mother, we conclude that, despite petitioner's diligent efforts, the mother failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, "there is no evidence that [the mother] had a realistic plan to provide an adequate and stable home for the child[ ]" (*Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part & denied in part* 35 NY3d 1003 [2020] [internal quotation marks omitted]).

Finally, the mother failed to preserve for our review her contention that Family Court should have granted a suspended judgment (*see Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1414 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]; *Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]). In any event, a suspended judgment was not warranted under the circumstances "inasmuch as any progress made by the [mother] prior to the dispositional determination was insufficient to warrant any further prolongation of the [child's] unsettled familial status" (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018] [internal quotation marks omitted]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

890

CA 23-00153

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

ROBERT DRUMM, PLAINTIFF-APPELLANT,

V ORDER

THE VILLAGE MOBILE HOME PARK, LLC,
DEFENDANT-RESPONDENT.

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

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (JILL L. CASSERT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 11, 2023. The order dismissed the complaint upon the motion of defendant.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

897

CA 23-01059

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF INVESTIGATOR JOHN KESEL,
ONTARIO COUNTY SHERIFF'S DEPARTMENT,
PETITIONER,

V MEMORANDUM AND ORDER

JEFFREY HOLTZ, RESPONDENT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE
OF NEW YORK, INTERVENOR-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH COCO OF COUNSEL), FOR INTERVENOR-APPELLANT.

SELENDY GAY ELSBERG PLLC, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), ON BEHALF OF DISTRICT OF COLUMBIA AND STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF INTERVENOR-APPELLANT.

ALVIN L. BRAGG, JR., DISTRICT ATTORNEY, NEW YORK CITY (JOHN T. HUGHES OF COUNSEL), ON BEHALF OF ALVIN BRAGG, JR., DISTRICT ATTORNEY, NEW YORK COUNTY; MELINDA KATZ, DISTRICT ATTORNEY, QUEENS COUNTY; MICHAEL E. MCMAHON, DISTRICT ATTORNEY, RICHMOND COUNTY; AND MIRIAM E. ROCAH, DISTRICT ATTORNEY, WESTCHESTER COUNTY AS AMICI CURIAE IN SUPPORT OF INTERVENOR-APPELLANT.

ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC (ARTHUR LUK OF COUNSEL), FOR GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND BRADY CENTER TO PREVENT GUN VIOLENCE, AMICI CURIAE.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 5, 2023. The order dismissed the application for a temporary extreme risk protection order and final extreme risk protection order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is reinstated, and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner filed an application seeking a temporary extreme risk protection order (TERPO) and final extreme risk protection order (ERPO) against respondent pursuant to CPLR article

63-A. Supreme Court issued the TERPO, and respondent was directed to surrender his weapons. Prior to a final ERPO hearing, respondent moved to vacate the TERPO and asserted that CPLR article 63-A is unconstitutional. It is undisputed that respondent did not notify the Attorney General of his challenge to the constitutionality of the statute (*see* CPLR 1012 [b] [1]). The court determined that article 63-A is unconstitutional, vacated the TERPO, and dismissed petitioner's application without conducting an evidentiary hearing on its merits. Intervenor Letitia James, Attorney General of the State of New York, subsequently intervened and now appeals from that order, contending that the court erred in determining that article 63-A is unconstitutional. Inasmuch as respondent failed to notify the Attorney General that he would be challenging the constitutionality of the statute, the court was prohibited from considering respondent's constitutional challenge (*see* CPLR 1012 [b] [3]) and, moreover, that challenge is not properly before us (*see People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]; *People v Crespi*, 51 AD3d 1036, 1036 [2d Dept 2008]; *People v Whitehead*, 46 AD3d 715, 716 [2d Dept 2007], *lv denied* 10 NY3d 772 [2008]). We therefore reverse the order, reinstate the application, and remit the matter to Supreme Court for further proceedings thereon after additional briefing on respondent's constitutional challenge.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

901

KA 21-00437

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS AUGELLO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 10, 2021. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of burglary in the third degree (Penal Law § 140.20). We agree with defendant that his waiver of the right to appeal was invalid because Supreme Court's "oral colloquy mischaracterized it as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver does not cure the deficient oral colloquy because the court did not inquire of defendant whether he understood the written waiver or whether he had read the waiver before signing it (*see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe. Defendant's related contention that he was unconstitutionally imprisoned for his inability to pay restitution is unpreserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Gilmore*, 202 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]; *People v Vasquez*, 74 AD3d 462, 463 [1st Dept 2010]) and, in any event, is without merit.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

902

KA 18-00607

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE S. HUTCHINGS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 15, 2018. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree, assault in the first degree, attempted robbery in the first degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jackson*, 207 AD3d 1077, 1077 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence (*see People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

904

KA 20-00925

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRANDON L. BISH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 13, 2020. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

906

KA 21-00981

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC EVERETT, ALSO KNOWN AS KAMARI BENZ,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE-MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC EVERETT, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 31, 2019. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of predatory sexual assault against a child (Penal Law § 130.96). Contrary to defendant's contention in his main brief that he was denied effective assistance of counsel because defense counsel violated the attorney-client privilege during pretrial discussions with County Court, we conclude that "defense counsel's remarks were an appropriate effort to ensure that defendant understood the proceedings before rejecting the plea offer and did not constitute a disclosure of confidential information" (*People v Davidson*, 201 AD3d 1025, 1027 [3d Dept 2022]). We further conclude that "[t]here is nothing in the record to indicate that defendant was deprived of meaningful representation" at any stage of the proceedings (*People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). We note that if defendant " 'can demonstrate facts, not recited in the record, that would raise [a colorable] issue [of ineffective assistance], that issue can be pursued by motion pursuant to CPL 440.10' " (*People v Barbuto*, 126 AD3d 1501, 1504 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]).

We also reject defendant's contention in his main brief that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see*

People v Danielson, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, contrary to defendant's contention in his main brief, that defendant's sentence is not unduly harsh or severe. We have reviewed the remaining contentions in the main and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

909

KA 16-00372

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMIAS SHAW, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

TOMIAS SHAW, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 1, 2016. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree and criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a controlled substance in the first degree (§ 220.21 [1]). In his main brief, defendant contends that his plea to manslaughter in the first degree was not voluntarily, knowingly, and intelligently entered because he negated an element of that offense during the colloquy and that he was coerced into pleading guilty on both counts. Inasmuch as defendant's challenges to the voluntariness of the plea would survive even a valid waiver of the right to appeal (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Sapp*, 210 AD3d 1431, 1432 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]), we need not address the validity of the waiver of the right to appeal, which defendant does not challenge on appeal (*see People v Morseman*, 199 AD3d 1475, 1475 [4th Dept 2021]).

We agree with defendant that his initial statements during the plea colloquy negated an essential element of manslaughter in the first degree, i.e., intent to cause serious physical injury (*see People v Hill*, 16 NY3d 811, 814 [2011]). The record shows, however, that there was the requisite further inquiry to ensure that

defendant's guilty plea was knowing, intelligent, and voluntary (*see People v Thompson*, 206 AD3d 1628, 1629 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]; *People v Cafarelli*, 193 AD3d 1350, 1350-1351 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; *People v Granger*, 96 AD3d 1667, 1667-1668 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]). Defendant's responses upon further questioning removed any doubt about his guilt (*see Cafarelli*, 193 AD3d at 1351; *People v Trinidad*, 23 AD3d 1060, 1061 [4th Dept 2005], *lv denied* 6 NY3d 760 [2005]). Inasmuch as the plea to manslaughter in the first degree was voluntarily made, we reject defendant's further contention in his main brief that the plea to criminal possession of a controlled substance in the first degree must be vacated on the ground that the plea was based on the promise that he would receive a concurrent sentence as part of the plea bargain (*see generally People v Williams*, 17 NY3d 834, 836 [2011]; *People v Richardson*, 132 AD3d 1313, 1316 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]).

Defendant next challenges the voluntariness of the plea on the ground that he was coerced into entering it by the fact that the guilty plea of the codefendant, who was his girlfriend and the mother of his child, was conditioned on him pleading guilty. We reject that contention. "[S]o long as the plea agreement is voluntarily, knowingly and intelligently made, the fact that it is linked to the prosecutor's acceptance of a plea bargain favorable to a third person does not, by itself, make defendant's plea illegal" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Although "connected pleas can present concerns which require special care, particularly where leniency in a promised sentence for a loved one is part of the bargain," the inclusion of a third-party benefit is just one factor to consider in determining whether a plea was voluntarily, knowingly, and intelligently made (*id.* at 545).

During the plea colloquy, defendant indicated that he understood that part of the plea bargain was "how they are going to deal" with the codefendant. The plea colloquy shows, however, that the plea was made knowingly, intelligently, and voluntarily. Defendant stated that he had enough time to consider the plea, that no promises were made to him other than the sentence, that no one threatened him or forced him to accept the plea, and that he was pleading guilty of his own free will. Thus, his claim of coercion is belied by the statements he made during the plea proceeding (*see generally People v Griffin*, 204 AD3d 1385, 1386 [4th Dept 2022]; *People v Garcia*, 203 AD3d 1585, 1586 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]).

Defendant further contends in his main brief that he was denied effective assistance of counsel. To the extent that defendant's contention survives his plea (*see Cunningham*, 213 AD3d at 1271; *People v Williams*, 210 AD3d 1507, 1507-1508 [4th Dept 2022], *lv denied* 39 NY3d 1081 [2023]; *People v Clark*, 191 AD3d 1471, 1472-1473 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]), we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant received a favorable plea and has not demonstrated "the absence of strategic or other legitimate

explanations" for counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]). Indeed, the record shows that defendant made a strategic decision to accept the plea offer before County Court issued a ruling on various requests for relief, including suppression of items seized pursuant to a search warrant (*see Granger*, 96 AD3d at 1668; *People v Lewis*, 116 AD2d 778, 779 [3d Dept 1986], *lv denied* 67 NY2d 885 [1986]).

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

911

CAF 22-01593

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF HANALISE S., MOSES B., AND SOPHIA B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

ORDER

EZRA B., JR., RESPONDENT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered August 29, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject children with petitioner.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

912

CAF 22-00321

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF AHREN B.-N.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GARY B.-N., RESPONDENT-APPELLANT,
AND SELENA B.-N., RESPONDENT.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-APPELLANT.

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (DEANA D. GATTARI OF COUNSEL), FOR PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered April 5, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued placement of the subject child with petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of disposition that, inter alia, determined that he neglected the subject child. We affirm.

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]; *see Matter of*

Arianna M. [Brian M.], 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We conclude that a sound and substantial basis in the record supports the court's finding that the child was "in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care" in providing the child with adequate food and medical care (*Jeromy J.*, 122 AD3d at 1399 [internal quotation marks omitted]; *see Matter of Nadjmaah S.B. [Aleshia R.M.]*, 140 AD3d 1058, 1058-1059 [2d Dept 2016], *lv denied* 29 NY3d 901 [2017]). Petitioner's evidence established that the child was severely underweight and exhibited signs of malnutrition and that, despite their awareness of the child's condition, the father and respondent mother did not comply with medical instructions about feeding the child (*see Matter of Dustin B.*, 24 AD3d 1280, 1281 [4th Dept 2005]; *Matter of Rakim W.*, 17 AD3d 376, 377-378 [2d Dept 2005], *lv denied* 5 NY3d 703 [2005]). The court credited the testimony of petitioner's witnesses and properly drew " 'the strongest possible negative inference' against the father after he failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]; *Matter of Brittany W. [Patrick W.]*, 103 AD3d 1217, 1218 [4th Dept 2013]). We reject the father's contention that the evidence did not establish that the child's malnourished state was attributable specifically to his actions. Petitioner established that the father "resided in the same household with the child[ ] and the[ ] mother," that he "was aware that the mother was unable to provide the child[ ] with adequate nutrition and that his assistance was critical to the health of his child[ ]," and that he "was reluctant, and sometimes unwilling, to offer his assistance in ensuring that his child[ ] received proper nourishment" (*Dustin B.*, 24 AD3d at 1281). Petitioner thereby established that the father "knew or should have known of circumstances requiring action to avoid harm or risk of harm to the child and failed to act accordingly" (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014] [internal quotation marks omitted]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

914

CAF 22-01377

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF LANDIN F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JODI G., RESPONDENT-APPELLANT.

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

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 23, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to the mother's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Zachary R. [Duane R.]*, 118 AD3d 1479, 1480 [4th Dept 2014]; *Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285 [4th Dept 2011], *lv denied* 17 NY3d 703 [2011]; *see generally Matter of Joyce T.*, 65 NY2d 39, 48 [1985]). The testimony of petitioner's expert psychologist established that the mother suffers from delusional disorder and that "the child[ ] would be in danger of being neglected if [he was] returned to her care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Zachary R.*, 118 AD3d at 1480).

The mother further contends that she was denied meaningful representation by, inter alia, her attorney's failure to retain and call an expert psychologist to rebut the evidence of petitioner's expert psychologist. We reject that contention. The mother failed to demonstrate that there were relevant experts who would have been

willing to testify in a manner helpful and favorable to her case, and her speculation that her attorney could have found an expert with a contrary medical opinion is insufficient to establish deficient representation (*see Matter of Michael S. [Brittany R.]*, 159 AD3d 1502, 1504 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]). Further, the record establishes that, " 'viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; *see Matter of Demariah A. [Rebecca B.]*, 71 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 701 [2010]).

Finally, we reject the mother's contention that Family Court abused its discretion in declining to hold a dispositional hearing (*see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633-1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Alberto C. [Tibet H.]*, 96 AD3d 1487, 1488 [4th Dept 2012], *lv denied* 19 NY3d 813 [2012]; *see generally Joyce T.*, 65 NY2d at 49-50).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

919

CA 23-00018

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF DIRECTOR, JEFFERSON COUNTY COMMUNITY SERVICES, PETITIONER-APPELLANT,

V ORDER

ALEXANDER J., ALSO KNOWN AS RENEE J., RESPONDENT-RESPONDENT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (TERENCE M. BRENNEN OF COUNSEL), FOR PETITIONER-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (DAVID A. EGHIGIAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered December 14, 2022, in a proceeding pursuant to Mental Hygiene Law article 9. The order granted the motion of respondent to proceed with an anonymous name.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

921

CA 22-01572

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

EMRES NEW YORK, LLC, PLAINTIFF-APPELLANT,

V ORDER

BROOKSTONE 8, LLC, DEFENDANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JACOBOWITZ NEWMAN TVERSKY LLP, CEDARHURST (EVAN M. NEWMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 7, 2022. The order, among other things, granted defendant's motion for leave to renew, and upon renewal, granted defendant's motion to vacate a default judgment.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

924

TP 22-01769

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF SORTIE MARBLE & GRANITE, INC.,
AND FRANK ADDEO, RESPONDENTS,

V MEMORANDUM AND ORDER

MARIA L. IMPERIAL, ACTING COMMISSIONER OF
DIVISION OF HUMAN RIGHTS, PETITIONER,
AND HENRY LEE BOLDEN, RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, STATE DIVISION OF HUMAN RIGHTS, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR PETITIONER.

DAVID W. POLAK, WEST SENECA, FOR RESPONDENTS SORTIE MARBLE & GRANITE, INC. AND FRANK ADDEO.

LAW OFFICE OF LINDY KORN, BUFFALO (LINDY KORN OF COUNSEL), FOR RESPONDENT HENRY LEE BOLDEN.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Catherine R. Nugent Panepinto, J.], entered August 2, 2022) to confirm a determination of the New York State Division of Human Rights. The determination awarded respondent Henry Lee Bolden lost wages and compensatory damages and imposed a civil fine and penalty on respondents Sortie Marble & Granite, Inc. and Frank Addeo.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the cross-petition is granted, and respondents Sortie Marble & Granite, Inc. and Frank Addeo are directed to pay respondent Henry Lee Bolden the sum of $2,080 for lost wages with interest at the rate of 9% per annum commencing December 1, 2019, and $20,000 for mental anguish with interest at the rate of 9% per annum commencing January 25, 2022, and to pay the Comptroller of the State of New York the sum of $30,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing January 25, 2022.

Memorandum: Petitioner, as relevant to this proceeding, filed a cross-petition pursuant to Executive Law § 298 seeking to enforce her final order, which in turn adopted the “recommended findings of fact, opinion and decision, and order” of an Administrative Law Judge (ALJ). The ALJ concluded, following a public hearing, that respondents Sortie Marble & Granite, Inc. and Frank Addeo (respondents) had engaged in unlawful discriminatory practices against respondent Henry Lee Bolden

(complainant) by subjecting him to a hostile work environment on account of his race, retaliating against him, and constructively discharging him from employment. The ALJ awarded complainant $2,080 for lost wages and $20,000 in compensatory damages for mental anguish and humiliation, and imposed a $30,000 civil fine and penalty on respondents.

We conclude that the determination of petitioner that respondents engaged in unlawful discriminatory practices is supported by substantial evidence (*see Matter of Miller v New York State Div. of Human Rights*, 210 AD3d 1526, 1527 [4th Dept 2022]; *Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1656-1657 [4th Dept 2018]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181 [1978]). Further, we agree with petitioner that Addeo "may be held liable for the discrimination inasmuch as he is the sole owner of the corporate [respondent] and was a perpetrator of the discrimination against complainant" (*Matter of El Agave Mexican Grill, Inc. v New York State Div. of Human Rights*, 192 AD3d 1565, 1566 [4th Dept 2021]).

With respect to the monetary awards, we conclude that the award for lost wages is reasonably related to the discriminatory conduct and is supported by substantial evidence (*see id.* at 1567) and that the award of compensatory damages to complainant is " 'reasonably related to the wrongdoing, supported by substantial evidence, and comparable to other awards for similar injuries' " (*Miller*, 210 AD3d at 1527; *see Matter of Gold Coast Rest. Corp. v Gibson*, 67 AD3d 798, 800 [2d Dept 2009]). We also conclude that petitioner did not abuse her discretion as a matter of law in imposing the civil fine and penalty (*see Stellar Dental Mgt. LLC*, 162 AD3d at 1658; *see generally Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]).

Finally, we note that Supreme Court, in transferring the proceeding to us, erred insofar as it purported to "stay," i.e., toll, the accrual of statutory interest pending resolution of the proceeding. Such "interest is not a penalty, and instead represents the cost of having the use of another person's money for a specified period" (*Matter of Rochester Inst. of Tech. v New York State Div. of Human Rights*, 169 AD3d 1421, 1423 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 27 [2002]). Thus, respondents, " 'who ha[ve] actually had the use of the money, ha[ve] presumably used the money to [their] benefit and, consequently, ha[ve] realized some profit, tangible or otherwise, from having it in hand' " (*Aurecchione*, 98 NY2d at 27, quoting *Love v State of New York*, 78 NY2d 540, 545 [1991]; *see Rochester Inst. of Tech.*, 169 AD3d at 1423). We therefore conclude that statutory interest on the monetary awards and civil fine and penalty shall accrue as provided in the determination (*see Rochester Inst. of Tech.*, 169 AD3d at 1423).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

925

KA 19-01491

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAUN CAMERON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered June 29, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). As defendant contends and the People correctly concede, his waiver of the right to appeal is invalid. There is no basis in the record upon which to conclude that Supreme Court "ensured that . . . defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Thompson*, 219 AD3d 1666, 1667 [4th Dept 2023] [internal quotation marks omitted]; *see People v Robbins*, 213 AD3d 1278, 1279 [4th Dept 2023]). In addition, the court mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Marshall*, 214 AD3d 1360, 1361 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

928

KA 22-01559

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASEY J. HALSEY, DEFENDANT-APPELLANT.

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

CASEY J. HALSEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 20, 2022. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]). We affirm.

Contrary to defendant's contention in his main and pro se supplemental briefs, County Court did not abuse its discretion in denying his motion to withdraw his plea of guilty inasmuch as there is no "evidence of innocence, fraud, or mistake in inducing the plea" (*People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022] [internal quotation marks omitted]; *see generally* CPL 220.60 [3]; *People v Fisher*, 28 NY3d 717, 721 [2017]).

Specifically, we reject defendant's contention that he was fraudulently induced to plead guilty based upon a prior plea offer. Although the People initially offered a plea to assault in the second degree with "the minimum sentence authorized by law," that offer was conditioned upon defendant pleading as a second felony offender. At a later appearance, a new plea offer was made that was not conditioned upon defendant pleading guilty as a second felony offender and, at that appearance, the court unequivocally explained to defendant that the determinate sentence of imprisonment would be the same, i.e., three years, regardless of whether he was adjudicated a second felony offender after a second felony offender hearing.

We also reject defendant's contention in his main and pro se supplemental briefs that the court erred in denying his motion to withdraw his guilty plea because the plea colloquy negated an element of the offense or should have prompted the court to inquire further as to a claim of self defense (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]). At no point during his plea colloquy did defendant negate an element of the offense or assert that he acted in self defense. Instead, defendant "knowingly and voluntarily admitted the factual allegations of the crime[ ] and made no protest of innocence" during the plea colloquy (*People v Haffiz*, 19 NY3d 883, 884-885 [2012]). Additionally, the evidence proffered by defendant on his motion, including two pages of the complainant's medical records, did not establish that defendant's admission to causing physical injury was factually incorrect (*see generally People v Greer*, 189 AD3d 2142, 2143 [4th Dept 2020], *lv denied* 37 NY3d 956 [2021]).

Defendant's remaining grounds for contending that the court erred in denying his motion to withdraw his plea in his main and pro se supplemental briefs are unpreserved for our review (*see generally People v Peque*, 22 NY3d 168, 182 [2013], *cert denied* 574 US 840 [2014]).

Finally, defendant's challenge in his main and pro se supplemental briefs to the severity of his sentence is "foreclosed by his unchallenged waiver of the right to appeal" (*People v Allen*, 203 AD3d 1574, 1574 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]; *see People v Rosado-Thomas*, 181 AD3d 1166, 1167 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

929

KA 21-01382

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS CROSBY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 2, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count of assault in the second degree (§ 120.05 [2]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Mowery*, 213 AD3d 1300, 1300 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

930

KA 20-00176

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN JENKINS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 17, 2019. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (six counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Same memorandum as in *People v Jenkins* ([appeal No. 2] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

931

KA 21-00991

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN JENKINS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Erie County Court (James F. Bargnesi, J.), rendered November 12, 2020. Defendant was resentenced upon his conviction of robbery in the second degree (six counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of six counts of robbery in the second degree (Penal Law § 160.10 [2] [b]) and, in appeal No. 2, he appeals from a resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Redar*, 195 AD3d 1577, 1578 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016]). We otherwise affirm the judgment in appeal No. 1 and affirm the resentence in appeal No. 2.

Defendant contends that the waiver of the right to appeal is invalid and that the resentence is unduly harsh and severe. Preliminarily, inasmuch as the sentencing conditions under which defendant agreed to waive the right to appeal did not change following the waiver obtained during the plea proceeding, his waiver of the right to appeal, if valid, would preclude his challenge to the severity of the resentence (*see People v Jones*, 219 AD3d 1666, 1666 [4th Dept 2023]; *People v McCarthy*, 145 AD3d 1572, 1573 [4th Dept 2016]; *cf. People v Fortner* [appeal No. 1], 203 AD3d 1690, 1690 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]; *People v Allen*, 97 AD3d 1164, 1164 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012]). Nonetheless, even

assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see generally People v Thomas*, 34 NY3d 545, 560-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his resentence (*see Jones*, 219 AD3d at 1666), we conclude that the resentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

932

KA 20-00698

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KORANE K. WOMACK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered January 26, 2017. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree and criminal sexual act in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and criminal sexual act in the third degree (§ 130.40 [3]). In appeal No. 2, defendant appeals from a resentence imposing an indeterminate term of 20 years to life imprisonment on the criminal sexual act in the third degree count.

We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Redar*, 195 AD3d 1577, 1578 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016]).

Viewing the evidence independently and in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Dexter*, 191 AD3d 1246, 1246-1247 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence on the count of criminal sexual act in the first degree predicated upon a theory of forcible compulsion (Penal Law § 130.50 [1]). "Forcible compulsion involves either the use of physical force

or a threat, express or implied, which places [the victim] in fear of immediate death or physical injury . . . in an effort to force the victim to submit to a defendant's advances" (*People v O'Donnell*, 195 AD3d 1430, 1431 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021] [internal quotation marks omitted]). Here, the victim testified at trial that defendant used physical force to pull the victim by her arm into an alley and placed the victim in fear of immediate death or physical injury by making multiple threats that he would kill or beat the victim if she did not engage in oral sex.

Again viewing the evidence independently and in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349; *Dexter*, 191 AD3d at 1246-1247), we further reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence on the count of criminal sexual act in the third degree (Penal Law § 130.40 [3]). The jury was entitled to credit the testimony of the victim that defendant forced her to engage in sexual contact with him. The testimony of the victim that she did not consent to the contact was corroborated by the testimony of a witness who observed the victim crying for help. The testimony was further corroborated by the testimony of a police officer who, upon arriving at the scene, heard the victim crying in distress and further testified that once the victim saw the police officer, she ran to him asking for help.

Although a different result may not have been unreasonable on either count, " '[t]he credibility of the victim and the weight to be accorded [her] testimony were matters for the jury' " (*People v McCray*, 96 AD3d 1480, 1480 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]) and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded.

Contrary to defendant's contention in appeal No. 2, the resentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

933

KA 22-01444

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KORANE WOMACK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (John J. Ark, J.), rendered May 16, 2022. Defendant was resentenced upon his conviction of criminal sexual act in the first degree and criminal sexual act in the third degree.

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

Same memorandum as in *People v Womack* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

936

KA 17-00398

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY M. MARTIN, DEFENDANT-APPELLANT.

ANNE LABARBERA, PC, NEW YORK CITY (ANNE LABARBERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered January 3, 2017. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the second degree and driving while intoxicated.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on the count of aggravated unlicensed operation of a motor vehicle in the second degree and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of misdemeanor driving while intoxicated (DWI) (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [b] [i]) and aggravated unlicensed operation of a motor vehicle in the second degree (AUO) (§ 511 [2] [a] [ii]). As a preliminary matter, we note that it is unnecessary to review defendant's challenge to his waiver of the right to appeal inasmuch as "none of the issues he raised would be foreclosed from review by a valid waiver of the right to appeal" (*People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *see People v Perkins*, 162 AD3d 1641, 1642-1643 [4th Dept 2018]; *People v Green*, 122 AD3d 1342, 1343 [4th Dept 2014]).

Defendant contends that the plea was not knowing, voluntary, and intelligent because County Court failed to advise him that the sentence on the DWI conviction would include use of an ignition interlock device for all three years of probation and not merely the two years that, according to defendant, was offered prior to entry of the plea. However, defendant was required, and failed, to preserve for our review that contention. The record demonstrates "that, prior to the imposition of [the] sentence, defendant had the actual and practical ability to object and preserve the claim he now

makes—[i.e.,] that his guilty plea was involuntary because of a deficient plea allocution as to the sentence promise, a direct consequence of the plea" (*People v Bush*, 38 NY3d 66, 71 [2022]; *see People v Williams*, 27 NY3d 212, 219-223 [2016]; *cf. People v Tung Nguyen*, 191 AD3d 1329, 1330-1331 [4th Dept 2021]). Specifically, despite being informed at the outset of the sentencing proceeding that the sentence on the DWI conviction would include use of an ignition interlock device for all three years of probation, and then being given an opportunity to address the court prior to imposition of the sentence, defendant did not move to withdraw the plea or otherwise object to the court's purported failure to apprise him of the direct consequences of his guilty plea. Defendant thus failed to preserve a challenge to the voluntariness of his plea (*see Williams*, 27 NY3d at 223; *People v Murray*, 15 NY3d 725, 726-727 [2010]; *People v Sealey*, 207 AD3d 1088, 1088-1089 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

As defendant further contends and the People correctly concede, the court erred by imposing the sentence on the AUO count when defendant was not present in violation of CPL 380.40 (1). We therefore modify the judgment by vacating the conditional discharge imposed on the AUO count and direct that defendant, upon remittal, be resentenced on that count (*see Perkins*, 162 AD3d at 1643).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

937

KA 09-00318

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHEQUAN L. NATHAN, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ELEANOR BIGGERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 18, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). On a prior appeal, we affirmed the judgment (*People v Nathan*, 108 AD3d 1077 [4th Dept 2013]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel's representation was not constitutionally adequate (*People v Nathan*, 208 AD3d 1653 [4th Dept 2022]). Specifically, we concluded that meaningful representation required that appellate counsel, after the Court of Appeals decided *People v Rudolph* (21 NY3d 497 [2013]) during the pendency of the prior appeal, seek to file an appropriate motion in this Court in order to raise the argument that *Rudolph* required that the sentence must be vacated and the matter remitted for determination of defendant's youthful offender status (*Nathan*, 208 AD3d at 1653-1654).

Upon reviewing the appeal de novo, we conclude that Supreme Court erred in failing to determine whether defendant should be afforded youthful offender status. Pursuant to CPL 720.20 (1), the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" (*Rudolph*, 21 NY3d at 501; *see Nathan*, 208 AD3d at 1653; *People v Crimm*, 122 AD3d 1300, 1300 [4th Dept 2014]). "[W]hile eligible youths are not necessarily entitled to be sentenced as a [youthful offender], all eligible youths

have the right ‘to have a court decide whether such treatment is justified’ ” (*People v Minemier*, 29 NY3d 414, 419 [2017], quoting *Rudolph*, 21 NY3d at 501). Here, contrary to the parties’ incorrect concessions, to which we are not bound (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Adair*, 177 AD3d 1357, 1357 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]), we note that “manslaughter in the first degree is not an ‘armed felony’ for purposes of CPL 720.10 (2) (a) (ii)” (*People v Graham*, 202 AD3d 1482, 1482-1483 [4th Dept 2022]). Thus, defendant’s “eligibility for youthful offender status d[oes] not turn . . . on the existence of a statutory mitigating factor enumerated in CPL 720.10 (3)” (*id.*; *see People v Jarvis*, 186 AD3d 1086, 1086-1087 [4th Dept 2020]). Inasmuch as defendant is otherwise eligible for youthful offender status on this conviction (*see* CPL 720.10 [1], [2]), the court was obligated to make a discretionary youthful offender determination before imposing sentence (*see id.* subd [1]; *Rudolph*, 21 NY3d at 501; *Graham*, 202 AD3d at 1483). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see Graham*, 202 AD3d at 1483).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

938

CAF 22-01142

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF LYNDA M., MAUREEN C., AND NEVEAH M.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARK M., RESPONDENT-APPELLANT, (AND ERICA C., RESPONDENT).

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered February 17, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Mark M. abused one of the subject children and derivatively abused the other two subject children.

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

Memorandum: Respondent father appeals from an order of fact-finding and disposition determining, following a hearing, that he sexually abused his eldest daughter (daughter) and derivatively abused his two other children.

We reject the father's contention that Family Court's finding of sexual abuse is not supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). " 'A child's out-of-court statements may form the basis for a finding of [abuse] . . . as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]; *see* § 1046 [a] [vi]). Here, the daughter's out-of-court statements were sufficiently corroborated by her "age-inappropriate knowledge of sexual conduct" (*Matter of William J.B. v Dayna L.S.*, 158 AD3d 1223, 1224 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020]). Moreover, the statements made to the police by the daughter's cousin also provided

sufficient cross-corroboration inasmuch as the statements regarding his sexual abuse by the father "tend to support the statements of [the daughter] and, viewed together, give sufficient indicia of reliability to each [child's] out-of-court statements" (*Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *see Matter of Elizabeth G.*, 255 AD2d 1010, 1012 [4th Dept 1998], *lv dismissed* 93 NY2d 848 [1999], *lv denied* 93 NY2d 814 [1999]). Additionally, the same cousin stated that he had observed the father abuse the daughter (*see generally Elizabeth G.*, 255 AD2d at 1012).

We agree with the father that the court erred in admitting in evidence that portion of the police report referring to some of the results of the father's polygraph examination and allowing a detective to testify regarding the same (*see Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279, 1279 [4th Dept 2008]; *Matter of Stephanie B.*, 245 AD2d 1062, 1063 [4th Dept 1997]). Nonetheless, we conclude that the error is harmless (*see Charles M.O.*, 52 AD3d at 1279; *Matter of Daniel R. v Noel R.*, 195 AD2d 704, 708 [3d Dept 1993]).

Finally, we have reviewed the father's remaining contentions and conclude that they lack merit.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

940

CAF 22-01111

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DENISE M. THURSTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAT J. BOMBARD, RESPONDENT-APPELLANT.

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

DENISE M. THURSTON, PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered May 18, 2022, in a proceeding pursuant to Family Court Act article 4. The order committed respondent to three months in jail.

It is hereby ORDERED that said appeal is unanimously dismissed without costs and respondent is granted leave to move to reinstate the appeal upon the posting of an undertaking with Family Court, Onondaga County, in the amount of $90,000 within 60 days of service of a copy of the order of this Court with notice of entry.

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order committing him to jail for three months for willfully failing to obey a child support order. The father moved to Florida without ever serving his term of imprisonment or purging the contempt finding by paying the amount set by the court toward his child support arrears. The father is now the subject of a bench warrant in this State, but has refused to return.

Contrary to the father's contention, the fugitive disentitlement theory applies to this appeal (*see Matter of Shehatou v Louka*, 118 AD3d 1357, 1358 [4th Dept 2014]; *Matter of Skiff-Murray v Murray,* 305 AD2d 751, 752-753 [3d Dept 2003]). By the father's "absence, [he] is evading the very order[ ] from which [he] seeks appellate relief and has willfully made [himself] unavailable to obey the mandate of [Family Court] in the event of an affirmance" (*Shehatou*, 118 AD3d at 1358 [internal quotation marks omitted]). We therefore dismiss the appeal and grant leave to the father to move to reinstate it on the condition that, within 60 days of the service of a copy of the order of this Court with notice of entry, he posts an undertaking with the court in the amount of $90,000.00, i.e., the amount set by the court to allow the father to purge the term of incarceration (*see id*.). In

light of our determination, we decline to reach the father's remaining contentions.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

941

CA 23-01129

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND NOWAK, JJ.

COLE R. SMITH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT D. SMITH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

CROUSE HEALTH HOSPITAL, INC., VANESSA GOYES RUIZ, M.D., KAITLYN C. LACHANCE, R.N., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PORTER LAW GROUP, SYRACUSE (JEFFREY M. NARUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 26, 2023. The order, among other things, denied the motion of defendants Crouse Health Hospital, Inc., Vanessa Goyes Ruiz, M.D., and Kaitlyn C. LaChance, R.N. seeking, inter alia, to quash plaintiff's subpoena for depositions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 7, 2023,

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

942

CA 23-00103

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF KERRI W.S., PSYD., AND
CARL J.S., JR., J.D., MA, INDIVIDUALLY AND ON
BEHALF OF THEIR MINOR SON, T.S.,
PETITIONERS-APPELLANTS,

V ORDER

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF HEALTH FOR STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF HEALTH, MARK FRENZEL,
IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF MONROE
ONE BOCES, FAIRPORT, AND MONROE ONE BOCES,
FAIRPORT, RESPONDENTS-RESPONDENTS.

PATRICIA FINN ATTORNEY, P.C., NANUET (PATRICIA FINN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH FOR STATE OF NEW YORK, AND NEW YORK STATE DEPARTMENT OF HEALTH.

HARRIS BEACH PLLC, PITTSFORD (JOSHUA D. STEELE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS MARK FRENZEL, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF MONROE ONE BOCES, FAIRPORT, AND MONROE ONE BOCES, FAIRPORT.

Appeal from a judgment of the Supreme Court, Yates County (Daniel J. Doyle, J.), entered January 3, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

943

CA 23-00600

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND NOWAK, JJ.

CLOVER/ALLEN'S CREEK NEIGHBORHOOD
ASSOCIATION LLC, SAVE MONROE AVE., INC.,
2900 MONROE AVE., LLC, CLIFFORDS OF
PITTSFORD, L.P., ELEXCO LAND SERVICES, INC.,
JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN,
AND STEVEN M. DEPERRIOR,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

M&F LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC,
MARDANTH ENTERPRISES, INC., M&F, LLC,
DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH
ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS
AS DANIELE FAMILY COMPANIES, TOWN OF BRIGHTON,
TOWN BOARD OF THE TOWN OF BRIGHTON, NMS ALLENS
CREEK INC., AND ROCHESTER GAS AND ELECTRIC
COMPANY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC,
CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND
SERVICES, INC., JULIA D. KOPP, MARK BOYLAN,
ANNE BOYLAN, AND STEVEN M. DEPERRIOR,
PLAINTIFFS-APPELLANTS,

V

TOWN OF BRIGHTON, TOWN BOARD OF THE TOWN OF
BRIGHTON, TOWN OF BRIGHTON PLANNING BOARD,
DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC,
MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC.,
M&F, LLC, THE DANIELE FAMILY COMPANIES,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 2.)

BRIGHTON GRASSROOTS, LLC, PLAINTIFF-APPELLANT,

V

TOWN OF BRIGHTON, TOWN OF BRIGHTON TOWN BOARD,
TOWN OF BRIGHTON PLANNING BOARD, M&F, LLC,
DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH
ENTERPRISES, INC., DANIELE MANAGEMENT, LLC,
COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY

COMPANIES, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 3.)

BRIGHTON GRASSROOTS, LLC, PLAINTIFF-APPELLANT,

V

TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON TOWN BOARD, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 4.)

SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN, AND STEVEN M. DEPERRIOR, PLAINTIFFS-APPELLANTS,

V

TOWN OF BRIGHTON PLANNING BOARD, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 5.)

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN, AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V

TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC, PETITIONER-APPELLANT,

V

TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON OFFICE OF THE BUILDING INSPECTOR, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, RESPONDENTS-RESPONDENTS, ET AL., RESPONDENTS.
(PROCEEDING NO. 2.)

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR PLAINTIFF-APPELLANT CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION, LLC.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS AND PETITIONERS-APPELLANTS SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN, AND STEVEN M. DEPERRIOR.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT AND PETITIONER-APPELLANT BRIGHTON GRASSROOTS, LLC.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), AND ROTHENBERG LAW, FOR DEFENDANTS-RESPONDENTS AND RESPONDENTS-RESPONDENTS M&F LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, AND MARDANTH ENTERPRISES, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, AND TOWN OF BRIGHTON PLANNING BOARD.

Appeals from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 28, 2023. The judgment, inter alia, issued declarations in favor of defendants and respondents.

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

Memorandum: Plaintiffs and petitioners (plaintiffs), individuals and organizations opposed to the development of a 93,000-square-foot commercial plaza (project), brought these actions and proceedings (actions) against defendants and respondents (defendants), including the Town of Brighton (Town), among others. Plaintiffs sought, inter alia, declaratory and injunctive relief related to the project's purported encroachment upon a 10-foot-wide strip of land over which the Town has perpetual non-exclusive easements to maintain a pedestrian pathway for public use (Town Easements). The actions were consolidated and, following a bench trial, Supreme Court issued a

global judgment that, inter alia, issued declarations in favor of defendants and dismissed plaintiffs' remaining claims. On appeal, plaintiffs contend that the court erred in declaring that the public trust doctrine is inapplicable to the Town Easements and that the Town did not constructively abandon the Town Easements in violation of Town Law § 64 (2).

Where, as here, the appeals follow a nonjury trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see Buchmann v State of New York*, 214 AD3d 1412, 1413 [4th Dept 2023]). "Nonetheless, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Davis v Hinds*, 215 AD3d 1242, 1243 [4th Dept 2023]). Moreover, when conducting such a review, we must view the record "in the light most favorable to sustain the judgment" (*Farace v State of New York*, 266 AD2d 870, 871 [4th Dept 1999]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286 [4th Dept 2014]). Upon conducting that review, we conclude that there is a fair interpretation of the evidence supporting the court's well-reasoned determinations. We have considered plaintiffs' specific contentions, and we conclude that they do not require a different result.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

946

CA 23-00997

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND DELCONTE, JJ.

ADIRONDACK BANK, N.A., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CBB REALTY, LLC, ET AL., DEFENDANTS,
CRAIG S. BRODOCK, DEFENDANT-RESPONDENT,
AND BARBARA M. BRODOCK, ALSO KNOWN AS BARBARA T. BRODOCK, DEFENDANT-APPELLANT.

YANG-PATYI LAW FIRM, PLLC, SYRACUSE (JOSEPHINE YANG-PATYI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered December 7, 2022. The order denied the motion of defendant Barbara M. Brodock, also known as Barbara T. Brodock, to compel the payment of an insurance premium and to terminate a receivership.

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

Memorandum: In this mortgage foreclosure action, Barbara M. Brodock, also known as Barbara T. Brodock (defendant), appeals from an order that denied her motion to compel the court-appointed receiver to pay an insurance premium on unencumbered property in Florida and to terminate the receivership. Defendant's contention that language in Supreme Court's decision concerning the receiver's past performance should be struck is not properly before us inasmuch as "the fact that [a decision] 'may contain language or reasoning which [parties] deem adverse to their interests does not furnish them with a basis . . . to take an appeal' " (*Matter of Olney v Town of Barrington*, 162 AD3d 1610, 1611 [4th Dept 2018]; *see Matter of Khatib v Liverpool Cent. School Dist.*, 244 AD2d 957, 957 [4th Dept 1997]). Similarly, defendant's contention that any of the court's "decision[s] and orders [that] contradict the terms of the [m]arital [s]ettlement [a]greement [between defendant and her former husband] and one another, [should] be vacated or modified so that they are consistent" is raised for the first time on appeal and is therefore not properly before us (*see Dunn v Covanta Niagara I, LLC* [appeal No. 1], 181 AD3d 1340, 1340 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We have reviewed defendant's remaining contentions and conclude that

none requires modification or reversal of the order appealed from.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

946.1

KA 19-00817

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL WALLACE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 6, 2019. The appeal was held by this Court by order entered March 24, 2023, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (214 AD3d 1448 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count of manslaughter in the second degree (Penal Law § 125.15 [1]) and six counts of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We previously held this case, reserved decision, and remitted the matter to Supreme Court for a ruling on defendant's motion to redact certain statements he made from the preplea investigation report, on which the court had reserved decision but failed to rule (*People v Wallace*, 214 AD3d 1448 [4th Dept 2023]). On remittal, the court granted the motion.

Contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

947

KA 21-00399

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIK J. WARREN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered December 12, 2019. The judgment convicted defendant, upon his plea of guilty, of reckless assault of a child.

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 reckless assault of a child (Penal Law § 120.02). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Defendant did not preserve his contention regarding the order of protection issued at sentencing (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]; *see generally People v Smart*, 169 AD3d 1525, 1526 [4th Dept 2019]; *People v Foster*, 87 AD3d 299, 301 [2d Dept 2011], *lv denied* 18 NY3d 858 [2011]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3]; *see also People v Storms*, 147 AD3d 1341, 1341 [4th Dept 2017]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

949

KA 22-00978

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FIMBO KAKESA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 12, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from separate judgments convicting him, upon his guilty pleas, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends in each appeal that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waivers of the right to appeal are invalid and therefore do not preclude our review of his challenge to the severity of his sentences (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

950

KA 22-00979

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FIMBO KAKESA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 12, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Kakesa* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

967

CA 22-01721

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND DELCONTE, JJ.

WEST COAST SERVICING, LLC, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT J. WILLIAMS, ET AL., DEFENDANTS,
AND GWENDOLYN WILLIAMS, DEFENDANT-APPELLANT.

RONALD D. WEISS, P.C., MELVILLE (ROSEMARIE KLIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARGOLIN, WEINREB & NIERER, LLP, SYOSSET (SETH D. WEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 18, 2022. The order, inter alia, denied the motion of defendant Gwendolyn Williams to vacate a judgment of foreclosure and sale.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

972

KA 22-01556

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SARAH M. KLINE, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 18, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the third degree.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

973

KA 22-00343

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON LUCAS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 29, 2018. The judgment convicted defendant upon his plea of guilty of rape in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of rape in the first degree (Penal Law § 130.35 [1]). We agree with defendant that his waiver of the right to appeal is invalid because Supreme Court's "oral colloquy mischaracterized it as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Schlifke*, 210 AD3d 1518, 1518 [4th Dept 2022], *lv denied* 39 NY3d 1080 [2023]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver does not cure the deficient oral colloquy because the court did not inquire of defendant whether he understood the written waiver or whether he had read the waiver before signing it (*see People v Bradshaw*, 18 NY3d 257, 262, 267 [2011]; *People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

975

KA 20-00968

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIO RESTO, ALSO KNOWN AS BENNY,
DEFENDANT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PAUL G. LYONS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered November 20, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the first degree (Penal Law §§ 110.00, 220.21 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see Alls*, 187 AD3d at 1515), we conclude that the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

977

KA 23-00571

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN R. BUSSOM, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered March 17, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in refusing to grant him a downward departure from his presumptive risk level. We reject that contention.

"Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score" (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4-5 [2006] [Guidelines]). "At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the [G]uidelines" (*Gillotti*, 23 NY3d at 861). "At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand" (*id.*). "If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure" (*id.*). "Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to

determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*id.*).

Here, "[a]lthough advanced age may constitute a basis for a downward departure," we conclude that defendant "failed to demonstrate that his age at the time of the SORA hearing, [57] years old, would, in and of itself, reduce his risk of reoffense" (*People v Griffin*, 187 AD3d 1566, 1566 [4th Dept 2020] [internal quotation marks omitted]; *see People v Munoz*, 155 AD3d 1068, 1069 [2d Dept 2017], *lv denied* 30 NY3d 912 [2018]). While defendant "submitted research studies that discussed the lower recidivism rate of sex offenders as age increases," he merely made a "conclusory assertion" that his age alone proved the existence of the mitigating factor and "did not establish by a preponderance of the evidence how his age minimize[d] his own risk of reoffending, particularly given that he was [44] years old at the time of the [last sexual contact with the minor victim]" (*People v Small*, 217 AD3d 1289, 1290 [3d Dept 2023]; *see Griffin*, 187 AD3d at 1566; *People v Rivas*, 185 AD3d 740, 740-741 [2d Dept 2020], *lv denied* 35 NY3d 918 [2020]; *People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]). Thus, even if we assume, arguendo, that defendant is correct in asserting that no aggravating factors were present, the court lacked the discretion to order a downward departure inasmuch as defendant failed to surmount the second analytical step of proving the existence of an appropriate mitigating factor (*see People v Stevens*, 207 AD3d 1061, 1061-1062 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]; *People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally Gillotti*, 23 NY3d at 861).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

978

KA 19-02220

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY CLINTON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered August 16, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), stemming from the shooting death of the victim. We affirm.

Defendant contends that County Court erred in granting the People's for-cause challenge to a prospective juror. Because defendant failed to object to the court's ultimate ruling on that for-cause challenge after the court conducted additional voir dire of the prospective juror, thereby acquiescing in the ruling, we conclude that defendant's contention is unpreserved for our review (*see* CPL 470.05 [2]; *People v Smith*, 200 AD3d 1689, 1691 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]; *People v Crumpler*, 163 AD3d 1457, 1460 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1125 [2018]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that his conviction of criminal possession of a weapon in the second degree under count 3 of the indictment (Penal Law § 265.03 [3]) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to

raise a constitutional challenge before the trial court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of [his conviction under the] statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *2-7 [2023]), and the mode of proceedings exception to the preservation requirement does not apply (*see People v David*, — NY3d —, —, 2023 NY Slip Op 05970, *3-4 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, contrary to defendant's contention, the court did not err in imposing consecutive sentences. The court sentenced defendant to, inter alia, an indeterminate term of 25 years to life on the murder count, and a consecutive determinate term of five years, plus five years of postrelease supervision, on count 3 of the indictment charging him with "simple" weapon possession (Penal Law § 265.03 [3]). When a defendant is so charged, "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013]; *see People v Malloy*, 33 NY3d 1078, 1080 [2019]).

Here, the evidence at trial establishes that, on the night of the shooting, defendant and the victim were talking outside a corner store. After about 10 to 15 minutes of conversation, defendant pulled out a gun and shot the victim once in the head. We conclude that the evidence "support[ed] the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to kill" (*Malloy*, 33 NY3d at 1080; *see People v Belton*, 199 AD3d 1373, 1375 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Evans*, 132 AD3d 1398, 1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

980

KA 22-01196

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY R. HICKEY, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered July 7, 2022. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that his statutory right to a speedy trial was violated inasmuch as County Court erred in denying that part of his omnibus motion seeking to strike the People's certificate of compliance as invalid. By pleading guilty, defendant forfeited review of his contention regarding the motion to strike (*see People v Smith*, 217 AD3d 1578, 1578 [4th Dept 2023]). Moreover, defendant's statutory speedy trial contention is unpreserved for our review (*see People v Hardy*, 47 NY2d 500, 505 [1979]; *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Pohl*, 160 AD3d 1453, 1454 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]; *cf. People v Gaskin*, 214 AD3d 1353, 1355 [4th Dept 2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Valentin*, 183 AD3d at 1272; *Pohl*, 160 AD3d at 1454). Finally, the sentence is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

982

CAF 23-00117

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF BRANDON P.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER M.C., RESPONDENT-APPELLANT,
AND JASON M.C., RESPONDENT-RESPONDENT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered January 3, 2023, in a proceeding pursuant to Family Court Act article 5. The order dismissed the amended petition.

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

Memorandum: Petitioner, who purportedly had sexual intercourse with respondent Jennifer M.C. (mother) during her marriage to respondent Jason M.C., commenced this proceeding pursuant to Family Court Act article 5 by filing a petition seeking to establish the paternity of the subject child through genetic testing, which petition was superseded by an amended petition seeking the same relief. Family Court concluded, after a hearing, that it was not in the best interests of the child to order genetic testing to determine the child's paternity and, in effect, dismissed the amended petition. The mother appeals.

We conclude that the mother's appeal must be dismissed inasmuch as she is not an aggrieved party (*see* CPLR 5511; *Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1385-1386 [4th Dept 2019], *lv dismissed* 38 NY3d 1167 [2022]). "A party is aggrieved when [the party] asks for relief but that relief is denied in whole or in part . . . [or] when someone asks for relief against [the party], which the [party] opposes, and the relief is granted in whole or in part" (*Tariq S.*, 177 AD3d at 1385 [internal quotation marks omitted]). Here, the mother did not seek any relief herself, and no one sought any relief against her (*see id.*). Indeed, the mother did not formally join in the amended petition, nor did she file a petition of her own seeking to establish the paternity of the child (*see id.* at 1385-1386; *Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1457-1458 [4th Dept 2015], *lv*

dismissed 26 NY3d 995 [2015]; *cf.* Family Ct Act § 522; *Matter of Jennifer L. v Gerald S.*, 145 AD3d 1581, 1582 [4th Dept 2016], *lv dismissed* 29 NY3d 942 [2017]). Moreover, the mother's rights remain unchanged, and the fact that she may be disappointed by the order does not equate to aggrievement under CPLR 5511 (*see Tariq S.*, 177 AD3d at 1386; *see generally Matter of DeLong*, 89 AD2d 368, 369-370 [4th Dept 1982], *lv denied* 58 NY2d 606 [1983]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

983

CAF 22-00797

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF KAMERON R.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALEXIS R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROBERT J. GALLAMORE, ST. GEORGE, UTAH, FOR RESPONDENT-APPELLANT.

AMY L. HALLENBECK, GLOVERSVILLE, FOR PETITIONER-RESPONDENT.

SCOTT OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered April 25, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and continued the custody of the subject child with the mother of respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of disposition that, inter alia, determined that she neglected the subject child. In appeal No. 2, the mother appeals from an order of protection issued in favor of the subject child. As an initial matter, we dismiss the appeal from the order in appeal No. 2 as moot inasmuch as the challenged order of protection expired by its terms on March 10, 2023 (*see Matter of Romeo M. [Nicole R.]*, 94 AD3d 1464, 1465 [4th Dept 2012], *lv denied* 19 NY3d 810 [2012]; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *Matter of Leah S.*, 61 AD3d 1402, 1402 [4th Dept 2009]). We further conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Contrary to the mother’s contention in appeal No. 1, we conclude that Family Court properly admitted in evidence her medical records and the medical records of the subject child (*see Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1403 [4th Dept 2021]; *Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1594-1595 [4th Dept 2019]; *see generally* Family Ct Act § 1046 [a] [iv]). Even assuming, arguendo,

that the court erred in admitting certain parts of those records, we conclude that any such error is harmless because, "even if those records are excluded from consideration, the finding of neglect is nonetheless supported by a preponderance of the credible evidence" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]; *see Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

We further reject the mother's contention that the court erred in determining that petitioner established by a preponderance of the evidence that she neglected the child. Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." That statutory presumption " 'operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established' " (*Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]; *see Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]).

Here, petitioner established that the mother admitted repeated drug use while pregnant. Indeed, petitioner established that, at the time of the child's birth, both the mother and the child tested positive for multiple drugs. Moreover, the evidence at the fact-finding hearing established that, following the child's birth, the mother relapsed into drug misuse several times during the relevant time frame and again tested positive for multiple drugs. Thus, the court's determination that petitioner established neglect by a preponderance of the evidence is supported by the requisite sound and substantial basis in the record (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1677-1678 [4th Dept 2021]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644-1645 [4th Dept 2019]).

Additionally, we conclude, contrary to the mother's contention, that the court properly determined that petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the child on the basis that she "knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Brian P. [April C.]*, 89 AD3d 1530, 1530 [4th Dept 2011]; *see generally* Family Ct Act §§ 1012 [f] [i] [b]; 1046 [a] [ii]). Specifically, the record supports the court's determination that, while the child was in the mother's care, at the age of approximately eight weeks, she dropped him and he landed on his head, causing him to sustain a skull fracture and hematoma. The mother did not tell anyone what had happened or

take the child to the hospital until the next day when the child was feverish and was suffering seizures. In short, petitioner's evidence established that the child sustained injuries that "would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of [the] child" (Family Ct Act § 1046 [a] [ii]; *see Matter of Grayson R.V. [Jessica D.]*, 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]; *see generally Matter of Philip M.*, 82 NY2d 238, 244 [1993]). Based on the child's age and size, the mother should have known that dropping the child with the result that he landed on his head "required action in order to avoid actual or potential impairment of the child" (*Matter of Nathanael E. [Melodi F.]*, 160 AD3d 1075, 1079 [3d Dept 2018] [internal quotation marks omitted]).

We also note that the court's credibility determinations are entitled to great deference, and we will not disturb those determinations, where, as here, they are supported by the record (*see Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842, 1843-1844 [4th Dept 2019]; *Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015]). Additionally, the court properly drew " 'the strongest possible negative inference' against [the mother] after [she] failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Noah C.*, 192 AD3d at 1678; *Matter of Brittany W. [Patrick W]*, 103 AD3d 1217, 1218 [4th Dept 2013]).

Finally, we have considered the mother's remaining contentions and conclude that none warrants reversal or modification of the order in appeal No. 1.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

984

CAF 22-00798

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF KAMERON C.R.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALEXIS M.B.-R., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ROBERT J. GALLAMORE, ST. GEORGE, UTAH, FOR RESPONDENT-APPELLANT.

AMY L. HALLENBECK, GLOVERSVILLE, FOR PETITIONER-RESPONDENT.

SCOTT OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered April 25, 2022, in a proceeding pursuant to Family Court Act article 10. The order granted an order of protection against respondent in favor of the subject child.

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

Same memorandum as in *Matter of Kameron R. (Alexis R.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

985

CAF 22-01792

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF CLARISSA F., WILLIAM F.,
ELAINA F., AND AYLA O.
---------- MEMORANDUM AND ORDER
ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

REX O., RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

ALLISON CARROW, COUNTY ATTORNEY, BELMONT, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), dated November 2, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject children with their mother after granting petitioner's motion for summary judgment on the issue whether respondent had neglected the children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the matter is remitted to Family Court, Allegany County, for further proceedings on the petition.

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent appeals from an order of disposition, entered on respondent's consent, that, inter alia, placed the children in the custody of their mother and placed respondent under petitioner's supervision for one year. Respondent and the mother are the biological parents of Ayla O. The mother is also the biological parent of Clarissa F., William F., and Elaina F. In October 2021, petitioner received a report from the State Central Register and information from a police investigator regarding allegations that respondent had inappropriately touched Clarissa, Elaina, and a friend of theirs. As a result of the allegations, respondent was arrested and charged with three counts of forcible touching. While the criminal matter was pending, petitioner commenced this neglect

proceeding, alleging that respondent was a person legally responsible for the care of the children, had neglected Clarissa and Elaina, and had derivatively neglected William and Ayla. After respondent was convicted upon his guilty plea of one count of endangering the welfare of a child, petitioner moved for summary judgment on the petition based upon, inter alia, the plea and certificate of conviction in the criminal matter. In a fact-finding order, Family Court granted petitioner's motion and determined that respondent neglected the children. Respondent appeals from the subsequent dispositional order.

Initially, we note that the order of disposition brings up for our review the court's contested finding of neglect (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]) and we further note that respondent "is aggrieved by that finding despite [his] consent to the disposition" (*Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]; *see Noah C.*, 192 AD3d at 1676-1677).

We agree with respondent that the court erred in granting petitioner's motion for summary judgment. "Family Court may grant summary judgment in a[ ] . . . neglect proceeding if no triable issue of fact exists" (*Matter of Kai G. [Amanda G.]*, 197 AD3d 817, 820 [3d Dept 2021]; *see* Family Ct Act § 165 [a]; *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Matter of Celeste S. [Richard B.]*, 164 AD3d 1605, 1605 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). As always, "[o]n a motion for summary judgment, the moving party bears the burden of establishing its prima facie entitlement to judgment as a matter of law" (*Kai G.*, 197 AD3d at 820; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Celeste S.*, 164 AD3d at 1605). Only if that burden is met does "the burden shift[ ] to the party opposing the motion to demonstrate the existence of a material issue of fact" (*Kai G.*, 197 AD3d at 820). "In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party" (*id.*).

"As relevant here, a criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" (*Matter of Lilliana K. [Ronald K.]*, 174 AD3d 990, 990-991 [3d Dept 2019] [internal quotation marks omitted]). "It is well settled that [t]he party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Matter of Stephiana UU.*, 66 AD3d 1160, 1163 [3d Dept 2009] [internal quotation marks omitted]). "In order to find a defendant guilty of endangering the welfare of a child, it must be proven that '[the defendant] knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old' " (*Lilliana K.*, 174 AD3d at 991, quoting Penal Law § 260.10 [1]). "In turn, [t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or

emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care" (*id.* [internal quotation marks omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]).

Here, the petition alleges that respondent engaged in the inappropriate touching on or about July 14, 2021 (Clarissa), October 13, 2021 (Elaina), and July 11, 2021 (the friend). The affidavit in support of the motion for summary judgment states that the offenses against all three children occurred on or about July 21, 2021. The certificate of conviction does not list the date or dates of the offense or the victim, and the minutes of respondent's plea allocution are not contained in the record on appeal. Thus, contrary to petitioner's assertion, it failed to establish the identity of the issues in the present litigation and the prior determination inasmuch as it is not clear whether the conviction related to the allegations with respect to Clarissa or Elaina—two of the children covered in the neglect petition and for whom respondent was a person legally responsible—or their friend—a child not named in the petition and for whom respondent was not legally responsible. "[I]t is not enough to merely establish the existence of the criminal conviction; the petitioner must prove a factual nexus between the conviction and the allegations made in the neglect petition" (*Matter of Jewelisbeth JJ. [Emmanuel KK.]*, 97 AD3d 887, 888 [3d Dept 2012]). Thus, on this record, we conclude that petitioner failed to meet its burden of establishing as a matter of law that respondent neglected Clarissa or Elaina (*cf. Matter of Blima M. [Samuel M.]*, 150 AD3d 1006, 1008 [2d Dept 2017]; *Matter of Doe*, 47 AD3d 283, 285 [3d Dept 2007], *lv denied* 10 NY3d 709 [2008]).

Inasmuch as petitioner failed to establish that respondent neglected Clarissa or Elaina, petitioner also failed to meet its burden of establishing as a matter of law respondent's derivative neglect of William and Ayla (*see Matter of David W. [Patricio W.]*, 191 AD3d 1349, 1351-1352 [4th Dept 2021]; *see generally* Family Ct Act § 1046 [a] [i]; *Matter of Sonja R. [Victor R.]*, 216 AD3d 1096, 1099 [2d Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

989

CA 22-01667

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

2006905 ONTARIO INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOODRICH AEROSPACE CANADA, LTD., AND DINO SOAVE, DEFENDANTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAY PITNEY LLP, HARTFORD, CONNECTICUT (JOHN W. CERRETA OF COUNSEL), AND NASH CONNORS, P.C., BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 21, 2022. The judgment dismissed the amended complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, fraud allegedly arising from failed negotiations regarding the renewal of a contract to supply parts. Plaintiff appeals from a judgment dismissing the amended complaint upon a jury verdict in favor of defendants. Plaintiff's appeal brings up for review both that part of an order granting defendants' pretrial motion to dismiss insofar as it sought to dismiss the negligent misrepresentation and fraudulent concealment causes of action alleged in the amended complaint and an order denying plaintiff's posttrial motion for judgment notwithstanding the verdict on the first element of the fraud cause of action or, in the alternative, to set aside the verdict and for a new trial on that cause of action (*see* CPLR 5501 [a] [1], [2]). We affirm.

Contrary to plaintiff's contention, we conclude that Supreme Court (Chimes, J.) properly dismissed, pursuant to CPLR 3211 (a) (7), the negligent misrepresentation and fraudulent concealment causes of action alleged in the amended complaint. Plaintiff failed to allege the requisite special relationship between it and defendant Goodrich Aerospace Canada, Ltd. (Goodrich) to state a cause of action for negligent misrepresentation. " 'Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties' " (*Flaherty Funding Corp. v Johnson*, 105 AD3d 1445, 1446 [4th Dept 2013]; *see Wright v Selle*, 27 AD3d 1065, 1067

[4th Dept 2006]) and, here, we conclude that plaintiff alleged, at most, that it and Goodrich had an ordinary business relationship (*see Flaherty Funding Corp.*, 105 AD3d at 1446). For the same reason, plaintiff failed to state a cause of action for fraudulent concealment (*see Lantau Holdings Ltd. v Orient Equal Intl. Group Ltd.*, 161 AD3d 714, 714-715 [1st Dept 2018]; *see also Dreamco Dev. Corp. v Empire State Dev. Corp.*, 191 AD3d 1444, 1445-1446 [4th Dept 2021]).

Next, we reject plaintiff's contention that the court (Walker, A.J.), in ruling upon defendants' motion in limine, erred in precluding plaintiff from introducing evidence of certain prior bad acts allegedly committed by defendant Dino Soave. " '[T]rial courts are accorded wide discretion in making evidentiary rulings [and], absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v Beals*, 27 NY3d 694, 709 [2016]; *see Golimowski v Town of Cheektowaga* [appeal No. 2], 184 AD3d 1195, 1197 [4th Dept 2020]). Here, we conclude that the court did not abuse its discretion in its ruling inasmuch as the probative value of evidence regarding Soave's purported professional misconduct nearly 23 years prior to trial during his employment with another company would not have outweighed the risk of undue prejudice (*see Siemucha v Garrison*, 111 AD3d 1398, 1399-1400 [4th Dept 2013]; *Bodensteiner v Vannais*, 167 AD2d 954, 954 [4th Dept 1990]; *see generally Mazella*, 27 NY3d at 709) and the limited precluded portion of the otherwise admissible evidence regarding Soave's termination from Goodrich lacked the requisite "tendency to show moral turpitude to be relevant on the [issue of Soave's] credibility" (*Badr v Hogan*, 75 NY2d 629, 634 [1990]; *see Delgado v Murray*, 115 AD3d 417, 418 [1st Dept 2014]).

Contrary to plaintiff's further contention, we conclude that any error by the court in allowing defendants' counsel to ask leading questions of Soave was harmless in this case (*see Dees v MTA N.Y. City Tr.*, 178 AD3d 633, 634 [1st Dept 2019], *lv denied* 36 NY3d 906 [2021]). Plaintiff failed to preserve for our review its related challenge to the court's questioning of Soave (*see Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 792 [4th Dept 2000]) and, in any event, we conclude that the court's "questions to [the] witness[ ] did not deprive [plaintiff] of a fair trial, inasmuch as those questions sought only to clarify the testimony, and there was no indication of prejudice or bias against plaintiff" (*Fiebiger v Jay-K Lbr., Inc.*, 81 AD3d 1311, 1312 [4th Dept 2011]; *see Tornatore v Cohen*, 162 AD3d 1503, 1506 [4th Dept 2018]).

We reject plaintiff's contention that the court erred in denying that part of its posttrial motion seeking to set aside the verdict as against the weight of the evidence (*see* CPLR 4404 [a]). It is well settled that a verdict in favor of a defendant may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]; *see DeFisher v PPZ Supermarkets, Inc.*, 186 AD3d 1062, 1063-1064 [4th Dept 2020]). The determination of a motion

to set aside a verdict as against the weight of the evidence "is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; *see McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]; *Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]). "[I]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*McMillian*, 136 AD3d at 1343-1344 [internal quotation marks omitted]; *see Sauter*, 103 AD3d at 1220). Based upon our review of the record, we conclude that the jury's findings "reasonably could have been rendered upon the conflicting evidence adduced at trial" (*Ruddock*, 307 AD2d at 721), and thus that the court properly denied plaintiff's posttrial motion insofar as it sought to set aside the jury verdict as against the weight of the evidence (*see Rew v Beilein* [appeal No. 2], 151 AD3d 1735, 1738 [4th Dept 2017]).

Contrary to plaintiff's contention, we conclude that the court properly denied its posttrial motion insofar as it sought judgment notwithstanding the verdict on the first element of the fraud cause of action (*see* CPLR 4404 [a]). Inasmuch as it cannot be said that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]), plaintiff is not "entitled to judgment as a matter of law" (CPLR 4404 [a]).

Finally, in light of our determination sustaining the verdict, plaintiff's contention that the court erred in granting defendants' motion during trial for a directed verdict (*see* CPLR 4401) dismissing any claim for punitive damages is academic (*see generally Mahoney v Adirondack Publ. Co.*, 71 NY2d 31, 40-41 [1987]; *Lehoczky v New York State Elec. & Gas Corp.*, 149 AD2d 862, 864 [3d Dept 1989]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

990

CA 22-01763

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

GAYLE BUNN AND PETER BUNN, SR.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

FAXTON-ST. LUKE'S HEALTHCARE,
DEFENDANT-APPELLANT-RESPONDENT,
AND FAIRBROTHER PROPERTY MAINTENANCE, LLC,
DEFENDANT-RESPONDENT.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BRINDISI, MURAD & BRINDISI PEARLMAN, LLP, UTICA (ANTHONY A. MURAD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

ROSSI & ROSSI, ATTORNEYS AT LAW, PLLC, NEW YORK MILLS (EVAN ROSSI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 4, 2022. The order, among other things, denied the motion of defendant Faxton-St. Luke's Healthcare for summary judgment, granted those parts of the cross-motion of defendant Fairbrother Property Maintenance, LLC for summary judgment dismissing plaintiff's amended complaint and the cross-claims of Faxton-St. Luke's Healthcare for contribution and contractual indemnification against it, and denied the cross-motion of plaintiffs for, inter alia, prohibition pursuant to CPLR 3126.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

996

CA 23-00886

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND NOWAK, JJ.

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65 LAKE AVENUE, LLC, PLAINTIFF-RESPONDENT,

V ORDER

LENDER CONSULTING SERVICES, INC.,
DEFENDANT-APPELLANT.

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

MAGAVERN MAGAVERN & GRIMM LLP, BUFFALO (RICHARD A. MOORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered April 10, 2023. The order denied the motion of defendant to dismiss the complaint.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

998

KA 21-01425

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY A. GAMLEN, DEFENDANT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered July 20, 2021. The judgment convicted defendant upon his plea of guilty of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [8]). He contends that County Court improperly sentenced him as a second felony offender because, at the time of sentencing, his predicate felony conviction for criminal sale of marihuana in the third degree (former § 221.45) was no longer a felony pursuant to the newly enacted Marihuana Regulation and Taxation Act (MRTA), which, inter alia, repealed Penal Law article 221 and enacted article 222 (*see* L 2021, ch 92, §§ 15-16). Defendant primarily argues that MRTA was ameliorative in nature, and therefore should be retroactively applied to essentially vacate the predicate felony conviction. We reject defendant's contention.

To ascertain whether a prior conviction qualifies as a predicate felony for second felony offender purposes, "[t]he [l]egislature's definition in the second felony offender statute signals its intent to look at the time of the prior crime—and the law [in effect] at that time" (*People v Walker*, 81 NY2d 661, 665 [1993]). With respect to the amelioration doctrine, "[a]bsent a constitutional violation, the validity and effect of a final judgment of conviction—which includes sentencing—are properly evaluated under the law existing at the time the conviction was obtained or by subsequent law applicable to the judgment under principles of retroactivity" (*id.* at 667 [internal quotation marks omitted]; *see People v Utsey*, 7 NY3d 398, 404 [2006]).

That doctrine "does not require reconsideration of final judgments under statutes that are later amended," and "[w]hen . . . defendant[s] [are] sentenced as . . . second felony offender[s], the initial felony case is not reopened, nor [are] defendant[s] punished *again* for [their] initial crime" (*Walker*, 81 NY2d at 667).

Here, there is no dispute that, under the law existing at the relevant time, defendant's predicate felony conviction was valid and, at no time has defendant sought to vacate that judgment of conviction. To the extent that defendant argues that the enactment of MRTA requires automatic vacatur of convictions under Penal Law article 221, we note that this Court has rejected similar contentions that MRTA should be applied retroactively to require automatic vacatur (*see e.g. People v Bennett*, 210 AD3d 1421, 1423 [4th Dept 2022]; *People v Hall*, 202 AD3d 1485, 1485-1486 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]). We therefore conclude that defendant's predicate felony conviction was not vitiated merely by the enactment of MRTA. Indeed, we reiterate that "[t]he proper mechanism for vacating [defendant's predicate] marihuana conviction is through the process detailed in CPL 440.46-a, which requires defendant to first 'petition the court of conviction' for any such relief (CPL 440.46-a [2] [a]) and is not automatic" (*Bennett*, 210 AD3d at 1423). Consequently, the court did not err in sentencing defendant as a second felony offender based on his predicate marihuana conviction inasmuch as that conviction was proper under the law in effect at the time it was obtained, and defendant did not obtain vacatur of that conviction before he was sentenced (*see generally* CPL 440.46-a; *Walker*, 81 NY2d at 667-668).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1002

KA 23-01039

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. MOTELL, IV, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oswego County Court (Spencer J. Ludington, A.J.), entered March 4, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk and a sexually violent offender under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in refusing to grant him a downward departure to a level one risk. That contention is not preserved for our review (*see People v Hackett*, 198 AD3d 1323, 1323 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *People v Ortiz*, 186 AD3d 1087, 1088 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]). In any event, defendant's contention lacks merit. Even assuming, arguendo, that he demonstrated the existence of an appropriate mitigating factor, we would nevertheless conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *People v Antonetti*, 188 AD3d 1630, 1632 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

In light of our determination, we reject defendant's further contention that he received ineffective assistance of counsel based on counsel's failure to request a downward departure (*see People v Whiten*, 187 AD3d 1661, 1662 [4th Dept 2020]; *People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time

of the representation, we conclude that defendant received meaningful representation (*see People v Clement*, 209 AD3d 1300, 1300-1301 [4th Dept 2022]; *Hackett*, 198 AD3d at 1324; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1005

KA 20-00417

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN SANTIAGO, JR., ALSO KNOWN AS BENJAMIN SANTIAGO, ALSO KNOWN AS BENJAMIN J. SANTIAGO, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered December 19, 2019. The judgment convicted defendant upon a plea of guilty of robbery in the first degree (two counts), assault in the first degree, grand larceny in the fourth degree, petit larceny (two counts), burglary in the second degree, and grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of two counts of robbery in the first degree (Penal Law § 160.15 [1], [3]) and one count of assault in the first degree (§ 120.10 [1]), among other offenses, defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, the waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]).

We nevertheless conclude that the sentence imposed by County Court is not unduly harsh or severe.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1008

CAF 23-00628

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF LEONARD P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals from orders determining that she abused the child who is the subject of appeal No. 1 (child) and derivatively abused the children who are the subject of appeal Nos. 2 and 3, i.e., the child's siblings. The orders were entered after a fact-finding hearing on abuse petitions filed against the mother and the children's father. We affirm.

We reject the mother's contention in all three appeals that Family Court's determinations lack a sound and substantial basis. Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244). Although the burden of establishing child abuse rests with the petitioner (*see id.*; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915

[2017]), once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]).

With respect to appeal No. 1, the court's finding of abuse of the child by the mother is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [b] [i]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). Two physicians who treated the child testified that the child, who was two months old at the time, sustained a moderately-sized subdural hemorrhage and numerous hemorrhages in the retina of the right eye. They both testified that the injuries to the child were non-accidental and that this was a case of shaken baby syndrome. Thus, petitioner established that the child suffered injuries that "would ordinarily not occur absent an act or omission of [the mother and the father]" (*Philip M.*, 82 NY2d at 243; *see Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). Petitioner further established that the mother and the father "were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243), and the "presumption of culpability extends" to both of them (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). We conclude that the mother failed to rebut the presumption of culpability (*see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384).

With respect to appeal Nos. 2 and 3, the court's finding of derivative abuse based on evidence that the mother abused the child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the child "is so closely connected with the care [of his siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Devre S.*, 74 AD3d at 1849). The abuse of the child further "demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

The mother's further contention in all three appeals that she was denied meaningful representation by her attorney's failure to retain and call a medical witness to rebut the evidence establishing the cause of the child's injuries "is 'impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]). In particular, the mother failed to "demonstrate[ ] that there were 'relevant experts who would have been willing to testify in a manner helpful [and favorable] to [her] case[ ]' . . . , and her speculation that [her attorney] could have found an expert with a contrary, exculpatory medical opinion is insufficient to establish deficient representation" (*Matter of Julian P. [Colleen Q.]*, 129 AD3d

1222, 1224-1225 [3d Dept 2015]; *see Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1412 [4th Dept 2017]). The record establishes that, " 'viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1009

CAF 23-00629

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF KEVIN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PATRICIA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Leonard P. (Patricia M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1010

CAF 23-00630

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF MICHAEL M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PATRICIA M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Leonard P. (Patricia M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1011

CAF 22-01033

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF DORIKA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, as limited by her brief, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition insofar as it determined that she abused her eldest child, and, in appeal Nos. 2 through 5, she appeals from orders of fact-finding and disposition insofar as they determined that she derivatively abused her other four children. Family Court's determination is based on findings that the mother failed to adequately respond when the eldest child, who was nine years old, reported that she was being sexually abused by her stepfather. We note that the mother does not challenge the stipulated dispositions with respect to the children, and that the mother's challenges in all five appeals to the findings of abuse and derivative abuse are properly before us inasmuch as the mother is "aggrieved by the court's findings of [abuse and derivative abuse]" despite her consent to the dispositions (*Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1677 [4th Dept 2021]; *see Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]). In all five appeals, we conclude that, contrary to the mother's contentions, the court's findings of abuse and derivative abuse are supported by a preponderance of the evidence.

We accord "great weight and deference to [the] [c]ourt's determinations, including its drawing of inferences and assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013] [internal citations omitted]). The evidence presented by petitioner at the fact-finding hearing on all five petitions included, inter alia, testimony that the mother did not remove the stepfather from the home after her eldest child reported that the stepfather was sexually abusing her, but, instead, merely instructed the child to "pretend to be asleep." In appeal No. 1, we conclude that the evidence, combined with the adverse inference that the court properly drew based upon the mother's failure to testify (*see Matter of Burke H. [Richard H.]*, 117 AD3d 1455, 1455 [4th Dept 2014]), provides a sound and substantial basis to support the finding that the mother abused the eldest child when she failed to sufficiently act to protect the eldest child when that child reported the sexual abuse (*see Matter of Michael B. [Samantha B.]*, 130 AD3d 619, 621 [2d Dept 2015], *lv denied* 26 NY3d 906 [2015]; *Matter of Alesha P. [Audrey B.]*, 112 AD3d 1369, 1369 [4th Dept 2013]). We further conclude in appeal Nos. 2 through 5 that the findings of derivative abuse with respect to the four other children are supported by a preponderance of the evidence (*see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1517 [4th Dept 2020]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1012

CAF 22-01034

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF JIBU M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BASEME M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorika S. (Baseme M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1013

CAF 22-01035

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF SALAMA M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BASEME M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorika S. (Baseme M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1014

CAF 22-01036

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF MUNEZERO L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BASEME M., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorika S. (Baseme M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1015

CAF 22-01037

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF ELIZABETH M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BASEME M., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent derivatively abused the subject child.

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

Same memorandum as in *Matter of Dorika S. (Baseme M.)* ([appeal No. 1] — AD3d — [Dec. 22, 2023] [4th Dept 2023]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1016

CAF 22-00306

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF AMELIA D.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES;
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAWN D., RESPONDENT-APPELLANT.

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 24, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law 384-b, respondent father appeals from an order that revoked a suspended judgment that had previously been entered against him and terminated his parental rights with respect to the subject child. The order was entered following an evidentiary hearing at which petitioner established that the father failed to comply with various terms and conditions of the suspended judgment.

Although the father concedes that he failed to comply with the suspended judgment, which had been in effect for six months, he contends that, instead of terminating his parental rights, Family Court should have extended the suspended judgment and afforded him another opportunity to comply with its terms. We reject that contention. The evidence at the hearing established that the father violated the suspended judgment by, among other things, missing the vast majority of scheduled visits with the child, failing to attend appointments for substance abuse treatment and being unsuccessfully discharged from the treatment program, failing to obtain a mental health evaluation despite a history of mental illness, attending only 2 out of 27 classes for domestic violence prevention, failing to complete a parent training program, failing to maintain stable housing, and failing to provide evidence of stable income. The evidence also established that the father was homeless at times during the period of the suspended

judgment and was incarcerated twice. In fact, the father was in jail at the time of the hearing. Under the circumstances, we conclude that the court's determination that it is in the child's best interests to terminate the father's parental rights is supported by a preponderance of the evidence (*see Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *see generally Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1447 [4th Dept 2021], *lv denied* 37 NY3d 1081 [2021]).

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1017

CAF 21-00902

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF ANDREW HERRNECKAR,
PETITIONER-RESPONDENT,

V ORDER

MELISSA WIGGINS, RESPONDENT-APPELLANT.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered May 3, 2021, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody and primary physical placement of the subject child.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1018

CAF 23-00159

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF LATORIA B., RASHAD B.,
SHAMIKA B., KAMIYAH B., AND KENDRA B.
---------- MEMORANDUM AND ORDER
OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

BIANCA B. AND KENNEX B., RESPONDENTS-APPELLANTS.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMY CHADWICK OF COUNSEL), FOR RESPONDENT-APPELLANT KENNEX B.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR RESPONDENT-APPELLANT BIANCA B.

AMY L. HALLENBECK, GLOVERSVILLE, FOR PETITIONER-RESPONDENT.

DONALD H. DODD, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered January 9, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondents' guardianship and custody rights with respect to the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father appeal from an order that terminated their parental rights with respect to their five children on the grounds that respondents severely abused two of the children and derivatively severely abused the other three children. Family Court's findings of severe abuse and derivative severe abuse were based on, inter alia, orders entered on the admissions and consent of respondents in a Family Court Act article 10 proceeding. We affirm.

Respondents both contend that the court erred in terminating their parental rights because the orders of fact-finding issued in the underlying Family Court Act article 10 proceeding were insufficient to establish severe abuse. Respondents' contentions are not preserved for appellate review inasmuch as respondents did not move to vacate the orders of fact-finding or to withdraw their admissions of severe abuse (*see Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Matter of Megan L.G.H. [Theresa*

G.H.], 102 AD3d 869, 869-870 [2d Dept 2013]). In any event, in making its determination to terminate respondents' parental rights on the ground that the children were severely abused and derivatively severely abused, the court did not rely solely on respondents' admissions of severe abuse. The court also relied on respondents' criminal convictions arising from their conduct towards the children, which establish that they severely abused and derivatively severely abused the children (*see* Social Services Law § 384-b [4] [e]; [8] [a] [iii] [C]).

Contrary to the further contentions of the mother, the court did not abuse its discretion in refusing to issue a suspended judgment. The record supports the court's determination that a suspended judgment was not in the children's best interests (*see generally Matter of Shadazia W.*, 52 AD3d 1330, 1331 [4th Dept 2008], *lv denied* 11 NY3d 706 [2008]; *Matter of Da'Nasjeion T.*, 32 AD3d 1242, 1242 [4th Dept 2006]).

We have considered the remaining contentions of respondents and conclude that they do not warrant reversal or modification of the order.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1019

CAF 22-01730

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF LAVAUGHN QUARLES, SR.,
PETITIONER-RESPONDENT,

V ORDER

IESHA LAURENT, RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), dated June 2, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1025.1

CA 23-00927

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF MARK M., PETITIONER,

V ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

MENTAL HYGIENE LEGAL SERVICE, NONPARTY-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR NONPARTY-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Deborah H. Karalunas, J.), entered May 4, 2023. The order, inter alia, denied the motion of Mental Hygiene Legal Service to be relieved as counsel for petitioner.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 6, 2023,

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1027

KA 22-01861

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DWIGHT MOSS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 12, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at County Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1029

KA 22-01810

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA ORTIZ, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Judith A. Sinclair, J.), entered October 3, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1039

CAF 22-00517

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF JEAN C. SEVILLA,
PETITIONER-APPELLANT,

V ORDER

ROCHELLE TORRES, RESPONDENT-RESPONDENT.

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 7, 2022, in a proceeding pursuant to Family Court Act article 8. The order, insofar as appealed from, dismissed the petition.

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1061

CAF 22-01283

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF BRANDI SEXTON,
PETITIONER-RESPONDENT,

V ORDER

JOSHUA LEE, RESPONDENT-APPELLANT.

IN THE MATTER OF JOSHUA LEE,
PETITIONER-APPELLANT,

V

BRANDI SEXTON, RESPONDENT-RESPONDENT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

NATASHA D. BURDICK, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 25, 2022, in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the subject child to petitioner-respondent.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court

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

1062

CA 23-00746

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

NEWCO CAPITAL GROUP VI LLC, PLAINTIFF-APPELLANT,

V ORDER

HOPE HOSPICE CARE, INC., DOING BUSINESS AS HOPE HOSPICE CARE, HOPE HOSPICE CARE, INC., HOPE CARE, 24HOUR HOME CAREGIVING, LLC, C.C.P.A., BEACH VIEW POST-ACUTE & REHAB, LLC, BEVERLY HILLS GLOBAL SPA, IMMANUEL HOSPICE, INC., TLC HOMECARE, INC., MANUEL V. GALLEGO NURSING ALUMNI ASSOCIATION OF THE USA, ROYALTY GLOBAL MEDSPA, GL JIMINEZ LLC, SKINR4 LLC, ORANGE COAST HOSPICE, INC., AND GEOFFREY LAPUZ JIMINEZ, DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (JAMES J. ZAWODZINSKI, JR., OF COUNSEL), AND BERKOVITCH & BOUSKILA, PLLC, PONOMA, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DOMINICK R. DALE, FOREST HILLS, POLLACK, POLLACK, ISAAC & DECICCO, LLP, NEW YORK CITY (BRIAN J. ISAAC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered January 20, 2023. The order, inter alia, transferred the action from Ontario County to New York County.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 6, 2023,

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

Entered: December 22, 2023

Ann Dillon Flynn
Clerk of the Court