SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 25, 2018

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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CA 17-01335

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

COREY J. HOGAN, PLAINTIFF-RESPONDENT,

V ORDER

ISKALO OFFICE HOLDINGS, III, LLC,
DEFENDANT-APPELLANT.

HOPKINS SORGI & ROMANOWSKI PLLC, BUFFALO (PETER J. SORGI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (COREY J. HOGAN OF COUNSEL), PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 9, 2017. The order and judgment, among other things, granted plaintiff's motion for summary judgment in lieu of complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 27 and July 13, 2018,

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

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01854

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ.

ELEANOR MCQUILKIN BURNS, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

ANDREW MCINTOSH BURNS, DEFENDANT-RESPONDENT.

BARNEY & AFFRONTI, LLP, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURNS & SCHULTZ LLP, PITTSFORD (ANDREW M. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 13, 2017. The order, among other things, denied plaintiff's motion to hold defendant in contempt.

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

Opinion by NEMOYER, J.:

According to the Domestic Relations Law and its common-law antecedents, the concept of spousal maintenance is limited to payments made to an unmarried ex-spouse. If divorcing spouses wish to vary this definition and provide for post-remarriage maintenance, they must do so clearly and unambiguously. In this case, nothing in the parties' agreement reflects an intent to depart from the statutory definition of maintenance with the clarity required by the governing caselaw. Consequently, as Supreme Court properly determined, defendant husband's maintenance obligation ended when plaintiff wife remarried.

FACTS

The parties were married in June 1992. In September 2004, the husband vacated the marital residence; shortly thereafter, the wife sued for divorce. The parties subsequently executed a divorce settlement agreement pursuant to Domestic Relations Law § 236 (B) (3). In the agreement, the parties specified that "[a]ll matters affecting interpretation of this [a]greement and the rights of the parties [t]hereto shall be governed by the laws of the State of New York."

The agreement obligated the husband to pay "rehabilitative maintenance" to the wife pursuant to the following schedule:

"(a) From December 1, 2007 - November 30, 2012:
$5,500.00 Per Month = $66,000.00
Rehabilitative Maintenance Per Annum

(b) From December 1, 2012 - November 30, 2014:
$2,916.00 Per Month = $34,992.00
Rehabilitative Maintenance Per Annum

(c) From December 1, 2014 - November 30, 2015:
$2,500.00 Per Month = $30,000.00
Rehabilitative Maintenance Per Annum

(d) From December 1, 2015 - November 30, 2020:
$2,200.00 Per Month = $26,400.00
Rehabilitative Maintenance Per Annum."

The foregoing constitutes the entirety of the agreement's maintenance provision. Critically, the agreement is silent regarding the effect, if any, of the wife's remarriage upon the husband's maintenance obligation. The agreement was subsequently incorporated, but not merged, into a judgment of divorce rendered by Supreme Court (Doyle, J.) in July 2008. The judgment includes a verbatim reproduction of the agreement's maintenance provision.

The wife remarried in December 2015. In April 2016, the husband emailed the wife to inform her that he would stop paying maintenance as a result of her remarriage. The husband's last maintenance payment was made that month.

The wife then moved to, inter alia, recover a monetary judgment for the amount outstanding and hold the husband in contempt for ending the maintenance payments. According to the wife, "a plain reading of . . . the agreement[] leads to only one conclusion: [the husband's] rehabilitative maintenance obligation survives [her] remarriage." That was so, the wife continued, because "[o]ther than November 30, 2020, no termination events are identified in the agreement. Since none can be implied and the Court cannot rewrite the parties' agreement, this Court must conclude [that the husband's] obligation to pay maintenance survives not only the wife's remarriage, but also her death and his death. The maintenance obligation ends on November 30, 2020 and no other time."

The husband opposed the wife's motion. Noting that the agreement contains no provision entitling the wife to continued maintenance payments upon her remarriage, the husband argued that the "fact that the parties did not expressly provide in the Agreement that maintenance payments would continue if [the wife] remarried establishes that the parties intended that [the husband's] obligation to pay [the wife] maintenance terminated upon her remarriage."

Supreme Court (Dollinger, A.J.) denied the wife's motion in its entirety. In a well-reasoned and thorough decision, the court held that, in light of the agreement's silence on the subject, the wife's remarriage ended the husband's obligation to pay maintenance. The

wife now appeals.

DISCUSSION

The friction point here is easily stated: the wife says that the husband's maintenance obligations are unaffected by her remarriage; the husband says that his maintenance obligations do not extend beyond the wife's remarriage. For the reasons that follow, we agree with the husband.

I

A divorce settlement agreement is a contract, subject to standard principles of contract interpretation (*see Rainbow v Swisher*, 72 NY2d 106, 109 [1988]; *Gurbacki v Gurbacki*, 270 AD2d 807, 807-808 [4th Dept 2000]). The agreement at issue does not explicitly define the term "maintenance," and it is silent regarding the effect of the wife's remarriage upon the husband's maintenance obligation. Thus, the plain text of the agreement – which the Court of Appeals says is the best source of the parties' intent (*see Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 176 [2008]) – is not conclusive of the question on appeal.

"Nevertheless, it is basic that, unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law" (*Dolman v United States Trust Co. of N.Y.*, 2 NY2d 110, 116 [1956]; *see Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 589 [1996] [applying *Dolman*]). The *Dolman* rule is of longstanding vintage, and the "principle embraces alike those [laws in force at the time of a contract's execution] which affect its validity, *construction*, discharge, and enforcement" (*Von Hoffman v City of Quincy*, 71 US 535, 550 [1866] [emphasis added]). By virtue of the *Dolman* rule, when parties enter into an agreement authorized by or related to a particular statutory scheme, the courts will presume – absent something to the contrary – that the terms of the agreement are to be interpreted consistently with the corresponding statutory scheme (*see e.g. Mayo v Royal Ins. Co. of Am.*, 242 AD2d 944, 945 [4th Dept 1997], *lv dismissed* 91 NY2d 887 [1998]; *Matter of Andy Floors, Inc. [Tyler Constr. Corp.]*, 202 AD2d 938, 938-939 [3d Dept 1994]).

The statutory scheme corresponding to the agreement in this case is Domestic Relations Law § 236, which authorizes divorce settlement agreements and directs that such agreements specify the "amount and duration of maintenance," if any (§ 236 [B] [3] [3]). The term " 'maintenance' " is defined within this statutory scheme as "payments provided for in a valid agreement between the parties or awarded by the court . . . , to be paid at fixed intervals for a definite or indefinite period of time" (§ 236 [B] [1] [a]). Critically, the statutory definition includes the following caveat: any maintenance award "shall terminate upon the death of either party or upon the payee's valid or invalid marriage" (*id.*). As thus defined, the

concept of maintenance is unequivocally limited to payments made to an *unmarried* ex-spouse (*see Matter of Howard v Janowski*, 226 AD2d 1087, 1088 [4th Dept 1996]). And unless the parties contract otherwise, the *Dolman* rule incorporates this statutory limitation directly into a divorce settlement agreement "as though it were expressed or referred to therein" (2 NY2d at 116; *see United States Trust Co. of N.Y. v New Jersey*, 431 US 1, 19 n 17 [1977], *reh denied* 431 US 975 [1977]).

Thus, we categorically reject the wife's argument that the statutory definition of maintenance embodied in Domestic Relations Law § 236 (B) (1) (a) is irrelevant simply because the parties chose to settle the terms of their divorce in a written agreement. To the contrary, the statutory definition of maintenance supplies the interpretive context necessary to understanding the agreement as an integrated whole, and it provides the benchmark against which those contractual provisions are to be construed. In short, the statutory definition shines a beacon light of clarity unto a term that might otherwise be subject to varying interpretations.[1]

II

The default rule of construction supplied by the statutory definition of maintenance is merely that, however – a default rule. There are many reported instances in which parties to a divorce settlement agreement have varied the statutory definition of maintenance so that payments would continue beyond the remarriage of the payee (*see e.g. Burn v Burn*, 101 AD3d 488, 489 [1st Dept 2012]; *Matter of DeAngelis v DeAngelis*, 285 AD2d 593, 593-594 [2d Dept 2001]; *Quaranta v Quaranta*, 212 AD2d 683, 684 [2d Dept 1995]; *Jung v Jung*, 171 AD2d 993, 994 [3d Dept 1991]; *Fredeen v Fredeen*, 154 AD2d 908, 908 [4th Dept 1989]). In so doing, such parties effectively rebutted the presumption, embodied in the *Dolman* rule, that they intended to incorporate the corresponding statutory definitions into their agreement.

As the wife's appellate brief spills much ink in demonstrating, such a variance does not offend public policy (*see Fredeen*, 154 AD2d at 908). But the courts will not lightly infer the parties' intent to depart from the statutory definition of maintenance (*see Scibetta v*

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[1] In Point I of her brief, the wife also argues that the summary maintenance-terminating procedure of Domestic Relations Law § 248 "do[es] not apply when the parties settle maintenance with a[n] opting out agreement." Perhaps so, but we need not definitively resolve that issue because the husband did not move to terminate maintenance under section 248, and the court did not direct such relief. To the contrary, as the wife recognizes elsewhere in her brief, this is a contract-interpretation case that requires us to construe the term "maintenance" in the agreement. Thus, although the substantive provisions of section 248 are arguably relevant to the public policy considerations of our interpretive inquiry, the summary procedure provided therein is not in play here.

Scibetta-Galluzzo, 134 AD2d 823, 824 [4th Dept 1987]), and it is well established that mere silence will not do (*see Quaranta*, 212 AD2d at 684; *Scibetta*, 134 AD2d at 824; *Jacobs v Patterson*, 112 AD2d 402, 403 [2d Dept 1985]). Far from it – the parties' "intent to vary the statutory and precedential preference of an end to maintenance payments upon [remarriage] of the pay[ee] *must be expressed clearly*" (*Matter of Riconda*, 90 NY2d 733, 737 [1997] [emphasis added]), for compelling a person to support a remarried ex-spouse, "absent an agreement to the contrary," most assuredly does violate the public policy of this State (*Jacobs v Patterson*, 143 AD2d 397, 398 [2d Dept 1988]; *see Scibetta*, 134 AD2d at 824).[2]

The requisite degree of "clarity" in an agreement can be gleaned from the cases in which the parties successfully varied the statutory definition of maintenance. In *Burn*, for example, the First Department held that the wife's "waiver of a share of assets worth millions of dollars[] evinces the intent of the parties that the maintenance payments would continue until [her] death or the death of [the husband], regardless of [her] marital status" (101 AD3d at 489).

Quaranta is similar to *Burn*. There, the Second Department held that "the parties intended that the [wife] receive lifetime maintenance payments" because she "gave up her right to a distributive share of [certain valuable] property in exchange for maintenance payments[, which] the [husband] could deduct . . . for income tax purposes" (*Quaranta*, 212 AD2d at 684).

In *DeAngelis*, the divorce settlement agreement specified, "in detail," multiple events that would terminate the husband's maintenance obligations, but it did not include the wife's remarriage among them (285 AD2d at 593). Such an agreement, the Second Department held, established that the husband had "implicitly agreed to pay post-remarriage maintenance" (*id.* at 594).

In *Jung*, the Third Department held that the divorce settlement agreement "clearly evinces the intent of the parties that [the husband's] maintenance obligation would continue for a five-year period unconditioned on [the wife's] marital status," given the parties' multiple affirmative statements on the record that the

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[2] Although *Riconda* involved the other enumerated component of the definition of maintenance set forth in Domestic Relations Law § 236 (B) (1) (a) – namely, that payments continue only so long as both payor and payee are living – that distinct prong of the definition is equally variable by the parties upon the same "clear" expression of intent. Thus, as the Third Department has recognized, the cases that explicate the degree of clarity necessary to vary the still-living prong of the statutory definition of maintenance are equally instructive when determining whether or not the parties effectively varied the remarriage prong of the definition (*see Sacks v Sacks*, 168 AD2d 733, 734-735 [3d Dept 1990]).

agreement's maintenance-terminating events, which did not include remarriage, were exclusive and unconditional (171 AD2d at 994 [internal quotation marks and brackets omitted]).

And in *Fredeen*, we held that "the agreement clearly evinces the intent of the parties that [the husband's] maintenance obligation would continue until February 1991[] unconditioned on [the wife's] marital status," given the language in the agreement that such payments would continue past February 1991 unless, inter alia, the wife had remarried in the interim (154 AD2d at 908).

The wife points to nothing in this record that establishes the parties' intent to vary the statutory definition of maintenance with the clarity required by *Riconda* and demonstrated in *Burn*, *DeAngelis*, *Quaranta*, *Jung*, and *Fredeen*. The wife did not waive her right to any particular property distribution in exchange for a sum certain of maintenance (as the wife did in *Burn* and *Quaranta*); the agreement does not indicate that the wife's remarriage would preclude further maintenance payments after a certain date or under certain circumstances (as it did in *Fredeen*); the agreement does not set forth, in detail, various termination events while omitting remarriage from the list (as it did in *DeAngelis*); and there is no extrinsic evidence indicating that a remarriage clause was purposefully omitted from the agreement (as there was in *Jung*).[3]

III

Rather than attempting to establish, based on the unique facts of this case, that the parties intended to vary the statutory definition of maintenance, the wife contends that by setting the *duration* of maintenance, the parties necessarily varied the *definition* of maintenance to include payments after remarriage. We reject that contention.[4]

The concept of "maintenance," as noted above, is explicitly

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[3] The other cases upon which the wife relies – *Matter of Benny v Benny* (199 AD2d 384 [2d Dept 1993]) and *Gush v Gush* (9 AD2d 815 [3d Dept 1959]) – are simply inapposite. The agreement in *Benny* was governed by California law (*see* 199 AD2d at 386-387), and the agreement in *Gush* – which was executed before the advent of equitable distribution – stated that the husband's alimony obligation was to be " 'absolute, unconditional and irrevocable' " (9 AD2d at 815).

[4] Given the many statutory and policy differences between maintenance and child support, the agreement's child support provisions do not logically inform the proper interpretation of the maintenance provisions, nor do the child support provisions assist in answering the discrete question posed by this appeal, i.e., whether the parties clearly varied the statutory definition of maintenance by providing for continued payments after the wife's remarriage.

limited by statute to payments made to an unmarried payee (*see* Domestic Relations Law § 236 [B] [1] [a]; *Howard*, 226 AD2d at 1088), and the Legislature explicitly invited parties to a divorce settlement agreement to fix the duration of "maintenance" *as defined within the operative statutory universe*, i.e., as payments that "shall terminate" upon the remarriage of the payee (§ 236 [B] [3] [3]; *see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 236).[5] It follows that, by setting the duration of "maintenance" in an agreement pursuant to Domestic Relations Law § 236, the parties are necessarily fixing the length of an obligation that continues in force only so long as the payee remains unmarried. If the parties wish to depart from that statutory definition, they must do so "clearly" (*Riconda*, 90 NY2d at 737), not simply by following the statutory directive to set the "duration" of a thing already defined. Any other construction would impermissibly frustrate the legislative definition of "maintenance." To the extent that our decision in *Hancher v Hancher* (31 AD3d 1152 [4th Dept 2006]) suggests a contrary rule, it should no longer be followed.

Indeed, the wife's proposed rule would mean that the Legislature initially defined the term "maintenance," yet then proceeded, within the same section of the Domestic Relations Law, to direct contracting parties to take an act – i.e., set the "duration" of "maintenance" in a settlement agreement – that would necessarily and fundamentally change the very definition that the Legislature had just adopted. In short, according to the wife, the Legislature simultaneously defined a term and set up a procedure that invariably negates a core feature of that definition in each and every case. Such a statutory scheme would be at war with itself, and we cannot countenance such a result.

The wife's argument overlooks the fact that, in practice, virtually every divorce settlement agreement will fix the duration of a maintenance award. Consequently, in the mine run of matrimonial dissolutions, the wife's proposed holding would effectively flip the statutory presumption: maintenance payments would presumptively survive the payee's remarriage, and the parties would need to take affirmative steps in the agreement to provide otherwise. But that is precisely the opposite of the Legislature's decree, and it is not for the courts to legislate in the guise of construction (*see generally Matter of Tormey v LaGuardia*, 278 NY 450, 451 [1938]).[6]

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[5] Statutes § 236, as distinct from Domestic Relations Law § 236, provides that, "[i]n the absence of anything in the statute indicating an intention to the contrary, where the same word [here, 'maintenance,'] is used in different parts of a statute, it will be presumed to be used in the same sense throughout." Thus, the term "maintenance" means the same thing in Domestic Relations Law § 236 (B) (3) (3) as it does in Domestic Relations Law § 236 (B) (1) (a).

[6] It is true, as the wife argues at great length, that parties to a divorce settlement agreement need not *explicitly* modify the statutory definition of maintenance in order to do so

CONCLUSION

Unless the parties clearly provide otherwise in a divorce settlement agreement, the payor's obligation to pay maintenance ends upon the remarriage of the payee. Here, the relevant agreement is silent as to whether the husband's maintenance obligation survives the wife's remarriage. As a result, the husband's maintenance obligation terminated upon the wife's remarriage. Supreme Court therefore properly denied the wife's motion to, inter alia, hold the husband in contempt and recover the unpaid maintenance. Accordingly, the order appealed from should be affirmed.

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effectively. No one suggests otherwise. But the mere fact that the statutory definition of maintenance could be varied *implicitly* does not, as the wife argues, relieve contracting parties of the obligation to express that variance *clearly*.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01688

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND NEMOYER, JJ.

SHARNICE BROWN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SIU C. BETTY NG, DEFENDANT-RESPONDENT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), AND ROBERT NICHOLS, BUFFALO, FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 27, 2016. The judgment dismissed the complaint upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, the complaint is reinstated and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained as a result of a car accident in which her vehicle was struck by a vehicle operated by defendant. At trial, defendant acknowledged that her failure to yield the right-of-way caused the accident, but she claimed that plaintiff did not sustain a resultant "serious injury" within the meaning of Insurance Law § 5102 (d). The following question appeared on the verdict sheet: "Was the negligence of defendant a substantial factor in causing injury to the plaintiff?" The jury answered that question in the negative and thereby returned a verdict in defendant's favor. Plaintiff now appeals from the judgment dismissing the complaint on the jury's verdict. Plaintiff's appeal brings up for review both the denial of her pretrial motion for partial summary judgment on the issue of serious injury and the denial of her posttrial motion to set aside the verdict as against the weight of the evidence (*see* CPLR 5501 [a] [1], [2]).

We first reject plaintiff's contention that Supreme Court erred in denying her motion for partial summary judgment. It is undisputed that plaintiff met her initial burden of establishing that she sustained a serious injury under the significant limitation of use and 90/180-day categories. The report submitted by defendant's medical

expert, however, raised an issue of fact regarding whether plaintiff sustained a serious injury as a result of the accident. Thus, the court properly denied plaintiff's motion for partial summary judgment (*see Hines-Bell v Criden*, 145 AD3d 1537, 1538 [4th Dept 2016]; *Harris v Campbell*, 132 AD3d 1270, 1271 [4th Dept 2015]).

We turn next to plaintiff's challenge to the denial of her posttrial motion to set aside the verdict as against the weight of the evidence. In conducting our weight of the evidence review, we are cognizant of the fact that the jury was asked to determine only whether plaintiff sustained an "injury." Unfortunately, the jury was not asked to determine the appropriate legal issue, i.e., whether plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). We therefore limit our analysis to whether the evidence of "injury" as colloquially understood "so preponderated in favor of the plaintiff that [the verdict] could not have been reached on any fair interpretation of the evidence" (*McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016] [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Rivera v MTA Long Is. Bus*, 45 AD3d 557, 558 [2d Dept 2007]).

We answer that question in the affirmative. Plaintiff's medical records from her visit to the emergency room immediately after the accident show that she was diagnosed with cervical sprain, strain, minor head injury, acute low back pain, and shoulder strain. Plaintiff's treating chiropractor testified that, in his opinion, plaintiff had "on going disabilities" and "continued to suffer pain and significant limitations of motion" as a result of the accident. He also testified that plaintiff's range of motion was limited and that she experienced moderate to severe muscle spasms on multiple occasions. Defendant's medical expert even testified that plaintiff suffered muscle pain as a result of the accident, although he opined that such pain was only "a mild or minor injury and not a significant consequential disabling injury." In light of the foregoing, we conclude that the evidence that the accident was "a substantial factor in causing an *injury* to plaintiff" so preponderates in plaintiff's favor that the jury's contrary finding could not have been reached on any fair interpretation of such evidence (*Herbst v Marshall*, 89 AD3d 1403, 1403 [4th Dept 2011] [emphasis added]; *see Marks v Alonso*, 125 AD3d 1475, 1475 [4th Dept 2015]; *Browne v Pikula*, 256 AD2d 1139, 1139 [4th Dept 1998]). Although there was conflicting testimony regarding whether plaintiff sustained a "serious injury," it is nevertheless undisputed that she sustained an "injury" as a result of the accident. We therefore reverse the judgment, grant the posttrial motion, set aside the verdict, reinstate the complaint and grant a new trial.

In light of our determination, we need not address plaintiff's remaining contention.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 13-01192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONTE S. LIVELY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 13, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he was denied effective assistance of counsel and was denied a fair trial by prosecutorial misconduct. We reject both contentions.

Viewing the evidence, the law and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant specifically contends that defense counsel was ineffective in failing to make a timely motion to suppress evidence that the police had obtained from a garbage tote located directly outside the attached garage of his grandmother's house. Although we agree with defendant that the search of the garbage tote in the curtilage of his grandmother's house is presumably unconstitutional (*see People v Morris*, 126 AD3d 813, 814 [2d Dept 2015], *lv denied* 25 NY3d 1168 [2015], citing *Florida v Jardines*, 569 US 1, 5-6 [2013], and *Oliver v United States*, 466 US 170, 180 [1984]; *cf. California v Greenwood*, 486 US 35, 39-40 [1988]; *People v Ramirez-Portoreal*, 88 NY2d 99, 113 [1996]), we conclude that, in light of the particular circumstances that led the police officers to the premises in search of a recently missing 17-year-old girl, that limited search fell within the recognized emergency exception to the warrant requirement (*see People v Krom*, 61 NY2d 187, 198-199 [1984]; *see also People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22

NY3d 1053 [2014], *cert denied* 572 US —, 134 S Ct 1552 [2014]). Thus, even assuming, arguendo, that defendant had standing to challenge the search of the tote located at his grandmother's home (*see People v Hill*, 153 AD3d 413, 416 [1st Dept 2017]; *cf. People v Ponder*, 54 NY2d 160, 166 [1981]), we conclude that the motion to suppress evidence obtained from the tote, if timely made, would not have been successful and that defense counsel was not ineffective in failing to make that motion in a timely manner (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant also contends that defense counsel was ineffective in failing to make a timely motion to suppress historical cell site location information (CSLI) and text messages sent to and received by a cellular phone being used by defendant. The CSLI and text messages were obtained from the cellular service provider's records. We note as a preliminary matter that it is of no moment that the phone was not registered to defendant. "One need not be the owner of the property for his [or her] privacy interest to be one that the Fourth Amendment protects, so long as he [or she] has the right to exclude others from dealing with the property" (*United States v Perea*, 986 F2d 633, 639-640 [2d Cir 1993]; *see United States v Ashburn*, 76 F Supp 3d 401, 412 [ED NY 2014]). Here, although the phone was registered to defendant's relative, it is undisputed that the phone was used exclusively by defendant.

With respect to the merits of defendant's contentions, the Supreme Court recently held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI" (*Carpenter v United States*, — US —, —, 138 S Ct 2206, 2217 [2018]). Even assuming, arguendo, that the holding in *Carpenter* applies with equal force to the contents of text messages sent to and received by the phone, we nevertheless conclude that there is little or no chance that the motion to suppress the historical CSLI or text messages, if timely made, would have been successful. The Supreme Court recognized that "case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances" (*id.* at 2222). "One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment . . . Such exigencies include the need to . . . protect individuals who are threatened with imminent harm" (*id.* at 2222-2223 [internal quotation marks omitted]; *see Riley v California*, — US —, — , 134 S Ct 2473, 2494 [2014]; *see e.g. United States v Caraballo*, 831 F3d 95, 101 [2d Cir 2016], *cert denied* — US —, 137 S Ct 654 [2017]; *People v Valcarcel*, 160 AD3d 1034, 1038 [3d Dept 2018], *lv denied* — NY3d — [May 31, 2018]). Where, as here, "law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to . . . child abductions" (*Carpenter*, — US at —, 138 S Ct at 2223). The Court was very clear that its decision in *Carpenter* did not "call into doubt warrantless access to CSLI in such circumstances" (*id.*). Applying the decision in *Carpenter* to CSLI as well as text messages, we conclude

that defense counsel was not ineffective in failing to make a timely motion to suppress either the CSLI or the text messages (*see generally Caban*, 5 NY3d at 152).

Defendant contends that he was denied a fair trial by prosecutorial misconduct on summation and that defense counsel was ineffective in failing to object to such misconduct. We agree with defendant that the prosecutor committed misconduct when she mischaracterized the DNA evidence by stating that defendant's DNA "matched" DNA found on the victim's acrylic nail (*see e.g. People v Wright*, 25 NY3d 769, 781-783 [2015]; *People v Rozier*, 143 AD3d 1258, 1260 [4th Dept 2016]; *People v Jones*, 134 AD3d 1588, 1589 [4th Dept 2015]). Although defense counsel did not object to the comment to preserve defendant's challenge for our review (*see People v Garrow*, 126 AD3d 1362, 1363 [4th Dept 2015]), we do not believe that reversal is warranted or that the failure to object rendered defense counsel ineffective. The testimony at trial established that defendant could not be excluded as the source of the DNA found on the victim's nail and that the chance of randomly selecting an unrelated individual as the source of the DNA was less than one in 114,000. Here, as in *People v Glass* (150 AD3d 1408 [3d Dept 2017], *lv denied* 30 NY3d 1115 [2018]), the sole mischaracterization of the DNA evidence " 'did not rise to the flagrant and pervasive level of misconduct [that] would deprive defendant of due process,' " (*id.* at 1411), and defense counsel was not ineffective in failing to object to the single improper comment (*see People v Boyd*, 159 AD3d 1358, 1363 [4th Dept 2018]; *cf. Wright*, 25 NY3d at 771-772).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

682

CA 18-00081

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

MARY G. DENG, AS PARENT AND NATURAL GUARDIAN OF FARIS MOHAMED, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BEAU J. YOUNG, DEFENDANT, SYRACUSE CITY SCHOOL DISTRICT AND WEBSTER ELEMENTARY SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered November 20, 2017. The order granted the motion of defendants Syracuse City School District and Webster Elementary School District for summary judgment and dismissed the complaint against those defendants.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants Syracuse City School District and Webster Elementary School District.

Memorandum: Plaintiff's son (hereafter, child) was a student at Webster Elementary School, improperly sued as Webster Elementary School District, which is located in the Syracuse City School District (collectively, defendants). On September 16, 2010, the child, who was then eight years old, missed his after-school bus and was allegedly told by school personnel to walk home, even though his home was located over two miles away from the school. While walking home, the child was struck by a car and suffered a fractured skull.

Plaintiff then commenced this negligence action to recover for the child's injuries. Defendants thereafter moved for summary judgment dismissing the complaint against them, and Supreme Court granted the motion. We now reverse, deny the motion, and reinstate the complaint against defendants.

"[A]lthough a school district's duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when the student is released into a potentially hazardous

situation, particularly when the hazard is partly of the school district's own making" (*Ernest v Red Cr. Cent. Sch. Dist.*, 93 NY2d 664, 671 [1999], *rearg denied* 93 NY2d 1042 [1999]). "Thus, while a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating" (*id.* at 672). Contrary to defendants' contention and the court's holding, *Ernest* does not limit a school's liability to injuries that occur near school grounds. Rather, a "school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm," irrespective of the physical distance between the school and the location of the reasonably foreseeable risk (*id.*).

Here, plaintiff raised a triable issue of fact concerning whether defendants, in violation of their own policies and procedures, released the child into a "foreseeably hazardous setting" partly of their own making and thereby breached their duty of care (*id.*). Specifically, the child testified at his deposition that, after he missed the bus, he approached a school employee, who told him to walk home. That employee, according to plaintiff, did not accompany the child to the main office to attempt to call the bus back or to arrange other transportation. The child testified that, instead, the employee simply left him alone with no further instructions. The child also testified that he attempted to reenter the school, as defendants had previously instructed him to do in such a situation, but that no one answered the buzzer. The credibility of the child's account is, of course, for the factfinder at trial (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Notably, the child did not have parental permission or direction to walk home, and he did not typically walk to or from school. Thus, our holding herein should not be construed to apply in circumstances where a student is injured while walking to or from school with parental consent or as part of his or her normal routine (*see e.g. Donofrio v Rockville Ctr. Union Free Sch. Dist.*, 149 AD3d 805, 805-806 [2d Dept 2017]).

Finally, and contrary to defendants' remaining contention, we conclude that "[p]laintiff's proof also created a triable issue on proximate cause" (*Ernest*, 93 NY2d at 674). Thus, under the unique circumstances of this case, the court erred in granting defendants' motion.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

707

KA 16-01057

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. PLANTIKO, ALSO KNOWN AS ROBERT W. PLANTIKO, JR., DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 4, 2015. The judgment convicted defendant, upon his 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.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that his waiver of the right to appeal is unenforecable and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily and intelligently entered, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that defendant was sentenced as a second felony offender convicted of a class D nonviolent felony, and his sentence of 2 to 4 years of incarceration is the minimum sentence he could have received for such an offense (*see* Penal Law § 70.06 [3] [d]; [4] [b]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

761

CA 18-00191

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

DAVID RUBMAN AND JENYA RUBMAN,
INDIVIDUALLY, AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WILLIAM OSUCHOWSKI AND OPR PROPERTY
MANAGEMENT, LLC, DEFENDANTS-RESPONDENTS.

THE LAW OFFICES OF E. DAVID HOSKINS, LLC, ALBANY (E. DAVID HOSKINS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (DAVID G. BURCH, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 4, 2018. The order granted the motion of defendants to dismiss the amended complaint and dismissed the complaint.

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 amended complaint insofar as asserted by plaintiff Jenya Rubman, individually, and on behalf of all others similarly situated, and as modified the order is affirmed without costs.

Memorandum: Plaintiff Jenya Rubman (Jenya) entered into a 12-month residential lease agreement with defendants, who own and manage more than 200 residential units in the City of Syracuse. Pursuant to the lease agreement, Jenya was required to pay a security deposit that would be returned by defendants within 30 days of the end of the lease term. After Jenya signed the lease and paid the security deposit, Jenya's father, plaintiff David Rubman (David), executed an addendum to the lease agreement in which he agreed to cosign the lease with Jenya. After the lease term concluded, defendants advised Jenya that only part of her security deposit would be returned as a result of various deductions that had been made by defendants. Plaintiffs commenced a class action against defendants seeking damages and declaratory and injunctive relief on behalf of themselves and all other persons who, within four years prior to the date of the filing of the amended complaint, rented residential property from defendants, provided defendants with a security deposit, and were not returned the entire security deposit upon termination of the lease. Plaintiffs

alleged, inter alia, that defendants failed to return their security deposit within the time set forth in the lease, and commingled security deposit moneys with other funds inasmuch as defendants used the same checking account to return part of Jenya's security deposit and to reimburse Jenya for "overpaid rent." Supreme Court granted defendants' pre-answer motion to dismiss the amended complaint. We modify the order by denying the motion in part and reinstating the amended complaint as asserted by plaintiff Jenya Rubman, individually, and on behalf of all others similarly situated.

We agree with plaintiffs that the court erred in granting the motion with respect to the class action allegations. We conclude that, "accept[ing] the facts as alleged in the [amended] complaint as true, [and] accord[ing] plaintiffs the benefit of every possible inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the amended complaint contains sufficient allegations to withstand that part of defendants' motion seeking dismissal of the class action allegations pursuant to CPLR 3211 (a) (7). "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*DeLuca v Tonawanda Coke Corp.*, 134 AD3d 1534, 1535 [4th Dept 2015] [internal quotation marks omitted]; *see Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229 [4th Dept 2008], *lv dismissed in part and denied in part* 10 NY3d 910 [2008]).

Here, plaintiffs adequately alleged all of the prerequisites to class certification (*see generally Ferrari v Natl. Football League*, 153 AD3d 1589, 1591 [4th Dept 2017]; *Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [4th Dept 2004]). Plaintiffs alleged that the class of tenants consists of more than 200 members, thereby satisfying the numerosity requirement (*see generally Ferrari*, 153 AD3d at 1591; *Cherry v Resource Am., Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005]). Plaintiffs also alleged that the common issue is whether, by commingling the security deposits of their tenants, defendants acted unlawfully, and that the individual issues are the amount of the security deposit and defendants' entitlement to deductions therefrom (*see generally Borden v 400 E. 55th St. Assoc. L.P.*, 24 NY3d 382, 399 [2014]; *Freeman*, 12 AD3d at 1171). Thus, we conclude that plaintiffs sufficiently alleged that the common issues predominate (*see* CPLR 901 [a] [2]). Regarding the typicality requirement, plaintiffs alleged that their claims arise from "the same course of conduct and are based on the same theories as the other class members" (*DeLuca*, 134 AD3d at 1536 [internal quotation marks omitted]; *see generally Freeman*, 12 AD3d at 1171). Plaintiffs also alleged that they can fairly and adequately protect the interests of the class inasmuch as they do not have conflicting interests with other class members (*see generally Ferrari,* 153 AD3d at 1592; *Cooper v*

Sleepy's, LLC, 120 AD3d 742, 744 [2d Dept 2014]). Plaintiffs satisfied the superiority requirement by alleging that the damages likely suffered by each of the tenants range between $475 and $4,500, and "the cost of prosecuting individual actions would deprive many of the putative class members of their day in court" (*Ferrari*, 153 AD3d at 1593). Thus, we conclude that the amended complaint contains sufficient allegations to state a class action (*see generally Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 796 [2d Dept 2015]).

We further agree with plaintiffs that the court erred in granting the motion with respect to the first cause of action inasmuch as the amended complaint adequately alleges a cause of action for conversion in violation of General Obligations Law § 7-103 (*see generally Milkie v Guzzone*, 143 AD3d 863, 864 [2d Dept 2016]). Where, as here, a plaintiff alleges that a landlord failed to provide written notice of the banking institution that holds the security deposit, an inference that the security deposit funds were commingled in violation of section 7-103 (1) is permitted (*see Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010]), and the plaintiff may seek the " 'immediate' return [of the security deposit] notwithstanding that [the] plaintiff may . . . have breached the lease" (*Dan Klores Assoc. v Abramoff*, 288 AD2d 121, 122 [1st Dept 2001]; *see Milkie*, 143 AD3d at 864).

We also agree with plaintiffs that the court erred in granting the motion with respect to the second cause of action, alleging that defendants violated Property Conservation Code of the City of Syracuse § 27-125, inasmuch as that section gives rise to a private cause of action. Generally, "where a statute does not explicitly provide for a private right of action, 'we begin with the presumption that [the legislature] did not intend one' " (*Jordan v Chase Manhattan Bank*, 91 F Supp 3d 491, 501 [SD NY 2015], quoting *Bellikoff v Eaton Vance Corp.*, 481 F3d 110, 116 [2d Cir 2007]), and the party seeking the private remedy has the burden of establishing that one was intended (*see id.*). It is well settled, however, that courts "have often found an implied right of private suit by a person aggrieved where the statute did not specifically so provide" (*Bodric v Mayfair Constr. Corp.*, 44 AD2d 520, 520 [1st Dept 1974], citing *United States v Post*, 148 US 124 [1893]), where the "denial of a private suit would be the grant of a right without a remedy" (*id.*). Here, we conclude that Property Conservation Code of the City of Syracuse § 27-125, which has the purpose of protecting the tenant's security deposit from misuse and ensuring its prompt return to the tenant, impliedly creates a private cause of action.

We further conclude that the court erred in granting the motion with respect to plaintiffs' third cause of action, for declaratory and injunctive relief, and fourth cause of action, for attorney's fees, inasmuch as those causes of action are based upon allegations that defendants violated General Obligations Law § 7-103 and Property Conservation Code of the City of Syracuse § 27-125. We note that the lease includes a clause requiring tenants to pay attorneys' fees if they breach the lease and, pursuant to Real Property Law § 234, the tenant has the "same benefit [to attorneys' fees as] the lease imposes

in favor of the landlord" (*Matter of Duell v Condon*, 84 NY2d 773, 780 [1995]). We reject defendants' contention that plaintiffs abandoned their request for attorneys' fees by failing to raise that issue in their appellate brief.

Finally, we reject plaintiffs' contention that the court erred in determining that David does not have standing to commence this action. Pursuant to the terms of the addendum to the lease agreement, David's interest in the security deposit was predicated on the default of Jenya, which did not occur. Thus, Jenya's interest in the security deposit was not assigned to David, and he therefore lacks standing to seek relief for defendants' alleged conduct with respect to the security deposit (*see generally Xavier Constr. Co., Inc. v Bronxville Union Free Sch. Dist.*, 143 AD3d 976, 977 [2d Dept 2016]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 18-00153

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

HOLLY M. REDMOND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 12, 2017. The order, among other things, granted the motion of defendants to strike plaintiff's expert witness disclosure and precluded plaintiff's expert witness from testifying at trial.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion seeking to strike plaintiff's expert witness disclosure and to preclude plaintiff's expert witness from testifying at trial regarding the 2010 Residential Code of New York State and the 2007 American National Standard Institute/National Spa and Pool Institute standard for aboveground/onground residential swimming pools, and reinstating the expert witness disclosure to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries she allegedly sustained by striking her head on the bottom of an aboveground swimming pool after sliding head first down a water slide. Plaintiff alleges that defendants were negligent with respect to the construction, ownership, use and control of their swimming pool and its component parts. Plaintiff's expert witness disclosure indicated that plaintiff's aquatic safety expert would testify that defendants' installation of a water slide on their aboveground swimming pool violated 16 CFR part 1207, which provides safety standards for swimming pool slides issued by the Consumer Product Safety Commission; the 2007 American National Standard Institute/National Spa and Pool Institute standard for aboveground/onground residential swimming pools (ANSI/NSPI-4); the Residential Code of New York State; and the Village of Wilson Zoning Law § 170-23. Defendants moved in limine seeking to strike

plaintiff's expert witness disclosure and preclude the expert from testifying at trial. Supreme Court granted defendants' motion, and plaintiff appeals.

Initially, we note that the order granting defendants' motion in limine is appealable because "the order in question is '[a]n order deciding . . . a motion [that] clearly involves the merits of the controversy . . . and affects a substantial right' " (*Muhammad v Fitzpatrick*, 91 AD3d 1353, 1353-1354 [4th Dept 2012]; *see Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015]). With respect to the merits, we agree with plaintiff that the expert witness disclosure provides defendants with "sufficient notice" of the theories on which the expert will testify at trial and of the specific standards upon which the expert's opinion is based (*Maldonado v Cotter*, 256 AD2d 1073, 1074 [4th Dept 1998]; *cf*. *Bax v Allstate Health Care, Inc*., 26 AD3d 861, 864 [4th Dept 2006]), and defendants therefore will be neither "surprise[d] [n]or prejudice[d]" by the expert testimony (*Maldonado*, 256 AD2d at 1074; *see generally Hunter v Tryzbinski*, 278 AD2d 844, 844-845 [4th Dept 2000]). Indeed, the expert witness disclosure included the expert's notes and opinions, as well as the expert's application of each of the standards to the facts of this case.

Nonetheless, we conclude that the court properly granted those parts of the motion seeking to strike the expert witness disclosure and to preclude the expert from testifying with respect to 16 CFR part 1207 and the Village of Wilson Zoning Law § 170-23. " 'It is within the sound discretion of the trial court to determine whether a witness may testify as an expert and that determination should not be disturbed in the absence of serious mistake, an error of law or abuse of discretion' " (*Guzek v B & L Wholesale Supply, Inc.,* 151 AD3d 1662, 1663 [4th Dept 2017]). Part 1207, which "sets forth the consumer product safety standard . . . for the manufacture and construction of slides for use in swimming pools," is inadmissible as evidence of negligence in this case (16 CFR 1207.1 [a]). By its terms, that regulation creates a duty for slide manufacturers, not for private homeowners, and it therefore was "not intended to create 'a standard of care in [a] negligence litigation' " such as this (*Hand v Gilbank*, 300 AD2d 1067, 1068 [4th Dept 2002]). We also reject plaintiff's contention that defendants' alleged violation of the Village of Wilson Zoning Law § 170-23 is admissible as "some evidence" of defendants' negligence here inasmuch as that section does not relate to swimming pool slides and thus does not apply to this case (*Elliott v City of New York*, 95 NY2d 730, 735 [2001]).

We agree with plaintiff, however, that the court erred in granting that part of the motion to strike the expert witness disclosure and to preclude the expert from testifying with respect to the 2010 Residential Code of New York State (Residential Code) and the ANSI/NSPI-4 standard for aboveground residential swimming pools, and we therefore modify the order accordingly. Section 1.2 of that standard provides that "[a]boveground/onground residential swimming pools are for swimming and wading only. No . . . slides or other

equipment are to be added to an aboveground/onground pool that in any way indicates that an aboveground/onground pool may be used or intended for . . . sliding purposes," and the ANSI/NSPI-4 standard is incorporated in the Residential Code that was in effect at the time of plaintiff's accident (*see* 2010 Residential Code of New York State §§ R102.6, G109.1). Inasmuch as the ANSI/NSPI-4 standard applies only to residential pools, and the Residential Code applies to family dwellings (*see* Residential Code § R101.2), we conclude that the Residential Code section adopting the ANSI/NSPI-4 standard applies to private homeowners. Thus, we further conclude that plaintiff's expert may properly rely on any violation of the ANSI/NSPI-4 standard as "some evidence" of defendants' negligence (*Elliott*, 95 NY2d at 735; *see generally* Executive Law § 106).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

770

CA 18-00130

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF STEVEN A. SCHULZ, ET AL.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF HOPEWELL ZONING BOARD OF APPEALS,
TOWN OF HOPEWELL PLANNING BOARD,
RESPONDENTS-DEFENDANTS-APPELLANTS,
AND EMILY JEFFERY, RESPONDENT-DEFENDANT.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (MARY JO S. KORONA OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

CHENEY & BLAIR, LLP, SKANEATALES (DAVID D. BENZ OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered February 15, 2017 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, in effect, denied the motion of respondents-defendants Town of Hopewell Zoning Board of Appeals and Town of Hopewell Planning Board to dismiss the petition/complaint, declared the variance approvals of respondent-defendant Town of Hopewell Zoning Board of Appeals null and void, and remitted the matter for reconsideration.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the motion in part, dismissing the petition/complaint insofar as it sought declaratory relief and vacating the declaration, and dismissing the petition/complaint against respondent-defendant Town of Hopewell Planning Board, and as modified the judgment is affirmed without costs.

Memorandum: This matter stems from the grant of three area variances by respondent-defendant Town of Hopewell Zoning Board of Appeals (ZBA) relieving respondent-defendant Emily Jeffery of a minimum lot width requirement with respect to Jeffery's proposed subdivision of property located in the Town of Hopewell (Town). Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to annul the ZBA's determinations approving the area variances and seeking a judgment declaring the ZBA's votes approving those variances void. Thereafter, the ZBA and respondent-defendant Town of Hopewell Planning

Board (Planning Board) moved to dismiss the petition/complaint on, inter alia, the grounds that petitioners failed to state a cause of action against the Planning Board and improperly sought declaratory relief. The ZBA and Planning Board (collectively, respondents) appeal from a judgment that, in effect, denied their motion and granted the relief sought in the petition/complaint.

We agree with respondents that Supreme Court erred in denying that part of their motion with respect to the request for declaratory relief, and we therefore modify the judgment accordingly. "[P]etitioner[s] improperly sought a declaration [pursuant to CPLR article 30] inasmuch as that relief is not an available remedy for challenging an administrative determination" (*Matter of One Niagara LLC v City of Niagara Falls*, 78 AD3d 1554, 1555 [4th Dept 2010]; *see Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333, 1334 [4th Dept 2009], *appeal dismissed* 12 NY3d 882 [2009], *lv denied* 13 NY3d 707 [2009]). We also agree with respondents that the court erred in denying that part of their motion seeking to dismiss the petition/complaint against the Planning Board, and we therefore further modify the judgment accordingly. The Planning Board, "which did not render the determination[s] [approving the area variances], is not a proper party to this proceeding . . . and the proceeding must, thus, be dismissed insofar as asserted against it" (*Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 826 [2d Dept 2010]; *see generally Matter of Wittie v State of N.Y. Off. of Children & Family Servs.*, 55 AD3d 842, 843 [2d Dept 2008]).

We agree with petitioners, however, that the court properly annulled the ZBA's determinations. The Town's Zoning Code (Code) provides that "[t]he [ZBA] shall refer applications for variance requests to the Planning Board for review and comments. The Planning Board shall forward comments within 30 days of the close of a public hearing of the [ZBA]" (Code § 302 [G]). Here, the Planning Board conducted a meeting on June 20, 2016, and voted to approve the relevant variances. On June 27, 2016, the ZBA held a public hearing and postponed its decision on the variance application until certain residents could comment at an upcoming July 18, 2016 Planning Board meeting. At the July 18, 2016 Planning Board meeting, various residents opposed the variances, and the Planning Board reversed its initial June 20, 2016 determination and voted not to approve the area variances. Thereafter, the ZBA determined that the Planning Board did not have the authority to reverse its prior determination and that the July 18, 2016 vote was null and void. The ZBA met on August 22, 2016 and voted to approve the area variances without considering the Planning Board's July 18, 2016 review and comments.

" 'It is well established that [c]ourts 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' " (*Matter of Bartz v Village of LeRoy*, 159 AD3d 1338, 1341 [4th Dept 2018]; *see* CPLR 7803 [3]; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428 [4th Dept 2017]). Here, inasmuch as no ZBA public hearing took place until June 27, 2016, the June 20, 2016

action on the variance application by the Planning Board was procedurally improper (*see* Code § 302 [G]). The ZBA's refusal to consider the procedurally compliant July 18, 2016 review and comments submitted by the Planning Board therefore violated the procedure set forth in section 302 (G) of the Code. We thus conclude that the ZBA's grant of the area variances was "made in violation of lawful procedure [and] was affected by an error of law" (CPLR 7803 [3]).

In light of our determination, we do not address respondents' remaining contention.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

788

CA 18-00071

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

DEBORAH O'REILLY-MORSHEAD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINE O'REILLY-MORSHEAD, DEFENDANT-APPELLANT.

EMPIRE JUSTICE CENTER, ROCHESTER (AMY E. SCHWARTZ-WALLACE OF COUNSEL), AND THE LEGAL AID SOCIETY OF ROCHESTER, FOR DEFENDANT-APPELLANT.

BADAIN & CROWDER, ROCHESTER (LARA ROBIN BADAIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered April 3, 2017. The order, insofar as appealed from, denied that part of defendant's motion seeking a determination that property acquired between June 9, 2003 and June 9, 2006 is subject to equitable distribution, and granted plaintiff partial summary judgment determining that such property is not subject to equitable distribution.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the second ordering paragraph is vacated, and that part of the motion seeking a determination that property acquired between June 9, 2003 and June 9, 2006 is subject to equitable distribution is granted.

Memorandum: Plaintiff and defendant are residents of New York who, on June 9, 2003, traveled to Vermont and entered into a civil union under the laws of that state. On June 9, 2006, the parties were married in Canada. In 2014, plaintiff commenced this action seeking dissolution of the marriage and defendant counterclaimed for, inter alia, dissolution of the civil union and the equitable distribution of property acquired during the civil union. Defendant thereafter moved for, inter alia, summary judgment on that counterclaim and requested that Supreme Court distribute the property acquired during the period of the civil union pursuant to the Domestic Relations Law or, in the alternative, pursuant to the court's equity jurisdiction. Plaintiff opposed the motion and sought an order determining that property acquired during the civil union but before the marriage is separate property and is therefore not subject to equitable distribution. The court granted defendant's motion in part, dissolved the civil union, and "search[ed] the record" to grant partial summary judgment to plaintiff, determining that property acquired during the civil union is not subject to equitable distribution on the ground that the court

lacked authority to distribute such property. The court ordered that the remaining issues with respect to the dissolution of the marriage and the equitable distribution of property would be determined after trial. Defendant appeals from those parts of the order that denied her motion and granted plaintiff summary judgment with respect to the equitable distribution of property acquired during the civil union. We reverse the order insofar as appealed from, vacate the second ordering paragraph granting partial summary judgment to plaintiff, and grant that part of the motion seeking a determination that property acquired during the civil union and prior to the marriage, i.e., between June 9, 2003 and June 9, 2006, is subject to equitable distribution.

Contrary to defendant's contention, the court properly declined to treat the civil union as equivalent to a marriage for the purposes of the equitable distribution of property under the Domestic Relations Law. When the New York State Legislature enacted the Marriage Equality Act, it granted same-sex couples the right to marry, but it did not grant those couples who had entered into civil unions the same rights as those who marry. Rather, the Domestic Relations Law provides that "[a] *marriage* that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex" (§ 10-a [1] [emphasis added]). While the word "marriage" is not defined in the Domestic Relations Law, the disposition of property in a matrimonial action is dependent on whether that property is "[m]arital property" (§ 236 [B] [5] [c]). The Domestic Relations Law defines " 'marital property' " as property acquired "during the marriage" (§ 236 [B] [1] [c]) and, as relevant here, "separate property" is defined as "property acquired before marriage" (§ 236 [B] [1] [d] [1]). Here, there is no dispute that the parties were married on June 9, 2006, and thus that the property at issue was acquired prior to the parties' marriage. We cannot ignore the statutory definitions in order to determine that the definition of "marital property" in the Domestic Relations Law includes property acquired during a civil union. Thus, we conclude that the court properly determined that a civil union is not equivalent to a marriage for the purposes of the equitable distribution of property, and thus properly denied defendant's request for equitable distribution pursuant to Domestic Relations Law § 236 (B) (5) (c) of the property acquired during the civil union but prior to the marriage.

We conclude, however, that the court erred in denying defendant's request to apply principles of comity to the civil union and thereby recognize that both parties have rights with respect to property acquired during the civil union. In *Debra H. v Janice R.* (14 NY3d 576 [2010], *rearg denied* 15 NY3d 767 [2010], *cert denied* 562 US 1136 [2011]), the Court of Appeals "invoked the common law doctrine of comity to rule that, because [a] couple had entered into a civil union in Vermont prior to [a] child's birth–and because the union afforded Debra H. parental status under Vermont law–her parental status should be recognized under New York Law as well" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 22 [2016]). Thus, the Court noted that a civil union under Vermont law created parental rights, and the Court determined that, under the principles of comity, those rights should

be recognized under New York law (*see Debra H.*, 14 NY3d at 599-600). While the Court left open the question whether New York should extend comity to the civil union for purposes other than parentage (*id.* at 601), we conclude that comity does require the recognition of property rights arising from a civil union in Vermont. One of the consequences of the parties' civil union in Vermont was that they would receive "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage" (Vt Stat Ann, tit 15, § 1204 [a]), including rights with respect to "divorce . . . and property division" (§ 1204 [d]; *see DeLeonardis v Page*, 188 Vt 94, 101, 998 A2d 1072, 1076 [2010]). That rule is consistent with the public policy of New York, inasmuch as the laws of Vermont and New York both "predicate[] [property rights] on the objective evidence of a formal legal relationship," i.e., legal union between the parties (*Debra H.*, 14 NY3d at 606). In other words, under the laws of both Vermont and New York, property acquired during a legal union of two people–in Vermont a civil union or marriage, and in New York, a marriage–is subject to equitable distribution under the governing statutes of the state. The relevant New York and Vermont statutes both provide similar factors for the court to consider when determining the equitable distribution of the property (*compare* Domestic Relations Law § 236 [B] [5] [c], [d], *with* Vt Stat Ann, tit 15, § 751 [b]). Thus, we conclude that, under the principles of comity, the property acquired during the civil union and prior to the marriage is subject to equitable distribution, and such property will therefore be equitably distributed after trial, along with the property acquired during the marriage.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

790

CA 17-01919

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RESIDENTIAL ASSET SECURITIES CORPORATION HOME EQUITY MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2006-KS2,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BALDERSTON, ET AL., DEFENDANTS,
AND PHILIP CIUFO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PHILIPPONE LAW OFFICES, ROCHESTER (CHRISTOPHER HUDAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

RAS BORISKIN, LLC, WESTBURY (CHRIS LESTAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 27, 2017. The order granted the motion of plaintiff for summary judgment and denied the cross motion of defendant Philip Ciufo for summary judgment.

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

Memorandum: These consolidated appeals arise from an action to foreclose a mortgage secured by property owned by Philip Ciufo (defendant). In appeal No. 2, defendant appeals from an order that, inter alia, granted plaintiff's motion for summary judgment on the complaint and denied defendant's cross motion seeking, among other relief, summary judgment dismissing the complaint against him on the ground that the statute of limitations had expired. In appeal No. 1, defendant purports to appeal from a separate order granting the motion and denying the cross motion. As an initial matter, we note that the notice of appeal applies only to the order in appeal No. 2. Nevertheless, we exercise our discretion to treat the notice of appeal as valid with respect to both orders (*see* CPLR 5520 [c]). We further note, however, that the order in appeal No. 1 was superseded by the order in appeal No. 2, and we therefore must dismiss appeal No. 1 (*see Morris v Ontario County*, 152 AD3d 1185, 1186 [4th Dept 2017]).

Contrary to defendant's contention, Supreme Court properly granted plaintiff's motion. Before addressing the merits, we conclude

that, although raised for the first time on appeal, plaintiff's contention that defendant does not have standing to assert a statute of limitations defense is properly before us inasmuch as it is an issue of law that "could not have been avoided by [defendant] if brought to [his] attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). We further conclude, however, that defendant, as the owner of the property, has standing to assert that defense (*cf. Pritchard v Curtis*, 101 AD3d 1502, 1502-1503 [3d Dept 2012]).

With respect to the merits, we conclude that plaintiff met its initial burden with respect to the cause of action for foreclosure "by submitting the note and mortgage together with an affidavit of nonpayment" (*Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209, 1209 [4th Dept 2013]; *see Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015]). "The burden then shifted to defendant[] to attempt to defeat summary judgment by production of evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[] and [mortgage]" (*I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]; *see Brandywine Pavers*, LLC, 108 AD3d at 1209-1210).

We reject defendant's contention that the evidence that he submitted in opposition raised a triable issue of fact with respect to the statute of limitations defense. Defendant submitted evidence establishing that plaintiff had commenced foreclosure actions in 2007 and 2008, more than six years before the commencement of this action, and "[t]he filing of the summons and complaint seeking the entire unpaid balance of principal in the prior foreclosure action constituted a valid election by the plaintiff to accelerate the maturity of the debt" (*Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]). Furthermore, it is well settled that, where "the mortgage holder accelerates the entire debt . . . , the six-year statute of limitations begins to run on the entire debt" (*Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]; *see Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). It is also well settled, however, that " '[a] lender may revoke its election to accelerate the mortgage, [although] it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action' " (*Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935; *see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987 [2d Dept 2016], *lv denied* 29 NY3d 919 [2017]). Here, in support of its motion, plaintiff submitted evidence establishing that the prior foreclosure actions commenced in 2007 and 2008 were settled by a modification agreement between plaintiff and the borrower whereby payments on the mortgage resumed. That evidence "establishes that the statute of limitations was tolled by demonstrating 'that [partial payment] was paid to and accepted by [plaintiff] as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' " (*Business Loan Ctr., Inc.*, 31 AD3d at 1123, quoting *Crow v Gleason*, 141 NY 489, 493 [1894]).

Defendant failed to submit any evidence establishing that the modification agreement did not toll the statute of limitations, and thus failed to raise an issue of fact.

We reject defendant's further contention that he raised a triable issue of fact by submitting evidence that plaintiff commenced another prior foreclosure action in September 2009, which was after the modification agreement was signed. Although the limitations period began to run when that action was commenced, this action was commenced in June 2015, which was within the six-year statute of limitations.

For the same reasons, we conclude that the court properly denied defendant's cross motion.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01920

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RESIDENTIAL ASSET SECURITIES CORPORATION HOME EQUITY MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2006-KS2,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BALDERSTON, ET AL., DEFENDANTS,
AND PHILIP CIUFO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PHILIPPONE LAW OFFICES, ROCHESTER (JAMES V. PHILIPPONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RAS BORISKIN, LLC, WESTBURY (CHRIS LESTAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 27, 2017. The order, inter alia, granted the motion of plaintiff for summary judgment against defendant Philip Ciufo, and struck the answer of that defendant.

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

Same memorandum as in *U.S. Bank N.A. v Balderston* ([appeal No. 1] — AD3d — [July 25, 2018] [4th Dept 2018]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

799

KA 15-00920

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY WOOD, DEFENDANT-APPELLANT.

DANIELLE C. WILD, PENFIELD, FOR DEFENDANT-APPELLANT.

TIMOTHY WOOD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 24, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and menacing in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal possession of a weapon in the second degree under count two of the indictment and menacing in the second degree under count three of the indictment and as modified the judgment is affirmed, and a new trial is granted on those counts.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of menacing in the second degree (§ 120.14 [1]), defendant contends that a supplemental instruction provided by Supreme Court in response to a jury note constituted an abuse of discretion. We agree. Therefore, we modify the judgment by reversing those parts convicting him of CPW in the second degree and menacing in the second degree under the second and third counts of the indictment, respectively, and we grant him a new trial on those counts.

On a summer day in 2012, defendant ate breakfast at a restaurant on Monroe Avenue in the City of Rochester. Displeased with the cost of the breakfast, he complained loudly to the restaurant's staff and became belligerent. One member of the staff (complainant) asked him to leave. Weeks later, defendant returned to the restaurant and approached the complainant. According to the complainant's trial testimony, defendant pulled a gun from his waistband, pointed it at

the complainant, and demanded sexual favors from other members of the restaurant's staff as compensation for the cost of the breakfast. The complainant again asked defendant to leave the restaurant. Defendant did so, and walked to a nearby convenience store. The police apprehended him there and discovered an antique French pistol in his waistband. The pistol was loaded with nine rounds and had one round in the chamber.

Thereafter, a grand jury indicted defendant. The first count of the indictment charged him with CPW in the second degree on the ground that he possessed a loaded firearm and was not in his home or place of business (*see* Penal Law § 265.03 [3]). The second count charged him with CPW in the second degree on the ground that he possessed a loaded firearm with the intent to use it unlawfully against another (*see* § 265.03 [1] [b]). The third count charged him with menacing in the second degree on the ground that, by displaying the firearm, he intentionally placed or attempted to place another person in reasonable fear of physical injury, serious physical injury, or death (*see* § 120.14 [1]).

At trial, defendant testified that the gun had belonged to his grandfather, who was a veteran of World War II. On the day of the incident, defendant was transporting the gun in his truck to another family member, also a war veteran. He decided to stop at a bar near the restaurant, but he kept the gun on his person so that no one could steal it from his truck. After the bar closed, defendant noticed the complainant inside the restaurant. Defendant testified that he was remorseful about their initial confrontation, so he went inside the restaurant to make amends with the complainant. After he entered the restaurant, the complainant insulted him, so defendant insulted the complainant back and left the restaurant. Defendant denied that he displayed the gun.

During its deliberations, the jury sent the court a note requesting clarification of the terms "intent" and "unlawfully" as they are used in Penal Law § 265.03 (1). With respect to those terms, the jury asked: "Does that mean when he put the gun in his waistband, when he stepped out of the car or when he pulled it out of his pants or at any point in time he was in possession of the gun?" The court recessed for the evening without responding to the note. The next morning, the jury sent an additional note asking the court to read back any testimony about the interaction in the restaurant between defendant and the complainant. The prosecutor then asked the court to instruct the jury, pursuant to Penal Law § 265.15 (4), that possession of a loaded firearm is presumptive evidence of intent to use it unlawfully against another. Defense counsel objected. Defense counsel noted that the prosecutor had not previously requested that instruction, and argued that it would be error for the court to read the instruction for the first time at that stage of the proceedings because defense counsel no longer had the opportunity to address the presumption of intent in his summation. The court overruled the objection and instructed the jury: "I have decided to give you another legal instruction and what I would like you to do is[,] after you hear this legal instruction, we're going to send you back. If you

want us to [read back the requested testimony,] actually we're going to continue to do it. If you don't want it, tell us, send a note out telling us, but let me read you this. The possession of a loaded firearm is presumptive evidence of intent to use the same unlawfully against another. What that means is that if the People have proven beyond a reasonable doubt that defendant possessed a loaded firearm, then you may, but are not required to, infer from the fact that he did so with the intent to use the same unlawfully against another." The jury resumed its deliberations and, within two minutes, wrote the court a note stating that no additional information was necessary and that it had reached a verdict.

The Criminal Procedure Law allows the jury to ask the court to clarify an instruction "[a]t any time during its deliberation" (CPL 310.30). Upon receiving such a request, the court must " 'perform the delicate operation of fashioning a response which meaningfully answer[s] the jury's inquiry while at the same time working no prejudice to the defendant' " (*People v Brewer*, 118 AD3d 1409, 1413 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]; *see People v Miller*, 288 AD2d 698, 700 [3d Dept 2001]). "[T]he court has significant discretion in determining the proper scope and nature of the response" (*People v Taylor*, 26 NY3d 217, 224 [2015]). In determining whether the court's response constituted an abuse of discretion, " '[t]he factors to be evaluated are the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the [information] actually given and the presence or absence of prejudice to the defendant' " (*id.*, quoting *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]).

We conclude that the court failed in its duty to fashion a response that meaningfully answered the jury's question and to avoid prejudicing defendant. The jury notes demonstrate that the jury had thoughtful questions about intent and was carefully weighing the conflicting testimony of the witnesses to determine whether and when defendant in fact formed the intent to use the gun unlawfully against another. The court, however, instructed the jury that defendant's possession of the gun was presumptive evidence of intent to use it unlawfully, and that the jury may not need or want to consider additional evidence in light of that presumption. That answer was not responsive to either note. Moreover, the court's response prejudiced defendant by introducing new principles of law after summations, when defense counsel no longer had the opportunity to argue that, despite the presumption, the evidence established that defendant lacked the requisite intent (*see Brewer*, 118 AD3d at 1413; *see generally People v Sierra*, 231 AD2d 907, 908 [4th Dept 1996]).

We further conclude that the error is not harmless. Even assuming, arguendo, that the proof of guilt is overwhelming, we cannot conclude that there is no significant probability that defendant would have been acquitted on the second and third counts if the court had not abused its discretion in responding to the jury notes (*cf. People v Nevins*, 16 AD3d 1046, 1047 [4th Dept 2005], *lv denied* 4 NY3d 889 [2005], *cert denied* 548 US 911 [2006]; *see generally People v*

Crimmins, 36 NY2d 230, 241-242 [1975]).

Nevertheless, we reject defendant's contention that the foregoing error compels reversal of that part of the judgment convicting him of CPW in the second degree under the first count of the indictment. The crime charged under that count does not require intent (*see* Penal Law § 265.03 [3]), and defendant's trial testimony established every element of that crime. The jury notes focused on the second and third counts and the legal definition of intent, and made no reference to the first count or its elements. Thus, there was no " 'reasonable possibility' that the jury's decision to convict on the tainted counts[, i.e., counts two and three,] influenced its guilty verdict in a 'meaningful way' " on the first count (*People v Doshi*, 93 NY2d 499, 504-505 [1999], quoting *People v Baghai-Kermani*, 84 NY2d 525, 532-533 [1994]).

Defendant failed to preserve for our review the further contention in his main and pro se supplemental briefs that the court erred in failing to conduct an inquiry of the jury foreperson inasmuch as he did not request that the court make an inquiry of her or move to discharge her (*see People v Quinones*, 41 AD3d 868, 868 [2d Dept 2007], *lv denied* 9 NY3d 1008 [2007]), and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The sentence with respect to count one of the indictment is not unduly harsh or severe. Finally, we conclude that the additional contentions in defendant's pro se supplemental brief do not require reversal or further modification of the judgment.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

801

KA 12-01622

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH GELLING, DEFENDANT-APPELLANT.

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

JOSEPH GELLING, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 19, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal possession of a weapon in the second degree, criminal mischief in the fourth degree, petit larceny and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Addressing first defendant's contentions in his main brief, we conclude that defendant was not denied effective assistance of counsel. Defendant contends that defense counsel was ineffective in failing to call an expert to testify regarding the potency of the alcoholic beverage that defendant admitted to drinking on the night of the incident in support of an intoxication defense. That contention lacks merit. " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938 [4th Dept 2001], *lv denied* 97 NY2d 684 [2001]). Contrary to defendant's contention, expert testimony was not required to establish an intoxication defense, and "defendant now offers little more than speculative assertions that an expert's testimony would have supported it" (*People v Muller*, 57 AD3d 1113, 1114 [3d Dept 2008], *lv denied* 12 NY3d 761 [2009]; *see People v King*, 124 AD3d 1064, 1067 [3d Dept 2015], *lv denied* 25 NY3d 1073 [2015]).

Defendant further contends that defense counsel was ineffective in failing to establish the meaning of a notation regarding his blood alcohol content that was apparently placed on a jail form when he was booked into the jail inasmuch as that information would have supported his intoxication defense. We reject that contention. It is well settled that, in order to establish that counsel was ineffective, defendant must " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Bank*, 129 AD3d 1445, 1447 [4th Dept 2015], *affd* 28 NY3d 131 [2016], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Anwar*, 151 AD3d 1628, 1629 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]). There is no evidence demonstrating that the notation indicated that defendant was intoxicated, and indeed it could be interpreted to indicate that he was sober enough to legally operate a motor vehicle. Consequently, we will not "second-guess whether [the] course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Here, "the evidence, the law, and the circumstances of [the] case, viewed in totality and as of the time of the representation, reveal that [defendant's] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see Satterfield*, 66 NY2d at 798-799).

Defendant's contention, that he was deprived of effective assistance of counsel regarding his decision to reject a pretrial plea offer, "involves strategic discussions between defendant and his attorney outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10" (*People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *see People v Surowka*, 103 AD3d 985, 986-987 [3d Dept 2013]).

Defendant's further contention that Supreme Court committed a mode of proceedings error when it permitted the weapon that had been received in evidence to be provided to the jurors in response to a jury note without notifying counsel of that request lacks merit. In its charge, the court instructed the jury that they could request that certain exhibits, including the rifle and ammunition, be provided to them, and defense counsel did not object to that charge or request any supplemental instruction regarding the rifle or ammunition (*see* CPL 310.20 [1]). Therefore, when the jury sent a note requesting the rifle, it was not error for the court to provide that exhibit to them without further input from the parties (*see People v Damiano,* 87 NY2d 477, 487 [1996], *superceded by statute on other grounds as stated in People v Miller*, 18 NY3d 704, 706 [2012]; *People v Black*, 38 AD3d 1283, 1285-1286 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]). To the contrary, the jury's request "was nothing more than an inquiry of a ministerial nature . . . , unrelated to the substance of the verdict . . . As a result, the judge was not required to notify defense counsel nor provide them with an opportunity to respond, as neither defense counsel nor defendant could have provided a meaningful contribution" (*People v Ochoa*, 14 NY3d 180, 188 [2010]).

We reject defendant's contention that the court erred in denying

his motion to dismiss the indictment pursuant to CPL 210.35 (4) on the ground that the People failed to provide him with reasonable notice of the grand jury proceedings pursuant to CPL 190.50 (5) (a). "CPL 190.50 (5) (a) does not mandate a specific time period for notice; rather, 'reasonable time' must be accorded to allow a defendant an opportunity to consult with [defense] counsel and decide whether to testify before a [g]rand [j]ury" (*People v Sawyer*, 96 NY2d 815, 816 [2001]). Here, the record establishes that the People gave defendant and his attorney 1½ days' notice that the matter was to be presented to the grand jury, which constituted reasonable notice (*see People v Sawyer*, 274 AD2d 603, 605-606 [2000], *affd* 96 NY2d 815 [2001]; *People v Lanier*, 130 AD3d 1310, 1312 [3d Dept 2015], *lv denied* 26 NY3d 1009 [2015]). Thus, we conclude that defendant had "sufficient time to consult with defense counsel prior to the filing of the indictment and, because neither defendant nor defense counsel notified the People that defendant intended to testify before the grand jury, defendant was not deprived of the right to testify" (*People v Quick*, 48 AD3d 1223, 1223 [4th Dept 2008]; *see People v Johnson*, 46 AD3d 1384, 1385 [4th Dept 2007]).

We also reject defendant's contention that he was denied the right to be present at a sidebar conference during the jury selection process. It is well settled that "reversal is not required [where, as here], because of the matter then at issue before the court or the practical result of the determination of that matter, the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome" (*People v Roman*, 88 NY2d 18, 26 [1996], *rearg denied* 88 NY2d 920 [1996]; *see generally People v Gamble*, 137 AD3d 1053, 1055 [2d Dept 2016]).

We reject defendant's contention that the verdict is contrary to the weight of the evidence inasmuch as his intoxication prevented him from forming the requisite intent to commit certain crimes of which he was convicted, and from knowingly possessing the weapon. Upon reviewing the evidence "in light of the elements of the crime[s] as charged [to the jury] without objection by defendant" (*People v Noble*, 86 NY2d 814, 815 [1995]; *see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence.

Penal Law § 15.25 states that "[i]ntoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." Although there was evidence in this case that defendant consumed alcohol, and thus the jury could have concluded that he was intoxicated, "it is well settled that '[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element[s] of intent' " and knowledge (*People v Williams*, 158 AD3d 1170, 1171 [4th Dept 2018], *lv denied* 31 NY3d 1018 [2018]; *see People v Principio*, 107 AD3d 1572, 1573 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]). Furthermore, it is also well settled that

" '[a] defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused' " (*People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]; *see Williams*, 158 AD3d at 1170).

In addition, with respect to the burglary charge, "a defendant's intent to commit a crime may be inferred from the circumstances of the entry . . . , as well as from defendant's actions and assertions when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see People v Gaines*, 74 NY2d 358, 362 n 1 [1989]; *People v Ramirez*, 278 AD2d 897, 897 [4th Dept 2000], *lv denied* 96 NY2d 833 [2001]). Here, the evidence established that defendant armed himself with a loaded weapon, made several attempts to enter the dwelling at issue by cutting screens and attempting to force open a door, eventually entered through a second-story window, took property and threw it out of the window to a spot where it could be retrieved and loaded into a waiting vehicle, and immediately fled when confronted by the homeowner. Based on that evidence and all the other evidence in the record, we reject defendant's contention that the evidence of his intoxication negated the elements of intent and knowledge for the crimes of which he was convicted (*see People v Madore*, 145 AD3d 1440, 1440 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]; *People v Jackson*, 269 AD2d 867, 867 [4th Dept 2000], *lv denied* 95 NY2d 798 [2000]).

Contrary to defendant's further contention, the integrity of the grand jury proceedings was not impaired by the prosecutor's failure to instruct the grand jurors on intoxication. The People were not required to give an intoxication charge to the grand jury because there was insufficient evidence of intoxication presented in that forum, and the People were also not required to present evidence of any mitigating defense (*see People v Lancaster*, 69 NY2d 20, 30 [1986], *cert denied* 480 US 922 [1987]; *People v Walton*, 70 AD3d 871, 874 [2d Dept 2010], *lv denied* 14 NY3d 894 [2010]) and, "[l]ike a mitigating defense, intoxication merely reduces the gravity of the offense by negating an element" (*People v Harris*, 98 NY2d 452, 475 [2002]). "The People generally enjoy wide discretion in presenting their case to the [g]rand [j]ury . . . and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused" (*Lancaster*, 69 NY2d at 25-26). Although the prosecutor has a duty to instruct the grand jury regarding any complete defense, "the prosecutor's obligation to instruct the [g]rand [j]ury on a particular defense depends upon whether that defense has the 'potential for eliminating a needless or unfounded prosecution' " (*id*. at 27, quoting *People v Valles*, 62 NY2d 36, 38 [1984]). Here, we conclude that "[t]he People here were not required to instruct the grand jury on intoxication" (*Harris*, 98 NY2d at 475).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions in his main brief and the contentions in his pro se supplemental brief, and we conclude that none warrants reversal or modification of the judgment.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

802

CA 16-01167

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF ALLAN M., CONSECUTIVE NO. 56998, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered June 14, 2016. The order, among other things, continued petitioner's commitment to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and ordering his continued commitment to a secure treatment facility pursuant to Mental Hygiene Law § 10.09 (h).

We reject petitioner's contention that the evidence is not legally sufficient to establish that he requires continued confinement. Respondents' evidence at the hearing consisted of the report and testimony of a psychologist who evaluated petitioner and opined that petitioner suffers from nonexclusive pedophilic disorder, unspecified paraphilic disorder, antisocial personality disorder, and psychopathy. The expert concluded that, as a result of those mental conditions, diseases or disorders, petitioner has such an inability to control his behavior that he is likely to commit sex offenses if not confined to a secure treatment facility. Respondents' expert also concluded that petitioner posed a high risk for sexual violence based on the Violence Risk Scale-Sex Offender version, a test designed to

evaluate an individual's risk of sexual violence. Respondents' expert based her opinions on, inter alia, the fact that petitioner has "not been treatment compliant" and that he has remained in Phase I of treatment, despite being in a secure treatment facility for almost five years.

Although respondents' expert acknowledged that petitioner has not engaged in sexually inappropriate behavior while in confinement, she opined that the absence of such behavior is not indicative that he has learned to control his behavior. Rather, she attributed the absence of sexually inappropriate behavior while confined to petitioner's lack of access to his victim pool, which was mainly comprised of prepubescent males. Upon our review of the record, we conclude that respondents established by the requisite clear and convincing evidence that petitioner "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]; *see also Matter of State of New York v Floyd Y.*, 30 NY3d 963, 965 [2017]).

We likewise reject petitioner's challenge to Supreme Court's determination on the ground that it is against the weight of the evidence. The court " 'was in the best position to evaluate the weight and credibility' " of respondents' expert testimony, and we perceive no reason to disturb the court's decision to credit that testimony (*Billinger*, 137 AD3d at 1758; *see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

803

CA 17-02205

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

BRG CORPORATION AND DEMETRIOS TAMOUTSELIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHEVRON U.S.A., INC., TEXACO, INC.,
DEFENDANTS-RESPONDENTS,
VALERO ENERGY CORPORATION, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 22, 2017. The order denied the motion of defendant Valero Energy Corporation to dismiss the second amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the second amended complaint is dismissed against defendant Valero Energy Corporation.

Memorandum: Plaintiffs commenced this action to recover the costs of remediating environmental contamination to their property in the City of Rochester. Plaintiffs allege that defendants, or their respective predecessors in interest, caused the contamination in the 1960s and 1970s. Valero Energy Corporation (defendant) moved to dismiss the second amended complaint against it for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). Supreme Court denied the motion, holding that plaintiffs had "provided ample evidence demonstrating the existence of facts sufficient to justify the exercise of personal jurisdiction over [defendant]," specifically that defendant was the successor in interest to a company that was itself subject to personal jurisdiction in New York. "*[A]s such*," the court continued, it "has personal jurisdiction over [defendant]" for the alleged torts of its purported predecessor (emphasis added). We now reverse.

It is undisputed that defendant, a foreign corporation with no present contacts in this State, is not subject to personal jurisdiction in New York under either CPLR 301 or 302 (a) (*see Semenetz v Sherling & Walden, Inc.*, 21 AD3d 1138, 1139-1140 [3d Dept 2005], *affd on other grounds* 7 NY3d 194 [2006]). Nevertheless, plaintiffs contend that personal jurisdiction exists over defendant because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York. The Third Department, however, expressly rejected that jurisdictional theory in *Semenetz* (*see id.* at 1140). The "successor liability rule[s]," wrote the *Semenetz* court, "deal with the concept of tort liability, not jurisdiction. When and if [successor liability] is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having in personam jurisdiction over the successor, but the [successor liability rules] do not and cannot confer such jurisdiction over the successor in the first instance" (*id.*).

Plaintiffs do not challenge *Semenetz's* holding or its rationale, nor do they ask us to chart our own course on this novel and unsettled jurisdictional issue (*see generally Semenetz*, 7 NY3d at 199 n 2; *Edie v Portland Orthopaedics Ltd.*, 2017 WL 945936, *2 [SD NY, Feb. 16, 2017, No. 14-Civ-7350 (NRB)]; *cf. Patin v Thoroughbred Power Boats Inc.*, 294 F3d 640, 653 [5th Cir 2002]; *Williams v Bowman Livestock Equip. Co.*, 927 F2d 1128, 1132 [10th Cir 1991]; *City of Richmond v Madison Mgt. Group, Inc.,* 918 F2d 438, 454 [4th Cir 1990]; *Bridges v Mosaic Global Holdings, Inc.*, 23 So 3d 305, 315-317 [La Ct App 2008], *cert denied* 1 So 3d 496 [La Sup Ct 2009]; *Jeffrey v Rapid Am. Corp.*, 448 Mich 178, 189-194, 529 NW2d 644, 650-653 [1995]; *Hagan v Val-Hi, Inc.*, 484 NW2d 173, 174-178 [Iowa Sup Ct 1992]). Moreover, plaintiffs do not claim that defendant qualifies for personal jurisdiction under the narrow " 'inherit[ed] jurisdictional status' " exception recognized in *Semenetz* (21 AD3d at 1140-1141; *see Societe Generale v Florida Health Sciences Ctr., Inc.*, 2003 WL 22852656, *4 [SD NY, Dec. 1, 2003, No. 03-Civ-5615 (MGC)]). We therefore conclude that the court erred in denying defendant's motion to dismiss the second amended complaint against it for lack of personal jurisdiction.

The parties' remaining contentions are academic in light of our determination.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

805

CA 17-02123

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

JOHN O. PROVENS AND JENNIFER PROVENS,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

BEN-FALL DEVELOPMENT, LLC, MARC-MAR HOMES, INC.,
AND DAVID ALEN SATTORA, DOING BUSINESS AS DAVID
SATTORA SIDING, DEFENDANTS-RESPONDENTS-APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL M. CHELUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS BEN-FALL DEVELOPMENT, LLC AND MARC-MAR HOMES, INC.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT DAVID ALEN SATTORA, DOING BUSINESS AS DAVID SATTORA SIDING.

Appeal and cross appeals from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 27, 2017. The order, among other things, denied plaintiffs' motion for partial summary judgment and granted in part and denied in part the cross motion of defendant David Alen Sattora, doing business as David Sattora Siding, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion, denying that part of the cross motion of defendant David Alen Sattora, doing business as David Sattora Siding, with respect to the Labor Law § 241 (6) cause of action against him and reinstating that cause of action to that extent, and granting that part of the cross motion of defendant David Alen Sattora, doing business as David Sattora Siding, with respect to the cross claims of defendants Ben-Fall Development, LLC and Marc-Mar Homes, Inc., and dismissing those cross claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages under, inter alia, Labor Law §§ 200, 240 (1), and 241 (6) for injuries that John O. Provens (plaintiff) sustained when he fell from a roof on which he had been working. As limited by their brief, plaintiffs appeal from an order to the extent that it denied their motion for partial summary judgment on liability under section 240 (1)

and granted that part of the cross motion of defendant David Alen Sattora, doing business as David Sattora Siding (hereafter, Sattora), for summary judgment dismissing the Labor Law § 241 (6) cause of action against him. Defendants Ben-Fall Development, LLC, the property owner, and Marc-Mar Homes, Inc., the construction manager (collectively, Ben-Fall defendants), cross-appeal from that part of the same order that denied their motion for summary judgment on their cross claim against Sattora for contractual indemnification. As limited by his brief, Sattora, the roofing contractor who subcontracted to plaintiff's employer the work in which plaintiff was engaged at the time of his accident, also cross-appeals from the same order insofar as it denied those parts of his cross motion for summary judgment dismissing the Labor Law § 240 (1) cause of action against him and for summary judgment dismissing the cross claims for contractual and common-law indemnification.

Addressing first plaintiffs' appeal and Sattora's cross appeal with respect to the Labor Law § 240 (1) cause of action, we agree with plaintiffs that Supreme Court erred in denying their motion, and we therefore modify the order accordingly. "Plaintiff[s] met [their] initial burden by establishing that [plaintiff's] injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk" (*Raczka v Nichter Util. Constr. Co.*, 272 AD2d 874, 874 [4th Dept 2000]). "[T]he question of whether [a] device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its [intended] function of supporting the worker and his or her materials" (*Cullen v AT&T, Inc.*, 140 AD3d 1588, 1590 [4th Dept 2016] [internal quotation marks omitted]; *see Flowers v Harborcenter Dev., LLC*, 155 AD3d 1633, 1634 [4th Dept 2017]). Here, plaintiffs established that, on the morning of the accident, plaintiff had been instructed to work on a pitched roof on which "toe boards," i.e., two- by six-inch boards nailed directly to the roof approximately two to three feet up from the bottom edge of the roof, had already been installed, and defendants failed to submit non-speculative evidence to the contrary. There is no dispute that the toe boards detached from the roof while plaintiff was working, causing him to fall and sustain injuries. The failure of that safety device constituted a violation of Labor Law § 240 (1) as a matter of law (*see Cullen*, 140 AD3d at 1590; *see generally Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 976-978 [2003]), and that violation was, at minimum, " 'a contributing cause of [plaintiff's] fall' " (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *see Sims v City of Rochester*, 115 AD3d 1355, 1355 [4th Dept 2014]). Thus, contrary to defendants' contentions, plaintiff's alleged failure to utilize other safety devices available on the job site, including his alleged failure to reinstall the toe boards with additional supporting roof jacks, raises no more than an issue of contributory negligence (*see Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]; *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]; *Portes v New York State Thruway Auth.*, 112 AD3d 1049, 1051 [3d Dept 2013], *lv dismissed* 22 NY3d 1167 [2014]).

We further agree with plaintiffs on their appeal that the court erred in granting Sattora's cross motion with respect to the Labor Law § 241 (6) cause of action, and we therefore further modify the order accordingly. Initially, we reject Sattora's contention that plaintiffs lack standing to challenge the court's determination to that extent because they failed to oppose that part of Sattora's cross motion and thus were not aggrieved parties (*cf. Capretto v City of Buffalo*, 124 AD3d 1304, 1305 [4th Dept 2015]). In his cross motion, Sattora contended that, because plaintiff's conduct was the sole proximate cause of his accident and Sattora never supervised or controlled plaintiff's work, not only should the Labor Law §§ 240 (1) and 200 causes of action be dismissed, but "[p]laintiffs' cause of action under Labor Law § 241 (6) must also be dismissed." Plaintiffs opposed that contention and, as noted above, established that plaintiff's conduct was not the sole proximate cause of his accident. Plaintiffs therefore never abandoned that contention and are aggrieved by the court's ruling (*cf. Capretto*, 124 AD3d at 1305; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]).

We conclude that the court erred in dismissing plaintiffs' Labor Law § 241 (6) cause of action on the ground that plaintiffs "failed to establish with any specificity which section of the Industrial Code [d]efendants allegedly violated." Sattora neither raised that contention in his cross motion nor established his prima facie entitlement to dismissal of that cause of action on any ground. Thus, the burden never shifted to plaintiffs to address their claim of regulatory violations (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, plaintiffs' second supplemental verified bill of particulars, incorporated by reference into Sattora's submissions on his cross motion, specified the regulations allegedly violated by defendants.

With respect to defendants' cross appeals, we agree with Sattora that he is entitled to summary judgment dismissing the Ben-Fall defendants' cross claims for common-law and contractual indemnification. Thus, we further modify the order by granting that part of Sattora's cross motion.

"[T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Grove v Cornell Univ.*, 151 AD3d 1813, 1816 [4th Dept 2017] [internal quotation marks omitted]; *see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014]). The Ben-Fall defendants contend on appeal that they were free from any negligence contributing to plaintiff's accident; however, they do not dispute the court's determination that Sattora was not actively negligent as a matter of law. Thus, the Ben-Fall defendants' common-law indemnification cross claim must be dismissed regardless of whether they established their own freedom from negligence as a matter of law.

With respect to the issue of contractual indemnification, "[w]hen

a party is under no legal duty to indemnify," such as here where Sattora has no common-law indemnification obligation, "a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *see McKay v Weeden*, 148 AD3d 1718, 1722 [4th Dept 2017]). An indemnification obligation "should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper Assoc.*, 74 NY2d at 491-492).

Here, defendants agree that the only written agreement between them is a 2011 "Addendum to Contract" (Addendum), which obligates Sattora to indemnify the Ben-Fall defendants "from and against any and all suits, actions, liabilities, damages, professional fees, including attorneys' fees, costs, court costs, expenses, disbursements or claims of any kind or nature for injury to or death of any person . . . arising out of or in connection with the performance of the Work of the Contractor." The "Work" is defined by the Addendum, however, as those services "more fully described in the contract, invoice, purchase order or other attached document referencing the Contractor's work and services to be provided, which is incorporated by reference herein and made a part hereof." Thus, we agree with Sattora that the plain language of the Addendum limits the indemnification agreement to only certain work of Sattora, i.e., work for which defendants had a written agreement or record that was contemporaneously executed with the execution of the Addendum (*cf. Hooper Assoc.*, 74 NY2d at 491-492; *see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Inasmuch as the Ben-Fall defendants do not dispute that no written contract or other record was ever executed between defendants for Sattora's performance of the relevant roofing work, there is no valid indemnification agreement between defendants for any claims arising out of or in connection with that work. The court therefore erred in denying that part of Sattora's cross motion seeking dismissal of the contractual indemnification cross claim.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

806

CA 17-01956

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

CAYUGA NATION, BY AND THROUGH ITS LAWFUL GOVERNING BODY, CAYUGA NATION COUNCIL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL CAMPBELL, CHESTER ISAAC, JUSTIN BENNETT, KARL HILL, SAMUEL GEORGE, DANIEL HILL, TYLER SENECA, MARTIN LAY, WILLIAM JACOBS, WARREN JOHN, WANDA JOHN, BRENDA BENNETT, PAMELA ISAAC, ET AL., DEFENDANTS-APPELLANTS, AND COUNTY OF SENECA, INTERVENOR. (APPEAL NO. 1.)

MARGARET A. MURPHY, P.C., ORCHARD PARK (MARGARET A. MURPHY OF COUNSEL), AND JOSEPH J. HEATH, SYRACUSE, FOR DEFENDANTS-APPELLANTS.

JENNER & BLOCK LLP, WASHINGTON, D.C. (DAVID W. DEBRUIN, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated September 18, 2017. The order, insofar as appealed from, denied the motion of defendants to dismiss the complaint.

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

Memorandum: This litigation involves a long-standing dispute over which of two competing factions should have control of the Cayuga Nation (Nation), a sovereign Indian Nation and a member of the Haudenosaunee Confederacy, sometimes called the Iroquois Confederacy. Plaintiff, whose members constitute one of the two factions vying for control of the Nation (hereafter, plaintiff's members), commenced this action seeking declaratory and injunctive relief as well as money damages. In the complaint, plaintiff's members alleged that defendants, who are members of the other competing faction, were improperly in control of and trespassing on certain property of the Nation on which the Nation's offices and security center, a cannery, a gas station and convenience store, and an ice cream store were located. Plaintiff moved for various interim relief, including a preliminary injunction directing defendants to vacate the subject property. Thereafter, defendants moved to dismiss the complaint on,

inter alia, the ground that Supreme Court lacked subject matter jurisdiction because this matter required a determination whether plaintiff or defendants constituted the proper governing body of the Nation. In support of their motion, defendants contended that such a determination was beyond the authority of the courts of New York inasmuch as it usurped the sovereign right of the people of the Nation to determine their own leadership. In appeal No. 1, defendants appeal from an order that, among other things, granted plaintiff's motion, issued a preliminary injunction, denied defendants' motion, and determined that no undertaking pursuant to CPLR 6312 (b) was required. We affirm.

Defendants thereafter moved for leave to reargue their opposition to plaintiff's motion, and for an order staying the preliminary injunction and setting an amount for the undertaking. In appeal No. 2, defendants appeal from an amended order that, inter alia, denied that part of their motion for leave to reargue, but granted that part of their motion with respect to the undertaking. This Court subsequently modified the amended order by reducing the amount of the undertaking.

Initially, we note that the amended order in appeal No. 2 insofar as it denied that part of defendants' motion for leave to reargue is not appealable (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). In addition, we note that defendants do not present any contentions on appeal with respect to the amended order in appeal No. 2, and thus they are deemed to have abandoned any issue with respect to that amended order (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We therefore dismiss appeal No. 2 in its entirety (*see Gaiter v City of Buffalo Bd. of Educ.*, 142 AD3d 1349, 1350 [4th Dept 2016]).

By way of background in appeal No. 1, plaintiff and defendants have vied for control of the Nation for more than a decade (*see Cayuga Indian Nation of N.Y. v Eastern Regional Director*, 58 IBIA 171, 172-176 [2014]). Defendants contend that they constitute the lawful governing body of the Nation under its historical governing structure, which was established by its oral tradition and is comprised of Chiefs and certain citizens of the Nation who were appointed by the Clan Mothers. Plaintiff's members are other citizens of the Nation who contend that they constitute the lawful governing body inasmuch as the majority of the Nation's citizens support them as the Nation's leaders. They contend that the support of the Nation's citizens was affirmed by a procedure that was recognized by the Nation's oral law and traditions and that permitted determinations on matters of great importance to be made by the entire Nation.

Before defendants took control of the relevant property, plaintiff effectively controlled the Nation because the United States Department of the Interior, Bureau of Indian Affairs (BIA), continued to recognize two of plaintiff's members as the Nation's federal representative and alternative representative for interactions between the Nation and the federal government even after the split between the

factions occurred, including recognizing those members of plaintiff as the payees for any federal funds paid to the Nation. The BIA continued to recognize those members of plaintiff because they were the last federal representative and alternative federal representative authorized by the Nation to interact with federal government prior to that split.

After defendants took control of the relevant property, plaintiff commenced a prior action in Supreme Court seeking to regain control of the property. The court dismissed the complaint on the ground that it lacked subject matter jurisdiction to determine which faction should control the property inasmuch as any such determination required the court to intervene in the Nation's internal government affairs. Although the BIA thereafter attempted to broker a settlement between the parties, those negotiations were unsuccessful.

In 2016, plaintiff and defendants each submitted to the BIA competing Indian Self-Determination and Education Assistance Act (ISDA) 638 Proposals (638 Proposals) (*see generally* 25 USCA § 5321), which are requests for federal funding for the Indian tribal organization's infrastructure, education or other needs. Significantly, both parties' 638 Proposals sought funds to maintain the Nation's office, which, as noted, is located on the subject property. When the BIA was unable to negotiate a settlement of the competing proposals, the Eastern Regional Director of the BIA (BIA Regional Director) requested that the parties submit briefs supporting their respective positions that they are the true governing body of the Nation. In response, plaintiff presented evidence that it engaged in an initiative, i.e., a statement of support process, pursuant to which a majority of the Nation's citizens indicated that they recognized plaintiff as the lawful governing body of the Nation. Defendants submitted evidence indicating that they were the lawful governing body of the Nation pursuant to its long-standing traditions, and that the Nation's oral laws and traditions prohibited a majority-rule "election" such as the one conducted by plaintiff. Plaintiff countered by submitting evidence that the Great Law of Peace, by which the Nation is governed, permits matters of great importance to be determined by the entire Nation rather than by the Clan leaders. The BIA Regional Director determined that the BIA would recognize plaintiff as the lawful governing body of the Nation for purposes of the 638 Proposals, and awarded the ISDA contract to plaintiff.

In making his determination, the BIA Regional Director identified several reasons why the BIA was required to determine which faction controlled the Nation in addition to deciding which 638 Proposal to accept, including that the BIA needed to make determinations regarding a Liquor Control Ordinance proposed by plaintiff and the Nation's application to conduct Class II gaming on its property. The BIA Regional Director concluded that the federal government required a specific entity with whom to negotiate when resolving those matters. In recognizing plaintiff as the Nation's governing body, the BIA Regional Director concluded that, "[v]ia the statement of support process, a significant majority of the Cayuga citizens have stated their support for [plaintiff. He therefore could not] consider this

outcome as anything other than resolution of a tribal dispute by a tribal mechanism. [He] consider[ed himself] obligated to recognize the result of that tribal process." Defendants appealed that determination, which was affirmed by a decision of the Acting Assistant Secretary of Indian Affairs. Defendants also commenced a federal district court proceeding challenging the BIA's determination, but that court declined to overturn it (*Cayuga Nation v Zinke*, 302 F Supp 3d 362, 364 [D DC 2018]).

Thereafter, plaintiff commenced this action and, as relevant, defendants challenge only that part of the order denying their motion to dismiss the complaint for lack of subject matter jurisdiction. As noted above, we affirm.

Defendants contend that the court erred in denying their motion because the courts of New York have no power to determine who controls the Nation. Although we agree with defendants that we may not resolve the Nation's leadership dispute, we are not required to do so in this appeal. Rather, we accord due deference to the BIA's conclusion that the Nation, at least with respect to that issue, has resolved the dispute in favor of plaintiff.

Indian Nations are "unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations' " (*United States v Mazurie*, 419 US 544, 557 [1975]). Thus, federal courts lack authority to resolve internal disputes about tribal law or governance (*see Shenandoah v United States Dept. of the Interior*, 159 F3d 708, 712 [2d Cir 1998]; *Runs After v United States*, 766 F2d 347, 352 [8th Cir 1985]). The same rule applies to the courts of New York State. Therefore, "New York courts do not have subject matter jurisdiction over the internal affairs of Indian tribes" (*Seneca v Seneca*, 293 AD2d 56, 58 [4th Dept 2002]), and "an election dispute concerning competing tribal councils" is a "non-justiciable intra-tribal matter" (*Matter of Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F3d 749, 764 [8th Cir 2003]).

Nevertheless, "[a]lthough the sovereign nature of Indian tribes cautions the Secretary [of the Interior and the BIA] not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage '*all* Indian affairs and . . . *all* matters arising out of Indian relations' " (*California Valley Miwok Tribe v United States*, 515 F3d 1262, 1267 [DC Cir 2008], quoting 25 USC § 2; *see Timbisha Shoshone Tribe v Salazar*, 678 F3d 935, 938 [DC Cir 2012]). Therefore, "the BIA has the authority to make recognition decisions regarding tribal leadership, but 'only when the situation [has] deteriorated to the point that recognition of some government was essential for *Federal* purposes' . . . Thus, the BIA 'has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe' " (*Cayuga Nation v Tanner*, 824 F3d 321, 328 [2d Cir 2016]). That includes "the responsibility to ensure that the Nation's representatives, with whom it must conduct government-to-government

relations, are the valid representatives of the Nation as a whole" (*Seminole Nation of Okla. v Norton*, 223 F Supp 2d 122, 140 [D DC 2002]; *see California Valley Miwok Tribe*, 515 F3d at 1267). Pursuant to federal law, "we owe deference to the judgment of the Executive Branch as to who represents a tribe" (*Timbisha Shoshone Tribe*, 678 F3d at 938).

Here, the BIA determined that it will conduct government-to-government relations with plaintiff. Based on that determination, the BIA awarded an ISDA contract to plaintiff for the purpose, among others, of running the Nation's office. In this action, plaintiff seeks several forms of relief, including possession of and the ability to run the Nation's office. Thus, although we may not make a determination that will interfere with the Nation's governance and right to self determination, we must defer to the federal executive branch's determination that the Nation has resolved that issue, especially where, as here, that determination concerns the very property that is the subject of this action.

We caution that we do not determine which party is the proper governing body of the Nation, nor does our determination prevent the Nation from resolving that dispute differently according to its law in the future. The Nation, as a sovereign body, retains full authority to reconcile its own internal governance disputes according to its laws. Until such action occurs, however, we accord deference to the BIA's determination that plaintiff is the proper body to enforce the Nation's rights, including its rights to control the property at issue in this action.

All concur except WHALEN, P.J., and CARNI, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following memorandum: We respectfully dissent in appeal No. 1. As the majority recognizes, "New York courts do not have subject matter jurisdiction over the internal affairs of Indian tribes" (*Seneca v Seneca*, 293 AD2d 56, 58 [4th Dept 2002]; *see also Cayuga Nation v Tanner*, 824 F3d 321, 327 [2d Cir 2016]). Here, this action was commenced on behalf of the Cayuga Nation (Nation) by certain individual members claiming to comprise the Nation's governing council by virtue of a decision of the Bureau of Indian Affairs (BIA) that recognized those members of the now-denominated "Cayuga Nation Council" for the purpose of a government-to-government relationship between the Nation and the United States. The individual defendants include clan chiefs, clan mothers, and clan representatives who also claim to constitute the governing council of the Nation under its traditional laws, a council that has also previously been recognized by the BIA for the purpose of the government-to-government relationship. In affirming the order in appeal No. 1, the majority assumes that, once deference is afforded to the most recent BIA decision, Supreme Court has jurisdiction to resolve the claims in the complaint without impermissibly intruding into issues of the Nation's internal governance. We cannot agree.

Initially, the majority's assumption ignores the specific claims alleged in the complaint. The complaint asserts causes of action for

trespass, conversion, tortious interference with prospective business relations, replevin, and ejectment based on defendants' allegedly unlawful actions in exercising dominion over Nation property, managing Nation funds, and operating Nation businesses "without permission or justification." Each of those causes of action requires proof that the individual defendants acted without any authority or justification with respect to their use and possession of the Nation's property (*see KAM Const. Corp. v Bergey*, 151 AD3d 1706, 1707 [4th Dept 2017]; *Reeves v Giannotta*, 130 AD3d 1444, 1444 [4th Dept 2015]; *National Fuel Gas Distrib. Corp. v Push Buffalo [People United for Sustainable Hous.]*, 104 AD3d 1307, 1309 [4th Dept 2013]; *Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067, 1068 [2d Dept 2012]; *Schick v Wolf*, 207 App Div 652, 655 [4th Dept 1924]). Here, although the complaint alleges that defendants' unlawful conduct began on April 28, 2014, the complaint also alleges that "the Nation's leadership dispute was [not] brought to a final resolution" until the July 14, 2017 decision of the Acting Assistant Secretary of Indian Affairs (Assistant Secretary). Thus, the court will be required to resolve issues of tribal law, specifically the parties' conflicting claims of their legitimate representation of the Nation, to the extent that the complaint seeks relief for defendants' actions prior to July 14, 2017 (*cf. Cayuga Nation*, 824 F3d at 328). Indeed, the court expressly acknowledged that it will be required to determine if any individual defendants were acting in their official capacities as Nation representatives to determine whether the defense of sovereign immunity is available. That intrusion into matters of tribal law falls outside the court's jurisdiction (*see Seneca*, 293 AD2d at 58).

Moreover, in order to conclude that the court has the authority to determine whether the "Cayuga Nation Council" is entitled to relief on the complaint's causes of action from July 14, 2017 forward without impermissibly resolving issues of tribal law, we must conclude that defendants are collaterally estopped by the BIA determination from asserting in their defense that they possess legitimate authority to act on behalf of the Nation. The BIA, however, did not render a final resolution of the parties' conflicting claims of legitimate governmental authority that would have a preclusive effect on defendants' further assertion of legitimacy (*see Jones v Town of Carroll*, 158 AD3d 1325, 1328 [4th Dept 2018], *lv dismissed* – NY3d –, 2018 NY Slip Op 71838 [2018]; *see generally Yanguas v Wai Wai Pun*, 147 AD2d 635, 635 [2d Dept 1989]). Instead, as recognized by Eastern Regional Director of the BIA (BIA Regional Director), the BIA undertook to resolve the sole issue of "which governing council to recognize for purposes of entering into a contract to provide the[] services" requested in the parties' competing "Community Services 638" contract proposals. The "competing proposals for [the] 638 contract require[d], and therefore permit[ted], the BIA to determine whether either of the proposals was submitted by the governing body of the Cayuga Nation." In choosing between the two separate councils for that purpose, the BIA made no finding that defendants lacked any colorable claim to the management of the Nation's affairs or that any individual defendant had been unlawfully acting on behalf of the Nation. Indeed, the BIA Regional Director stated that his reliance on the statement of support process "should not freeze the Nation with

its current configuration of leaders." He further recognized that "[g]oing forward, the meaning of the statement of support campaign is a question of Cayuga Nation law."

The Assistant Secretary similarly emphasized the limited import of the statement of support process when he affirmed the BIA Regional Director's decision to award the 638 contract to the "Cayuga Nation Council." Specifically, the Assistant Secretary recognized that the statement of support process "was designed to establish a baseline tribal government through which [the] BIA could perpetuate its government-to-government relationship with the Nation." It nonetheless remained "the Nation's right, and responsibility, to determine how its governance will operate moving forward – whether via the Nation's traditional consensus process," for which defendants advocate, "through some form of electoral process, or however else."

The BIA determination therefore does not preclude defendants from contending that they had and continue to have a legitimate claim under traditional law to exercise authority over the property at issue as Nation representatives, and as such the "Cayuga Nation Council" cannot establish that defendants are collaterally estopped from raising that contention in defense of the claims against them (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). Inasmuch as the issue of defendants' legitimate authority or justification is material to each of the causes of action in the complaint, the court cannot rule on those claims without impermissibly resolving questions of tribal law (*see Seneca*, 293 AD2d at 58; *cf. Cayuga Nation*, 824 F3d at 330). Thus, we would reverse the order insofar as appealed from, grant defendants' motion to dismiss the complaint, and vacate the first through fourth ordering paragraphs.

Mark W. Bennett

Entered: July 25, 2018

Clerk of the Court

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

807

CA 17-01957

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

CAYUGA NATION, BY AND THROUGH ITS LAWFUL GOVERNING BODY, CAYUGA NATION COUNCIL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL CAMPBELL, CHESTER ISAAC, JUSTIN BENNETT, KARL HILL, SAMUEL GEORGE, DANIEL HILL, TYLER SENECA, MARTIN LAY, WILLIAM JACOBS, WARREN JOHN, WANDA JOHN, BRENDA BENNETT, PAMELA ISAAC, ET AL., DEFENDANTS-APPELLANTS, AND COUNTY OF SENECA, INTERVENOR. (APPEAL NO. 2.)

MARGARET A. MURPHY, P.C., ORCHARD PARK (MARGARET A. MURPHY OF COUNSEL), AND JOSEPH J. HEATH, SYRACUSE, FOR DEFENDANTS-APPELLANTS.

JENNER & BLOCK LLP, WASHINGTON, D.C. (DAVID W. DEBRUIN, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered October 18, 2017. The amended order, inter alia, denied that part of defendants' motion seeking leave to reargue and directed defendants to post an undertaking.

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

Same memorandum as in *Cayuga Nation v Campbell* ([appeal No. 1] — AD3d — [July 25, 2018] [4th Dept 2018]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

809

CA 18-00235

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

MOHAMMED SALAHUDDIN, DDS, PH.D., AND ROMSA, P.C. (ROCHESTER ORAL AND MAXILLOFACIAL SURGERY ASSOCIATES), PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHRISTINE K. CRAVER AND CARRIE MASSARO, DEFENDANTS-RESPONDENTS.

JEANNE M. COLOMBO, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

UNDERBERG & KESSLER, LLP, ROCHESTER (JILLIAN K. FARRAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered May 16, 2017. The order, inter alia, denied that part of the motion of plaintiffs seeking summary judgment dismissing the counterclaims and granted in part the cross motion of defendants for summary judgment on their counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the Labor Law §§ 162 (2), 195 (5), and 198 counterclaims and dismissing those counterclaims, denying that part of the cross motion with respect to the Labor Law § 195 (1) (a) counterclaims, striking the amount of $7,597.98 from the 11th ordering paragraph and replacing it with the amount of $2,595.98, and striking the amount of $6,229.60 from the 25th ordering paragraph and replacing it with the amount of $1,229.60, and as modified the order is affirmed without costs.

Memorandum: Defendants allegedly embezzled over $100,000 from plaintiffs, their alleged former employers. Plaintiffs then commenced this action for fraud, conversion, and breach of fiduciary duty. Defendants both counterclaimed for, inter alia, slander per se and the violations of Labor Law §§ 162 (2), 191 (3), 195 (1) (a), and 195 (5). Defendant Carrie Massaro also counterclaimed for a violation of section 198 and for unpaid overtime under the Federal Fair Labor Standards Act (FLSA). Insofar as relevant here, Supreme Court denied that part of plaintiffs' motion for summary judgment dismissing the foregoing counterclaims, and it granted that part of defendants' cross motion for summary judgment on the counterclaims under section 195 (1)

(a). Plaintiffs now appeal.

Turning first to the Labor Law § 162 (2) counterclaims, we agree with the parties that defendants have no private right of action to enforce that provision (*see Hill v City of New York*, 136 F Supp 3d 304, 350-351 [ED NY 2015]; *see generally Carrier v Salvation Army*, 88 NY2d 298, 302 [1996]). The court therefore erred in refusing to dismiss the section 162 (2) counterclaims, and we modify the order accordingly.

We turn next to the Labor Law § 191 (3) counterclaims. Initially, plaintiffs' contention that defendants have no private right of action to enforce section 191 (3) is improperly raised for the first time on appeal (*see Alberti v Eastman Kodak Co.*, 204 AD2d 1022, 1023 [4th Dept 1994]). Plaintiffs' remaining challenge to the section 191 (3) counterclaims, i.e., that no liability exists under that provision because they acted in good faith and because it would be fundamentally unfair to hold them liable under these circumstances, is not a cognizable defense to liability under section 191 (3). The court thus properly refused to dismiss the section 191 (3) counterclaims.

We turn next to the Labor Law § 195 (1) (a) counterclaims. Initially, plaintiffs' contention that these counterclaims are time-barred is improperly raised for the first time on appeal (*see Aly v Abououkal, Inc.*, 153 AD3d 481, 483 [2d Dept 2017]; *Peak Dev., LLC v Construction Exch.*, 100 AD3d 1394, 1396 [4th Dept 2012]). Similarly, plaintiffs' contention that defendants have no private right of action to enforce section 195 (1) (a) is both "unpreserved for appellate review [and] improperly raised for the first time in [the] reply brief" (*Matter of Cascardo*, 130 AD3d 822, 823 [2d Dept 2015]). We agree with plaintiffs, however, that the affidavit of plaintiff Mohammed Salahuddin, DDS, Ph.D. raises triable issues of fact regarding their potential entitlement to the affirmative defense provided by section 198 (1-b) (ii). Contrary to defendants' contention, " '[a]n unpleaded affirmative defense may be invoked to defeat a motion for summary judgment' " (*Scott v Crystal Constr. Corp.*, 1 AD3d 992, 993 [4th Dept 2003]; *see Kapchan v 31 Mt. Hope, LLC*, 111 AD3d 530, 530-531 [1st Dept 2013]; *Lerwick v Kelsey*, 24 AD3d 918, 919 [3d Dept 2005], *lv denied* 6 NY3d 710 [2006]). Thus, although the court properly refused to dismiss the section 195 (1) (a) counterclaims, the court erred in granting defendants summary judgment on those same counterclaims given plaintiffs' potential entitlement to the affirmative defense under section 198 (1-b) (ii) (*see generally Hobart v Schuler*, 55 NY2d 1023, 1024 [1982]; *Grodsky v Moore*, 136 AD3d 865, 865 [2d Dept 2016]). We therefore further modify the order accordingly. Plaintiffs' remaining contention regarding the section 195 (1) (a) counterclaims is academic in light of our determination.

We turn next to the Labor Law § 195 (5) counterclaims. Although the legislature specifically authorized a private right of action to enforce subdivisions (1) and (3) of section 195, it was silent regarding a private right of action to enforce section 195 (5) (*see*

§ 198 [1-b], [1-d]). Thus, applying the well-established framework for discerning an implied private right of action, we agree with plaintiffs that no private right of action exists to enforce section 195 (5) (*see Carrier*, 88 NY2d at 304; *Varela v Investors Ins. Holding Corp.*, 81 NY2d 958, 961 [1993], *rearg denied* 82 NY2d 706 [1993]; *Sheehy v Big Flats Community Day*, 73 NY2d 629, 634-636 [1989]). The court therefore erred in refusing to dismiss the section 195 (5) counterclaims, and we further modify the order accordingly.

We turn next to Massaro's standalone counterclaim under Labor Law § 198. Section 198 "is not a substantive provision, but [rather] provides for remedies available to a prevailing employee" (*Villacorta v Saks Inc.*, 32 Misc 3d 1203[A], 2011 NY Slip Op 51160[U], *3 [Sup Ct, NY County 2011]; *see Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 459-465 [1993], *rearg denied* 83 NY2d 801 [1994]; *Simpson v Lakeside Eng'g, P.C.*, 26 AD3d 882, 883 [4th Dept 2006], *lv denied* 7 NY3d 704 [2006]). Thus, Massaro's standalone counterclaim under section 198 should have been dismissed (*see APF Mgt. Co., LLC v Munn*, 151 AD3d 668, 671 [2d Dept 2017]). We therefore further modify the order accordingly.

We turn finally to the counterclaims for slander per se and for unpaid overtime under the FLSA. Defendants' counterclaims for slander per se are replete with triable issues of fact, and the court therefore properly refused to dismiss them (*see Stich v Oakdale Dental Ctr.*, 120 AD2d 794, 796 [3d Dept 1986]). Moreover, given the well-established rule that a " 'party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof' " (*Brady v City of N. Tonawanda*, 161 AD3d 1526, 1527 [4th Dept 2018]), the court properly refused to dismiss Massaro's FLSA counterclaim. Lastly, plaintiffs' contention that the FLSA is categorically inapplicable under these circumstances is improperly raised for the first time on appeal (*see City of Albany v Central Locating Serv.*, 228 AD2d 920, 921-922 [3d Dept 1996]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

824

CA 17-01570

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MARY E. EDWARDS, BERNARD LEFFLER, CLAIRE LEFFLER, JAMIE L. SMITH AND PAUL SUTTON, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF TOWN OF AMHERST, UPSTATE CELLULAR NETWORK, DOING BUSINESS AS VERIZON WIRELESS, AND PUBLIC STORAGE, INC., RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR RESPONDENT-RESPONDENT UPSTATE CELLULAR NETWORK, DOING BUSINESS AS VERIZON WIRELESS.

STANLEY J. SLIWA, TOWN ATTORNEY, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF TOWN OF AMHERST.

BROWN & KELLY, LLP, BUFFALO (JESSICA J. BURGASSER OF COUNSEL), FOR RESPONDENT-RESPONDENT PUBLIC STORAGE, INC.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 1, 2017 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging the determination of respondent Zoning Board of Appeals of the Town of Amherst (ZBA) granting a special use permit to respondent Upstate Cellular Network, doing business as Verizon Wireless (Verizon), for the construction of a wireless telecommunications tower on the property of respondent Public Storage, Inc. in the Town of Amherst (Town). Petitioners appeal from a judgment dismissing their petition. We affirm.

Petitioners contend that the ZBA's determination to grant the special use permit is inconsistent with the Town's comprehensive plan. We reject that contention. It is well settled that the inclusion of a permitted use in a zoning code "is tantamount to a legislative finding

that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243 [1972]; *see Matter of Young Dev., Inc. v Town of W. Seneca*, 91 AD3d 1350, 1351 [4th Dept 2012]). "Where, as here, the zoning ordinance authorizes a use permit subject to administrative approval, the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impact on the surrounding area . . . The [zoning authority] is required to grant a special use permit unless it has reasonable grounds for denying the application" (*Matter of North Ridge Enters. v Town of Westfield*, 87 AD2d 985, 986 [4th Dept 1982], *affd* 57 NY2d 906 [1982]).

Here, in chapter 203 of the Code of the Town of Amherst (Code), the Town authorized the ZBA to grant or deny special use permits for the construction of "wireless telecommunications facilities (WTF)" (ch 203, § 6-7-1), upon review of the application for compliance with various requirements. Those requirements are intended, among other things, to promote and encourage the placement and design of WTFs in such a manner as to minimize adverse aesthetic impacts in the surrounding area and preserve the character of residential areas by ensuring that adequate "stealth" design technology is used (ch 203, §§ 6-7-2, 6-7-3; *see generally* Town Law §§ 261, 263). In compliance with the Code, the Planning Department of the Town submitted an advisory written report to the ZBA containing its analysis of Verizon's application (*see* ch 203, § 6-7-12 [C]). Although the Planning Department initially concluded that aspects of the application would not be consistent with the Town's comprehensive plan, it recommended approval of the application upon certain conditions, which included employing stealth design to disguise the tower as an evergreen tree and reconfiguring the site plan to move the tower as far away as possible from adjacent residences. After holding a public hearing and formally considering the application, the ZBA approved the application subject to the recommended conditions and issued a written decision to that effect (*see* ch 203, § 6-7-12 [D]). Thus, we conclude that there is no merit to petitioners' contention that the special use permit ultimately granted by the ZBA was inconsistent with the Town's comprehensive plan.

Petitioners further contend that the ZBA, in granting the special use permit, issued certain "variances" to the Town's zoning regulations that did not comply with the requirements of Town Law § 267-b (3). That contention is without merit. Town Law § 274-b (3) provides that where, as here, "a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to [Town Law § 267-b]." Additionally, Town Law § 274-b (5) provides that a town "may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits submitted for approval." "In effect, subdivision (5) allows a town . . . to establish one-stop special use permitting if it so chooses" (*Matter of Real Holding Corp. v Lehigh*, 2 NY3d 297, 302 [2004]).

Thus, "where a town . . . exercises its discretion under subdivision (5), an applicant may have 'two avenues to address an inability to comply with a given . . . requirement in connection with a special use permit,' but this overlap 'does not create discord in the Town Law or render either [subdivision (3) or subdivision (5)] superfluous' " (*id.*).

Here, the Town has exercised its discretion under Town Law § 274-b (5) by authorizing the ZBA, in considering whether to grant a special use permit, to waive "any aspect or requirement" for WTFs as long as the applicant "demonstrates by clear and convincing evidence that, if granted, the relief, waiver or exemption will have no significant effect on the health, safety and welfare of the Town, its residents and other service providers" (ch 203, § 6-7-21). Thus, contrary to petitioners' contention, we conclude that the requirements for area variances set forth in Town Law § 267-b (3) are inapplicable here inasmuch as the ZBA issued waivers pursuant to Town Law § 274-b (5). The record also establishes that Verizon demonstrated by clear and convincing evidence that the waivers would have "no significant effect on the health, safety and welfare of the Town, its residents and other service providers" (ch 203, § 6-7-21).

Contrary to petitioners' further contention, we conclude upon our review of the record that the ZBA, in granting the special use permit and waivers, did not violate any of the other provisions of the Code relied upon by petitioners.

We also reject petitioners' contention that the ZBA improperly issued a negative declaration pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8). The record establishes that the ZBA properly "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; *see Matter of Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723 [4th Dept 2009], *lv denied in part and dismissed in part* 13 NY3d 901 [2009]).

In light of our determination, we do not address respondents' contention with respect to an alternative ground for affirmance.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

827

CA 17-00065

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

RICHARD G. VOGT, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF LINDA VOGT, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM B. EBERHARDT, JR., AND JULIA A. BERGAN,
DEFENDANTS-RESPONDENTS.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered October 6, 2016. The order, inter alia, granted the motion of defendants to vacate a default judgment and vacated the default judgment.

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

Memorandum: Plaintiff and Linda Vogt, now deceased, commenced this action seeking damages for injuries sustained by Vogt when she fell after she caught the heel of her shoe in the track of a sliding glass door at the Sherwood Inn (Inn) in September 2012. The Inn is owned and operated by defendant William B. Eberhardt, Jr., and defendant Julia A. Bergan is an employee of the Inn.

In August 2014, plaintiff and Vogt commenced an action (first action) against Dining Associates, Inc., doing business as Sherwood Inn (Dining Associates), alleging that Vogt's injuries resulted from the negligence of Dining Associates. Eberhardt, who is also the owner of Dining Associates, forwarded the summons and complaint to the insurance carrier for the Inn, Nationwide Insurance Company (Nationwide), and Nationwide assigned counsel to defend Dining Associates in the first action. In September 2015, after plaintiff and Vogt learned that the Inn was not owned by Dining Associates, they commenced the instant action against defendants. Defendants forwarded the summons and complaint to Nationwide, just as Eberhardt had done in the first action. Nationwide received the documents and did not deny coverage to defendants, but Nationwide failed to assign counsel to represent defendants. Defendants subsequently defaulted in the instant action, and Supreme Court granted the motion of plaintiff and

Vogt for a default judgment on the issue of liability. Plaintiff now appeals from an order that granted defendants' motion to vacate the default judgment. We affirm.

"A party seeking to vacate an order or judgment on the ground of excusable default must offer a reasonable excuse for its default and a meritorious defense to the action" (*Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]; *see Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128 [4th Dept 2013]). The determination whether the moving party's excuse is reasonable lies within the sound discretion of the court (*see Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1099 [4th Dept 2013]).

We reject plaintiff's contention that defendants failed to proffer a reasonable excuse for their default. Defendants submitted an affidavit of the claims specialist for Nationwide who was responsible for managing their defense, which established that the claims specialist had received copies of the summons and complaint in the instant action and determined that defendants were entitled to a defense and indemnification. Although she communicated that information to the law firm that was defending Dining Associates in the first action, the claims specialist inadvertently neglected to assign counsel to represent defendants in the instant action. We conclude that Nationwide's inadvertent failure to assign counsel to defendants is a reasonable excuse for their default (*see Cary v Cimino*, 128 AD3d 1460, 1461 [4th Dept 2015]; *Accetta v Simmons*, 108 AD3d 1096, 1097 [4th Dept 2013]; *Hayes v Maher & Son*, 303 AD2d 1018, 1018 [4th Dept 2003]). We note that defendants "evidenc[ed] a good faith intent to defend the proceeding on the merits" (*Reilly v City of Rome*, 114 AD3d 1255, 1256 [4th Dept 2014] [internal quotation marks omitted]), and plaintiff, who caused a lengthy delay in the first action by failing to comply with discovery demands, was not prejudiced by the delay in this action (*see Accetta*, 108 AD3d at 1097).

Contrary to plaintiff's further contention, we conclude that defendants proffered a meritorious defense to the action by submitting evidence establishing a prima facie case of trivial defect (*see generally Wells Fargo Bank, N.A.*, 149 AD3d at 1552; *Calaci*, 108 AD3d at 1129). Defendants submitted evidence establishing that the track of the sliding glass door was approximately half an inch wide, and similar terrain differentials have been held to be trivial as a matter of law (*see Leverton v Peters Groceries*, 267 AD2d 1014, 1015 [4th Dept 1999]; *see also Palladino v City of New York*, 127 AD3d 708, 710 [2d Dept 2015]; *Boynton v Haru Sake Bar*, 107 AD3d 445, 445 [1st Dept 2013]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

828

CA 18-00234

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF SOUTHGATE ASSOCIATES, LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEST SENECA, RESPONDENT-APPELLANT,
WEST SENECA CENTRAL SCHOOL DISTRICT AND
COUNTY OF ERIE, INTERVENORS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (NICHOLAS C. ROBERTS OF COUNSEL), FOR INTERVENOR-APPELLANT WEST SENECA CENTRAL SCHOOL DISTRICT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR INTERVENOR-APPELLANT COUNTY OF ERIE.

WOLFGANG & WEINMANN, LLP, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered November 17, 2017 in a proceeding pursuant to RPTL article 7. The order, among other things, granted petitioner's motion for summary judgment.

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

Memorandum: Petitioner commenced this tax certiorari proceeding to challenge respondent-appellant's reassessment of its real property. Supreme Court subsequently granted petitioner's motion for summary judgment on its petition on the ground that the challenged reassessment was unconstitutionally selective. We now reverse.

"It is well settled that a system of selective reassessment that has no rational basis in law violates the equal protection provisions of the Constitutions of the United States and the State of New York. Nevertheless, reassessment upon improvement is not illegal in and of itself . . . *so long as the implicit policy is applied even-handedly to all similarly situated property*" (*Matter of Board of Mgrs. v Assessor, City of Buffalo*, 156 AD3d 1322, 1324 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Carroll v Assessor*

of City of Rye, N.Y., 123 AD3d 924, 925 [2d Dept 2014]). "When a taxpayer in a tax certiorari proceeding seeks summary judgment, it is necessary that the movant establish his [or her] cause of action . . . sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Board of Mgrs.*, 156 AD3d at 1323 [internal quotation marks omitted]; *see Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1337 [4th Dept 2015]).

Here, petitioner's moving papers featured only bald assertions that the reassessment was unconstitutionally selective, and petitioner did not identify any similarly situated property that was purportedly treated differently than the subject property. Petitioner thus failed to submit competent evidence establishing that the challenged reassessment was unconstitutionally selective (*see Matter of LCO Bldg. LLC v Michaux*, 53 AD3d 1062, 1062 [4th Dept 2008], *lv dismissed* 11 NY3d 837 [2008]), and petitioner is therefore not entitled to summary judgment (*see Matter of Highbridge Dev. BR, LLC v Assessor of the Town of Niskayuna*, 121 AD3d 1324, 1326 [3d Dept 2014]). "Contrary to the court's apparent holding, the absence from the record of a 'comprehensive written plan of reassessment' did not, by itself, warrant the granting of . . . summary judgment to petitioner on its claim that the parcel had been . . . unequally reassessed on a selective basis" (*Matter of City of Rome v Board of Assessors and/or Assessor of Town of Lewis* [appeal No. 2], 147 AD3d 1410, 1411 [4th Dept 2017]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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TP 17-01928

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF J.C. SMITH, INC.,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, ALSO KNOWN AS EMPIRE STATE DEVELOPMENT, HOWARD ZEMSKY, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT AND CEO OF EMPIRE STATE DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT OF NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, AND LOURDES ZAPATA, DIRECTOR, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT OF NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Onondaga County [James P. Murphy, J.], entered October 18, 2017) to review a determination of respondent Division of Minority and Women's Business Development of New York State Department of Economic Development. The determination denied petitioner's application for recertification as a women-owned business enterprise.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination of respondent Division of Minority and Women's Business Development of the New York State Department of Economic Development (Division), which denied its application for recertification as a women-owned business enterprise ([WBE]; *see* Executive Law § 310 [15]; 5 NYCRR 144.2). In 1976, John Smith (John) and Josephine Smith (Josephine; collectively, Smiths) founded petitioner, a business specializing in the sale, service, and rental of light construction equipment and supplies. Following John's

retirement in 1994, Josephine was elected president. The Division first certified petitioner as a WBE in 1995, and petitioner was granted recertification periodically thereafter. After Josephine's death in October 2013, her shares were distributed to each of the Smiths' three children—Joanne Reed (Joanne), Jeffrey Smith (Jeffrey), and Jay Smith (Jay)—each of whom was involved and held shares in the business. Jeffrey later transferred one of his shares to his wife, Mary Smith, who was also involved and held additional shares in the business, in order to maintain petitioner's eligibility for certification as a WBE (*see* Executive Law § 310 [15] [a]). In November 2013, the owners reconfigured petitioner's corporate structure by amending the bylaws to create a new position of Chief Executive Officer as the top executive office and appointing Joanne to that position.

Petitioner submitted an application for recertification in May 2014, but the Division denied it on grounds including that petitioner did not meet the eligibility criterion related to women's control of the business because petitioner failed to demonstrate that the women owners made decisions pertaining to the operations of the business enterprise (*see* 5 NYCRR 144.2 [b] [1]). Petitioner filed an administrative appeal and thereafter declined to proceed with a hearing and instead requested that the matter be decided as a written appeal. After receiving written submissions, the Administrative Law Judge recommended that the determination be affirmed on the aforementioned ground, and the Executive Director of the Division accepted that recommendation.

We note at the outset that Supreme Court erred in transferring the proceeding to this Court inasmuch as it does not involve a substantial evidence issue (*see* CPLR 7803 [4]; 7804 [g]). "A substantial evidence issue 'arises only where a quasi-judicial hearing has been held and evidence [has been] taken pursuant to law' . . . and[, here,] no hearing was held" (*Matter of Scherz v New York State Dept. of Health*, 93 AD3d 1302, 1303 [4th Dept 2012]; *see Matter of Occupational Safety & Envtl. Assoc., Inc. v New York State Dept. of Economic Dev.*, 161 AD3d 1582, 1582 [4th Dept 2018]). We nevertheless address the merits of petitioner's contentions in the interest of judicial economy (*see Occupational Safety & Envtl. Assoc., Inc.*, 161 AD3d at 1582).

" 'In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious' " (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see Occupational Safety & Envtl. Assoc., Inc.*, 161 AD3d at 1583; *see generally* CPLR 7803 [3]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Peckham*, 12 NY3d at 431). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*id.*). "Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of

expertise" (*id.*), and thus an agency's interpretation of its own regulations will not be disturbed where it " 'is not irrational or unreasonable' " (*Matter of Elderwood Health Care Ctr. at Linwood v Novello*, 59 AD3d 932, 933 [4th Dept 2009]).

We reject petitioner's contention that the Division's interpretation of the regulations promulgated pursuant to the applicable statute is irrational or unreasonable. The statute requires the business applying for certification as a WBE to establish that its "women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise" (Executive Law § 310 [15] [c]), and the regulation at issue here provides that a business seeking to establish the requisite control of the business by women must establish that its women owners make "[d]ecisions pertaining to the operations of the business enterprise" (5 NYCRR 144.2 [b] [1]). In view of the legislative purpose to facilitate additional business opportunities for women-owned enterprises (*see e.g.* Executive Law § 311 [3] [a]), and the requirement that women exercise independent control over the day-to-day business decisions of the enterprise (*see* § 310 [15] [c]), we conclude that it is not irrational or unreasonable for the Division to require that a woman owner must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification (*see Matter of Skyline Specialty v Gargano*, 294 AD2d 742, 742 [3d Dept 2002]). In so doing, the Division ensures that a woman owner exercises bona fide independent control over the operations of the business enterprise rather than mere nominal control in order to reap the benefits of certification (*see generally Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795, 797-799 [3d Dept 1988]). Contrary to petitioner's contention, the Division's interpretation of the regulations is not a departure from the factor-based evaluation set forth under the "control" criterion of the regulations (5 NYCRR 144.2 [b] [1] [i]-[iii]); rather, it informs that evaluation by identifying the "operations of the business enterprise" for which a woman owner must make decisions in order to demonstrate her independent control of the business (5 NYCRR 144.2 [b] [1]; *see generally Matter of C.W. Brown, Inc. v Canton*, 216 AD2d 841, 842-843 [3d Dept 1995]; *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890-891 [3d Dept 1995]).

Contrary to petitioner's further contention, we conclude that the Division's determination to deny the application for recertification is supported by a rational basis and is not arbitrary and capricious. In particular, it was rational for the Division to determine that decisions pertaining to the operations of the business enterprise were not made by the women claiming ownership of the business (*see* 5 NYCRR 144.2 [b] [1]; *Occupational Safety & Envtl. Assoc., Inc.*, 161 AD3d at 1583). The record establishes that petitioner's core operations consist of the sale, service, and rental of light construction equipment and supplies, and that Jeffrey is the sales manager who supervises salespersons and monitors the performance of petitioner's various retail locations while Jay meets with manufacturers' sales representatives and oversees the purchase of supplies and inventory.

By contrast, the record establishes that Joanne is primarily responsible for human resource issues, financial management, accounts receivable, and legal matters. Based upon that evidence, the Division rationally concluded that Jeffrey and Jay, rather than Joanne, exercised operational control over the core functions of the business (*see C.W. Brown, Inc.*, 216 AD2d at 843). Although a woman owner who otherwise exercises independent operational control over the core functions of the business does not relinquish eligibility for certification as a WBE by merely delegating responsibilities (*see generally* Executive Law § 310 [15] [c]; 5 NYCRR 144.2 [b] [1]), the record here supports the determination that petitioner is operated as a family-owned business rather than a women-owned business inasmuch as each of the family member owners shared operational control and responsibility for managerial decisions (*see Occupational Safety & Envtl. Assoc., Inc.*, 161 AD3d at 1583; *Northeastern Stud Welding Corp.*, 211 AD2d at 891).

Petitioner also contends that it was arbitrary and capricious for the Division to deny its application for recertification because petitioner had consistently been certified while Josephine was alive, and nothing "in the structure, operations, or management of core functions changed after Josephine's death." Inasmuch as that contention is raised for the first time before this Court, petitioner failed to preserve it for our review and we have no discretionary authority to review it in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Finally, we have reviewed petitioner's remaining contention and conclude that it is without merit.

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 18-00403

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLEN J. SIEMBOR, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 17, 2015. The judgment convicted defendant, upon his plea of guilty, of unlawful surveillance in the second degree (33 counts) and possessing a sexual performance by a child.

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 33 counts of unlawful surveillance in the second degree (Penal Law § 250.45 [3] [a]) and one count of possessing a sexual performance by a child (§ 263.16), defendant contends that his sentence, an aggregate indeterminate term of imprisonment of 5 to 15 years, is unduly harsh and severe. We reject that contention. Although defendant has no prior criminal record and has been gainfully employed for most of his adult life, he victimized dozens of females, ranging in age from 8 to 49, by videotaping them without their knowledge while they were in the changing room of his store and the bathroom of his home. He even videotaped some victims in their own homes, also without their knowledge. He videotaped customers, coworkers and employees, and even the children of his close friends.

We note that, more than two years before defendant’s arrest, one of his coworkers discovered that he had surreptitiously videotaped her in the dressing room and confronted him about it. Defendant begged and pleaded with the employee not to contact the police, promising that he would seek counseling and saying that exposure would ruin his family. Although the employee was persuaded not to contact the police, defendant did not seek counseling and continued his unlawful activities unabated, victimizing more unsuspecting women until his arrest several years later. Under the circumstances, we perceive no basis in the record upon which to modify the sentence as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 25, 2018

Mark W. Bennett
Clerk of the Court