SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 11, 2021

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. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED JUNE 11, 2021

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_____	637	CA 20 00489	DOUGLAS A. CORNELIUS V GORDON TUSSING
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 19-00349

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRKLAN WRIGHT, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered December 21, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the third degree, resisting arrest and false personation.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the second omnibus motion seeking to suppress physical evidence and statements is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), resisting arrest (§ 205.30), and false personation (§ 190.23). Defendant contends that County Court erred in denying that part of his second omnibus motion seeking suppression of physical evidence and oral statements he made to the police. We agree.

The testimony at the suppression hearing established that, at approximately 11:55 p.m. on the night in question, a uniformed police officer and two fellow officers were on patrol when the officers spotted two men walking along a street. According to one officer, one of the men "appeared to have an open container, open alcoholic beverage container, taller can inside a paper bag." The testifying officer explained that "people attempt to hide open containers, alcoholic beverage containers, in paper bags, plastic bags, so we can't see the container and I have made it a practice of mine to stop pretty much everyone I see that has a—has similar to that, what I believe to be an open container." All three officers exited the marked patrol car in which they were riding and immediately began "notifying the male with what we believe to be an open container, the

open alcoholic beverage, that we're checking to see if the alcoholic beverage is closed." The testifying officer explained that he then approached defendant because, as the officers approached, defendant "separate[d] himself, enter[ed] a driveway, just partially enter[ed] a driveway on the north side of the street and then blade[d] his body to us while kind of grabbing at his right waistband area." It is well settled that, "[i]n evaluating police conduct, a court 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]; *see People v Perez*, 31 NY3d 964, 966 [2018]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). At the first level of a police-civilian encounter, i.e., a request for information, a police officer may approach an individual "when there is some objective credible reason for that interference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223), and "[t]he request may 'involve[] basic, nonthreatening questions regarding, for instance, identity, address or destination' " (*People v Garcia*, 20 NY3d 317, 322 [2012], quoting *People v Hollman*, 79 NY2d 181, 185 [1992]). "The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a [police officer] is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" (*De Bour*, 40 NY2d at 223).

Here, even assuming, arguendo, that the officers possessed a level one right to approach defendant and his companion (*cf. People v Mercado*, 178 AD2d 986, 986 [4th Dept 1991], *lv denied* 79 NY2d 951 [1992]), the officers nonetheless immediately "engaged in a level two intrusion, i.e., 'a more pointed inquiry into [the] activities [of defendant and his companion]' . . . , by asking 'invasive question[s] focusing on the possible criminality of the subject' " (*People v Wallace*, 181 AD3d 1214, 1216 [4th Dept 2020]; *cf. People v Doll*, 98 AD3d 356, 367 [4th Dept 2012], *affd* 21 NY3d 665 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). Notably, the officers did not see defendant or his companion drinking from whatever item was in the paper bag, and there were no other attendant circumstances indicative of criminal behavior that would warrant the more pointed inquiry at the outset (*see Wallace*, 181 AD3d at 1216; *cf. People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). We therefore reverse the judgment, vacate the plea, grant that part of defendant's second omnibus motion seeking to suppress physical evidence and oral statements, and dismiss the indictment.

All concur except CENTRA and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. The majority concludes that County Court erred in denying that part of defendant's second omnibus motion seeking the suppression of physical evidence and oral statements. In our view, the police officers had an objective, credible reason to approach defendant and request information (*see People v De Bour*, 40 NY2d 210, 223 [1976]), and "the action taken was justified in its inception and at every subsequent

stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]; *see De Bour*, 40 NY2d at 215, 222-223). We would therefore affirm the judgment.

Defendant was initially observed by the police as he was walking down a street next to a man who was holding a tall can inside a paper bag. As the officers approached them and began speaking to defendant's companion, defendant separated from his companion and moved into a nearby driveway while touching his waistband area. Defendant turned the right side of his body away from the officers while grabbing at his right waistband area with his right hand, and an officer approached defendant and asked him his name and date of birth. Defendant gave the officer a name, but his speech was broken and delayed, and he seemed nervous. The officer testified that he believed that defendant gave a false name inasmuch as the officer believed that defendant was actually another individual with a different name than the one defendant had provided. Defendant said his date of birth was "1/86/87". Concerned for his safety, an officer decided to conduct a pat frisk of defendant, and a handgun was recovered from defendant's front right pocket.

As set forth by the majority, under level one of the *De Bour* analysis, officers need an objective, credible reason to approach and request information (*see De Bour*, 40 NY2d at 223). "The request may 'involve[] basic, nonthreatening questions regarding, for instance, identity, address or destination' " (*People v Garcia*, 20 NY3d 317, 322 [2012], quoting *People v Hollman*, 79 NY2d 181, 185 [1992]). We reject defendant's contention that there was no objective, credible reason for the officers' approach. In our view, the actions of defendant that drew the attention of one of the officers gave that officer, at a minimum, an objective, credible reason to approach defendant and ask him his name and date of birth (*see generally People v Britt*, 160 AD3d 428, 429-430 [1st Dept 2018], *affd* 34 NY3d 607 [2019]), and it is of no moment that defendant's companion rather than defendant was the person carrying what the officers believed to be an open container of alcohol (*see People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]).

The majority assumes, arguendo, that the officers possessed a level one right to approach defendant and his companion but concludes that the officers improperly engaged in a level two intrusion under *De Bour* by asking invasive questions focused on criminality. We disagree. The majority relies on the officers' questions to defendant's *companion* about the can he was carrying. The testimony at the suppression hearing establishes that an officer asked defendant only questions about his identity, which were clearly permissible under level one of *De Bour*.

Furthermore, we reject defendant's contention that the officers did not have reasonable suspicion to believe that he posed a threat to their safety when the pat frisk was conducted. Defendant's actions in shielding the right side of his body away from the officers' view while grabbing at his right waistband area and his nonsensical response when asked for his date of birth, combined with the belief of

one of the officers that defendant had provided a false name, gave rise to a reasonable suspicion that defendant was armed and posed a threat to the officers' safety, thereby justifying the pat frisk (*see Terry v Ohio*, 392 US 1, 27 [1968]; *De Bour*, 40 NY2d at 223; *People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *see also* CPL 140.50 [1], [3]).

Entered: June 11, 2021

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 19-01721

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF FINGER LAKES RAILWAY CORP.,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF CANANDAIGUA, ASSESSOR FOR CITY OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW FOR CITY OF CANANDAIGUA, TOWN OF CANANDAIGUA, ASSESSOR FOR TOWN OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW FOR TOWN OF CANANDAIGUA, TOWN OF GENEVA, ASSESSOR FOR TOWN OF GENEVA, BOARD OF ASSESSMENT REVIEW FOR TOWN OF GENEVA, TOWN OF HOPEWELL, ASSESSOR FOR TOWN OF HOPEWELL, BOARD OF ASSESSMENT REVIEW FOR TOWN OF HOPEWELL, TOWN OF MANCHESTER, ASSESSOR FOR TOWN OF MANCHESTER, BOARD OF ASSESSMENT REVIEW FOR TOWN OF MANCHESTER, TOWN OF PHELPS, ASSESSOR FOR TOWN OF PHELPS, BOARD OF ASSESSMENT REVIEW FOR TOWN OF PHELPS, VILLAGE OF PHELPS, VILLAGE OF SHORTSVILLE, VILLAGE OF CLIFTON SPRINGS, CANANDAIGUA CITY SCHOOL DISTRICT, GENEVA CITY SCHOOL DISTRICT, MANCHESTER-SHORTSVILLE CENTRAL SCHOOL DISTRICT, PHELPS-CLIFTON SPRINGS CENTRAL SCHOOL DISTRICT, AND COUNTY OF ONTARIO,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

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

BOYLAN CODE LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CITY OF CANANDAIGUA, ASSESSOR FOR CITY OF CANANDAIGUA, AND BOARD OF ASSESSMENT REVIEW FOR CITY OF CANANDAIGUA.

CHALIFOUX LAW, P.C., PITTSFORD (SHEILA M. CHALIFOUX OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF CANANDAIGUA, ASSESSOR FOR TOWN OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW FOR TOWN OF CANANDAIGUA, TOWN OF GENEVA, ASSESSOR FOR TOWN OF GENEVA, BOARD OF ASSESSMENT REVIEW FOR TOWN OF GENEVA, TOWN OF HOPEWELL, ASSESSOR FOR TOWN OF HOPEWELL, BOARD OF ASSESSMENT REVIEW FOR TOWN OF HOPEWELL, TOWN OF MANCHESTER, ASSESSOR FOR TOWN OF MANCHESTER, BOARD OF ASSESSMENT REVIEW FOR TOWN OF MANCHESTER, TOWN OF PHELPS, ASSESSOR FOR TOWN OF PHELPS, BOARD OF ASSESSMENT REVIEW FOR TOWN OF PHELPS, VILLAGE OF PHELPS, VILLAGE OF SHORTSVILLE, VILLAGE OF CLIFTON SPRINGS AND COUNTY OF ONTARIO.

FERRARA FIORENZA PC, EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CANANDAIGUA CITY SCHOOL DISTRICT, GENEVA CITY SCHOOL DISTRICT, MANCHESTER-SHORTSVILLE CENTRAL SCHOOL DISTRICT, AND PHELPS-CLIFTON SPRINGS CENTRAL SCHOOL DISTRICT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered August 20, 2019 in a proceeding pursuant to, inter alia, CPLR article 78. The order and judgment granted the motions of respondents-defendants to dismiss the amended petition and complaint and dismissed the amended petition and complaint.

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

Memorandum: In this proceeding pursuant to, inter alia, CPLR article 78, petitioner-plaintiff (petitioner) appeals from an order and judgment that granted respondents-defendants' motions pursuant to, inter alia, CPLR 3211 (a) (7) seeking dismissal of the amended petition and complaint challenging the removal of certain tax exemptions from its properties. We affirm. Contrary to petitioner's contention, there is no conflict between General Municipal Law § 874 and RPTL 412-a (*see Matter of POP Displays USA, LLC v City of Yonkers*, 70 AD3d 702, 703 [2d Dept 2010]). General Municipal Law § 874 "provides that public agencies are not required to pay taxes upon real properties they control" (*id.*; *see Matter of Pyramid Co. of Watertown v Tibbets*, 76 NY2d 148, 151 [1990]), whereas RPTL 412-a "provides for the mechanism that public agencies must follow to obtain their tax exemptions" (*POP Displays USA, LLC*, 70 AD3d at 703). Here, the application for tax exempt status was not timely submitted in accordance with the requirements of RPTL 412-a (2) (*see id.*).

Petitioner further contends that it was not required to submit an exemption application for the tax year in question because an application had been submitted for a prior tax year and there had been no changes to the applicable payment-in-lieu-of-taxes (PILOT) agreement since the submission of the prior application. We reject that contention. Although petitioner is correct that "[n]o application shall be required in subsequent years unless the terms of the agreement are modified or changed" (RPTL 412-a [2]), the same subdivision requires every exemption application to "include an extract of the terms of *any* agreement relating to the project" (*id.* [emphasis added]), not *only* the PILOT agreement. Thus, we conclude that the plain language of the statute requires the filing of a new exemption application where, as here, there is a change in ownership status of property (*see generally Kimmel v State of New York*, 29 NY3d 386, 392 [2017]).

We have reviewed petitioner's remaining contentions and conclude

that none warrants reversal or modification of the order and judgment.

Entered: June 11, 2021

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 20-00299

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

CENTERLINE/FLEET HOUSING PARTNERSHIP, L.P. - SERIES B, A DELAWARE LIMITED PARTNERSHIP, AND RCHP SLP II, L.P., A DELAWARE LIMITED PARTNERSHIP, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF HOPKINS COURT ASSOCIATES, L.P., A NEW YORK LIMITED PARTNERSHIP, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HOPKINS COURT APARTMENTS, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY CAPITAL COMPANY, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY, WHITNEY HOPKINS ASSOCIATES, A NEW YORK GENERAL PARTNERSHIP, CRS PROPERTIES, INC., A NEW YORK CORPORATION, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

KING & SPALDING LLP, LOS ANGELES, CALIFORNIA (ERIC S. PETTIT, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BOND, SCHOENECK & KING, PLLC, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

WINTHROP & WEINSTINE, P.A., MINNEAPOLIS, MINNESOTA (DAVID A. DAVENPORT, OF THE MINNESOTA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND WOODS OVIATT GILMAN LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 8, 2020. The judgment, insofar as appealed from, determined that section 9.2 (B) of the parties' partnership agreement determines the price of a purchase option.

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

Memorandum: Plaintiffs, as limited partners, and defendant Hopkins Court Apartments, L.L.C. (HCA), as general partner, are members of a partnership formed for the purpose of constructing and operating an affordable housing complex for senior citizens (project). In 2016, HCA, acting pursuant to section 4.3 (E) of the partnership agreement, refinanced the project without plaintiffs' consent. Plaintiffs thereafter commenced this action asserting, inter alia, breach of contract and breach of fiduciary duty causes of action. HCA and three of its affiliates, Whitney Capital Company, L.L.C., Whitney Hopkins Associates, and CRS Properties, Inc. (collectively,

defendants) answered and asserted a counterclaim, wherein defendants alleged that HCA exercised a purchase option under the partnership agreement by electing to redeem plaintiffs' ownership interest in the partnership. Defendants therefore sought, inter alia, a declaration that section 9.2 (B) of the partnership agreement controlled the calculation of the purchase option price. Defendants moved for summary judgment seeking dismissal of the complaint and certain declaratory relief sought in the counterclaim (prior motion), which Supreme Court denied. Following a previous appeal in which this Court affirmed the order denying the prior motion (*Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1596 [4th Dept 2019]), defendants moved for, inter alia, leave to reargue the prior motion insofar as it sought a declaration that section 9.2 (B) controls on the ground that the court neglected to address that part of the prior motion. Plaintiffs appeal from a judgment that, inter alia, granted that part of defendants' motion seeking leave to reargue and, upon reargument, granted in part defendants' prior motion by effectively declaring that the partnership agreement unambiguously requires that section 9.2 (B), not section 12.4, applies to determine the option price. We affirm.

Preliminarily, we note that the court properly granted that part of defendants' motion seeking leave to reargue inasmuch as a court " 'retain[s] continuing jurisdiction to reconsider its prior interlocutory order[ ] during the pendency of the action' " (*Nationstar Mtge., LLC v Goodman*, 187 AD3d 1635, 1636 [4th Dept 2020]; *see Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *Carrington Mtge. Servs., LLC v Sudano*, 173 AD3d 1814, 1815 [4th Dept 2019]). Here, the court acknowledged that it had inadvertently failed to address the subject portion of defendants' prior motion.

As in the prior appeal, we are once again faced with a question of contract interpretation. "It is well settled that [t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Centerline/Fleet Hous. Partnership, L.P.—Series B*, 176 AD3d at 1597 [internal quotation marks omitted]).

Here, as noted, in exercising its purchase option, HCA elected to redeem plaintiffs' limited partnership interest. It is undisputed that, by exercising the purchase option, the price HCA would pay plaintiffs for their interest is equal to the amount plaintiffs would receive if the project was sold at fair market value (hypothetical sale). We agree with defendants that section 9.2 of the partnership agreement applies to the sale proceeds of the project regardless of whether they are the result of a direct purchase by HCA or a hypothetical sale price calculation for redemption purchases. We further agree with defendants that any dissolution, governed by section 12, must occur after distribution of the sale proceeds under

section 9.2 (B). The partnership agreement defines a "Sale or Refinancing Transaction" to include, inter alia, a sale of the project, and section 9.2 (B) sets forth the process for distributing the proceeds of such a transaction. The fact that section 9.2 (B) is made expressly "[s]ubject to the provisions of" section 12.4 simply means that the project could be sold during the dissolution process and provides in that event for the distribution of the proceeds pursuant to section 12.4 (A). Section 12.1 of the partnership agreement does provide that the partnership "shall be dissolved upon the happening of," inter alia, the sale of the project. But, in that event, the dissolution does not occur until after the sale. The fact that a sale of the project triggers a dissolution, and thereafter a liquidation, does not mean that the sale and its proceeds are automatically included in the subsequent liquidation.

We further conclude that plaintiffs' interpretation of the partnership agreement—that any sale of the project results in an immediate dissolution of the partnership that would, in effect, predate the sale and require section 12.4 (A) to control the distribution of its proceeds—would impermissibly operate to render portions of the partnership agreement meaningless (*see generally Burgdorf v Kasper*, 83 AD3d 1553, 1555 [4th Dept 2011]; *Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421, 422 [1st Dept 2011]).

In view of the foregoing, we conclude that defendants established that the only reasonable interpretation of the partnership agreement is that section 9.2 (B) applies under these circumstances (*see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905, 906 [4th Dept 2014]; *Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [4th Dept 2009]; *see also CED Capital Holdings 2000 EB, L.L.C. v CTCW-Berkshire Club, LLC*, 2020 WL 1856259, *4 [Fla Cir Ct, Apr. 8, 2020, No. 2018-CA-013886-O], *affd* 306 So 3d 103 [Fla Dist Ct App 2020]), and thus the court properly granted the prior motion insofar as it sought a declaration to that effect. We have reviewed plaintiffs' remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

67

CA 20-00584

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

BRYAN R. BAUM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAVEN CONSTRUCTION CO., INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (H. CHRISTOPHER BARTOLOMUCCI OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 2, 2020. The amended judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the amended judgment so appealed from is unanimously vacated without costs, the order entered August 8, 2019 is modified on the law by denying the motion, and as modified the order is affirmed and the matter is remitted to Supreme Court, Erie County, for a trial on the issue of liability and, if liability is established, for a new trial on the issue of damages.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell on a path covered by ice and snow while carrying elevator rails to be installed at a construction project. Defendant acted as general contractor on the project and hired plaintiff's employer to install an elevator for the project. After Supreme Court granted plaintiff's motion for partial summary judgment on the issue of liability on the Labor Law § 241 (6) cause of action and denied defendant's cross motion insofar as it sought summary judgment dismissing that same cause of action, the case proceeded to trial solely on the issue of damages with respect to the Labor Law § 241 (6) cause of action. The jury ultimately returned a verdict awarding plaintiff damages.

At the outset, we note that defendant's appeal from the amended final judgment brings up for review the non-final order resolving the parties' respective motion and cross motion for summary judgment (prior order) (*see* CPLR 5501 [a] [1]; *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1390 [4th Dept 2014]). With respect to the prior order, defendant contends that the court erred in granting the motion and denying the cross motion with respect to the Labor Law § 241 (6) cause of action because Industrial Code (12 NYCRR) 23-1.7 (d) did not

apply to the facts of this case. We reject that contention. Section 23-1.7 (d), which governs slipping hazards, states in relevant part that "employers shall not . . . permit any employee to use a floor, passageway, [or] walkway . . . which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The term passageway has been interpreted as meaning "a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]).

Generally, a parking lot will not be considered a passageway where it is primarily functioning as a parking lot at the time of the accident (*see id.* at 1251; *Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397-1398 [4th Dept 2008]). Here, however, both parties submitted deposition testimony establishing that the accident site, despite being situated in a parking lot, actually functioned as a passageway because it was the only way that plaintiff could move the elevator rails from a staging area to the installation site. Additionally, photographs of the site submitted by plaintiff in support of his motion show that the accident site constituted a path for purposes of 12 NYCRR 23-1.7 (d) and was not merely functioning as a parking lot (*cf. Steiger*, 104 AD3d at 1251). Thus, we conclude that section 23-1.7 (d) applies to the facts here because the evidence establishes as a matter of law that the path through the parking lot was plaintiff's "only means of going to and from" the installation site (*Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1103 [2d Dept 2020]).

We agree with defendant, however, that the court erred in granting plaintiff's motion for partial summary judgment on liability on the Labor Law § 241 (6) cause of action. We therefore modify the prior order accordingly, vacate the amended judgment and remit the matter to Supreme Court for a trial on the issue of liability and, if liability is established, for a new trial on the issue of damages. Although plaintiff's submissions established that defendant had a nondelegable duty to keep the pathway safe and free of ice and snow (*see generally Zukowski*, 187 AD3d at 1103; *Thompson v 1241 PVR, LLC*, 104 AD3d 1298, 1299 [4th Dept 2013]), triable issues of fact exist whether defendant, by salting the pathway several hours before the accident, discharged that duty (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]; *Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009]; *Irwin v St. Joseph's Intercommunity Hosp.*, 236 AD2d 123, 131-132 [4th Dept 1997]). Given the existence of those issues of fact, we reject defendant's related contention that the court erred in denying its cross motion with respect to the Labor Law § 241 (6) cause of action.

Although our remittal renders defendant's remaining contentions academic, given the need for a trial on liability and, if necessary, a new trial on damages, we note our agreement with defendant that the court erred in granting plaintiff's request to preclude defendant from introducing at the prior damages trial any evidence of plaintiff's comparative fault with respect to the Labor Law § 241 (6) cause of

action. The court determined that defendant was precluded from offering evidence of plaintiff's comparative fault at trial because that issue had been decided when the court granted plaintiff's motion. Contrary to the court's determination, however, consideration of comparative fault is still required even "[w]hen a defendant's liability is established as a matter of law before trial" because the jury must still "determine whether the plaintiff was negligent and whether such negligence was a substantial factor" in causing his or her injuries (*Rodriguez v City of New York*, 31 NY3d 312, 324 [2018]). Further, unlike Labor Law § 240 (1) claims (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *see Rizzuto*, 91 NY2d at 350).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

69.1

CAF 20-00247

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

IN THE MATTER OF PATRICK J. HANKINSON,
PETITIONER-RESPONDENT,

V ORDER

ASHLEY M. STEELE, RESPONDENT-APPELLANT.

JEFFREY DEROBERTS, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR PETITIONER-RESPONDENT.

KAREN J. DOCTER, FAYETTEVILLE, ATTORNEY FOR THE CHILD.

Appeal from a decision of the Family Court, Onondaga County (Allison J. Nelson, A.J.), entered February 10, 2020 in a proceeding pursuant to Family Court Act article 6. The decision denied the motion of respondent to vacate default orders.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Garcia v Town of Tonawanda*, — AD3d —, —, 2021 NY Slip Op 02966, *1 [4th Dept 2021]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see also* CPLR 5512 [a]).

Entered: June 11, 2021

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 19-01845

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

JULIE E. PASEK, INDIVIDUALLY, AND AS POWER OF ATTORNEY FOR JAMES G. PASEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., MERCY HOSPITAL OF BUFFALO, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 27, 2019. The order granted the motion of defendants Catholic Health System, Inc., and Mercy Hospital of Buffalo for summary judgment dismissing plaintiff's vicarious liability claims against them.

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

Memorandum: Plaintiff, individually, and as power of attorney for her husband, James G. Pasek, commenced this medical malpractice action seeking damages for injuries sustained by Pasek, who was admitted to defendant Mercy Hospital of Buffalo (Mercy Hospital) for mitral valve repair surgery in February 2014. Serious complications occurred during the surgery and, during the post-operative period, Pasek was placed on a ventilator and an extracorporeal membrane oxygenation (ECMO) system, which mechanically circulated his blood outside his body through an artificial lung. A few days after the surgery, Pasek's condition deteriorated and he was emergently transported from the open heart unit to the operating room. During the transport, the ECMO tubing became unintentionally disconnected, and Pasek subsequently suffered, among other things, massive blood loss, hypoxic brain injury due to a lack of oxygen, and occipital lobe damage. Plaintiff appeals from an order that granted the motion of defendants Catholic Health System, Inc. and Mercy Hospital (collectively, Mercy defendants) for summary judgment dismissing plaintiff's vicarious liability claims against them. We affirm.

Plaintiff contends that Supreme Court erred in granting the motion because questions of material fact exist whether Mercy Hospital exercised control over defendants John Bell-Thomson, M.D., George R. Bancroft, M.D., and Support Services of WNY, LLC (Support Services), and whether Mercy Hospital held out those defendants as apparent agents of Mercy Hospital, such that the Mercy defendants may be vicariously liable for their conduct. We reject that contention. "[I]t is well settled that, '[i]n general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee' " (*Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713 [4th Dept 2010]; *see Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012]). A hospital may be liable for the negligence of an independent physician, however, if the hospital "maintained control over the manner and means of the physician's work" (*Torns v Samaritan Hosp.*, 305 AD2d 965, 967 [3d Dept 2003]; *see Nagengast v Samaritan Hosp.*, 211 AD2d 878, 878-879 [3d Dept 1995]). "The test employed is one of control in respect to the manner in which the work is to be done" (*Mduba v Benedictine Hosp.*, 52 AD2d 450, 452 [3d Dept 1976]).

"[V]icarious liability for the medical malpractice of an independent, private attending physician may [also] be imposed under a theory of apparent or ostensible agency by estoppel" (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *see Diller v Munzer*, 141 AD3d 628, 629 [2d Dept 2016]; *Thurman v United Health Servs. Hosps., Inc.*, 39 AD3d 934, 935-936 [3d Dept 2007], *lv denied* 9 NY3d 807 [2007]). "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal . . . , [and] the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal" (*Dragotta*, 39 AD3d at 698; *see Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 836 [3d Dept 2006], *amended on rearg* 2006 NY Slip Op 05866 [3d Dept 2006]). "In the context of a medical malpractice action against a hospital, the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital's behalf" (*Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]).

With respect to plaintiff's claim that the Mercy defendants are vicariously liable for the conduct of Bell-Thomson, the Mercy defendants submitted evidence establishing that Bell-Thomson was not an employee of Mercy Hospital and that Mercy Hospital did not control his work. The Mercy defendants' submissions included Bell-Thomson's deposition testimony, which established that he had his own practice. The Mercy defendants also submitted a letter from Bell-Thomson to Pasek, which explained that Bell-Thomson and members of his team would coordinate Pasek's care, that Mercy Hospital would not be directly overseeing or coordinating Pasek's care during his admission to the hospital, and that Mercy Hospital would not be actively involved in arranging for Pasek's incidental care, which might involve other medical specialties such as anesthesiology and perfusion services (*see*

Giambona v Hines, 104 AD3d 807, 811 [2d Dept 2013]; *Nagengast*, 211 AD2d at 879).

The Mercy defendants also established they are not liable for Bell-Thomson's conduct under a theory of apparent agency. In support of their motion, they submitted the deposition testimony of plaintiff, which established that Pasek selected Bell-Thomson to perform the surgery because he was the only local surgeon who could perform the surgery robotically. Inasmuch as the Mercy defendants established that Pasek procured Bell-Thomson's services independently, and that Bell-Thomson performed Pasek's surgery with physicians and specialists that he coordinated, we conclude that the Mercy defendants established that Pasek could not have reasonably believed that the Mercy defendants chose Bell-Thomson to treat Pasek or that Bell-Thomson was acting on behalf of Mercy Hospital (*see Thurman*, 39 AD3d at 937).

In opposition to the motion, plaintiff failed to raise a triable issue of fact whether Mercy Hospital exercised control over the manner and means of Bell-Thomson's work (*see Nagengast*, 211 AD2d at 879), or whether the Mercy defendants are liable under a theory of apparent agency (*cf. Keesler*, 140 AD3d at 1022-1023; *Dragotta*, 39 AD3d at 699). To the extent that plaintiff contends that the failure of the Mercy defendants to submit Mercy Hospital's contract with Bell-Thomson creates a question of fact, we note that the facts necessary to establish a relationship of control between Mercy Hospital and Bell-Thomson were not exclusively within the control of Mercy Hospital, and plaintiff's failure to ascertain the facts was due to her own inaction (*see Sheehan v Columbia Presbyt. Med. Ctr., Presbyt. Hosp. in City of N.Y.*, 182 AD2d 556, 556 [1st Dept 1992]).

With respect to the claim that the Mercy defendants have vicarious liability for the conduct of Bancroft, we reject plaintiff's contention that the Mercy defendants failed to meet their initial burden on their motion. "Generally, a hospital may not be held liable for the acts of an anesthesiologist who was not an employee of the hospital, but was one of a group of independent contractors" (*Keesler*, 140 AD3d at 1022; *see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]), unless there was apparent agency between the hospital and anesthesiologist or the hospital exercised control over the anesthesiologist (*see Sklarova v Coopersmith*, 180 AD3d 510, 512 [1st Dept 2020]; *Brown v LaFontaine-Rish Med. Assoc.*, 33 AD3d 470, 471 [1st Dept 2006]; *Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881 [4th Dept 1997]). Here, the Mercy defendants established through the submission of Bancroft's deposition testimony that Bancroft was a member of an independent group of anesthesiologists and not an employee of Mercy Hospital (*see Sampson v Contillo*, 55 AD3d 588, 590-591 [2d Dept 2008]; *cf. Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213-1214 [2d Dept 2018]).

Contrary to plaintiff's contention, the Mercy defendants' submissions did not raise a question of fact whether Mercy Hospital held out Bancroft as an employee and whether Pasek reasonably relied upon that misrepresentation in accepting Bancroft's medical services (*see generally King v Mitchell*, 31 AD3d 958, 959-960 [3d Dept 2006]).

The presence of the Catholic Health logo on the anesthesia records is insufficient to establish that Mercy Hospital held out Bancroft as its employee (*see Thurman*, 39 AD3d at 936; *King*, 31 AD3d at 960; *Nagengast*, 211 AD2d at 879; *cf. Dragotta*, 39 AD3d at 699-700) and, although Pasek did not specifically request the services of Bancroft, Bancroft's presence at Mercy Hospital is insufficient to raise a question of fact whether Mercy Hospital held him out as an employee of the hospital (*see Thurman*, 39 AD3d at 936). Indeed, the Mercy defendants' submissions established that Bell-Thomson chose Mercy Hospital as the setting for Pasek's surgery and advised Pasek that he would ask one or more specialist consultants to assist with Pasek's care.

With respect to the claim of vicarious liability for the conduct of Support Services, the Mercy defendants met their initial burden of establishing that Mercy Hospital did not employ Support Services or its employees (*see generally Orgovan v Bloom*, 7 AD3d 770, 771 [2d Dept 2004]) and did not exercise control over them (*see Dolan v Jaeger*, 285 AD2d 844, 846 [3d Dept 2001]; *cf. Contreras v Adeyemi*, 102 AD3d 720, 722-723 [2d Dept 2013]). The Mercy defendants submitted the deposition testimony of several employees of Support Services and the contract between Support Services and Mercy Hospital, which established that Support Services controlled the daily scheduling of its employees. Although the contract between Mercy Hospital and Support Services required that Support Services provide a perfusionist at Mercy Hospital at all times, Mercy Hospital did not control Support Services's staffing or billing. The contract and the deposition testimony established that Support Services maintained control over the scheduling of perfusionists and their respective assignments, as well as their ECMO training. Plaintiff failed to raise a triable issue of fact (*see generally Nagengast*, 211 AD2d at 879).

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

Entered: June 11, 2021

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 19-01400

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

WILLIAM TAROLLI AND LAURIE TAROLLI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JERVIS B. WEBB COMPANY, DEFENDANT,

MCMAHON KUBLICK, P.C., APPELLANT.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 21, 2019. The order apportioned 5 percent of attorneys' fees to appellant McMahon Kublick, P.C.

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

Memorandum: This appeal involves a dispute between law firms over attorneys' fees arising from the legal services provided to plaintiffs in a personal injury action. McMahon Kublick, P.C. (McMahon) appeals from an order that, after a hearing, apportioned McMahon 5 percent of the net contingent attorneys' fee, and apportioned the remaining 95 percent to Smith, Sovik, Kendrick & Sugnet, P.C. (Smith Sovik), the law firm that represented plaintiffs when the personal injury action was settled.

We reject McMahon's contention that Supreme Court abused its discretion in fashioning the award. In fixing the percentages to be awarded to McMahon and Smith Sovik, the court properly considered the amount of time each firm spent on the case, the nature of the work performed, the relative contributions of counsel and the quality of the services rendered (*see Cellino & Barnes, P.C. v York* [appeal No. 2], 170 AD3d 1658, 1658-1659 [4th Dept 2019]; *McCarthy v Roberts Roofing & Siding Co., Inc.*, 45 AD3d 1375, 1375-1376 [4th Dept 2007]; *see generally Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]). Contrary to McMahon's further contention, we conclude that Smith Sovik's argument that McMahon was discharged for cause and therefore not entitled to any fees was not frivolous, and thus McMahon is not entitled to attorneys' fees and costs for having to litigate

that issue (*see* 22 NYCRR 130-1.1 [a], [c]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

109

CA 20-00757

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

COLLING ENTERPRISES, LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES J. GRABER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 20, 2020. The order denied defendant's motion for summary judgment and denied plaintiff's cross motion for summary judgment.

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

Memorandum: Plaintiff, following a fire at a building that it owned, commenced this action to recover damages allegedly owed to it under a fire insurance policy issued by defendant. We agree with defendant on its appeal that Supreme Court erred in denying its motion for summary judgment dismissing the complaint, and we therefore modify the order accordingly. Here, "the clear and unambiguous language of the policy exclud[ed] coverage if plaintiff's building was vacant for 60 consecutive days prior to the loss, and the record establishes that the building was vacant within the meaning of the policy for the requisite period" (*Nicholas J. Masterpol, Inc. v Travelers Ins. Cos.*, 273 AD2d 817, 817 [4th Dept 2000]). Plaintiff had "conclusive presumptive knowledge of the terms of the policy prior to the loss and took no action to close the gap in coverage resulting from the exclusion for vacancy" (*id.* at 818; *see Gui's Lbr. & Home Ctr., Inc. v Pennsylvania Lumbermens Mut. Ins. Co.*, 55 AD3d 1389, 1390 [4th Dept 2008]). The cases upon which plaintiff relies are inapposite because, here, the policy was undisputedly valid when it was delivered (*cf. Short v Home Ins. Co.*, 90 NY 16, 20 [1882]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

115

CA 20-01000

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

TINA CARSWELL, PLAINTIFF-APPELLANT,

V ORDER

THEODORE R. TRAVIS AND LAWMAN HEATING AND COOLING, INC., DEFENDANTS-RESPONDENTS.

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

BURKE, SCOLAMIERO & HURD LLP, ALBANY (STEVEN V. DEBRACCIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 28, 2020. The order, insofar as appealed from, granted in part the motion of defendant to toll the accrual of statutory interest.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 7, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

129

CA 20-00569

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

MARY P. RAYMOND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JON HILLEBERT, ET AL., DEFENDANTS,
HOME DELIVERY LINK, INC. AND HOME DELIVERY, INC.,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA, LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 20, 2020. The order granted the motion of defendants Home Delivery, Inc. and Home Delivery Link, Inc. for summary judgment dismissing plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant Home Delivery Link, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when the motor vehicle in which she was traveling collided with a delivery truck. Supreme Court granted the motion of Home Delivery Link, Inc. (defendant) and defendant Home Delivery, Inc. (Wisconsin entity) for summary judgment dismissing the complaint against them, and plaintiff appeals. Initially, plaintiff does not contend in her brief that the court erred in granting the motion with respect to the Wisconsin entity, and therefore we deem any challenge to that part of the order abandoned (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We agree with plaintiff that the court erred in granting the motion with respect to defendant because defendant failed to establish as a matter of law that the operator of the delivery truck was an independent contractor, not an employee. Therefore, we modify the order accordingly.

An entity that retains an independent contractor generally is not liable for the independent contractor's negligent acts (*see Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]; *Tschetter v Sam Longs' Landscaping, Inc.*, 156 AD3d 1346, 1347 [4th Dept 2017]). Whether a relationship between a delivery company and its drivers " 'is that of

employees or independent contractors involves a question of fact as to whether there is evidence of either control over the results produced or over the means used to achieve the results' " (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 301 [2017], quoting *Matter of Rivera [State Line Delivery Serv.-Roberts]*, 69 NY2d 679, 682 [1986], *rearg dismissed* 69 NY2d 823 [1987], *rearg denied* 69 NY2d 946 [1987], *cert denied* 481 US 1049 [1987]). Here, defendant's own evidentiary submissions established that defendant rented the delivery truck that was involved in the accident, was empowered to install its own signage on the truck, designed the delivery routes, set the times for the deliveries, and required drivers to submit incident reports following any accidents, thereby raising a question of fact with respect to the nature of the employment relationship (*see Carlson*, 30 NY3d at 300-301; *Edwards v Rosario*, 166 AD3d 453, 454 [1st Dept 2018]; *Christ v Ongori*, 82 AD3d 1031, 1032 [2d Dept 2011]; *Anikushina v Moodie*, 58 AD3d 501, 501-502 [1st Dept 2009], *lv denied* 12 NY3d 905 [2009]).

Entered: June 11, 2021

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 18-00265

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAUN BOWEN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Robert L. Bauer, A.J.), rendered December 13, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, arson in the first degree and criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]), arson in the first degree (§ 150.20 [1] [a] [i]), and criminal mischief in the third degree (§ 145.05 [2]). Defendant's conviction stems from his conduct in placing a propane tank inside an oven at a 12-room boarding house, which led to a fire and caused the death of one of the tenants (decedent). Defendant, a prior tenant of the house, was visiting his former housemates and became angry after arguing with some of them, leading to his retaliatory action.

County Court (Aloi, J.) held a *Huntley* hearing and determined that defendant invoked his right to counsel during a videotaped interview with the police but that several inculpatory statements made by defendant thereafter were admissible because they were spontaneously made. Those statements were made by defendant after the interrogation ceased and while a detective was sitting next to him, completing the arrest paperwork. After the detective asked him certain pedigree questions, defendant asked "How's Annie doing?," referring to decedent's wife. The detective replied that she was "hurt" and said that she "lost the person she loved the most in life." The detective then asked defendant if he wanted another coffee or soda and, after defendant responded that he would like another cup of coffee, he started crying. The detective whispered "good response" and told him "that's remorse." There was a brief interruption when

another detective opened the door to the interview room and discussed lunch plans with the first detective, and the first detective then asked defendant if he was hungry. Defendant responded "yeah," and then stated "it wasn't supposed to happen like that" and that he "didn't mean for any of that to happen" (first statement). After the detective responded "I understand," defendant stated "I just wanted to prank 'em just like jig 'em" (second statement). After the detective responded with several statements including that "remorse is what we wanted to see" and that the police did not think that defendant's intentions were to kill anyone, defendant said "I should've just stuck around. Maybe I coulda [sic] done something" (third statement).

We reject defendant's contention that reversal is required because the three statements outlined above should have been suppressed. It is well settled that "statements made by a defendant who has invoked the right to counsel may nevertheless be admissible at trial if they were made spontaneously . . . [and were not] the result of express questioning or its functional equivalent" (*People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983] [internal quotation marks omitted]; *see People v Rivers*, 56 NY2d 476, 479-480 [1982], *rearg denied* 57 NY2d 775 [1982]). We reject defendant's contention that the detective provoked defendant's first and second statements when the detective made his remark about remorse (*see People v Huffman*, 61 NY2d 795, 797 [1984]). Rather, those statements were triggered by defendant's own thoughts about "Annie," who was one of his former housemates. After the detective made his remark about remorse, there was a brief interruption by another detective and then the first detective effectively changed the subject when he asked defendant if he was hungry. Yet defendant, still obviously troubled about "Annie," spontaneously made the first and second statements. We therefore conclude that defendant's first and second statements were not "triggered by police conduct which should reasonably have been anticipated to evoke a declaration from . . . defendant" (*People v Lynes*, 49 NY2d 286, 295 [1980]; *see People v Watson*, 90 AD3d 1666, 1666-1667 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]; *People v Fuller*, 70 AD3d 1391, 1391-1392 [4th Dept 2010], *lv denied* 14 NY3d 840 [2010]).

With respect to the third statement, we agree with defendant that it was not spontaneous because it was made in response to the functional equivalent of express questioning by the detective (*see generally Harris*, 57 NY2d at 342). We conclude, however, that the error in admitting the third statement was harmless (*see People v Kaba*, 166 AD3d 1566, 1567 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]). The proof of guilt, including defendant's first and second statements detailed above, was overwhelming, and there was no reasonable possibility that the error contributed to the conviction (*see People v Paulman*, 5 NY3d 122, 134 [2005]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant next contends that the court (Bauer, A.J.) erred in allowing the jury to hear certain comments made by the first detective during the videotaped interview with defendant inasmuch as those

comments constituted improper opinion evidence. We reject that contention inasmuch as the detective's statements were not unduly prejudicial and were required to place defendant's statements in context (*cf. People v Smith*, 126 AD3d 1528, 1529 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]). In any event, any error in admitting those statements was harmless (*see People v Sommerville*, 30 AD3d 1093, 1094 [4th Dept 2006]). Defendant had already admitted his guilt by that point in the interview, and we thus conclude that there is no significant probability that the jury would have acquitted defendant had it not been for the allegedly erroneous admission of the detective's statements (*see Crimmins*, 36 NY2d at 241-242).

Finally, the sentence is not unduly harsh or severe.

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and conclude that County Court (Aloi, J.) erred in refusing to suppress all of the statements defendant made after he unequivocally invoked the right to counsel. I further conclude that the constitutional error cannot be deemed harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). I would therefore reverse the judgment, grant that part of the omnibus motion that sought suppression of any statements made by defendant after he invoked the right to counsel and grant a new trial.

After fire engulfed a rooming house in the City of Syracuse, one of the tenants (decedent) died in the blaze. Detectives spoke to several tenants of the property, and they identified defendant, a former tenant of the rooming house, as a possible suspect. Although he was interviewed twice by detectives, defendant challenges only those statements that were made after he invoked his right to counsel during the second interview.

"The State constitutional right to counsel is a 'cherished principle' . . . , worthy of the 'highest degree of [judicial] vigilance' " (*People v Ramos*, 99 NY2d 27, 32 [2002]). Here, as in *People v Harris* (57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983]), it is clear that defendant invoked his right to counsel and that no further questioning was permitted unless defendant waived his right to counsel in the presence of defense counsel. One recognized exception to that rule is where a defendant's subsequent statements are spontaneous and not the product of express interrogation or its functional equivalent (*see id.*). The reason for that exception is because law enforcement officers have no obligation "to prevent a talkative person in custody from making an incriminating statement" (*People v Rivers*, 56 NY2d 476, 479 [1982], *rearg denied* 57 NY2d 775 [1982]).

Here, after defendant unequivocally invoked his right to counsel and after arrest paperwork was completed, defendant asked how decedent's wife was doing. I agree with the People and the majority that defendant's initial inquiry into the well-being of decedent's wife was a spontaneous question not subject to suppression. The interviewing detective then gave a lengthy response, which concluded

with the statement that "every day she says uh you know she's lost the person she loved the most in life." Defendant thereafter started to cry, whereupon the interviewing detective stated, "Good response. That's remorse Bud that's good. I, I know you're friends with these people. You've known them for a long time." Shortly after the detective's statement and a brief interruption by another detective, defendant said, "It wasn't supposed to happen like that you know they were supposed to go with . . . I don't know. I didn't mean for any of that to happen" (first statement). The interviewing detective told defendant that he understood, at which time defendant continued, "I just wanted to prank 'em just like jig 'em" (second statement). At that point, the detective again told defendant that he understood and that remorse was what the detectives wanted to see. The detective told defendant that "none of us thought that uh obviously when we're talking to you we wanted to know what was going through your mind but neither one of us thought that uh your intentions were to kill somebody." Following that last statement, defendant stated, "Why didn't they just get out? I should've just stuck around. Maybe I coulda done something" (third statement).

Defendant sought suppression of the three incriminating statements, but the court refused to suppress any of them, determining that the challenged statements were "clearly volunteered in that . . . defendant spoke with genuine spontaneity and that he was neither induced nor provoked by [the interviewing detective] into making such statements." The majority agrees with the People that the court did not err in refusing to suppress the first two statements and that any error in refusing to suppress the third statement is harmless. I respectfully disagree and conclude that all of those statements should have been suppressed.

"In order for [the] statements to be characterized as spontaneous, it must be shown that they were in no way the product of an interrogation environment, the result of express questioning or its functional equivalent" (*Harris*, 57 NY2d at 342 [internal quotation marks omitted]; *see People v Stoesser*, 53 NY2d 648, 650 [1981]; *see also Rivers*, 56 NY2d at 480). We are thus required to determine whether there were "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should [have known were] reasonably likely to elicit an incriminating response" (*Rhode Island v Innis*, 446 US 291, 301 [1980]; *see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; *People v Allnutt*, 148 AD2d 993, 994 [4th Dept 1989], *lv denied* 74 NY2d 736 [1989]).

According to the Court of Appeals, "[t]he test in such situations [is] . . . whether the defendant's statement can be said to have been triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant" (*People v Lynes*, 49 NY2d 286, 295 [1980]). "[C]onsidering the totality of the circumstances leading up to the subject statement[s]" in this case (*People v Stephans*, 168 AD3d 990, 995 [2d Dept 2019]), including the interviewing detective's initial failure to scrupulously honor

defendant's first requests for an attorney by asking him why he wanted an attorney and whether he needed an attorney to determine whether he should confess (*cf. Harris*, 57 NY2d at 342), I cannot conclude that "defendant spoke with genuine spontaneity 'and not [as] the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed' " (*Stoesser*, 53 NY2d at 650, quoting *People v Maerling*, 46 NY2d 289, 302-303 [1978]).

Before defendant invoked his right to counsel, the interviewing detective implored defendant to "do the right thing," and informed him that a showing of remorse would be a significant factor in the charges and how he was viewed by a jury. I thus conclude that the interviewing detective's subsequent comments concerning remorse and friendship, made after defendant invoked his right to counsel, related back to the detective's prior requests for defendant to show remorse and do the right thing. In my view, "the only possible object of [the detective's comments] [was] to elicit a statement from [defendant]" (*Ferro*, 63 NY2d at 323-324). In any event, even if the detective's subsequent references to remorse were innocently made, I conclude that they "did precipitate the conversation and did evoke a damaging admission from . . . defendant" (*People v Howard*, 62 AD2d 179, 182 [1st Dept 1978], *affd for the reasons stated* 47 NY2d 988 [1979]). I thus conclude that all of defendant's incriminating statements following his invocation of the right to counsel should have been suppressed. Inasmuch as there is a reasonable possibility that the erroneous admission of defendant's inculpatory statements contributed to the verdict, the error in refusing to suppress all of those statements cannot be considered harmless, and reversal is required (*see Crimmins*, 36 NY2d at 237).

Based on my determination, there is no need to address the remainder of defendant's contentions, but I would concur with the majority's resolution of those contentions.

Entered: June 11, 2021

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 20-00194

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

LAUREEN BURKE, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WOMEN GYNECOLOGY AND CHILDBIRTH ASSOCIATES, P.C., DEFENDANT-RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY A. WADSWORTH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 13, 2020. The judgment dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendant breached the terms of her employment agreement with defendant. As relevant on appeal, plaintiff asserted several causes of action for breach of contract based on defendant's alleged failure to pay her full base compensation for various years pursuant to the compensation schedule set forth in the employment agreement (first cause of action), to pay her for ultrasound work she performed pursuant to a 2010 ultrasound compensation agreement (third cause of action), to pay her post-termination compensation pursuant to the employment agreement (fourth cause of action), and to pay her attorney's fees and expenses pursuant to the employment agreement (fifth cause of action). Plaintiff appeals from a judgment entered after a bench trial that, inter alia, dismissed her amended complaint.

Our scope of review in this determination after a nonjury trial is as broad as that of the trial court (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]; *Cianchetti v Burgio*, 145 AD3d 1539, 1540 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]). It is well settled, however, that the decision of a court following a nonjury trial should not be disturbed on appeal "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the

credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]). Moreover, when conducting such a review, we must view the record "in the light most favorable to sustain the judgment" (*Farace v State of New York*, 266 AD2d 870, 871 [4th Dept 1999]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286 [4th Dept 2014]).

Initially, we note that inasmuch as plaintiff raised in her appellate brief contentions concerning only the four causes of action identified above, she abandoned any contentions with respect to the other causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We reject plaintiff's contention that the decision of Supreme Court dismissing the first, third, fourth and fifth causes of action is not supported by a fair interpretation of the evidence.

With respect to the first cause of action, the parties' employment agreement provided that defendant reserved the right to change the base compensation percentages set forth in the compensation schedule as required to pay its overhead costs, and the other evidence at trial established that defendant exercised that right. Thus, we conclude that there is a fair view of the evidence that supports the court's determination that defendant did not breach the employment agreement by failing to pay plaintiff in accordance with the base compensation schedule during the period from 2006 to 2009 (*see generally Cianchetti*, 145 AD3d at 1540-1541; *Suprunchik v Viti*, 139 AD3d 1389, 1389-1390 [4th Dept 2016]).

We further conclude that plaintiff failed to establish that defendant breached the employment agreement by not paying her the required base compensation for the period after 2010. The evidence at trial established that, starting in 2010, plaintiff agreed to take flat salary draws. While plaintiff's expert testified at trial that plaintiff was owed additional base compensation for 2011 and 2012 pursuant to the compensation schedule in the employment agreement, that compensation schedule had been abandoned in 2010 (*see generally Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465 [4th Dept 2015]) and thus did not establish the basis for any compensation owed to plaintiff thereafter. Further, records admitted at trial demonstrate that plaintiff was overpaid for her base compensation in 2011 and 2012 as a result of her monthly salary draws using the compensation formula eventually implemented by defendant. Therefore, a fair interpretation of the evidence also supports the court's determination that defendant did not breach the employment agreement by failing to pay plaintiff her full base compensation in 2011 and 2012 (*see generally Cianchetti*, 145 AD3d at 1541; *Wenger v Alidad*, 265 AD2d 322, 323 [2d Dept 1999], *lv denied* 94 NY2d 758 [2000]).

With respect to the third cause of action, plaintiff's expert conceded that plaintiff was not owed anything under the 2010 ultrasound compensation agreement, and thus there is a fair view of the evidence supporting the court's determination that the ultrasound

compensation agreement was not breached (*see generally Hetelekides v County of Ontario*, 193 AD3d 1414, 1417 [4th Dept 2021]).

Regarding the fourth cause of action, while both parties agree that plaintiff was not paid post-termination compensation pursuant to the employment agreement, a fair interpretation of the evidence supports the court's determination that plaintiff failed to establish her entitlement to the post-termination compensation (*see Wenger*, 265 AD2d at 323; *see generally Berley Indus. v City of New York*, 45 NY2d 683, 686-687 [1978]). Notably, plaintiff relied upon her base compensation schedule, which was no longer in effect when she left the practice, and she did not request that her expert provide an opinion on damages related to unpaid post-termination compensation. Plaintiff's alternative damages calculation was offered for the first time on appeal and is therefore not properly before us (*see Ciesinski*, 202 AD2d at 985; *see also Blue Heron Constr. Co., LLC v Village of Nunda*, 63 AD3d 1694, 1696 [4th Dept 2009]).

Finally, with respect to the fifth cause of action, plaintiff is not entitled to attorneys' fees and costs (*cf. LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d 1153, 1154 [2d Dept 2019]; *see generally Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Entered: June 11, 2021

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 20-01205

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

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, PETITIONER,

V MEMORANDUM AND ORDER

RONALD E. HAWK, BIG MONEY JIM, INC., DOING BUSINESS AS CHAFFEE FLATTS BAR AND GRILL AND CAROL POUST, RESPONDENTS.

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

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Catherine R. Nugent Panepinto, J.], entered September 3, 2020) seeking judicial review and enforcement of petitioner's notice and final order, issued on May 6, 2015, and amended notice and final order, issued on March 17, 2017.

It is hereby ORDERED that the determinations are unanimously confirmed without costs, the petition is granted, and respondents Ronald E. Hawk and Big Money Jim, Inc., doing business as Chaffee Flatts Bar and Grill are directed to pay respondent Carol Poust the sum of $10,000 as compensatory damages with interest at the rate of 9% per annum commencing May 6, 2015, and to pay the Comptroller of the State of New York the sum of $3,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing May 6, 2015.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking enforcement of orders of its Commissioner that, inter alia, found respondents Ronald E. Hawk and Big Money Jim, Inc., doing business as Chaffee Flatts Bar and Grill (Chaffee Flatts) liable to respondent Carol Poust (complainant) for sexual harassment and age-based discrimination. After a fact finding hearing, the Administrative Law Judge (ALJ) awarded complainant $10,000 in compensatory damages for mental anguish and humiliation and imposed a $3,000 civil penalty based on claims of a hostile work environment and constructive discharge of complainant's employment. Petitioner adopted the recommended findings of fact, opinion, decision and order of the ALJ.

Initially, with respect to the merits of the enforcement petition, neither Hawk nor Chaffee Flatts answered the petition.

Nonetheless, "[a]n enforcement proceeding initiated by [petitioner] raises the issue of whether its determination was supported by sufficient evidence in the record as a whole" even where that petition is unopposed (*Matter of New York State Div. of Human Rights v Roadtec, Inc.*, 167 AD3d 898, 899 [2d Dept 2018] [internal quotation marks omitted]; *see Matter of New York State Div. of Human Rights v Waldorf Niagara, Inc.*, 181 AD3d 1281, 1282 [4th Dept 2020]). Applying that standard, we conclude that petitioner's determinations are supported by substantial evidence inasmuch as the administrative record contains "relevant proof as a reasonable mind may accept as adequate to support" the relevant conclusions and factual findings (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Here, even though the record contains some conflicting evidence "and room for choice exists[,] there is a rational basis for the determination and thus the judicial function is exhausted" (*Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1565 [4th Dept 2014] [internal quotation marks omitted]; *see generally Matter of AMG Managing Partners, LLC v New York State Div. of Human Rights*, 148 AD3d 1765, 1767 [4th Dept 2017]).

We further conclude that Hawk, as owner and president of Chaffee Flatts, and the person who committed the complained-of sexual harassment and age-based discrimination, may be held individually liable for the discriminatory actions that damaged complainant (*see Matter of New York State Div. of Human Rights v Nancy Potenza Design & Bldg. Servs., Inc.*, 87 AD3d 1365, 1365-1366 [4th Dept 2011]; *see generally Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]; *Matter of New York State Div. of Human Rights v ABS Elecs. Inc.*, 102 AD3d 967, 969 [2d Dept 2013], *lv denied* 24 NY3d 901 [2014]). Furthermore, Chaffee Flatts may be held liable for Hawk's conduct because he was " 'within the class of an employer organization's officials who may be treated as the organization's proxy' " (*Matter of Winkler v New York State Div. of Human Rights*, 59 AD3d 1055, 1056 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]), and because it knew of Hawk's conduct yet did nothing to ameliorate or otherwise correct the situation (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 53-55 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]).

We also conclude that the amount of the award for mental anguish and humiliation is "reasonably related to the wrongdoing, . . . is supported by substantial evidence, and . . . is comparable to awards in similar cases" and therefore should be confirmed (*Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1658 [4th Dept 2018]; *see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 218-219 [1991]; *Nancy Potenza Design Bldg. Servs., Inc.*, 87 AD3d at 1366; *Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights*, 265 AD2d 809, 809 [4th Dept 1999]).

We agree with petitioner that the civil penalty of $3,000 is not excessive. "Judicial review of an administrative penalty is limited to whether the measure or mode of penalty . . . constitutes an abuse

of discretion as a matter of law . . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see County of Erie*, 121 AD3d at 1566). Here, the penalty imposed is not an abuse of discretion as a matter of law.

Finally, because the unopposed petition for enforcement demonstrates that Hawk and Chaffee Flatts have failed to comply with the orders, enforcement is granted (*see generally* Executive Law § 298; *Waldorf Niagara, Inc.*, 181 AD3d at 1282-1283).

Entered: June 11, 2021

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 20-00448

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

IN THE MATTER OF DENNIS REX AND DIANE REX,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF TOWN OF SENNETT,
RESPONDENT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR PETITIONERS-APPELLANTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 12, 2020 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging the determination of respondent denying their application for a special use permit to develop a mini-storage facility on property that was zoned agricultural/residential. In making its determination, respondent concluded that the proposed use did not "meet the goals of [the] comprehensive plan" and would "alter[] the essential character of the neighborhood." Supreme Court denied the petition, and petitioners appeal. We affirm.

The operation of a mini-storage facility is identified in the Town of Sennett's zoning ordinance as permitted upon the issuance of a special use permit (*see* Zoning Ordinance of the Town of Sennett § 504). The zoning ordinance provides that respondent "shall grant a Special Use Permit when it finds adequate evidence that a proposed use . . . will meet all of the . . . general requirements and standards listed [in the ordinance] for the proposed use" (§ 1509 [C] [3]), including that the proposed use must be "[i]n the best interest of the Town of Sennett, . . . [s]uitable for the property in question and designed, constructed, operated and maintained so as to be in harmony with and appropriate in appearance with the existing intended character to the general vicinity" (§ 1509 [C] [3] [a], [b]; *see generally Matter of Mobil Oil Corp. v Oaks*, 55 AD2d 809, 809 [4th Dept 1976]). Furthermore, "[t]he stated standards in the ordinance guiding [respondent's] consideration of [the special use permit] application condition availability of a special exception, and compliance with

those standards must be shown before any exception can be secured" (*Matter of Durante v Town of New Paltz Zoning Bd. of Appeals*, 90 AD2d 866, 867 [3d Dept 1982]; *see Matter of Wegmans Enters. v Lansing*, 72 NY2d 1000, 1001-1002 [1988]; *Matter of Francis Dev. & Mgt. Co. v Town of Clarence*, 306 AD2d 880, 881-882 [4th Dept 2003]).

Although the comprehensive plan for the Town of Sennett envisions some commercial development on land zoned agricultural/residential, "it also indicates that this type of commercial development should be restricted" to specific areas (*Francis Dev. & Mgt. Co.*, 306 AD2d at 882). As petitioners correctly concede, their proposed commercial development did not fall within the specified areas designated for such development. Inasmuch as the "[f]ailure to meet any one of the conditions set forth in the ordinance" provides a rational basis for denying an application for a special use permit (*Wegmans Enters.*, 72 NY2d at 1001), respondent had a rational basis to deny petitioners' application (*see Matter of Frittita v Pax*, 251 AD2d 1077, 1077 [4th Dept 1998]). We note that there is no evidence in the record that respondent granted special use permits to similarly situated property owners proposing comparable projects (*cf. Matter of c/o Hamptons, LLC v Rickenbach*, 98 AD3d 736, 737-738 [2d Dept 2012]; *Matter of Scott v Zoning Bd. of Appeals of Town of Salina*, 88 AD2d 767, 767 [4th Dept 1982]) and, contrary to petitioners' contention, the fact that respondent did not include specific factual findings in its decision does not require annulment of respondent's determination inasmuch as "the record as a whole addresses the applicable considerations or otherwise provides a basis for concluding that there was a rational basis for [respondent's] determination" (*Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1421 [4th Dept 2014]).

Finally, we have considered petitioners' remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

197

CA 20-00322

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

LG 2 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERALD JASINSKI, DEFENDANT-RESPONDENT,
THE DIOCESE OF BUFFALO, N.Y., AND BLESSED
MOTHER TERESA OF CALCUTTA PARISH, FORMERLY
KNOWN AS ST. JAMES ROMAN CATHOLIC CHURCH,
DEFENDANTS.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 24, 2020. The order, insofar as appealed from, stayed entry of judgment against defendant Gerald Jasinski pending disposition of the action with respect to the remaining defendants.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs, the second ordering paragraph is vacated, the motion is granted in its entirety and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action pursuant to the Child Victims Act seeking damages for personal injuries he sustained as a result of sexual abuse allegedly perpetrated in the late 1970s by Gerald Jasinski (defendant), who was purportedly then serving as a priest at defendant Blessed Mother Teresa of Calcutta Parish, formerly known as St. James Roman Catholic Church (Church), operated by defendant Diocese of Buffalo, N.Y. (Diocese). Plaintiff asserted a cause of action against defendant for his alleged intentional conduct that constituted sexual offenses under Penal Law article 130. Plaintiff also asserted causes of action against the Church and the Diocese (collectively, Church defendants) alleging that they knew or should have known of defendant's propensity to commit sexual abuse and that they were negligent and reckless in appointing, training, retaining, and supervising defendant. The Church defendants answered, but defendant, despite being personally served, failed to answer. Plaintiff thereafter moved pursuant to CPLR 3215 for a judgment determining that defendant was in default and directing a determination of damages against defendant. There was no opposition to plaintiff's motion.

Supreme Court determined that plaintiff had established his entitlement to a default judgment against defendant. The court further determined, however, that plaintiff's claims against defendant implicated the potential liability and damages against the Church defendants, which were still litigating those issues, and that an award of damages against defendant prior to resolution of those issues would be prejudicial to the Church defendants. The court thus granted plaintiff's motion insofar as it sought a determination that defendant was in default. The court, however, effectively denied that part of the motion seeking a determination of damages by staying entry of a default judgment, pursuant to CPLR 3215 (d), until the conclusion of a trial or disposition of the matter with respect to the non-defaulting Church defendants, at which time damages would be determined. Plaintiff now appeals from the ensuing order to that extent.

As a preliminary matter, we take judicial notice of the fact that, following entry of the order on appeal, the Diocese commenced a chapter 11 bankruptcy proceeding (*see MJD Constr. v Woodstock Lawn & Home Maintenance*, 293 AD2d 516, 517 [2d Dept 2002], *lv denied* 100 NY2d 502 [2003], *rearg denied* 100 NY2d 616 [2003]; *Marcinak v General Motors Corp.*, 285 AD2d 387, 387 [1st Dept 2001]; *see generally Matter of Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004]). We agree with plaintiff, however, that the bankruptcy proceeding does not stay this appeal, which involves only plaintiff and defendant. In general, "the automatic stay provisions of section 362 (a) (1) of the Bankruptcy Code (11 USC § 362 [a] [1]) do not apply to non[-]debtor defendants" (*Central Buffalo Project Corp. v Edison Bros. Stores*, 205 AD2d 295, 297 [4th Dept 1994], citing, inter alia, *Teachers Ins. & Annuity Assn. of Am. v Butler*, 803 F2d 61, 65 [2d Cir 1986]; *see e.g. Deutsche Bank Natl. Trust Co. v Karlis*, 138 AD3d 915, 917 [2d Dept 2016]; *Katz v Mount Vernon Dialysis, LLC*, 121 AD3d 856, 857 [2d Dept 2014]). Under certain limited circumstances, "[t]he automatic stay can apply to non-debtors, but normally does so only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate" (*Queenie, Ltd. v Nygard Intl.*, 321 F3d 282, 287 [2d Cir 2003]), such as "when the bankrupt [defendant] is obligated to indemnify a non-debtor defendant" (*Murnane Assoc. v Harrison Garage Parking Corp.*, 217 AD2d 1003, 1003 [4th Dept 1995], citing *A.H. Robins Co. v Piccinin*, 788 F2d 994, 999-1001 [4th Cir 1986], *cert denied* 479 US 876 [1986]; *see Central Buffalo Project Corp.*, 205 AD2d at 297). Here, the automatic stay provisions of 11 USC § 362 do not apply to defendant, a non-debtor, and the record lacks evidence of any circumstances that would warrant extension of the stay to defendant (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 AD3d 89, 89 [1st Dept 2004]; *Murnane Assoc.*, 217 AD2d at 1003).

With respect to the merits, plaintiff first contends that the court erred in denying his motion in part because, pursuant to CPLR 3215 (d), deferring the entry of judgment and the determination of damages is authorized only upon application of the party seeking a default judgment, and here plaintiff made no such application. We reject that contention. Upon our review of the text of CPLR 3215 (d),

as well as "the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010] [internal quotation marks omitted]; *see Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *rearg denied* 31 NY3d 1136 [2018]), we conclude that where, as here, a court has before it a motion for a judgment against one defaulting defendant and other non-defaulting defendants, the court is afforded discretion to decide whether the determination of damages against the defaulting defendant should await the disposition of the matter against the non-defaulting defendants (*see* Sponsor's Mem, Bill Jacket, L 1992, ch 255 at 5; Mem in Support, Bill Jacket, L 1992, ch 255 at 6; Assembly Introducer's Mem in Support, Bill Jacket, L 1992, ch 255 at 8; *cf.* NY St Bar Assn, Comm on Civ Practice & Rules, Bill Jacket, L 1992, ch 255 at 19-20; *see also* 7 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 3215.18 [2020]; *see generally Caronia v Peluso*, 2016 NY Slip Op 30311[U], *2 [Sup Ct, Suffolk County 2016], *affd* 170 AD3d 649 [2d Dept 2019]; *Revankar v Tzabar*, 16 Misc 3d 1127[A], 2007 NY Slip Op 51590[U], *6-7 [Sup Ct, Kings County 2007]).

We nevertheless agree with plaintiff that the court's decision to stay entry of judgment and defer the determination of damages against defendant until resolution of the matter with respect to the Church defendants constitutes an improvident exercise of its discretion, and we therefore substitute our own discretion "even in the absence of abuse [of discretion]" (*Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032 [1984]; *see generally Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 833 [1987]). To the extent that prejudice to non-defaulting defendants is an appropriate consideration under CPLR 3215 (d) (*see Revankar*, 2007 NY Slip Op 51590[U], *6-7), we conclude that any prejudice to the Church defendants is relatively insignificant. While plaintiff's damages arising from the intentional sexual abuse by defendant are certainly closely related to the claims of negligence and recklessness against the Church defendants, a determination of damages against defendant will not be given preclusive effect against the Church defendants inasmuch as they will not have had a full and fair opportunity to litigate that issue in the separate damages proceeding involving only defendant (*see Taylor v Pescatore*, 102 AD2d 867, 867 [2d Dept 1984]; *Gallivan v Pucello*, 38 AD2d 876, 876 [4th Dept 1972]). Instead, the Church defendants will be afforded a full and fair opportunity to contest both liability and damages for their own alleged negligence and recklessness, which, although related, is distinct from the intentional conduct for which defendant is liable in default.

Conversely, plaintiff may suffer significant prejudice by further delay of a determination of damages against defendant. As with stays generally, a postponement of a damages determination "can easily be a drastic remedy, on the simple basis that justice delayed is justice denied" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2201:7). In that regard, we agree with plaintiff that further delay undermines the purpose of the Child Victims Act, which is to "finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators

through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties" (NY Comm Report, 2019 NY Senate Bill 2440). Given the uncertainty as to when plaintiff's claims may be resolved against the Church defendants, additional delay may hinder his efforts to prove damages against defendant and secure a final judgment, particularly considering defendant's age and the prospect that defendant's assets may be dissipated in the interim. Although judicial economy, which is an important consideration under CPLR 3215 (d) (*see* Sponsor's Mem, Bill Jacket, L 1992, ch 255 at 5; Assembly Introducer's Mem in Support, Bill Jacket, L 1992, ch 255 at 8), may favor a single damages proceeding involving both the defaulting and non-defaulting defendants, we conclude that such consideration does not outweigh the significant prejudice that may inure to plaintiff, who has expressed his desire to move forward against defendant regardless of the additional economic and emotional costs in doing so.

We therefore reverse the order insofar as appealed from in the exercise of discretion, vacate the second ordering paragraph, and grant the motion in its entirety, and we remit the matter to Supreme Court for a determination of damages pursuant to CPLR 3215 (b). Finally, to the extent that plaintiff is enjoined from prosecuting this action against defendant as a result of a preliminary injunction recently issued by the bankruptcy court, we note that he may pursue whatever relief therefrom is available to him including, as stated by the bankruptcy court, a motion seeking relief from that court.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

199

CA 20-01065

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

BUFFALO EMERGENCY ASSOCIATES, LLP, EXIGENCE MEDICAL OF BINGHAMTON, PLLC, EXIGENCE MEDICAL OF JAMESTOWN, PLLC, EXIGENCE MEDICAL OF OLEAN, PLLC, EMERGENCY CARE SERVICES OF NY, PC, AND EMERGENCY PHYSICIAN SERVICES OF NY, PC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AETNA HEALTH, INC., AETNA HEALTH INSURANCE COMPANY OF NEW YORK AND AETNA LIFE INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (JAMES M. MCGUIRE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ELLIOTT GREENLEAF, P.C., BLUE BELL, PENNSYLVANIA (GREGORY S. VOSHELL, OF THE PENNSYLVANIA AND NEW JERSEY BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND PHILLIPS LYTLE LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered March 10, 2020. The order granted defendants' motion to dismiss plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action asserting causes of action for breach of implied-in-fact contract, unjust enrichment, and declaratory relief based on alleged underpayments made by defendants for out-of-network emergency services provided by plaintiffs' physicians to defendants' insureds. Plaintiffs appeal from an order that granted defendants' motion to dismiss the complaint with prejudice pursuant to, inter alia, CPLR 3211 (a) (5). We note at the outset that, on appeal, plaintiffs seek reinstatement of only the first and second causes of action, and they have thus abandoned any issues concerning the propriety of the order insofar as it granted that part of defendants' motion to dismiss the third cause of action, for declaratory relief (*see Regan v City of Geneva*, 136 AD3d 1423, 1424 [4th Dept 2016]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Contrary to plaintiffs' contention on appeal, Supreme Court properly granted defendants' motion with respect to the first and second causes of action on the ground that they are barred by res judicata and collateral estoppel.

"In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions . . . if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert denied* 555 US 1136 [2009] [internal quotation marks omitted]; *see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Here, plaintiffs previously commenced an action in New York County Supreme Court asserting causes of action for, inter alia, breach of implied-in-fact contract and unjust enrichment and seeking to recover, as they do in this action, the reasonable value of the emergency services plaintiffs' physicians provided to defendants' insureds. New York County Supreme Court granted defendants' motion to dismiss the amended complaint, rejecting, among other things, plaintiffs' argument that the common-law claims that were asserted existed independent of the New York Emergency Medical Services and Surprise Bills Act (Act), the statutory act that requires health care insurers such as defendants to "pay an amount that [they] determine[] is reasonable for the emergency services . . . rendered by the non-participating physician or hospital, in accordance with [Insurance Law § 3224-a]" (Financial Services Law § 605 [a] [1]; *see* § 603 [c]). The First Department affirmed, similarly concluding that the Act "does not provide for a private right of action to enforce its provisions, and the court properly dismissed the [amended] complaint as an improper effort to 'circumvent the legislative preclusion of private lawsuits' for violation of the Act" (*Buffalo Emergency Assoc., LLP v Aetna Health, Inc. [N.Y.]*, 167 AD3d 461, 462 [1st Dept 2018]; *see also Han v Hertz Corp.*, 12 AD3d 195, 196 [1st Dept 2004]).

Thus, contrary to plaintiffs' contention on the current appeal, "the prior action was dismissed on the merits, and not merely because of technical pleading defects" (*Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 431 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010]; *see Pieroni v Phillips Lytle LLP*, 140 AD3d 1707, 1709 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016]). Inasmuch as plaintiffs' claims were brought to a final conclusion on the merits, " 'all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]; *see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Finally, to the extent that plaintiffs alleged claims in the current action that accrued after resolution of the prior action, those claims are similarly barred by collateral estoppel (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

200.1

CA 20-00365

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

DAWN KUZNIK-DEFRANCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CUSHMAN & WAKEFIELD, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered December 11, 2019. The order denied the motion of defendant Cushman & Wakefield, Inc. for summary judgment dismissing the amended complaint against it.

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

Memorandum: In this premises liability action, defendant-appellant (defendant) appeals from an order that denied its motion for summary judgment dismissing the amended complaint against it. Contrary to defendant's contention, it failed to establish that the alleged defect that caused plaintiff to fall was trivial as a matter of law (*see generally Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]). In support of its motion, defendant submitted plaintiff's deposition testimony, wherein she explained that there was a several-inch-deep hole in the sidewalk next to a sidewalk grate and that she fell when her foot became caught between the hole and the sidewalk grate, the latter of which was raised approximately "an inch and a half or so" above the level of the sidewalk. Thus, although defendant asserts that the hole was a design element of the sidewalk grate intended to accommodate a support beam for the grate, the dangerous condition alleged here is the combination of that hole and the raised sidewalk grate that occurred in a "heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet" (*id.*; *see Brenner v Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767 [2d Dept 2013]). Thus, we also reject defendant's alternative contention that, if the dangerous condition were not trivial as a matter of law, then it was so open and obvious that it warranted dismissing plaintiff's failure to warn claim (*see Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533-1534 [4th Dept

2012]).

Contrary to its further contention, defendant failed to meet its " 'initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]; *see Divens v Finger Lakes Gaming & Racing Assn., Inc.*, 151 AD3d 1640, 1642 [4th Dept 2017]). Supreme Court therefore properly denied the motion regardless of the sufficiency of the opposition papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

200

CA 20-00130

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

DAWN KUZNIK-DEFRANCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CUSHMAN & WAKEFIELD, INC., DEFENDANT,
GLOBAL INDUSTRIAL SERVICE, INC., EARTHCO, INC.,
DOING BUSINESS AS EARTH CO DEVELOPMENT, INC.,
AND EARTH CO. SERVICE, ALAN ORTMAN ALSO KNOWN
AS ALAN ORTMAN INDIVIDUALLY AND DOING BUSINESS
AS EARTH CO DEVELOPMENT ALSO KNOWN AS EARTH CO
DEVELOPMENT, INC., AND ALAN ORTMAN, INDIVIDUALLY
AND DOING BUSINESS AS EARTH CO ALSO KNOWN AS
EARTHCO, INC., DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT GLOBAL INDUSTRIAL SERVICE, INC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR DEFENDANT-APPELLANT EARTHCO, INC., DOING BUSINESS AS EARTH CO DEVELOPMENT, INC. AND EARTH CO. SERVICE, ALAN ORTMAN ALSO KNOWN AS ALAN ORTMAN INDIVIDUALLY AND DOING BUSINESS AS EARTH CO DEVELOPMENT ALSO KNOWN AS EARTH CO DEVELOPMENT, INC., AND ALAN ORTMAN, INDIVIDUALLY AND DOING BUSINESS AS EARTH CO ALSO KNOWN AS EARTHCO, INC.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 8, 2020. The order, insofar as appealed from, denied in part the motion for summary judgment of defendant Global Industrial Service, Inc. and denied the motion for summary judgment of defendants Earthco, Inc., doing business as Earth Co Development, Inc. and Earth Co. Service, Alan Ortman also known as Alan Ortman individually and doing business as Earth Co Development also known as Earth Co Development, Inc., and Alan Ortman, individually and doing business as Earth Co also known as Earthco, Inc. insofar as it sought dismissal of the complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant

Global Industrial Service, Inc. is granted in its entirety and the amended complaint against it is dismissed, and the motion of defendants Earthco Inc., doing business as Earth Co Development, Inc., and Earth Co. Service; Alan Ortman also known as Alan Ortman individually and doing business as Earth Co Development also known as Earth Co Development, Inc.; and Alan Ortman, individually and doing business as Earth Co also known as Earthco Inc. is granted in part and the complaint is dismissed against those defendants.

Memorandum: Plaintiff commenced these consolidated actions seeking damages for injuries she allegedly sustained when she fell on the sidewalk of a property due, inter alia, to an elevated sidewalk grate. Defendant Global Industrial Service, Inc. (Global) contracted to provide landscaping, snow removal, and janitorial services for the property on which plaintiff's accident occurred. Global subcontracted the snow removal obligation for the property to defendants Earthco Inc., doing business as Earth Co Development, Inc., and Earth Co. Service; Alan Ortman also known as Alan Ortman individually and doing business as Earth Co Development also known as Earth Co Development, Inc.; and Alan Ortman, individually and doing business as Earth Co also known as Earthco Inc. (collectively, Earthco defendants). Global and Earthco defendants moved for, inter alia, summary judgment dismissing the respective amended complaint and complaint against them, and they each appeal from an order insofar as it denied their respective motions to that extent. We reverse the order insofar as appealed from.

We agree with Global on its appeal that it met its initial burden of establishing as a matter of law that it owed no duty of care to plaintiff (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). "A landowner is liable for a dangerous or defective condition on his or her property when the landowner created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Anderson v Weinberg*, 70 AD3d 1438, 1439 [4th Dept 2010] [internal quotation marks omitted]). Here, it is undisputed that Global was not the property owner at the time of plaintiff's accident, but was instead merely a subcontractor hired to perform limited services on the property. Further, although "a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons" in certain situations (*Espinal*, 98 NY2d at 140), here, neither plaintiff's amended complaint nor her bill of particulars alleged that Global " 'launche[d] a force or instrument of harm' " in the performance of its duties, that "plaintiff detrimentally relie[d] on [Global's] continued performance of [its contracted] duties," or that Global "entirely displaced the [property owner's] duty to maintain the premises safely" (*id.*; *see Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761 [4th Dept 2006]). Thus, "in establishing [its] prima facie entitlement to judgment as a matter of law, [Global was] not required to negate the possible applicability of any of [those] exceptions" (*Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1320 [4th Dept 2012] [internal quotation marks omitted]; *see Brathwaite v New York City Hous. Auth.*, 92 AD3d 821, 824 [2d Dept 2012], *lv denied* 19 NY3d 804 [2012]). In opposition, plaintiff argued

only that the actions of an employee of Earthco defendants during snow removal operations may have exacerbated the dangerous condition contributing to plaintiff's accident. Plaintiff therefore failed to raise a triable issue of fact in opposition to that part of Global's motion seeking summary judgment dismissing the amended complaint against it.

We also agree with Earthco defendants on their appeal that they established their entitlement to summary judgment dismissing plaintiff's complaint against them. Plaintiff alleged that Earthco defendants "launched a force or instrument of harm, i.e., created or exacerbated a dangerous condition" (*Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1403 [4th Dept 2018]). In support of their motion, Earthco defendants submitted evidence establishing that, although a snowplow had damaged a different sidewalk grate, only shovels and snowblowers were used in the area where plaintiff fell and that Earthco defendants' snowplow would not have been able to navigate in that area. Further, although the employee of Earthco defendants performing snow removal services on the property testified at his deposition that the shovel or snowblower would briefly catch on the edge of the galvanized steel sidewalk grate, those tools would frequently catch on imperfections in the sidewalk before continuing unabated. Earthco defendants also submitted evidence that the damage to the sidewalk grate at issue included a rolling or warping in the area where the sections of grate met one another, not at the edge of the grate where plaintiff tripped. In opposition, plaintiff failed to raise a triable issue of fact.

In light of our conclusions, defendants-appellants' remaining contentions are academic.

Entered: June 11, 2021

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 20-00321

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

LG 1 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK M. FRIEL, DEFENDANT-RESPONDENT,
THE DIOCESE OF BUFFALO, N.Y., AND HOLY
APOSTLES PARISH OF JAMESTOWN, FORMERLY
KNOWN AS SS PETER & PAUL ROMAN CATHOLIC
CHURCH, DEFENDANTS.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 24, 2020. The order, insofar as appealed from, stayed entry of judgment against defendant Mark M. Friel pending disposition of the action with respect to the remaining defendants.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs, the second ordering paragraph is vacated, the motion is granted in its entirety, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action pursuant to the Child Victims Act seeking damages for personal injuries he sustained as a result of sexual abuse allegedly perpetrated in the mid-1980s by Mark M. Friel (defendant), who was purportedly then serving as a priest at defendant Holy Apostles Parish of Jamestown, formerly known as SS Peter & Paul Roman Catholic Church (Church), operated by defendant Diocese of Buffalo, N.Y. (Diocese). Defendant failed to answer. Plaintiff thereafter moved pursuant to CPLR 3215 for a judgment determining that defendant was in default and directing a determination of damages against defendant. Supreme Court granted plaintiff's motion insofar as it sought a determination that defendant was in default. The court, however, effectively denied that part of the motion seeking a determination of damages by staying entry of a default judgment, pursuant to CPLR 3215 (d), until the conclusion of a trial or disposition of the matter with respect to the non-defaulting Church and Diocese, at which time damages would be determined. Plaintiff now appeals from the ensuing order to that extent. For the reasons set forth in our decision in the companion case (*Doe v Jasinski*, — AD3d — [June 11, 2021] [4th Dept 2021]), we reverse the order insofar as appealed from in the exercise of discretion, vacate the second

ordering paragraph, and grant the motion in its entirety, and we remit the matter to Supreme Court for a determination of damages pursuant to CPLR 3215 (b). Finally, to the extent that plaintiff is enjoined from prosecuting this action against defendant as a result of a preliminary injunction recently issued by the bankruptcy court, we note that he may pursue whatever relief therefrom is available to him including, as stated by the bankruptcy court, a motion seeking relief from that court.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

212

KA 17-01813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON ISAAC, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 25, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]). We affirm.

Viewing the evidence independently and in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence as to identity (*see People v McKenzie-Smith*, 187 AD3d 1668, 1668 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]; *see generally People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349). Specifically, the text messages established that defendant schemed for months to set the victim up in order to rob him of a large quantity of marihuana and that defendant instructed the victim to report to the place where he was killed at the time that he was killed. Additionally, the cell-site data showed that defendant's phone and the codefendant's phone were both present at the time and place of the victim's death, the surveillance videos showed the codefendant's vehicle driving in the vicinity of the crime scene at the relevant time, defendant obtained a new phone minutes after the shooting, and the police recovered bullets from defendant's house that were very similar to, and shared many "unusual" characteristics with, the bullets recovered from the victim's body. Given the overwhelming circumstantial evidence, the notion that some unknown person or group just happened to have robbed

and murdered the victim at the very place and time that defendant designated is so implausible that it could not create a reasonable doubt as to defendant's guilt.

We note, however, that the People's brief "incorrectly states that, in conducting our weight of the evidence review, '[t]he jury's determinations should be given great weight . . . and should not be disturbed unless clearly unsupported by the record' " (*People v Dexter*, 191 AD3d 1246, 1247 [4th Dept 2021], *lv denied* — NY3d — [2021]). The proper standard for conducting weight of the evidence review is set forth in *Delamota* (18 NY3d at 116-117) and *Danielson* (9 NY3d at 349).

Defendant next argues that Supreme Court erred in granting the People's *Batson* challenge to his peremptory strike of a male prospective juror. The court determined that defendant's proffered reason for peremptorily challenging the subject prospective juror was a mere pretext for impermissible gender discrimination. That determination is entitled to " 'great deference' " (*People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]), and it is supported by the record (*see People v Glover*, 123 AD3d 1142, 1142 [2d Dept 2014], *lv denied* 25 NY3d 1201 [2015]; *People v Franklin*, 248 AD2d 726, 726 [2d Dept 1998], *lv denied* 92 NY2d 897 [1998]). Thus, the court properly disallowed defendant's peremptory strike of that prospective juror (*see generally Flowers v Mississippi*, — US —, —, 139 S Ct 2228, 2243 [2019]).

Contrary to defendant's further contention, the court properly allowed a police officer to testify about the meaning of coded language used in the text messages (*see People v Browning*, 117 AD3d 1471, 1471 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). Finally, the court properly denied defendant's motion to sever his trial from the codefendant's trial because "the People's evidence was introduced to establish the joint enterprise, . . . there was no irreconcilable conflict between the defenses presented nor was there a significant danger that any alleged conflict led the jury to infer any defendant's guilt . . . [, and] no defendant took an aggressive adversarial stance against another" (*People v De Los Angeles*, 270 AD2d 196, 197-198 [1st Dept 2000], *lv denied* 95 NY2d 889 [2000]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

251

KA 16-02292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL M. COLEMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 25, 2016. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted on count one of the indictment.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court erred in permitting the prosecutor to exercise a peremptory challenge to exclude a black prospective juror. We agree.

Pursuant to *Batson v Kentucky* (476 US 79 [1986]) and its progeny, "the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more [prospective] jurors for an impermissible reason . . . Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory—step two . . . The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*People v Smocum*, 99 NY2d 418, 421-422 [2003]; *see People v Morgan*, 75 AD3d 1050, 1051-1052 [4th Dept 2010], *lv denied* 15 NY3d 894 [2010]).

As the People correctly concede, because the court asked the prosecutor to place his race-neutral reasons for challenging the

prospective juror on the record, the sufficiency of defendant's prima facie showing under step one of the *Batson* analysis is moot (*see People v Hecker*, 15 NY3d 625, 652 [2010]; *People v Mallory*, 121 AD3d 1566, 1567 [4th Dept 2014]). With respect to step two of the analysis, we conclude that the People failed to meet their burden of setting forth a race-neutral reason for striking the challenged prospective juror (*see generally Mallory*, 121 AD3d at 1567).

Here, the prosecutor stated only that the peremptory challenge was based on the "last comments . . . made in response to [defense counsel's] discussion . . . [where defense counsel] asked him about contacts with police or the differences between police in Brooklyn and here in Rochester, and [the prospective juror] made some comments . . . to the effect of, they're not as harsh . . . [and] it was a clear distinction between his views of the police between Brooklyn and Rochester or Monroe County." As defense counsel accurately responded, however, the prospective juror never described any police entity as "harsh," said anything negative about police or policing, offered an opinion distinguishing between policing in Rochester or Brooklyn, or stated that he had any interactions with police in either location. Instead, the prospective juror stated that "[i]t's a little easier growing up [in Rochester]," which related to his prior statement that living in Rochester was "a lot different" than Brooklyn because Rochester was "smaller" and "slower [paced]." The only question asked of the prospective juror that pertained to policing was whether he ever had "any different experiences" regarding "law enforcement stuff," to which the prospective juror answered in the negative. The prospective juror's statements neither reflected a bias with respect to police nor described his view of police or policing. Instead, the prosecutor's proffered race-neutral reason for the peremptory challenge appears to have been based on an erroneous recollection of the prospective juror's statements. In deciding the ultimate issue, however, the court accepted the prosecutor's erroneous account, explaining, "I think the reference that [the prosecutor] was referring to . . . was not as harsh. Law enforcement here in Monroe County was easier going than down in Brooklyn."

We conclude that reversal is required because the race-neutral reason proffered by the prosecutor and accepted by the court is not borne out by the record (*see generally People v Fabregas*, 130 AD3d 939, 942 [2d Dept 2015]; *People v Jackson*, 213 AD2d 335, 336 [1st Dept 1995], *appeal dismissed* 86 NY2d 860 [1995]). Although the record need not conclusively establish that a prospective juror actually harbors bias in order for a bias-based peremptory challenge to withstand review under *Batson* (*see generally People v Hernandez*, 75 NY2d 350, 357 [1990], *affd* 500 US 352 [1991]), a proffered race-neutral reason cannot withstand a *Batson* objection where it is based on a statement that the prospective juror did not in fact make (*see generally Fabregas*, 130 AD3d at 942). Here, the record does not support the prosecutor's characterization of the prospective juror's statements. We therefore reverse the judgment and grant a new trial on count one of the indictment (*see generally Mallory*, 121 AD3d at 1568). In view of our determination, we do not address defendant's remaining contentions.

All concur except NEMOYER and WINSLOW, JJ., who dissent and vote to modify in accordance with the following memorandum: We dissent. We would modify the judgment by reducing the sentence imposed and otherwise affirm. In our view, there was no *Batson* violation because the prosecutor provided a race-neutral reason for the peremptory challenge and County Court providently determined that the prosecutor's explanation was not pretextual. "The court's determination whether a proffered race-neutral reason for striking a prospective juror is pretextual is accorded great deference on appeal" (*People v Norman*, 183 AD3d 1240, 1241 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]; *see People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *see generally People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]), and we reject the view of the majority that the race-neutral reason proffered by the prosecutor and accepted by the court is not supported by the record.

Here, defense counsel asked the prospective juror, who had lived in both Brooklyn and Rochester, whether living in Rochester was a different living experience than living in New York City. The prospective juror responded that it was a lot different in Rochester, as it was smaller and slower. Defense counsel then specifically asked the prospective juror if he had any different experiences with respect to law enforcement, and the prospective juror began to respond, "It's just -- no." He then answered, "It's a little easier growing up here." Inasmuch as that answer was given in response to the question whether the prospective juror had any different experiences with respect to law enforcement, it was not unreasonable for the prosecutor and the court to understand the statement to mean that, based on the prospective juror's experience with law enforcement, "Monroe County was easier going than down in Brooklyn." Even if the court and prosecutor misunderstood the prospective juror, the prosecutor could reasonably believe, based on the prospective juror's response to the question, that he may have had some mistrust of police officers based upon his experiences with law enforcement in Brooklyn (*see People v Fowler*, 45 AD3d 1372, 1373-1374 [4th Dept 2007], *lv denied* 9 NY3d 1033 [2008]; *see also People v Cunningham*, 21 AD3d 746, 748 [1st Dept 2005], *lv denied* 6 NY3d 775 [2006]). We therefore would not disturb the court's determination that the prosecutor provided a facially neutral, non-pretextual reason to challenge the prospective juror (*see People v Escobar*, 181 AD3d 1194, 1196 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]; *People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006], *lv denied* 9 NY3d 1032 [2008]). In our view, the majority's contrary determination is inconsistent with the "well established" principles that "prosecutors are not required to show that the peremptory challenge was specifically related to the facts of the case" and that a prosecutor's race-neutral reason for a peremptory strike need not "rise to the level of a challenge for cause in order to survive *Batson's* step-three inquiry into pretextuality" (*Linder,* 170 AD3d at 1558 [internal quotation marks omitted]).

We agree with defendant, however, that the sentence imposed is unduly harsh and severe and that a reduction of the sentence would be appropriate under the circumstances presented here. Thus, as a matter of discretion in the interest of justice, we would modify the judgment

by reducing the sentence of imprisonment imposed to a determinate term of seven years (*see* CPL 470.15 [6] [b]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

268

CA 20-00367

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

LAURIE KADAH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MAYADA KADAH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HASSAN KADAH, DECEASED, GINA KADAH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RONALD KADAH, DECEASED, ALICIA S. CALAGIOVANNI, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF ANN M. KADAH, DECEASED, LAMISE KADAH CARANO, DIANNE KADAH, DEFENDANTS-RESPONDENTS, ANDREW KADAH, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

SCOLARO, FETTER, GRIZANTI, MCGOUGH & KING, SYRACUSE (DOUGLAS J. MAHR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACKENZIE HUGHES, LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR DEFENDANT-RESPONDENT MAYADA KADAH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HASSAN KADAH, DECEASED.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF COUNSEL), FOR DEFENDANT-RESPONDENT ALICIA S. CALAGIOVANNI, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF ANN M. KADAH, DECEASED.

Appeals from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 14, 2020. The judgment, inter alia, granted the motion of defendant Mayada Kadah, as personal representative of the estate of Hassan Kadah, to dismiss the complaint and to dismiss the cross claims of defendant Andrew Kadah.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion to the extent that it sought dismissal of the declaratory judgment cause of action and cross claim, reinstating that cause of action and cross claim, and granting judgment in favor of defendant Mayada Kadah, as personal representative of the estate of Hassan Kadah, as follows:

It is ADJUDGED and DECLARED that the estate of Hassan

Kadah is the owner of 100% of International Controls & Measurement, Corp. stock,

and as modified the judgment is affirmed without costs.

Memorandum: In this action seeking declaratory and injunctive relief arising from a dispute over the ownership of shares in a business named International Controls & Measurement, Corp., plaintiff Laurie Kadah (Laurie) and defendant Andrew Kadah (Andrew) (collectively, appellants) each appeal from a judgment that, inter alia, granted the motion of defendant Mayada Kadah, as personal representative of the estate of Hassan Kadah (estate), to dismiss Laurie's complaint and Andrew's cross claims pursuant to CPLR 3211. We agree with the estate that, contrary to appellants' contentions, Supreme Court did not err when, in essence, it gave a final order from a Florida court that previously determined the ownership issue against appellants the same preclusive effect that the order would have in Florida as a matter of full faith and credit (*see* US Const, art IV, § 1; *Miller v Miller*, 152 AD3d 662, 664-665 [2d Dept 2017]; *Matter of Bennett*, 84 AD3d 1365, 1367 [2d Dept 2011], *lv denied* 19 NY3d 801 [2012]; *see also Allie v Ionata*, 503 So 2d 1237, 1242 [Fla 1987]; *Wade v Clower*, 98 Fla 817, 829, 114 So 548, 552 [1927]; *In re Estate of Walters*, 700 So 2d 434, 435 n 1 [Fla Dist Ct App 1997]). The court nonetheless erred in granting that part of the motion seeking dismissal of the declaratory judgment cause of action and cross claim rather than declaring the rights of the parties (*see Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1431-1432 [4th Dept 2017]). We therefore modify the judgment accordingly. Finally, in light of the foregoing, we conclude that the court properly granted that part of the motion seeking dismissal of the preliminary injunction cause of action and cross claim (*see Wachtel v Park Ave & 84th St., Inc.*, 180 AD3d 545, 546-547 [1st Dept 2020]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

304

KA 14-01894

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLAN SMITH, DEFENDANT-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 14, 2014. The judgment convicted defendant upon a jury verdict of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). The conviction arose from an incident in which defendant stabbed the victim during a verbal altercation. We reject defendant's contention that he was deprived of a fair trial by the People's failure to disclose purported *Brady* material, i.e., a Mental Health Court referral for a prosecution witness who observed the stabbing (eyewitness). Even assuming, arguendo, that the Mental Health Court referral was in the People's possession and constituted material impeachment evidence that was favorable to defendant (*see People v Giuca*, 33 NY3d 462, 473 [2019]), we conclude that defendant was not deprived of a fair trial because defense counsel was able to obtain the information regarding the referral prior to trial and had "a meaningful opportunity to use th[at] allegedly exculpatory evidence to cross-examine the [eyewitness]" (*People v Hines*, 132 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016]; *see People v Concepcion*, 262 AD2d 1058, 1058 [4th Dept 1999], *lv denied* 94 NY2d 821 [1999]).

We further reject defendant's contention that County Court erred in refusing to issue a subpoena for medical records related to the eyewitness. A defendant seeking such a subpoena must "proffer a good

faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory" (*People v Kozlowski*, 11 NY3d 223, 241 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]). Here, defense counsel argued on the first day of trial that she wanted to determine whether medical records existed regarding the eyewitness's neurological condition in light of his purported 100 concussions and thus requested that the court issue a subpoena for the eyewitness's medical records. Inasmuch as defense counsel did not know whether medical records regarding the eyewitness's neurological condition even existed, she failed to request "specifically identified materials" (*id.*) and to demonstrate that she was "not engaged in a fishing expedition" (*id.* at 242).

Defendant also contends that the court erred in refusing to charge the jury on the defense of justification. We reject that contention. The evidence at trial established that defendant responded to the victim's threats of nondeadly force by using deadly physical force—to wit, stabbing the victim in the arm with a knife (*see People v Haynes*, 133 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). Viewing the record in the light most favorable to defendant (*see People v Brown*, 33 NY3d 316, 324 [2019], *rearg denied* 33 NY3d 1136 [2019]), we conclude that "there is no reasonable view of the evidence that [defendant] was anything other than the initial aggressor in his use of deadly physical force," and thus "he is not entitled to a jury instruction on justification" (*id.* at 325; *see People v Taylor*, 134 AD3d 508, 509 [1st Dept 2015], *lv denied* 28 NY3d 1075 [2016]).

We likewise reject defendant's contention that the verdict is against the weight of the evidence. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the sentence is unduly harsh and severe, particularly in light of defendant's lack of criminal history and the circumstances of this case (*see People v Hampton*, 113 AD3d 1131, 1133 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1062 [2014], *cert denied* 575 US 1042 [2015]). We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 10 years, which was the term that the People had recommended at the time of sentencing, to be followed by the five-year period of postrelease supervision previously

imposed by the court.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

344

KA 19-00666

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJENEE JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 1, 2017. The judgment convicted defendant, after a nonjury trial, of burglary in the second degree, robbery in the second degree, and attempted robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of burglary in the second degree (Penal Law § 140.25 [2]), robbery in the second degree (§ 160.10 [2] [b]), and attempted robbery in the third degree (§§ 110.00, 160.05). We affirm.

Contrary to defendant's contention, Supreme Court did not err in refusing to suppress defendant's statements to the police. The court properly determined that he voluntarily waived his *Miranda* rights before making the statements (*see People v Huff*, 133 AD3d 1223, 1224 [2015], *lv denied* 27 NY3d 999 [2016]). Furthermore, the People met their initial burden at the *Huntley* hearing of establishing that defendant's statements were not the product of improper police conduct (*cf. People v Guilford*, 21 NY3d 205, 212 [2013]), "and '[d]efendant presented no bona fide factual predicate in support of his conclusory speculation that his statement[s were] coerced' " (*People v Wilson*, 120 AD3d 1531, 1533 [4th Dept 2014], *affd* 28 NY3d 67 [2016], *rearg denied* 28 NY3d 1158 [2017]). In any event, any error in admitting the statements in evidence is harmless beyond a reasonable doubt (*see People v McDonald*, 173 AD3d 1633, 1635 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Viewing the evidence in the light most favorable to the People

(*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention that the pipe that he displayed did not sufficiently resemble a rifle or shotgun to satisfy that element of the crime of robbery in the second degree as defined in Penal Law § 160.10 (2) (b), " 'the object displayed need not closely resemble a firearm or bear a distinctive shape' " (*People v Smith*, 29 NY3d 91, 100 [2017]), and thus a "towel wrapped around a black object . . . , a toothbrush held in a pocket . . . or even a hand consciously concealed in clothing may suffice . . . if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery" (*People v Lopez*, 73 NY2d 214, 220 [1989]). Here, we conclude that defendant's display of a pipe wrapped in a towel, under circumstances including the manner in which it was brandished and the threats he made while holding it, is sufficient to establish that he displayed what appeared to be a rifle, shotgun, or other long gun (*see generally People v Akinlawon*, 158 AD3d 1245, 1246 [4th Dept 2018], *lv denied* 31 NY3d 1114 [2018]). Contrary to defendant's further contention, the evidence is sufficient to permit the inference that defendant had the requisite intent to steal property (*see generally People v Gordon*, 23 NY3d 643, 649-650 [2014]), which is an element of all three crimes of which defendant was convicted. In addition, with respect to the count of burglary in the second degree, the evidence is sufficient to permit the court to conclude "that defendant possessed the requisite intent to commit [larceny] when he unlawfully entered the building" (*People v Hymes*, 132 AD3d 1411, 1412 [4th Dept 2015], *lv denied* 26 NY3d 1146 [2016]). Contrary to defendant's additional contention, we conclude with respect to the count of attempted robbery in the third degree that "the People presented evidence from which defendant's threatened use of force could be implied" (*People v Parris*, 74 AD3d 1862, 1863 [4th Dept 2010], *lv denied* 15 NY3d 854 [2010] [internal quotation marks omitted]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence with respect to all of the crimes of which defendant was convicted (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We note that the certificate of conviction incorrectly states that defendant was convicted upon a guilty plea, rather than upon a nonjury verdict. The certificate of conviction must therefore be amended to correct that clerical error (*see People Brooks*, 183 AD3d 1231, 1233 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]; *People v Simpson*, 173 AD3d 1617, 1621 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

360

KA 20-00784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR E. JOHNSON, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

VICTOR E. JOHNSON, SR., DEFENDANT-APPELLANT PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered December 18, 2019. The judgment convicted defendant upon his plea of guilty of attempted enterprise corruption.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted enterprise corruption (Penal Law §§ 110.00, 460.20 [1] [a]). We affirm.

Initially, to the extent that the purported waiver of the right to appeal is relevant to any of his contentions, we agree with defendant that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Mazaika*, 191 AD3d 1419, 1419 [4th Dept 2021]).

Addressing first defendant's contentions in his main brief, we reject defendant's assertion that Supreme Court erred in refusing to entertain his pro se motions to withdraw his plea. "Because a criminal defendant is not entitled to hybrid representation, . . . the decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" (*People v Rodriguez*, 95 NY2d 497, 500 [2000]; *see People v Alsaifullah*, 96 AD3d 1103, 1103 [3d Dept 2012], *lv denied* 19 NY3d 994 [2012]). Here, we conclude that the court did not abuse its discretion in refusing to entertain the pro se motions (*see Rodriguez*, 95 NY2d at 502-503; *People v Fowler*, 136 AD3d 1395, 1395 [4th Dept 2016], *lv denied* 27 NY3d 996 [2016], *reconsideration denied* 27 NY3d 1132 [2016]). Contrary to defendant's

related contention, we conclude that the court did not abuse its discretion in denying defense counsel's request for a further adjournment of sentencing to afford him an opportunity to review defendant's pro se motions (*see People v Spears*, 24 NY3d 1057, 1058-1060 [2014]; *People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Defendant's challenge to the voluntariness of his plea is thus not preserved for our review (*see People v Carroll*, 172 AD3d 1821, 1822 [3d Dept 2019], *lv denied* 34 NY3d 929 [2019]; *People v Horton*, 166 AD3d 1226, 1227 [3d Dept 2018]), and we conclude that this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Furthermore, by pleading guilty, defendant forfeited his challenges to the court's *Molineux* and *Sandoval* rulings (*see People v Sapp*, 147 AD3d 1532, 1534 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]).

Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel, which rendered his plea involuntary, because defense counsel failed to properly investigate, did not adequately seek discovery, provided inadequate advice during their conversations, and failed to move for a competency examination. Defendant's contention survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019]). Here, defendant's contention "is based, in part, on matter appearing on the record and, in part, on matter outside the record, and, thus, constitutes a 'mixed claim of ineffective assistance' " (*People v Tallegrand*, 177 AD3d 783, 784 [2d Dept 2019]; *see Spencer*, 170 AD3d at 1615). Where, as here, "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the [mixed] claim' " to the extent it survives the guilty plea (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018] [emphasis omitted]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Even assuming, arguendo, that defendant preserved for our review his further contention in his pro se supplemental brief that the court erred in failing to recuse itself, we conclude that "the record does not support his claim of bias on the part of the court and, thus, recusal was not required" (*People v Barnes*, 156 AD3d 1417, 1419 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]; *see generally People v McCann*, 85 NY2d 951, 952-953 [1995]; *People v Moreno*, 70 NY2d 403, 405-406 [1987]). In addition, by pleading guilty before the court decided his pro se motion—which was adopted by defense counsel—to dismiss the indictment on statutory and constitutional speedy trial

grounds, defendant abandoned those claims and is foreclosed from pursuing the merits thereof on appeal (*see People v Hardy*, 173 AD3d 1649, 1649-1650 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]; *see also People v Rodriguez*, 50 NY2d 553, 558 [1980]).

Finally, we have considered the remaining contentions in defendant's pro se supplemental brief and conclude that they are either without merit or involve matters outside the record.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

366

KA 20-00785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR E. JOHNSON, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

VICTOR E. JOHNSON, SR., DEFENDANT-APPELLANT PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered December 18, 2019. The judgment convicted defendant upon his plea of guilty of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [a]). We affirm.

We first address defendant's contentions in his main brief. Initially, we agree with defendant that his purported waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Mazaika*, 191 AD3d 1419, 1419 [4th Dept 2021]).

Defendant contends that Supreme Court erred in refusing to suppress statements that he made to a police officer because such evidence was improperly obtained as a result of an unlawful vehicle stop. Defendant's contention is not preserved for our review inasmuch as he did not raise that specific contention in his motion papers or at the suppression hearing as a ground for suppressing his statements (*see People v Witt*, 129 AD3d 1449, 1449 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]), nor did the court expressly decide the question raised on appeal (*see* CPL 470.05 [2]; *People v Graham*, 25 NY3d 994, 997 [2015]; *People v Turriago*, 90 NY2d 77, 83-84 [1997], *rearg denied* 90 NY2d 936 [1997]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3]

[c]).

Defendant further contends that the court erred in refusing to suppress the statements that he made to the officer outside of his vehicle because he was in custody at that time but had not been advised of his *Miranda* rights. We reject that contention inasmuch as "the evidence at the *Huntley* hearing establishes that defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required" (*People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). "The suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016] [internal quotation marks omitted]) and, here, we conclude that there is no basis to disturb the court's determination to credit the testimony of the officer over defendant's testimony (*see People v Fioretti*, 155 AD3d 1662, 1664 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *People v Witherspoon*, 66 AD3d 1456, 1458 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]).

We also conclude that, "by pleading guilty, defendant forfeited his challenge to the court's *Sandoval* ruling[s]" (*People v Smith*, 164 AD3d 1621, 1622 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]).

Defendant further contends that the court erred in refusing to entertain his pro se motions to withdraw his plea. We reject that contention. "Because a criminal defendant is not entitled to hybrid representation, . . . the decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" (*People v Rodriguez*, 95 NY2d 497, 500 [2000]; *see People v Alsaifullah*, 96 AD3d 1103, 1103 [3d Dept 2012], *lv denied* 19 NY3d 994 [2012]). Here, we conclude that the court did not abuse its discretion in refusing to entertain the pro se motions (*see Rodriguez*, 95 NY2d at 502-503; *People v Fowler*, 136 AD3d 1395, 1395 [4th Dept 2016], *lv denied* 27 NY3d 996 [2016], *reconsideration denied* 27 NY3d 1132 [2016]). Contrary to defendant's related contention, we conclude that the court did not abuse its discretion in denying defense counsel's request for a further adjournment of sentencing to afford him an opportunity to review defendant's pro se motions (*see People v Spears*, 24 NY3d 1057, 1058-1060 [2014]; *People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Defendant's challenges in his main and pro se supplemental briefs to the voluntariness of his plea are thus not preserved for our review (*see People v Carroll*, 172 AD3d 1821, 1822 [3d Dept 2019], *lv denied* 34 NY3d 929 [2019]; *People v Horton*, 166 AD3d 1226, 1227 [3d Dept 2018]), and we conclude that this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

In light of our determination, there is no need to address defendant's remaining contention in his main brief. Finally, we have considered the remaining contentions in defendant's pro se supplemental brief and conclude that they are either without merit or involve matters outside the record.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

367

KA 18-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BAYRON CASTRO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered May 22, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

368

KA 19-00237

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BAYRON CASTRO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), dated January 8, 2019. The order denied defendant's motion and supplemental motion pursuant to CPL 440.10.

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

Memorandum: Defendant appeals, by permission of this Court, from an order that denied his motion and supplemental motion (motions) pursuant to CPL 440.10 to vacate a judgment convicting him upon his plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that Supreme Court abused its discretion in denying the motions without a hearing (*see generally People v Wright*, 27 NY3d 516, 520 [2016]). Under the circumstances of this case, we conclude that there is no " 'reasonable possibility' " that defendant would have rejected the plea bargain if the People had timely provided the *Brady* material in question (*People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

370

KA 19-02176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN T. SHAW, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered December 5, 2016. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a], [b]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Defendant's challenge to the voluntariness of his plea is unpreserved for our review inasmuch as the record does not reflect that he moved to withdraw the plea or to vacate the judgment of conviction (*see People v Ware*, 115 AD3d 1235, 1235 [4th Dept 2014]; *see generally People v Conceicao*, 26 NY3d 375, 381 [2015]). We decline defendant's request to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

373

CA 20-00935

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

GEORGE WENTWORTH AND JAYNE WENTWORTH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MIRNA ELEANOR MARTINEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered July 14, 2020. The order granted the amended motion of defendant Erie Insurance Company to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended motion is denied, and the complaint is reinstated against defendant Erie Insurance Company.

Memorandum: Plaintiffs commenced this action seeking judgment declaring that Erie Insurance Company (defendant) is obligated to defend and indemnify plaintiffs with respect to counterclaims asserted against them in an underlying action. We agree with plaintiffs that Supreme Court erred in granting defendant's amended motion to dismiss the complaint against it based upon documentary evidence (*see* CPLR 3211 [a] [1]). The documentary evidence submitted by defendant in support of the amended motion " 'failed to resolve all factual issues and conclusively dispose of [plaintiffs' cause of action] as a matter of law' " (*Calabro v General Ins. Co. of Am.*, 23 AD3d 326, 326 [2d Dept 2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

375/20

CA 19-01099

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

ERICA L. NYSTROM, FORMERLY KNOWN AS ERICA L. WATKINS, PLAINTIFF-RESPONDENT,

V ORDER

ROME MEMORIAL HOSPITAL, INC., PATRICIA LANE, M.D., RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP, ROME MEDICAL GROUP, P.C., TIMOTHY MIHM, R.P.A.C., SHRAVANTI HALPERN, M.D., PRESTON WIGFALL, M.D., ROME EMERGENCY SERVICES, M.D., P.C., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (THOMAS A. CULLEN OF COUNSEL), FOR DEFENDANT-APPELLANT ROME MEMORIAL HOSPITAL, INC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ERIC G. JOHNSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS PATRICIA LANE, M.D. AND RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP.

BROWN, GRUTTADARO & PRATO, LLC, ROCHESTER (WILLIAM KALISH OF COUNSEL), FOR DEFENDANTS-APPELLANTS PRESTON WIGFALL, M.D. AND ROME EMERGENCY SERVICES, M.D., P.C.

LEVENE, GOULDIN & THOMPSON LLP, VESTAL (PATRICIA M. CURTIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS TIMOTHY MIHM, R.P.A.C. AND SHRAVANTI HALPERN, M.D.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (MICHAEL CIRINCIONE OF COUNSEL), FOR DEFENDANT-APPELLANT ROME MEDICAL GROUP, P.C.

DEMORE LAW FIRM, PLLC, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 22, 2019. The order denied in part the motions of defendants-appellants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 13, 16, 22 and 23, 2020, April 23, 2020, and July 31, 2020,

It is hereby ORDERED that said appeals are unanimously dismissed

without costs upon stipulation.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

378

CA 20-00487

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

SUZANNE L. KORPOLINSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD KORPOLINSKI, DEFENDANT-RESPONDENT.

MICHAEL J. DOWD, LEWISTON, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 19, 2020. The order, insofar as appealed from, denied the motion of plaintiff seeking attorney's fees and the motion of plaintiff seeking, inter alia, entry of a judgment with interest pursuant to Domestic Relations Law § 244.

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

Memorandum: Plaintiff, as limited by her brief, appeals from an order insofar as it denied her separate motions for attorney's fees and, inter alia, entry of a judgment with interest related to the distribution of defendant's pension pursuant to a settlement agreement that was incorporated but not merged in the parties' judgment of divorce (*see* Domestic Relations Law §§ 237 [c]; 244). We affirm.

Contrary to plaintiff's contention, she failed to establish that defendant's "failure to [pay the distributive award] was willful, and thus '[plaintiff] is not automatically entitled to counsel fees under Domestic Relations Law § 237 (c)' " (*Boardman v Boardman*, 300 AD2d 1110, 1111 [4th Dept 2002]). Defendant's failure to pay the distributive award was not his fault, but was the result of the failure of plaintiff's divorce attorney to file a Qualified Domestic Relations Order at the time of the divorce. Further, Supreme Court credited defendant's testimony that he was not in possession of a final copy of the settlement agreement, which contained the terms of the distributive award, and the court's credibility findings are entitled to deference (*see Leo v Leo*, 125 AD3d 1319, 1319 [4th Dept 2015]). For the same reasons, we conclude that the court properly denied plaintiff's motion for interest based on an implicit finding that defendant's conduct was not willful (*cf. Mowers v Mowers*, 229 AD2d 941, 941-942 [4th Dept 1996]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

413/20

CA 19-02179

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

MARC MCSWEENEY, PLAINTIFF-RESPONDENT,

V ORDER

NORFOLK SOUTHERN RAILWAY COMPANY,
DEFENDANT-APPELLANT,
IROQUOIS BAR CORP., ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAXWELL MURPHY, LLC, BUFFALO (JOHN F. MAXWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 1, 2019. The order, among other things, granted in part plaintiff's motion for summary judgment against defendant Norfolk Southern Railway Company.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 6, 2020,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

452

KA 17-02227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMSON C. GORTON, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Matthew J. Doran, A.J.), rendered October 16, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Defendant's conviction stems from his conduct in stabbing his housemate (victim) with a knife after the victim confronted defendant and accused him of stealing his property. We reject defendant's contention that the evidence is legally insufficient to establish his intent to cause serious physical injury. It is well settled that " '[a] jury is entitled to infer that a defendant intended the natural and probable consequences of his acts' " (*People v Barboni*, 21 NY3d 393, 405 [2013]; *see People v Manigault*, 145 AD3d 1428, 1429 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]). Here, defendant stabbed the victim in the abdomen with a hunting knife that lacerated the victim's stomach and liver and even broke off the tip of a rib. We conclude that "the natural and probable consequence of defendant's conduct in thrusting a knife four inches into the victim's torso is, at a minimum, serious physical injury" (*People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *see People v Collins*, 43 AD3d 1338, 1338 [4th Dept 2007], *lv denied* 9 NY3d 1005 [2007]; *see also People v Smajlaj*, 160 AD3d 455, 456 [1st Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

We also reject defendant's contention that the evidence is

legally insufficient to establish that his actions were not justified. County Court instructed the jury on justification in defense of a person and in defense against a robbery (*see* Penal Law § 35.15 [2] [a], [b]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the People disproved the defense of justification beyond a reasonable doubt (*see People v Allen*, 36 NY3d 1033, 1034 [2021]; *Manigault*, 145 AD3d at 1429; *People v Brooks*, 139 AD3d 1391, 1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]). With respect to defendant's purported justification in defense of a person, the People established that defendant did not actually believe that the victim was using or about to use deadly physical force against him and that a reasonable person in defendant's position would not have so believed (*see* § 35.15 [2] [a]; *see generally People v Wesley*, 76 NY2d 555, 559-560 [1990]; *People v Butera*, 23 AD3d 1066, 1068 [4th Dept 2005], *lv denied* 6 NY3d 774 [2006], *reconsideration denied* 6 NY3d 832 [2006]). The victim was not carrying a weapon, and defendant did not testify that he believed that the victim was doing so. There was simply no evidence for the jury to conclude that defendant believed that the victim was using or about to use deadly physical force. With respect to defendant's purported justification in the context of a robbery, "[t]here was no credible evidence that defendant reasonably believed that the victim was committing or attempting to commit a robbery" (*People v Cardamone*, 287 AD2d 407, 407 [1st Dept 2001], *lv denied* 97 NY2d 702 [2002]; *see People v Patterson*, 176 AD3d 1637, 1639 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019]; *see also People v Green*, 32 AD3d 364, 365 [1st Dept 2006], *lv denied* 7 NY3d 902 [2006]). Although the victim testified that he told defendant to drop the bags that he was carrying, the victim gave no indication that he was about to use force to take the property (*see* §§ 35.15 [2] [b]; 160.00).

Viewing the evidence in light of the elements of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that the indictment should be dismissed because the prosecutor failed to instruct the grand jurors on the justification defense in the context of a robbery. There was no reasonable view of the evidence before the grand jury to support that justification defense (*see People v Forde*, 140 AD3d 1085, 1087 [2d Dept 2016], *lv denied* 28 NY3d 929 [2016]; *People v Torres*, 252 AD2d 60, 65 [1st Dept 1999], *lv denied* 93 NY2d 1028 [1999]; *see generally People v Ball*, 175 AD3d 987, 988 [4th Dept 2019], *affd* 35 NY3d 1009 [2020]). Defendant did not testify before the grand jury, and his statement to the police that was admitted in evidence before the grand jury was equivocal and vague on the issue whether he believed the victim was attempting to rob him.

Defendant contends that, during the trial, the court erred in not giving an expanded charge on the justification defense in the context of a robbery to explain that a person, i.e., the victim, may not use

force to recover property allegedly owned by him under a good-faith claim of right (*see generally People v Reid*, 69 NY2d 469, 475 [1987]). The court used the standard jury charges on justification in the defense of a person and justification in the context of a robbery as set forth in the Criminal Jury Instructions, and the court's charge set forth the governing law (*see People v Acevedo*, 118 AD3d 1103, 1107 [3d Dept 2014], *lv denied* 26 NY3d 925 [2015]). The court did not err in declining to use the expanded charge that was suggested by defendant (*see id.*; *People v Dunlap*, 51 AD3d 943, 944 [2d Dept 2008], *lv denied* 10 NY3d 958 [2008]; *People v Van Billiard*, 277 AD2d 958, 958 [4th Dept 2000], *lv denied* 96 NY2d 788 [2001]). The victim did not testify that he used any force, physical or verbal, in an attempt to have defendant return what the victim believed were his belongings, and there was therefore no need for the court to explain to the jury that the victim would not have been able to use force under a good-faith claim of right to the property.

Defendant's contention that he was punished for exercising his right to trial is unpreserved (*see People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). In any event, that contention is without merit inasmuch as "[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

454

KA 18-00606

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS O'DONNELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered March 19, 2018. The judgment convicted defendant, upon a jury verdict, of coercion in the first degree (two counts), rape in the first degree (four counts), and attempted criminal sexual act in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of coercion in the first degree under counts two and three of the indictment, rape in the first degree under counts four and six of the indictment, and attempted criminal sexual act in the first degree under count eight of the indictment and dismissing those counts of the indictment, and by directing that the sentences imposed on counts five, seven, and nine of the indictment run concurrently with each other, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of four counts of rape in the first degree (Penal Law § 130.35 [1], [2]), two counts of attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1], [2]), and two counts of coercion in the first degree (§ 135.65 [1]). We modify.

Viewing the evidence independently and in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Dexter*, 191 AD3d 1246, 1246-1247 [4th Dept 2021], *lv denied* — NY3d — [2021]), we agree with defendant that the verdict is against the weight of the evidence on the counts of rape in the first degree predicated upon a theory of forcible compulsion (Penal Law § 130.35 [1]) and on the count of attempted criminal sexual act in the first degree predicated upon a theory of forcible compulsion (§§ 110.00, 130.50 [1]). "Forcible compulsion involves either the use of 'physical force' or 'a threat, express or implied,

which places [the victim] in fear of immediate death or physical injury' . . . in an effort to force the victim to submit to a defendant's advances" (*People v Hemingway*, 85 AD3d 1299, 1301 [3d Dept 2011], quoting § 130.00 [8] [a], [b]). Here, the trial evidence established that defendant physically abused the victim on two different occasions, that defendant once made a vague reference to the victim about having harmed someone in New Jersey on an unknown prior occasion, and that defendant and the victim had repeated sexual contact over the course of a month. The People, however, failed to establish beyond a reasonable doubt that defendant used either physical force or a threat to compel or attempt to compel the victim to engage in any particular sex act (*see e.g. People v Aponte*, 89 AD3d 1429, 1429 [4th Dept 2011], *lv denied* 18 NY3d 955 [2012]; *Hemingway*, 85 AD3d at 1301-1302; *People v Chapman*, 54 AD3d 507, 508-509 [3d Dept 2008]; *People v Fuller*, 50 AD3d 1171, 1175 [3d Dept 2008], *lv denied* 11 NY3d 788 [2008]; *People v Howard*, 163 AD2d 846, 846-847 [4th Dept 1990], *lv denied* 77 NY2d 996 [1991]). The existence of physical abuse between parties to an ongoing sexual relationship does not automatically make every sex act or attempted sex act within that relationship a product of forcible compulsion, and here the People failed to link any particular sex act or attempted sex act to any physically abusive conduct or purportedly threatening commentary on defendant's part. We therefore modify the judgment on the facts by reversing those parts convicting defendant of rape in the first degree under counts four and six of the indictment and attempted criminal sexual act in the first degree under count eight of the indictment and dismissing those counts (*see* CPL 470.15 [5]; 470.20 [5]). In light of our determination, we "need not reach the issue of whether the evidence [on those counts] was legally sufficient" (*Matter of Arnaldo R.*, 24 AD3d 326, 328 [1st Dept 2005], *appeal dismissed* 6 NY3d 824 [2006]; *see generally People v Clayton*, 175 AD3d 963, 967 [4th Dept 2019]).

Again viewing the evidence independently and in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349; *Dexter*, 191 AD3d at 1246-1247), we further agree with defendant that the verdict is against the weight of the evidence on the counts of coercion in the first degree (Penal Law § 135.65 [1]). Specifically, the People failed to prove, beyond a reasonable doubt, that the victim was compelled or induced into any particular conduct by defendant's alleged statements (*see e.g. People v Singh*, 109 AD3d 1010, 1012 [2d Dept 2013], *lv denied* 23 NY3d 1067 [2014]; *People v Bens*, 5 AD3d 391, 392 [2d Dept 2004], *lv denied* 2 NY3d 796 [2004]). We therefore further modify the judgment on the facts by reversing those parts convicting defendant of coercion in the first degree under counts two and three of the indictment and dismissing those counts (*see* CPL 470.15 [5]; 470.20 [5]), and we likewise "need not reach the issue of whether the evidence [on those counts] was legally sufficient" (*Arnaldo R.*, 24 AD3d at 328).

We reject, however, defendant's challenges to the legal sufficiency and weight of the evidence on the charges of rape in the first degree predicated upon a theory of physical helplessness (Penal

Law § 130.35 [2]) and on the charge of attempted criminal sexual act in the first degree predicated upon a theory of physical helplessness (§§ 110.00, 130.50 [2]; *see People v Shevchenko*, 175 AD3d 922, 923-924 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's claim of prosecutorial misconduct on summation is unpreserved for appellate review (*see People v Carlson*, 184 AD3d 1139, 1142 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). In any event, reversal is unwarranted because the prosecutor's comments did not "deprive defendant of a fair trial" on the three charges that are supported by the weight of the evidence (*id.*). We nevertheless take this opportunity to reprove the prosecutor for her misstatement of the record during her summation, in which she purported to quote verbatim a statement made by defendant to a trial witness. The prosecutor's recounting of the purported verbatim quote was materially incorrect, and it transformed the relatively benign—albeit crude—statement that defendant actually made into a far more sinister statement that could be construed as a confession. The prosecutor then compounded her error by arguing, without any record support, that defendant was "bragging" to the trial witness about committing rape. We again remind the People that "[p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process" (*id.* [internal quotation marks omitted]).

The aggregate sentence is unduly harsh and severe given defendant's advanced age and lack of any criminal record (*see* CPL 470.15 [6] [b]). We therefore further modify the judgment as a matter of discretion in the interest of justice by directing that all remaining sentences run concurrently with each other (*see* CPL 470.20 [6]).

We have considered and rejected defendant's remaining contention.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

467/20

CA 19-00787

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

LINDSAY ANN WROBEL, PLAINTIFF-RESPONDENT,

V ORDER

WOODFORD PROPERTY MANAGEMENT, LLC,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (SAM A. ELBADAWI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 25, 2019. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 14 and 18, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

471

KA 19-02122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER D. DELLES, DEFENDANT-APPELLANT.

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

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Lewis County Court (Daniel R. King, J.), dated September 19, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Lewis County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court failed to comply with Correction Law § 168-n (3), pursuant to which the court was required to set forth the findings of fact and conclusions of law on which it based its determination. We agree. The record does not demonstrate that the court considered any recommendation by the Board of Examiners of Sex Offenders, as required by Correction Law § 168-l (6), if in fact such a recommendation was made. The standardized form order merely lists the court's risk factor point assessments, identifies without elaboration the factors supporting an upward departure, and denies in conclusory fashion defendant's request for a downward departure. That is plainly inadequate to fulfill the statutory mandate (*see People v Gatling*, 188 AD3d 1765, 1765 [4th Dept 2020]; *People v Gilbert*, 78 AD3d 1584, 1584 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]). We therefore hold the case, reserve decision, and remit the matter to County Court for compliance with Correction Law § 168-n (3).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

476

KA 16-01907

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN T. JACOBS, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered February 26, 2016. The judgment convicted defendant upon a jury verdict of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). The conviction stems from defendant's conduct in stealing, with the assistance of his girlfriend, money and property from the home of the girlfriend's mother.

Defendant contends that the evidence is legally insufficient to support the conviction because the testimony of his accomplice was not supported by the requisite corroborative evidence (*see* CPL 60.22 [1]). That contention is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' at [that] alleged error" (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, the contention lacks merit (*see People v Davis*, 28 NY3d 294, 303 [2016]; *People v Baska*, 191 AD3d 1432, 1433 [4th Dept 2021]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

We reject defendant's further contention that Supreme Court erred in allowing the People to introduce evidence of his involvement with his girlfriend in an uncharged larceny from the truck of the girlfriend's mother, which occurred 10 days after the burglary but before the burglary had been discovered. The evidence of an uncharged larceny was properly admitted under the common scheme or plan exception to the *Molineux* rule (*see People v Lukens*, 107 AD3d 1406, 1407 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *People v Austin*,

13 AD3d 1196, 1197 [4th Dept 2004], *lv denied* 5 NY3d 785 [2005]; *People v Washpun*, 134 AD2d 858, 858 [4th Dept 1987], *lv denied* 70 NY2d 1012 [1988]).

Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a trial (*see People v Smith*, 187 AD3d 1652, 1656 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Cotton*, 184 AD3d 1145, 1149 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, given defendant's extensive criminal record, we perceive no basis in the record to modify the sentence in the interest of justice.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

482

CA 20-00805

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

HARRY T. BATSCHELET AND LUANNE K. BATSCHELET,
PLAINTIFFS-RESPONDENTS,

V ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JAMES J. GASCON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered June 2, 2020. The order denied defendant's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 30, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

486

CA 19-02362

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

MOMENTUM AUTOMOTIVE MANAGEMENT, LLC,
MOMENTUM AUTO GROUP, INC., RAHIM HASSANALLY,
PETITIONERS-APPELLANTS,
ET AL., PETITIONERS,

V MEMORANDUM AND ORDER

RADIUM2 CAPITAL, INC., RESPONDENT-RESPONDENT.

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

STEIN ADLER DABAH & ZELKOWITZ LLP, NEW YORK CITY (CHRISTOPHER R. MURRAY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 25, 2019. The order dismissed the petition.

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

Memorandum: Petitioners-appellants (petitioners) appeal from an order that, inter alia, dismissed their petition without prejudice based on the doctrine of forum non conveniens. On appeal, petitioners contend that Supreme Court erred in sua sponte dismissing the petition based on forum non conveniens. We conclude that the appeal must be dismissed. " 'It is incumbent upon an appellant to assemble a proper record, including the relevant documents that were before the lower court, and appeals will be dismissed when the record is incomplete' " (*Christa Constr., LLC v Vanguard Light Gauge Steel Bldgs.* [appeal No. 3], 181 AD3d 1310, 1310 [4th Dept 2020]; *see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Inasmuch as petitioners failed to meet their responsibility as the appellants to assemble an adequate record on appeal, we cannot review the propriety of the court's order dismissing the petition (*see generally Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286-1287 [4th Dept 2016]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

492

KA 20-00390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GAINEY, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 10, 2019. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to defendant's contention, County Court did not err in declining to grant him a "violent felony override." In fact, the court had no authority to do so (*see People v Jackson*, 136 AD3d 1056, 1057 [2d Dept 2016], *lv denied* 27 NY3d 1070 [2016]; *People v Burnice*, 129 AD3d 1498, 1499 [4th Dept 2015], *lv denied* 27 NY3d 993 [2016]; *People v Lynch*, 121 AD3d 717, 718-719 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]). Moreover, to the extent that defendant sought a "court-generated document" to establish that his crime "did not involve: being armed with, the use of or threatened use of, or the possession with the intent to use unlawfully against another of, a deadly weapon or dangerous instrument or the infliction of a serious physical injury" (7 NYCRR 1900.4 [c] [1] [iv]), we note that the prosecutor recited those facts during the sentencing proceeding, and that the court was obligated to send "a certified copy of the stenographic minutes of the sentencing proceeding . . . to the person in charge of the institution to which . . . defendant [was] delivered within thirty days from the date such sentence was imposed" (CPL 380.70; *see generally* 7 NYCRR 1900.2, 1900.4).

In light of defendant's prior criminal history, which includes numerous convictions and several violations of probation spanning more than a decade, we conclude that the agreed-upon sentence is neither

unduly harsh nor severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

494

KA 20-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON M. PECKHAM, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 11, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the fourth degree and unauthorized use of a motor vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of, inter alia, criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Defendant failed to preserve for our review his contention that County Court erred in imposing an enhanced sentence without holding a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]) inasmuch as he failed to request such a hearing and failed to move to withdraw his plea on that ground (*see People v Scott*, 101 AD3d 1773, 1773 [4th Dept 2012], *lv denied* 21 NY3d 1019 [2013]; *People v Anderson*, 99 AD3d 1239, 1239 [4th Dept 2012], *lv denied* 20 NY3d 1059 [2013]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). The sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

495

KA 19-01651

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD G. MAUS, II, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Stephen T. Miller, A.J.), entered April 19, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in failing to grant a downward departure from his presumptive classification as a level two risk based upon certain mitigating circumstances not adequately taken into account by the guidelines, including his college education and consistent employment history. Defendant, however, failed to request a downward departure based on those alleged mitigating circumstances and thus failed to preserve his contention for our review (*see People v Johnson*, 11 NY3d 416, 421-422 [2008]; *see generally People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *People v Ratcliff*, 53 AD3d 1110, 1110 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]). At the hearing, defendant requested a downward departure based on his lack of a criminal history, lack of substance abuse, participation in a treatment program, and acceptance of responsibility for his actions. Inasmuch as those alleged mitigating factors or circumstances are adequately taken into account by the guidelines, they are improperly asserted as mitigating factors (*see People v Gerros*, 175 AD3d 1111, 1112 [4th Dept 2019]; *People v Reber*, 145 AD3d 1627, 1627-1628 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally People v*

Gillotti, 23 NY3d 841, 861 [2014]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

499

KAH 20-00819

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MICHAEL RHYNES, PETITIONER-APPELLANT,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (AMBER R. POULOS OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 9, 2020 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

501

CAF 20-00279

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

IN THE MATTER OF JOSEPH FREDERICK SCHULTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHERYL LYNN LANPHEAR, RESPONDENT-RESPONDENT.

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

CHERYL LYNN LANPHEAR, RESPONDENT-RESPONDENT PRO SE.

LYLE T. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner therapeutically supervised in-person visitation with the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order modifying a prior order of custody and access by, inter alia, awarding the father therapeutically supervised in-person visitation with the subject child, with the visitation to occur a minimum of once per month for a period of two hours and to take place at an agency in Buffalo, as well as monthly supervised video access to be agreed upon and arranged by respondent mother and the visitation supervisor. We affirm for reasons stated in the decision at Family Court and write only to address the father's contention that the court improperly delegated its authority to schedule visitation (*see Matter of Thomas v Small*, 142 AD3d 1345, 1345-1346 [4th Dept 2016]). We conclude that the court did not improperly delegate its authority to schedule visitation, and we thus reject the father's contention that the matter should be remitted to the court to fashion a more specific visitation schedule (*see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Alan U. v Mandy V.*, 146 AD3d 1186, 1189 [3d Dept 2017]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

503

CAF 18-01643

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

IN THE MATTER OF JUSTIN WASHBURN,
PETITIONER-RESPONDENT,

V ORDER

JESSICA A. WILSON-LINDERMAN,
RESPONDENT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered July 31, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that the parties shall have joint custody of the subject children with primary physical residence with petitioner.

It is hereby ORDERED that said appeal insofar as it concerns the older child is unanimously dismissed (*see Matter of Richter v Richter*, 187 AD3d 1592, 1592 [4th Dept 2020]) and the order is affirmed without costs for reasons stated in the decision at Family Court.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

506

CA 21-00167

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

JOSEPH ANDALORO, PLAINTIFF-APPELLANT,

V ORDER

BOARD OF EDUCATION OF SYRACUSE CITY SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

GATTUSO & CIOTOLI, PLLC, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered August 19, 2020. The judgment granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

509

CA 20-01005

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

IN THE MATTER OF CHARLES PERDUE,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered July 24, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

511

TP 21-00193

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JOEL BROWN, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 2, 2021) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

513

KA 19-01436

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JALEN SNOW, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered May 21, 2019. The judgment convicted defendant upon a plea of guilty of attempted rape in the first degree, burglary in the second degree, assault in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless reject defendant's challenge to the severity of the sentence.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

514

KA 19-00092

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRANCE GALLAGHER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 6, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

515

KA 20-00378

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRANCE GALLAGHER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 6, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

516

KA 19-00585

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN DRAKE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 4, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fourth 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 second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. The record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* -- US --, 140 S Ct 2634 [2020]; *People v Heath*, 192 AD3d 1473, 1473 [4th Dept 2021]), and that valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

518

KA 20-00984

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD NELSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered July 21, 2020. Defendant was resentenced upon his conviction of gang assault in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 12 years, and as modified the resentence is affirmed.

Memorandum: Defendant was convicted following a jury verdict of gang assault in the first degree (Penal Law § 120.07). On a prior appeal, we, inter alia, reduced the conviction to gang assault in the second degree under a theory of accomplice liability (§§ 20.00, 120.06), vacated the sentence, and remitted the matter to Supreme Court for resentencing (*People v Nelson*, 178 AD3d 1395, 1397 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020]). Defendant now appeals from the resentence.

Although defendant contends that his conviction should be further reduced to assault in the third degree, a defendant who appeals from a resentence only may not challenge the underlying judgment of conviction (*see People v Smith*, 21 AD3d 1360, 1360 [4th Dept 2005], *lv denied* 5 NY3d 885 [2005]; *see generally* CPL 450.30 [3]; *People v Jordan*, 16 NY3d 845, 846 [2011]; *People v Ramos*, 105 AD3d 684, 685 [1st Dept 2013], *lv denied* 21 NY3d 1045 [2013]).

Finally, defendant contends that his resentence is unduly harsh and severe because it is the same as the sentence that was originally imposed on the count of gang assault in the first degree, which was later reduced. We agree with defendant that the sentence should be modified to reflect the reduction of his conviction from gang assault

in the first degree, a class B felony, to gang assault in the second degree, a class C felony. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 12 years, to be followed by the five-year period of postrelease supervision previously imposed by the court (*see* CPL 470.15 [6] [b]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

519

KA 20-01201

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL JUNE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Stephen J. Dougherty, J.), entered September 20, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining him to be a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends, and the People correctly concede, that County Court violated his right to due process by assessing 30 points under risk factor three because defendant was not provided with the requisite notice thereof (*see* § 168-k [2]; *see also People v Chrisley*, 172 AD3d 1914, 1915-1916 [4th Dept 2019]). However, that error was harmless inasmuch as, contrary to defendant's contention, the court properly determined as an alternative basis for the risk level assessment that, if defendant were a presumptive level one risk, the People would be entitled to the grant of their request for an upward departure from that presumptive risk level (*see generally People v Baxin*, 26 NY3d 6, 11 [2015]). Indeed, the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines, including a quantity of over 1,000 images and videos depicting child pornography that were discovered on defendant's computer, the sadomasochistic or violent nature of many of those images, and the ages of the children depicted in the images, some of whom were as young as one year old (*see People v Tatner*, 149 AD3d 1595, 1595-1596 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]). We have reviewed defendant's remaining contentions and conclude that none warrants

reversal or modification of the order.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

520

KA 19-00795

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSICA RICHARDSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 15, 2019. The judgment convicted defendant, upon a plea of guilty, of attempted burglary in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on February 28, 2021, and by the attorneys for the parties on March 10 and 17, 2021,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

521

CAF 20-00814

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF ALICIA M. DETRICK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. DETRICK, RESPONDENT-APPELLANT.

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

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Livingston County (Jennifer M. Noto, J.), entered February 19, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent shall have supervised visitation with the subject child once per week for no more than one hour.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, effectively granted petitioner mother's petition to modify a prior order of custody and visitation by limiting the father to supervised visitation with the parties' child. Contrary to the father's contention, Family Court did not err in failing to appoint a guardian ad litem for him inasmuch as the record as a whole demonstrates that he was capable of understanding the proceedings, assisting counsel, and defending his rights (*see* CPLR 1201; *Matter of Turetsky v Murray*, 177 AD3d 653, 653-654 [2d Dept 2019]; *Matter of Marie ZZ. [Jeanne A.]*, 140 AD3d 1216, 1217 [3d Dept 2016]).

With respect to the merits of the order on appeal, we reject the father's contention that the court erred in reducing the amount of his visitation with the child and in requiring that such visitation be supervised. " 'Visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record' " (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011]). Thus, "deferring to 'the court's firsthand assessment of the character and credibility of the parties,' " we conclude that there is a sound and substantial basis in the record to support the determination limiting the father's visitation with the

child to supervised visitation once per week for up to one hour (*id.*; *see Matter of Edmonds v Lewis*, 175 AD3d 1040, 1042 [4th Dept 2019], *lv denied* 34 NY3d 909 [2020]).

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

523

CAF 20-00523

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF MALACHI S., ALSO KNOWN AS MALACHI W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 5, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate a default.

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

Memorandum: In appeal No. 1, respondent father appeals from an order denying his motion to vacate the default order in appeal No. 2. In appeal No. 2, the father appeals from a default order that, inter alia, revoked a suspended judgment and terminated his parental rights with respect to the child who is the subject of this proceeding.

Addressing first appeal No. 2, we note that the father failed to appear at the hearing on petitioner's application by order to show cause seeking to revoke the suspended judgment and, although his attorney was present at the hearing, the attorney did not participate. Under the circumstances, we conclude that Family Court properly determined that the father's unexplained failure to appear constituted a default (*see Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1181-1182 [4th Dept 2009]; *see also Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv denied in part and dismissed in part* 18 NY3d 854 [2011]). We therefore dismiss the appeal from the order in appeal No. 2 (*see Tiara B.*, 64 AD3d at 1182).

With respect to appeal No. 1, it is well settled that a parent seeking to vacate a default order revoking a suspended judgment and

terminating his or her parental rights must demonstrate a reasonable excuse for the default and a meritorious defense to the underlying allegations (*see Lastanzea L.*, 87 AD3d at 1356; *Tiara B.*, 64 AD3d at 1182). We review a court order resolving a motion to vacate a default order using either the abuse of discretion standard (*see Tiara B.*, 64 AD3d at 1182) or the improvident exercise of discretion standard (*see Matter of Kimberly S.K. [Kimberly K.]*, 138 AD3d 853, 854 [2d Dept 2016]; *Shouse v Lyons*, 4 AD3d 821, 823 [4th Dept 2004]). Here, we conclude that the court properly exercised its discretion in denying the father's motion.

Although " '[a] parent has a right to be heard on matters concerning [his or] her child and the parent's rights are not to be disregarded *absent a convincing showing of waiver*' " (*Matter of Dominique L.B.*, 231 AD2d 948, 948 [4th Dept 1996] [emphasis added]), " '[a] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute,' " and " '[t]he child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication' " (*Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]).

Contrary to the father's contention, he was notified of the scheduled hearing date, and we conclude that he willfully failed to appear and thereby waived his appearance (*see Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753 [3d Dept 2004]; *cf. Matter of Kendra M.*, 175 AD2d 657, 658 [4th Dept 1991]). "By willfully failing to appear on dates for which the court provided adequate notice, [the father] forfeited any right he had to be present at the hearing" (*Elizabeth T.*, 3 AD3d at 753), regardless of whether he was warned that the hearing would proceed in his absence (*see Matter of Monroe County Support Collection Unit v Wills*, 19 AD3d 1019, 1019 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]; *Matter of Geraldine Rose W.*, 196 AD2d 313, 316-318 [2d Dept 1994], *lv dismissed* 84 NY2d 967 [1994]).

In any event, the father failed to demonstrate a meritorious defense in support of his motion to vacate the default. It is well settled that, "[i]f [petitioner] establishes by a preponderance of the evidence that there has been noncompliance with *any* of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Keyon M. [Kenyetta M.]*, 85 AD3d 1560, 1561 [4th Dept 2011], *lv denied* 17 NY3d 709 [2011] [emphasis added and internal quotation marks omitted]; *see* Family Ct Act § 633 [f]; *Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014]). Although the court misstated a few facts in its findings, there was ample evidence at the hearing that the father violated multiple terms of the suspended judgment and that it was in the child's best interests to terminate the father's parental rights. The father on his motion did not establish otherwise (*see Tiara B.*, 64 AD3d at 1182; *see also Lastanzea L.*, 87 AD3d at 1356).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

524

CAF 20-00718

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF MALACHI S., ALSO KNOWN AS MALACHI W.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MICHAEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, MONROE COUNTY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Same Memorandum as in *Matter of Malachi W. (Michael W.)* ([appeal No. 1] — AD3d — [June 11, 2021] [4th Dept 2021]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

526

CAF 19-01931

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF BONNIE L. DRIES,
PETITIONER-RESPONDENT,

V ORDER

PATRICIA H. JOHNSON, NATHAN P. SPAGNOLA,
RESPONDENTS-RESPONDENTS,
AND NATALIE S. JOHNSON, RESPONDENT-APPELLANT.

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

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 6, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, provided that respondent Natalie S. Johnson have supervised visitation with the subject child.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

527

CA 20-00987

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

JAMES MONTANA AND APRIL MONTANA, INDIVIDUALLY,
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V ORDER

DAVID MARKOWITZ METAL CO., INC.,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

GORDON REES SCULLY MANSUKHANI, LLP, HARRISON, SHAUB AHMUTY CRITRIN & SPRATT, LLP, LAKE SUCCESS (CHRISTOPHER SIMONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered June 11, 2020. The order denied the motion of defendant David Markowitz Metal Co., Inc., for summary judgment dismissing the amended complaint against it.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

534

TP 21-00147

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF BABLIN YOU, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 21, 2021) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

535

KA 18-01366

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAIME M. FONTANEZ-BAEZ, ALSO KNOWN AS CHEMA; JOTA,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered April 13, 2018. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[ ] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Montgomery*, 191 AD3d 1418, 1418-1419 [4th Dept 2021], *lv denied* — NY3d — [Apr. 28, 2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see Montgomery*, 191 AD3d at 1419; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (*see Montgomery*, 191 AD3d at 1419), we nevertheless

conclude that the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

536

KA 19-00784

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARRMEL PETERSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 18, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends, and the People correctly concede, that his waiver of the right to appeal is invalid because Supreme Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nonetheless conclude that the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

537

KA 19-02149

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL MURRAY-ADAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered November 29, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the first degree and endangering the welfare of 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, inter alia, burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. We agree with defendant that he did not validly waive his right to appeal. Supreme Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing it as an absolute bar to the taking of an appeal, and we thus conclude that the colloquy was insufficient to ensure that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that "[t]he better practice is for the court to use the Model Colloquy, which neatly synthesizes . . . the governing principles" (*People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020] [internal quotation marks omitted]; *see Thomas*, 34 NY3d at 567; NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

538

KA 18-01616

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECMAR L. VIRELLA CALDERO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered August 1, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the second degree (§ 220.18 [1]). Defendant failed to preserve for our review his challenge to the voluntariness of his plea because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Furthermore, this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]).

Defendant further contends that County Court erred in refusing to suppress physical evidence recovered from his house because there was an insufficient basis for issuance of the warrant and the amended warrant to search the premises. We reject that contention. "Reviewing the warrant application[s] in a 'common-sense and realistic fashion,' " we conclude that they established probable cause to believe that a search of defendant's residence would result in evidence of weapons and drug activity (*People v McLaughlin*, 269 AD2d 858, 858 [4th Dept 2000], *lv denied* 95 NY2d 800 [2000]).

Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

542

KA 19-01985

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GENE A. KUBIAK, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered July 10, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the third degree.

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

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 [7]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. We agree with defendant that he did not validly waive his right to appeal. As the People correctly concede, County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing it as an absolute bar to the taking of an appeal, and we thus conclude that the colloquy was insufficient to ensure that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that "[t]he better practice is for the court to use the Model Colloquy, which neatly synthesizes . . . the governing principles" (*People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020] [internal quotation marks omitted]; *see Thomas*, 34 NY3d at 567; NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

543

KA 17-01716

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN A. HARRISON, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 21, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree, disseminating indecent material to minors in the second degree and failure to register as a sex offender.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), disseminating indecent material to minors in the second degree (§ 235.21 [3]), and failure to register as a sex offender (Correction Law § 168-f [4]). We affirm.

As the People correctly concede, defendant's purported waiver of the right to appeal is invalid (*see People v Smith*, 192 AD3d 1599, 1599 [4th Dept 2021]; *People v Hunt*, 188 AD3d 1648, 1648-1649 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]). Defendant failed to preserve for our review his challenge to the voluntariness of his plea because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Furthermore, this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

544

KA 18-02252

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH W. SCOTT, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 22, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment against defendant is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). As we previously determined on the appeal of a codefendant, Supreme Court erred in denying that part of the omnibus motion seeking to suppress physical evidence seized by the police (*see People v Fitts*, 188 AD3d 1676, 1677-1678 [4th Dept 2020]). We therefore reverse the judgment, grant that part of the motion, and dismiss the indictment against defendant.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

545

CAF 20-00587

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF GREGORY D. ETTELT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BILLIE J. ETTELT, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-APPELLANT.

KACIE M. CROUSE, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), dated February 4, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking to modify a prior order of custody and visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that dismissed his petition seeking to modify a prior order of custody and visitation. Contrary to the father's contention, we conclude that Family Court did not abuse its discretion in dismissing his petition without conducting a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" and, here, the father failed to "make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [4th Dept 2003] [internal quotation marks omitted]; *see Matter of Williams v Reid*, 187 AD3d 1593, 1594-1595 [4th Dept 2020]; *Matter of Fowler v VanGee*, 136 AD3d 1320, 1320 [4th Dept 2016]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

566

CA 20-00829

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF CYNTHIA CONSTANTINO-GLEASON,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK UNIFIED COURT SYSTEM AND
NEW YORK STATE OFFICE OF COURT ADMINISTRATION,
RESPONDENTS-RESPONDENTS.

JOSEPH A. DETRAGLIA, UTICA, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 3, 2020 in a CPLR article 78 proceeding. The judgment denied the amended petition.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

571

CA 20-01389

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

ROCCO DELMONTE, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN RELIABLE INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

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

JEFFREY SAMEL & PARTNERS, NEW YORK CITY (ROBERT G. SPEVACK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered September 22, 2020. The order denied plaintiff's motion for leave to reargue its opposition to the motion of defendant American Reliable Insurance Company to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

572

CA 20-01390

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

ROCCO DELMONTE, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN RELIABLE INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

JEFFREY SAMEL & PARTNERS, NEW YORK CITY (ROBERT G. SPEVACK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered June 30, 2020. The order granted the motion of defendant American Reliable Insurance Company to dismiss the complaint.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

574

KA 20-00476

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN ROSSBOROUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered February 20, 2020. The judgment convicted defendant upon his plea of guilty of forgery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of forgery in the second degree (Penal Law § 170.10 [1]), defendant contends that County Court erred when it refused his request, made for the first time at sentencing, for a sentence of parole supervision pursuant to CPL 410.91. We reject that contention. Assuming, arguendo, that defendant was eligible for such a sentence, we conclude that defendant received the sentence promised by the court at the plea proceedings and, under the circumstances of this case, the court did not err in concluding that parole supervision pursuant to CPL 410.91 would not be appropriate (*see People v Johnson*, 137 AD3d 1419, 1420 [3d Dept 2016]; *People v Patterson*, 119 AD3d 1157, 1158 [3d Dept 2014], *lv denied* 24 NY3d 1046 [2014]). Contrary to defendant's further contention, the agreed-upon sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

579

KA 17-00894

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KWAME J. YOUNG, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 16, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree and aggravated criminal contempt.

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, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that County Court erred in denying defense counsel's challenge for cause to a prospective juror. Defendant correctly concedes that the denial, even if error, would not require reversal because defense counsel exercised a peremptory challenge to excuse that prospective juror and did not thereafter exhaust defendant's peremptory challenges (*see* CPL 270.20 [2]) and, contrary to defendant's contention, "defense counsel's failure to exhaust all of the available peremptory challenges does not constitute ineffective assistance of counsel" (*People v Printup*, 278 AD2d 834, 835 [4th Dept 2000], *lv denied* 96 NY2d 786 [2001]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

582

CAF 19-01247

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JENNIFER KOPCIOWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HENRY KOPCIOWSKI, RESPONDENT-APPELLANT.

IN THE MATTER OF HENRY KOPCIOWSKI,
PETITIONER-APPELLANT,

V

JENNIFER KOPCIOWSKI, RESPONDENT-RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered April 17, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the subject children to petitioner-respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner father appeals from an order that, inter alia, granted the petition of petitioner-respondent mother seeking to modify the parties' existing custody arrangement by awarding her sole custody of the parties' children. Contrary to the father's contention, the mother met her burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody arrangement is in the best interests of the children (*see Matter of Krier v Krier*, 178 AD3d 1372, 1372 [4th Dept 2019]; *Lauzonis v Lauzonis*, 120 AD3d 922, 924 [4th Dept 2014]; *Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561 [4th Dept 2010]). " '[A] change in circumstances exists where, as here, the [parties'] relationship becomes so strained and acrimonious that communication between them is impossible' " (*Matter of Gibbardo v Ramos*, 169 AD3d 1482, 1482 [4th Dept 2019]; *see Lauzonis*, 120 AD3d at 924). Contrary to the father's further contention, there is a sound and substantial basis in the record for Family Court's determination that awarding the

mother sole custody of the children is in their best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]; *Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306 [4th Dept 2012]).

Assuming, arguendo, that the court erred in admitting in evidence the notes of the children's school counselor, we conclude that such error was harmless (*see Matter of Nicole VV.*, 296 AD2d 608, 613 [3d Dept 2002], *lv denied* 98 NY2d 616 [2002]). Indeed, there is a "sound and substantial basis in the record for the . . . [c]ourt's determination without consideration of [those notes]" (*Matter of Tercjak v Tercjak*, 49 AD3d 772, 773 [2d Dept 2008], *lv denied* 10 NY3d 716 [2008]; *see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

585

CA 20-01454

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

KMART PLAZA BELLFLOWER, CA. LIMITED PARTNERSHIP,
PLAINTIFF-RESPONDENT,

V ORDER

KAY LINK CORP., AMIN ALI AND NADIA ISMAIL,
DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (STEVEN A. LUCIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (RAUL E. MARTINEZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 9, 2020. The order granted the motion of plaintiff for summary judgment dismissing the counterclaims of defendants.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

586

CA 20-01003

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

CHARLES BEST, PLAINTIFF-RESPONDENT,

V ORDER

DCG DEVELOPMENT GROUP, LLC, ET AL., DEFENDANTS,
WM. J. KELLER & SONS CONSTRUCTION CORP. AND
DELSIGNORE BLACKTOP PAVING, INC.,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANT-APPELLANT DELSIGNORE BLACKTOP PAVING, INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT WM. J. KELLER & SONS CONSTRUCTION CORP.

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

Appeals from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered July 13, 2020. The order, among other things, granted plaintiff's motion for leave to amend the complaint to add Wm. J. Keller & Sons Construction Corp. and Delsignore Blacktop Paving, Inc. as defendants.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

588

CA 20-00999

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

CYNTHIA BROWN AND ANDREW P. BROWN,
PLAINTIFFS-RESPONDENTS,

V ORDER

ANNE T. VENTURA AND GARY M. VENTURA,
DEFENDANTS-APPELLANTS.

MICHAEL J. ROULAN, GENEVA, FOR DEFENDANTS-APPELLANTS.

REFERMAT HURWITZ & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), dated April 28, 2020. The order and judgment, among other things, granted plaintiffs' motion for summary judgment and denied in part defendants' cross motion for summary judgment.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

593

KA 18-01633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICKEY T. HEFFNER, JR., DEFENDANT-APPELLANT.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered March 22, 2018. The judgment convicted defendant upon a nonjury verdict of attempted rape in the first degree and criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury trial of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and criminal sexual act in the first degree (§ 130.50 [1]). We affirm. Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved because he did not renew his motion for a trial order of dismissal at the close of his case (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]).

We reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict convicting defendant of attempted rape in the first degree and criminal sexual act in the first degree is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Nicholas*, 130 AD3d 1314, 1315-1316 [3d Dept 2015]). We reject defendant's contention that the victim's trial testimony was incredible as a matter of law (*see People v Lostumbo*, 182 AD3d 1007, 1008 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Her testimony merely "presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]), and we see no reason to disturb County Court's credibility determinations.

Defendant contends that the court abused its discretion in prohibiting him from cross-examining the victim concerning alleged prior false allegations of sexual abuse against another family member. We reject that contention inasmuch as there is insufficient proof to establish that the prior allegations "were false or suggestive of a pattern that casts doubt on the validity of, or bore a significant probative relation to, the instant charges" (*People v McKnight*, 55 AD3d 1315, 1316 [4th Dept 2008], *lv denied* 11 NY3d 927 [2009] [internal quotation marks omitted]; *see People v Hill*, 17 AD3d 1081, 1082 [4th Dept 2005], *lv denied* 5 NY3d 806 [2005]).

Finally, we have considered defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

595

KA 19-01169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SMYRE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 18, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]) and burglary in the first degree (§ 140.30 [1]). We reject defendant's contention that Supreme Court erred in refusing to admit in evidence a statement of a codefendant as a declaration against penal interest. The portions of the codefendant's statement regarding defendant's involvement in the crime were not against the codefendant's penal interest (*see People v Ennis*, 11 NY3d 403, 412-413 [2008], *cert denied* 556 US 1240 [2009]; *People v Arias*, 243 AD2d 309, 309 [1st Dept 1997], *lv denied* 91 NY2d 1004 [1998]; *see generally People v Brensic*, 70 NY2d 9, 16 [1987]). Moreover, there was no showing that the codefendant's statement is reliable (*see Ennis*, 11 NY3d at 413; *People v Roberts*, 288 AD2d 403, 403-404 [2d Dept 2001], *lv denied* 97 NY2d 760 [2002]; *see generally People v Shabazz*, 22 NY3d 896, 898 [2013]). Inasmuch as "the statement was properly excluded as inadmissible hearsay, the defendant's contention that his constitutional right to present a defense was violated is without merit" (*People v Simmons*, 84 AD3d 1120, 1121 [2d Dept 2011], *lv denied* 18 NY3d 928 [2012]; *see generally People v Jones*, 129 AD3d 477, 477-478 [1st Dept 2015], *lv denied* 26 NY3d 931 [2015]).

We reject defendant's further contention that the court erred in denying his *Batson* challenge with respect to two prospective jurors. The People gave race-neutral reasons for the peremptory challenges,

and defendant did not meet his ultimate burden of establishing that those reasons were pretextual (*see People v Switts*, 148 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Johnson*, 38 AD3d 1327, 1328 [4th Dept 2007], *lv denied* 9 NY3d 866 [2007]). "[T]he court was in the best position to observe the demeanor of the prospective juror[s] and the prosecutor, and its [implicit] determination that the prosecutor's explanation[s were] race-neutral and not pretextual is entitled to great deference" (*People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006], *lv denied* 9 NY3d 1032 [2008] [internal quotation marks omitted]), and we see no reason to disturb that determination.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and affording great deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

597

KA 19-01170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS SANTIAGO, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 31, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and harassment in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) under count one of the indictment to criminal possession of a firearm (§ 265.01-b) and by vacating the sentence imposed on count one of the indictment and imposing an indeterminate sentence of imprisonment of 1⅓ to 4 years on that count, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [3]), defendant contends that the evidence is legally insufficient to establish that the firearm recovered by the police was loaded. Although defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant. The indictment, inter alia, charged defendant with CPW in the second degree on the ground that he possessed a loaded firearm on a certain date (*see* Penal Law § 265.03 [3]). At trial, there was no evidence that the firearm was loaded on that date. To the contrary, the victim testified that, on the date in question, defendant put the firearm to her head and pulled the trigger twice, but it did not fire. Because the People presented no direct or circumstantial evidence that the firearm was loaded, we conclude that

the evidence is legally insufficient to support the conviction for CPW in the second degree (*see People v Smith*, 155 AD2d 704, 705 [2d Dept 1989], *lv denied* 75 NY2d 776 [1989]; *cf. People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). We further conclude, however, that the evidence is legally sufficient to support a conviction of the lesser included offense of criminal possession of a firearm, a class E felony (§ 265.01-b), and we therefore modify the judgment accordingly. Because defendant has already served the maximum term of imprisonment permitted for a class E felony, there is no need to remit the matter to Supreme Court for resentencing on that count (*see People v McKinney*, 91 AD3d 1300, 1300 [4th Dept 2012]). Instead, in the interest of judicial economy, we further modify the judgment by vacating the sentence imposed on count one and by imposing the maximum allowed for a class E felony, i.e., an indeterminate term of imprisonment of 1⅓ to 4 years (*see id.* at 1300-1301). Contrary to defendant's further contention, viewing the evidence in light of the elements of the lesser included offense of criminal possession of a firearm (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that a verdict convicting defendant of that crime would not be against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Barrett*, 188 AD3d 1736, 1738 [4th Dept 2020]).

Defendant next contends that the court erred in failing to charge the jury concerning accomplice testimony (*see generally* CPL 60.22). Defendant failed to preserve that contention because he did not request such a charge or object to the charge as given (*see People v Lipton*, 54 NY2d 340, 351 [1981]), and we decline to exercise our power to review it in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that his counsel's failure to make such a request denied him effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case in their totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Although defendant contends that he was denied a fair trial as a result of prosecutorial misconduct during summation, he failed to object to each instance of alleged impropriety that he now raises on appeal, and thus he failed in part to preserve his contention for our review (*see People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). In any event, with respect to the alleged instances of misconduct, both preserved and unpreserved, we conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*id.*).

In light of our determination, we need not consider defendant's challenge to the severity of his sentence.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

600

CA 20-00647

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

MICHAEL CRESPO, PLAINTIFF-APPELLANT,

V ORDER

JFD HOLDINGS, LP, DEFENDANT-RESPONDENT.

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCGIVNEY, KLUGER, CLARK & INTOCCIA, P.C., SYRACUSE (LEIGH A. LIEBERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 16, 2020. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

606

CA 20-01008

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

MICHELLE THOMPSON, PLAINTIFF-APPELLANT,

V ORDER

ONE GENNY, LLC, VILLAGE STATION, LLC, AND
VILLAGE OF NEW HARTFORD, DEFENDANTS-RESPONDENTS.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANT-RESPONDENT ONE GENNY, LLC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DEVON M. CONROY OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE STATION, LLC.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (MARGARET J. FOWLER OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF NEW HARTFORD.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 8, 2020. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

612

KA 19-01371

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LOIRMUS DESIUS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered March 26, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

617

CA 21-00068

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF GRAY MEDIA GROUP, INC.,
PETITIONER-RESPONDENT,

V ORDER

CITY OF WATERTOWN AND JEFFREY M. SMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF WATERTOWN, RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BALLARD SPAHR, LLP, NEW YORK CITY (JOSEPH SLAUGHTER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 18, 2020 in a CPLR article 78 proceeding. The judgment granted the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 9 and 10, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

618

CA 20-00936

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND DEJOSEPH, JJ.

DEBORAH IAFALLO, PLAINTIFF-RESPONDENT,

V ORDER

CHELSEA M. SOMMER, RAY ROMENTAL,
DEFENDANTS-APPELLANTS,
ROBERT W. HENDRIX, FRANCES E. GALARZA,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARK A. FORDEN OF COUNSEL), FOR DEFENDANT-APPELLANT CHELSEA M. SOMMER.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT RAY ROMENTAL.

CELLINO LAW, LLP, BUFFALO (JOHN W. LOONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FRANCES E. GALARZA AND ROBERT W. HENDRIX.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 16, 2020. The order, insofar as appealed from, denied the motions of defendants Chelsea M. Sommer and Ray Romental for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 27, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

621.1

KAH 20-01420

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
STEFEN R. SHORT, ESQ., ON BEHALF OF JOHN FRATESCHI,
ALBERT JACKSON, THOMAS JACKSON, RICARDO LOPEZ
AND MICHAEL YANCY, PETITIONER-APPELLANT,

V ORDER

WILLIAM FENNESSY, SUPERINTENDENT, MID-STATE
CORRECTIONAL FACILITY, PATRICK REARDON,
SUPERINTENDENT, MARCY CORRECTIONAL FACILITY,
AND ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

THE LEGAL AID SOCIETY PRISONERS' RIGHTS PROJECT, NEW YORK CITY (STEFEN R. SHORT OF COUNSEL), AND KASOWITZ BENSON TORRES LLP, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (David A. Murad, J.), entered May 11, 2020 in a habeas corpus proceeding. The judgment granted the motion of respondents to dismiss the petition and dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 26 and 30, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

631

CA 20-01521

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

PATRICIA LUDWIG, PLAINTIFF-APPELLANT,

V ORDER

CORNERSTONE COMMUNITY FEDERAL CREDIT UNION
AND BROCK HEITZENRATER, DOING BUSINESS AS
BH LAND & SNOW, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF ROBERT BERKUN, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LITCHFIELD CAVO, LLP, NEW YORK CITY (JUSTIN T. SHAIN OF COUNSEL), FOR DEFENDANT-RESPONDENT CORNERSTONE COMMUNITY FEDERAL CREDIT UNION.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR DEFENDANT-RESPONDENT BROCK HEITZENRATER, DOING BUSINESS AS BH LAND & SNOW.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered May 7, 2020. The order granted the motions of defendants for summary judgment dismissing the amended complaint.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

635

CA 20-01268

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

KATHLEEN QUINN-JACOBS AND DAVID QUINN-JACOBS,
PLAINTIFFS-APPELLANTS,

V ORDER

ROSS MOQUIN, M.D., ET AL., DEFENDANTS,
AND CROUSE HOSPITAL, DEFENDANT-RESPONDENT.

EDELMAN & EDELMAN, P.C., NEW YORK CITY (DAVID M. SCHULLER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), dated September 1, 2020. The amended order, insofar as appealed from, granted in part the motion of defendant Crouse Hospital for summary judgment and denied the cross motion of plaintiffs for summary judgment.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

637

CA 20-00489

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, AND WINSLOW, JJ.

DOUGLAS A. CORNELIUS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SUSAN CORNELIUS, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

GORDON TUSSING, D.O., DEFENDANT-APPELLANT, AND KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL MEDICAL CENTER, DEFENDANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CRAIG R. WATSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order and judgment (one paper) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 4, 2020. The order and judgment granted the motion of defendant Kaleida Health, doing business as Buffalo General Medical Center, for summary judgment and dismissed the complaint and all cross claims against that defendant.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

639

CA 20-01064

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

ERIC DIETZ, PLAINTIFF-RESPONDENT,

V ORDER

SUNBELT BUSINESS BROKERS OF WESTERN
NEW YORK, INC., CALVIN LAWSON, LIDIA COUZO,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LEROI C. JOHNSON, BUFFALO, FOR DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES R. O'CONNOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 30, 2020. The judgment, among other things, awarded plaintiff $32,000 against defendants-appellants.

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

926

KA 18-00530

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN LIGGINS, ALSO KNOWN AS "AGE," DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Matthew J. Doran, A.J.), rendered September 12, 2017. The judgment convicted defendant upon a jury verdict of, inter alia, robbery in the first degree (two counts).

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

Memorandum: In this prosecution arising from a shooting that took place in connection with an attempt to collect on a drug debt, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [2], [3]). We affirm.

Defendant contends that, for multiple reasons, County Court erred in permitting the People to introduce a wiretap recording of a phone call that he made to an unknown female interlocutor. During that call, defendant said that he had seen one of the People's witnesses on her way to "meet the DA" and that he "could have kidnapped her right there, . . . but there were too many cops" in the area, although he would "definitely . . . have that opportunity [again]." We are unable to review defendant's contention that the court erred in refusing to suppress the recording due to deficiencies in the eavesdropping warrant because the application for the warrant is not part of the record on appeal, and defendant therefore failed to meet his burden of presenting a sufficient factual record (*see People v Hickey*, 284 AD2d 929, 930 [4th Dept 2001], *lv denied* 97 NY2d 656 [2001]). We reject defendant's further contentions that the court erred in admitting the recording because it did not establish his consciousness of guilt and because, in any event, it was more prejudicial than probative. Although "evidence of consciousness of guilt . . . has limited probative value . . . , its probative weight is highly dependent upon the facts of each particular case" (*People v Cintron*, 95 NY2d 329,

332-333 [2000]). Here, defendant's statements on the recording were probative of his consciousness of guilt inasmuch as they suggested that he intended to stop a witness from testifying against him and, moreover, the court alleviated any undue prejudice by giving an adequate limiting instruction, which the jury is presumed to have followed (*see People v Wallace*, 59 AD3d 1069, 1070 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]).

Defendant "made only a general motion for a trial order of dismissal, and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence" (*People v Alejandro*, 60 AD3d 1381, 1382 [4th Dept 2009], *lv denied* 12 NY3d 850 [2009]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject defendant's contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant expressly consented to the annotations on the verdict sheet and thus waived his present contention that the verdict sheet was improperly annotated (*see* CPL 310.20 [2]; *People v Brown*, 90 NY2d 872, 874 [1997]; *People v Cipollina*, 94 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]). Additionally, defendant's contention that the People improperly failed to seek an advance ruling concerning the admissibility of evidence of defendant's involvement in a drug transaction is not preserved for our review (*see People v Strauss*, 147 AD3d 1426, 1426 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017], *reconsideration denied* 30 NY3d 953 [2017]). In any event, "the court has discretion to admit evidence despite the failure of the People to provide advance notice of their intent to present such evidence . . . , particularly where," as here, "the defendant was aware of the evidence" (*People v MacLean*, 48 AD3d 1215, 1215 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

931

KA 19-01733

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN STAFFORD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered May 31, 2018. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]). Initially, we note that defendant's contention that his guilty plea was not voluntarily, knowingly, and intelligently entered survives his purported waiver of the right to appeal (*see People v McKay*, 5 AD3d 1040, 1041 [4th Dept 2004], *lv denied* 2 NY3d 803 [2004]). Insofar as defendant contends that his plea was not voluntarily, knowingly, and intelligently entered because County Court failed to conduct a sufficient inquiry into whether he possessed the requisite intent to commit the offense, his contention is preserved for our review by his motion to withdraw his plea. Nevertheless, that contention lacks merit. Even assuming, arguendo, that defendant's initial statement regarding his inability to remember details of the incident "cast[] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the plea" (*People v Hess*, 46 AD3d 1407, 1407 [4th Dept 2007], *lv denied* 10 NY3d 841 [2008] [internal quotation marks omitted]; *see People v Lopez*, 71 NY2d 662, 666 [1988]), defendant unequivocally affirmed upon further questioning by the court that he possessed the requisite intent (*see generally Lopez*, 71 NY2d at 666; *People v Burroughs*, 106 AD3d 1512, 1512 [4th Dept 2013]). Furthermore, insofar as defendant contends that his plea was not voluntarily, knowingly, and intelligently entered because the court did not address a possible intoxication defense, his contention is unpreserved for our review because he failed to move to withdraw his guilty plea or to vacate the judgment of conviction on that basis

(*see People v Bender*, 270 AD2d 924, 925 [4th Dept 2000], *lv denied* 95 NY2d 832 [2000]). Moreover, defendant's contention does not fall within the rare exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666).

Defendant's contention that the court abused its discretion in denying his motion to withdraw the plea also survives his purported waiver of the right to appeal (*see People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]). Nevertheless, we reject that contention. "The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court" (*People v Smith*, 122 AD3d 1300, 1301-1302 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015] [internal quotation marks omitted]). Furthermore, "[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his [or her] contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927 [1974]). Here, the record establishes that defendant was afforded such an opportunity inasmuch as the court adjourned sentencing for more than two months to allow defendant to retain new counsel, file a formal motion, and argue that motion in court.

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

941

CA 19-01942

PRESENT: CENTRA, J.P., NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KEVIN M. BERNSTEIN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSHUA M. TALLENT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 20, 2019 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the petition insofar as it sought to annul those parts of the determinations imposing condition 6 of the Alabama-Telegraph permits and condition 7 of the Huntley-Lockport permits, and as modified the judgment is affirmed without costs.

Memorandum: This proceeding concerns three projects undertaken by petitioner to repair and upgrade its power equipment. The three projects are known as the Alabama-Telegraph project, the South Dow-Poland project, and the Huntley-Lockport project. For each project, petitioner applied to respondent for both a freshwater wetland permit under Environmental Conservation Law (ECL) article 24 and a corresponding water quality certification (WQC) under 33 USC § 1341 (collectively, permits).

Respondent granted the requested permits, but it conditioned them on petitioner's undertaking of a comprehensive post-construction program to monitor and suppress the spread of multiple invasive plant species at the project sites. Insofar as relevant here, the Alabama-Telegraph and Huntley-Lockport permits provided that petitioner would be "compliant" with the invasive-species mitigation conditions only if there was no net increase in certain invasive plant species at the project sites after five growing seasons. In other words, the

Alabama-Telegraph and Huntley-Lockport permits obligated petitioner to discover and eliminate any net increase in designated invasive plants at the project sites for five years after construction had ended, irrespective of whether that increase was in any way attributable to petitioner or its construction activities.

Petitioner then commenced this CPLR article 78 proceeding to, in effect, annul those parts of respondent's determinations imposing the invasive-species mitigation conditions. As relevant here, petitioner argued that respondent lacked authority to condition the permits on invasive-species mitigation of any kind. Even if respondent had such authority in the abstract, petitioner continued, the specific invasive-species mitigation conditions in the subject permits were arbitrary and capricious because they made petitioner responsible for controlling invasive-species growth that it had no role in causing. Supreme Court summarily dismissed the petition on the merits. Petitioner now appeals.

Preliminarily, we agree with respondent that the petition is time-barred insofar as it challenges any aspect of the determination regarding the South Dow-Poland project (*see* ECL 24-0705 [6]). The balance of our analysis therefore concerns only the Alabama-Telegraph and Huntley-Lockport projects.

Contrary to petitioner's contention, respondent was authorized to require some form of invasive-species mitigation as a condition of a freshwater wetland permit under ECL article 24. The governing statutory scheme authorizes the issuance of a freshwater wetland permit subject to "conditions or limitations designed to carry out the public policy set forth in this article" (ECL 24-0705 [4]), and the "public policy" of ECL article 24 is to, inter alia, "preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands" (ECL 24-0103). Requiring the mitigation of invasive species plainly advances the public policy of ECL 24-0103 and is thus permitted by ECL 24-0705 (4) (*see generally Matter of Town of Henrietta v Department of Envtl. Conservation of State of N.Y.*, 76 AD2d 215, 222-223 [4th Dept 1980]). Petitioner's reliance on *Matter of While You Wait Photo Corp. v Department of Consumer Affairs of City of N.Y.* (87 AD2d 46 [1st Dept 1982], *appeal dismissed* 57 NY2d 957 [1982]) is unavailing because, unlike here, the condition imposed in that case was directed at policy concerns outside the jurisdiction of the regulating agency.

Contrary to petitioner's further contention, respondent was authorized to require some form of invasive-species mitigation as a condition of a WQC. While petitioner correctly notes that respondent may not *deny* a WQC application in its entirety based on factors outside the "water quality standards set forth by [6 NYCRR parts 701 to 704]" (*Matter of Niagara Mohawk Power Corp. v New York State Dept. of Envtl. Conservation*, 82 NY2d 191, 194 [1993], *cert denied* 511 US 1141 [1994]), respondent may *grant* a WQC application subject to conditions that are reasonably "necessary to ensure [the] permittees'

compliance with [parts 701 to 704]" (*Matter of Port of Oswego Auth. v Grannis*, 70 AD3d 1101, 1103 [3d Dept 2010], *lv denied* 14 NY3d 714 [2010]; *see* 33 USC § 1341 [d]; *see generally Niagara Mohawk Power Corp.*, 82 NY2d at 200). As the Third Department held in *Port of Oswego Auth.*, an invasive-species mitigation condition is reasonably necessary to ensure compliance with, at a minimum, the part 703 regulation that prohibits the introduction of " 'other deleterious substances' [in] amounts that will . . . 'impair the waters for their best usages' " (70 AD3d at 1104, quoting 6 NYCRR 703.2).

We agree with petitioner, however, that the particular invasive-species mitigation conditions that respondent attached to the Alabama-Telegraph and Huntley-Lockport permits are arbitrary and capricious. It is undisputed that the project sites are already infested with multiple invasive plant species, and it is likewise undisputed that those invasive species can be propagated by factors wholly beyond petitioner's control, such as birds, wind, and all-terrain vehicles. Indeed, respondent has never denied that some spread of invasive plants at the project sites is inevitable regardless of any human activities. Thus, by obligating petitioner to suppress any net increase of certain invasive species at the project sites for a five-year period, irrespective of petitioner's role in creating or exacerbating such growth, respondent is effectively requiring petitioner to do something impossible. As we held under materially indistinguishable circumstances with respect to condition 18 in *Town of Henrietta* (76 AD2d at 225), such a requirement is quintessentially irrational and arbitrary. We therefore modify the judgment accordingly.

Petitioner's remaining contentions are academic in light of our determination.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

947

CA 19-02304

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

ROBERT W. POKORSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FDA LOGISTICS, LLC AND KELMIC HOLDINGS, LLC,
DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RAMOS & RAMOS, BUFFALO (DEAN P. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 15, 2019. The order granted plaintiff's motion to preclude defendants from having plaintiff examined by a neuropsychologist.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the motion is denied.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on accumulated snow and ice on defendants' property. Defendants served plaintiff with a notice of physical examination pursuant to CPLR 3121 requiring plaintiff to undergo a neuropsychological examination (NPE), and plaintiff moved by order to show cause for an order precluding defendants from obtaining the NPE on the ground that the NPE would be cumulative of the other neurological examinations plaintiff was required to undergo. Supreme Court granted the motion, and defendants appeal.

Although discovery determinations generally rest within the sound discretion of the trial court (*see e.g. Mosey v County of Erie*, 148 AD3d 1572, 1573 [4th Dept 2017]; *McCarter v Woods*, 106 AD3d 1540, 1541 [4th Dept 2013]), here, we substitute our discretion for that of the court and conclude that the motion should be denied (*see generally Hawe v Delmar*, 148 AD3d 1788, 1789 [4th Dept 2017]; *Daniels v Rumsey*, 111 AD3d 1408, 1409 [4th Dept 2013]). CPLR 3101 (a) requires the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Following the commencement of an action, if a plaintiff's mental or physical condition is in controversy, the defendant may require the plaintiff to submit to a

mental or physical examination pursuant to CPLR 3121. There is no restriction in the statute limiting the number of examinations to which a plaintiff may be subjected; however, a defendant seeking a further examination must demonstrate the necessity for it (*see Carrington v Truck-Rite Dist. Sys. Corp.*, 103 AD3d 606, 607 [2d Dept 2013]; *Futersak v Brinen*, 265 AD2d 452, 452 [2d Dept 1999]).

Under the circumstances of this case, we agree with defendants that the preclusion order sought by plaintiff is not warranted inasmuch as the NPE is material and necessary to defend against plaintiff's claims that he sustained head injuries and cognitive impairment (*see generally Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011]). Here, plaintiff placed his mental and physical condition in controversy by alleging in the verified complaint, as amplified by the verified bills of particulars, that he injured, inter alia, his head, neck, spine, left wrist and left elbow and suffered "emotional and psychological pain . . . with related mental anguish, stress, and anxiety" as a result of the accident. Furthermore, defendants' submissions in opposition to the motion established, inter alia, that plaintiff's neurologist and psychologist had both ordered neuropsychological evaluations of plaintiff that had not been conducted, and that the requested NPE differs significantly from neurologic and neurosurgical examinations. In particular, defendants submitted an affidavit from the neuropsychologist who would conduct the NPE, who averred that he would utilize a different methodology, would administer a different battery of psychological tests, and would complete more detailed cognitive testing to determine the existence of any mood or behavioral deficits resulting from plaintiff's alleged injuries, whereas the testing done by neurologists and neurosurgeons generally focuses on physical abnormalities and physical manifestations of those abnormalities.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

948

CA 19-02089

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

BARILLA AMERICA NY, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOULTER INDUSTRIAL CONTRACTORS, INC.,
DEFENDANT-APPELLANT.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (ELIZABETH K. OGNENOVSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Matthew A. Rosenbaum, J.), entered November 12, 2019. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff, Barilla America NY, Inc. (Barilla), is the owner of a pasta production plant in Avon, New York. Barilla entered into an oral agreement (agreement) with defendant, Boulter Industrial Contractors, Inc. (Boulter), whereby Boulter would provide millwrights to perform preventative maintenance on Barilla's equipment during its annual shutdown of the plant. The millwrights performed maintenance on two of Barilla's four pasta production lines. Shortly after the machines were placed back into production, Barilla discovered that the dry pasta produced on those two lines was contaminated with metal particles. The metal contamination resulted in the Food and Drug Administration directing a recall of Barilla pasta produced during the relevant time period. Barilla commenced the instant action asserting, inter alia, breach of contract as a first cause of action and seeking damages as a result of the contamination. Boulter answered and thereafter moved for summary judgment dismissing the complaint. Supreme Court, inter alia, denied the motion in part with respect to the first cause of action. Boulter appeals, and we affirm.

Boulter contends that it established as a matter of law that it did not breach the agreement because it satisfied its sole obligation thereunder when it supplied Barilla with qualified millwright laborers and, thus, that the court erred insofar as it denied the motion. We

reject that contention. While Boulter submitted in support of its motion, inter alia, the deposition testimony of a Barilla employee who admitted that Boulter consistently provided "qualified" millwrights, Boulter's own submissions on the motion raised triable issues of fact whether the millwrights were qualified inasmuch as those submissions established that the millwrights' work resulted in metal fragments in Barilla products (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, Boulter's own submissions raised triable issues of fact as to the scope of Boulter's obligation under the agreement (*see generally id.*).

Boulter further contends that the court erred insofar as it denied the motion because the millwrights were special employees of Barilla, which thus assumed sole liability for any negligence attributable to them (*see generally Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-560 [1991]; *Moore v Newport Quarries, Inc.*, 285 App Div 640, 642 [4th Dept 1955]). We reject that contention as well. A person's status as a special employee is generally a question of fact and may be determined as a matter of law "[o]nly where the undisputed facts establish surrender of complete control by the general employer and assumption of control by the special employer" (*Ozzimo v H.E.S., Inc.*, 249 AD2d 912, 913 [4th Dept 1998]; *see Thompson*, 78 NY2d at 557-558). Here, Boulter's own submissions in support of its motion, which included the deposition testimony of employees of both Boulter and Barilla and Barilla's answers to interrogatories, raised questions of fact as to which party provided the supervision and direction of the work performed by the millwrights (*see generally Zuckerman*, 49 NY2d at 562).

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

962

CA 19-02038

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

VERNA BIEGER, AS EXECUTRIX OF THE ESTATE OF
NELSON J. BIEGER, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH SYSTEM, INC., DOING BUSINESS AS
BUFFALO GENERAL HOSPITAL, PATRICK DRUMMOND, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 4, 2019. The order, among other things, denied those parts of the motion of defendants Kaleida Health System, Inc., doing business as Buffalo General Hospital, Patrick Drummond, M.D. and Jessica L. Patten, R.N., seeking summary judgment dismissing the complaint and all cross claims against defendants-appellants.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion for summary judgment dismissing the complaint and any cross claims against defendant Patrick Drummond, M.D., and for summary judgment dismissing the complaint and any cross claims against defendant Kaleida Health System, Inc., doing business as Buffalo General Hospital, insofar as the complaint asserts a claim of vicarious liability against that defendant arising from the conduct of Patrick Drummond, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages for injuries that plaintiff's decedent sustained after his discharge from defendant Kaleida Health System, Inc., doing business as Buffalo General Hospital (Kaleida Health). Decedent's care was managed by attending physician Anne B. Curtis, M.D. and first-year resident Patrick Drummond, M.D., both of whom are defendants in this action, as well as cardiology fellow Dr. Leon Varjabedian and third-year senior resident Dr. Shaun Bath, neither of whom is a party to this action. As relevant on appeal, plaintiff's primary claim of negligence involved the decision to

discontinue one of decedent's medications, Plavix, at the time of his discharge, which, according to plaintiff, caused him to suffer a fatal stroke several days later. Kaleida Health and Dr. Drummond (collectively, defendants), among others, moved for, inter alia, summary judgment dismissing the complaint and any cross claims against them, contending that they did not deviate from the applicable standard of care and that there was no proximate cause between their treatment of decedent and the injuries alleged; that Dr. Drummond could not be liable because he did not exercise any independent medical judgment and instead properly followed the direction of his supervisors to discontinue the medication at discharge; and that Kaleida Health was not vicariously liable for the conduct of Drs. Drummond, Bath, Varjabedian, or Curtis. Supreme Court denied that part of the motion with respect to Kaleida Health and Dr. Drummond, and defendants appeal.

We agree with defendants that the court erred in denying the motion insofar as it sought summary judgment dismissing the complaint and any cross claims against Dr. Drummond, and we therefore modify the order accordingly. Defendants met their initial burden on the motion by presenting the affidavit of an expert who opined that, as a first-year resident, Dr. Drummond could not and did not make any medical decisions independently and that he properly wrote the discharge instruction to discontinue the medication only after discussing and confirming that decision with the appropriate supervisors, a practice that complied with the applicable standard of care (*see Hatch v St. Joseph's Hosp. Health Ctr.*, 174 AD3d 1404, 1405 [4th Dept 2019]; *Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012]). Defendants also submitted the deposition testimony of Drs. Drummond and Bath, which established that Dr. Drummond consulted with Dr. Bath prior to decedent's discharge and confirmed with him that the decision had been made to discontinue the medication. Plaintiff failed to raise a triable issue of fact in opposition (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]). Based on that conclusion, we likewise agree with defendants that the court erred in denying that part of the motion seeking summary judgment dismissing the complaint and any cross claims against Kaleida Health insofar as the complaint asserts a claim of vicarious liability based on the alleged conduct of Dr. Drummond (*see generally Wulbrecht*, 92 AD3d at 1214), and we further modify the order accordingly.

Contrary to their contention, however, defendants failed to meet their initial burden of establishing that Kaleida Health could not be held vicariously liable for the alleged conduct of Drs. Bath and Varjabedian. Although defendants submitted the affidavit of an expert who opined that Drs. Bath and Varjabedian did not exercise independent medical judgment and complied with the applicable standard of care by consulting and confirming the discharge instructions with Dr. Curtis (*see generally Hatch*, 174 AD3d at 1405; *Poter v Adams*, 104 AD3d 925, 927 [2d Dept 2013]), their other submissions raised an issue of fact whether Drs. Bath and Varjabedian did, in fact, appropriately confirm and discuss the discharge instructions. Further, although defendants met their initial burden of establishing that Kaleida Health could not

be held liable for the conduct of Dr. Curtis because she was not an employee of Kaleida Health, plaintiff, in opposition to the motion, raised a triable issue of fact whether Kaleida Health could nevertheless be vicariously liable under a theory of ostensible agency (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79-81 [1986]; *Clair v St. James Mercy Hosp.*, 298 AD2d 943, 943 [4th Dept 2002]; *Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881 [4th Dept 1997]).

We have reviewed defendants' remaining contentions and conclude that none warrants reversal or further modification of the order.

All concur except BANNISTER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm the order inasmuch as I conclude that Supreme Court properly denied the motion of Kaleida Health System, Inc., doing business as Buffalo General Hospital (Kaleida Health), and Patrick Drummond, M.D. (collectively, defendants) insofar as it sought summary judgment dismissing the complaint and any cross claims against them. I agree with my colleagues that defendants met their initial burden on the motion by submitting the affidavit of an expert who opined that Dr. Drummond did not make any independent medical decisions and that he wrote the discharge instruction to discontinue Plavix only after discussing the decision with a more senior resident physician. In my view, however, plaintiff raised several triable issues of fact in opposition sufficient to defeat the motion.

It is undisputed that defendant Anne B. Curtis, M.D. was the attending physician in charge of supervising the residents who were part of her "Cardiac B" team, including Dr. Drummond. Dr. Curtis explained in her deposition testimony that Dr. Drummond's responsibilities included preparing the patients' discharge instructions. Although Dr. Drummond asked a more senior resident physician whether the discharge instructions for decedent should include the continued use of Plavix, Dr. Drummond never consulted Dr. Curtis, who was the physician who also signed off on the document. Thus, in my view, plaintiff demonstrated issues of fact whether Dr. Drummond properly confirmed the decision to discontinue the Plavix with the appropriate supervising physician (*see generally Petty v Pilgrim*, 22 AD3d 478, 479 [2d Dept 2005])

Moreover, the record reflects that Dr. Drummond was factually and medically aware that the direction to discontinue Plavix was not medically advisable. Indeed, Dr. Drummond acknowledged in his deposition testimony that he was aware that decedent was at a high risk for future strokes without Plavix, as evidenced by the fact that he took steps to discuss the discontinuance of Plavix with a more senior resident. Thus, in my view, plaintiff also raised an issue of fact whether Dr. Drummond actually exercised independent judgment when he questioned the propriety of the discharge instructions (*see Williams v Moscati*, 85 AD3d 1608, 1608-1609 [4th Dept 2011]).

Plaintiff also submitted the deposition testimony of various physicians, including Dr. Curtis, who stated that Plavix should not

have been discontinued upon the decedent's discharge. Plaintiff's expert opined that the failure to continue Plavix after discharge was a "serious[] and indefensible" deviation from the standard of care and that the decedent should never have been discharged without either anti-coagulant or anti-platelet medication. Thus, plaintiff raised triable issues of fact whether the order to discontinue the Plavix "so greatly deviate[d] from normal practice" that Dr. Drummond, a medical doctor, was obligated to intervene (*Lorenzo v Kahn*, 74 AD3d 1711, 1713 [4th Dept 2010]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1030

CA 19-01515

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

JULIE E. PASEK, INDIVIDUALLY AND AS POWER OF ATTORNEY FOR JAMES G. PASEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., ET AL., DEFENDANTS, COLDER PRODUCTS COMPANY AND DOVER CORPORATION, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TUCKER ELLIS LLP, CLEVELAND, OHIO (LAURA KINGSLEY HONG, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HURWITZ & FINE, P.C., BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 27, 2019. The order granted the motion of defendants Colder Products Company and Dover Corporation for a protective order.

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

Memorandum: Plaintiff appeals from an order granting the motion of defendants Colder Products Company (Colder) and Dover Corporation (Dover) for a protective order striking two notices to admit. Initially, we note that Dover was subsequently awarded summary judgment dismissing the complaint and all cross claims against it, and plaintiff did not appeal from the order awarding that relief. Thus, the discovery issue on appeal is moot with respect to Dover (*see Clark C.B. v Fuller*, 59 AD3d 1030, 1031 [4th Dept 2009]).

We reject plaintiff's contention that Supreme Court abused its discretion in granting the motion with respect to Colder. Although we agree with plaintiff that the notices to admit were served more than 20 days before trial and were therefore timely (*see* CPLR 3123 [a]), both notices requested improper admissions from Colder, and the court was not required to "prune" the notices by striking some of the requests and leaving others intact (*Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 454 [1st Dept 1995]; *see Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 761 [1st Dept 1984]; *see generally Singh v G & A Mounting & Die Cutting*, 292 AD2d 516, 516 [2d Dept 2002]). "[I]n view of the underlying purpose of the notice to

admit," i.e., "to eliminate from dispute those matters about which there can be no controversy," we discern "no abuse of discretion in [the court's determination]" (*Voigt v Savarino Constr. Corp.*, 94 AD3d 1574, 1575 [4th Dept 2012] [internal quotation marks omitted]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1032

CA 19-01889

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF BRANDON D., FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

KEVIN WILSON, ACTING DIRECTOR, MENTAL HYGIENCE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered September 10, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. 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 of County Court, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

We reject petitioner's contention that the evidence is legally insufficient to establish that he is a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control [his or her] behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The Mental Hygiene Law defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that

results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]).

Petitioner contends that the evidence is legally insufficient to prove that he had a mental abnormality because he was diagnosed with sexual sadism disorder only provisionally and the remaining diagnoses of ASPD, psychopathy and various substance use disorders are insufficient to support a finding that he is predisposed to sexually offend. Viewing the evidence in the light most favorable to respondent (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence that petitioner suffers from a mental abnormality as that term is defined by the Mental Hygiene Law (*see Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609 [4th Dept 2016]). To meet the statutory definition of mental abnormality, "not only must the State establish by clear and convincing evidence the existence of a predicate 'condition, disease or disorder,' it must also link that 'condition, disease or disorder' to a person's predisposition to commit conduct constituting a sex offense and to that person's 'serious difficulty in controlling such conduct' " (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* — US —, 137 S Ct 579 [2016]).

Although petitioner's diagnoses, alone, are insufficient to support a finding of mental abnormality that would predispose a person to commit sex offenses (*see Matter of State of New York v Donald DD.*, 24 NY3d 174, 190 [2014]; *Matter of Groves v State of New York*, 124 AD3d 1213, 1214 [4th Dept 2015]), both petitioner's expert and respondent's expert also opined that petitioner exhibited psychopathic traits, and respondent's expert opined that petitioner exhibited at least five behavioral traits of sexual sadism. As a result, respondent's expert rendered a provisional diagnosis of sexual sadism disorder.

Petitioner correctly concedes that a provisional diagnosis in combination with other diagnoses can constitute legally sufficient evidence of a mental abnormality (*see Matter of State of New York v Steven M.*, 159 AD3d 1421, 1422 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]; *Matter of State of New York v Derrick B.*, 68 AD3d 1124, 1126 [2d Dept 2009]), but he contends that, inasmuch as neither expert was able to conclude to a reasonable degree of medical certainty that he actually suffered from sexual sadism, there is insufficient evidence that he suffers from a mental abnormality. We reject that contention. Inasmuch as the provisional diagnosis of sexual sadism disorder is supported by the record, we conclude that there is "sufficient evidence of petitioner's diagnosis of ASPD, along with sufficient evidence of other diagnoses and/or conditions, to sustain a finding of mental abnormality" (*Vega*, 140 AD3d at 1609; *see Matter of Gooding v State of New York*, 144 AD3d 1644, 1645 [4th Dept 2016]).

We further conclude that the determination that petitioner has such a mental abnormality is based on a fair interpretation of the evidence and, as a result, is not against the weight of the evidence (*see Matter of State of New York v Orlando T.*, 184 AD3d 1149, 1149

[4th Dept 2020]; *Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]). The court, "as the trier of fact, was in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented" (*Matter of State of New York v Gooding*, 104 AD3d 1282, 1282 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013] [internal quotation marks omitted]; *see Matter of State of New York v Scholtisek*, 145 AD3d 1603, 1605 [4th Dept 2016]), and we see "no basis to disturb [the court's] decision to credit the testimony of [respondent's] expert over that of [petitioner's] expert" (*Gooding*, 104 AD3d at 1282; *see Matter of Edward T. v State of New York*, 185 AD3d 1423, 1425 [4th Dept 2020]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1033

CA 20-00214

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

JACQUELYNE TURNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GINA ZITO, DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-APPELLANT.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered October 30, 2019. The order granted the motion of plaintiff for partial summary judgment on the issue of serious injury and refused to entertain defendant's cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained in a car accident. Plaintiff thereafter moved for partial summary judgment on the issue of serious injury, and defendant filed an untimely cross motion for summary judgment dismissing the complaint on that same issue (*see generally* Insurance Law § 5102 [d]). Supreme Court granted plaintiff's motion and refused to entertain defendant's cross motion given its untimeliness. Defendant now appeals.

With respect to plaintiff's motion, we agree with defendant that plaintiff failed to meet her initial burden of establishing, as a matter of law, that she suffered a serious injury in the subject accident (*see Savilo v Denner*, 170 AD3d 1570, 1570-1571 [4th Dept 2019]; *Aughtmon v Ward*, 133 AD3d 1270, 1271 [4th Dept 2015]). In any event, defendant raised a triable issue of fact in opposition (*see Cook v Peterson*, 137 AD3d 1594, 1596-1597 [4th Dept 2016]). The court thus erred in granting plaintiff's motion, and we modify the order accordingly.

We reject defendant's further contention, however, that the court abused its discretion in refusing to entertain her untimely cross motion (*see Wilmington Sav. Fund Socy., FSB v McKenna*, 172 AD3d 1566,

1567-1568 [3d Dept 2019]; *see generally Fahrenholz v Security Mut. Ins. Co.* [appeal No. 2], 32 AD3d 1326, 1328 [4th Dept 2006]). "While [plaintiff's] pending motion . . . for similar relief would have been a sufficient basis to consider [defendant's] untimely [cross] motion" (*Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]), the court was not obligated to do so.

Defendant's remaining contention is without merit.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1035

CA 19-02095

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

JULIE E. PASEK, INDIVIDUALLY AND AS POWER OF ATTORNEY FOR JAMES G. PASEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., ET AL., DEFENDANTS, AND COLDER PRODUCTS COMPANY, DEFENDANT-APPELLANT.

TUCKER ELLIS LLP, CLEVELAND, OHIO (LAURA KINGSLEY HONG, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HURWITZ & FINE, P.C., BUFFALO, FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 9, 2019. The order, among other things, denied in part the motion of defendant Colder Products Company seeking summary judgment.

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

Memorandum: In this action for, inter alia, strict products liability seeking damages for injuries sustained by James G. Pasek, Colder Products Company (defendant) appeals from an order that, insofar as appealed from, denied that part of its motion seeking summary judgment dismissing plaintiff's failure to warn claim against it. We affirm.

Pasek underwent mitral valve repair surgery in February 2014. Serious complications occurred during the surgery and, during the post-operative period, Pasek was placed on a ventilator and an extracorporeal membrane oxygenation system, which mechanically circulated his blood outside his body through an artificial lung utilizing a customized tubing pack that was manufactured by defendant Terumo Cardiovascular Systems Corp. (Terumo). The tubing pack included a component coupling known as the "Quick Disconnect," which was designed, manufactured, and sold by defendant to Terumo for incorporation into Terumo's customized tubing packs. The Quick Disconnect is a two-component medical-grade coupling that was a part of defendant's medical plastic couplings series and was "integrated into tubing circuits to facilitate the flow of liquid." A few days after Pasek's surgery, his condition deteriorated, and he was

emergently transported from the open heart unit to the operating room. During the transport, however, the Quick Disconnect became unintentionally disconnected, and Pasek subsequently suffered, among other things, massive blood loss, hypoxic brain injury due to a lack of oxygen, and occipital lobe damage.

Defendant contends that Supreme Court erred in denying that part of its motion with respect to the failure to warn claim against it because it established as a matter of law that it adequately warned Terumo that the Quick Disconnect could unintentionally disconnect. We reject that contention. Although "in a proper case the court can decide as a matter of law that there is no duty to warn or that the duty has been discharged as a matter of law" (*Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 65 [4th Dept 1980]), the adequacy of a warning generally is a question of fact (*see Alessandrini v Weyerhauser* Co., 207 AD2d 996, 996 [4th Dept 1994]). Here, defendant relies not on a specific warning regarding the possibility of unintentional disconnects, but instead on general and ambiguous language contained in its catalogue and other literature. The adequacy of the alleged warnings contained in defendant's catalogue and other literature, however, is not "susceptible to the drastic remedy of summary judgment" (*Beyrle v Finneron*, 199 AD2d 1022, 1022 [4th Dept 1993]; *see Rickicki v Borden Chem.*, 159 AD3d 1457, 1459 [4th Dept 2018]; *Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1187 [4th Dept 2014]).

Defendant further contends that it is entitled to summary judgment dismissing the failure to warn claim against it inasmuch as the danger in question was open and obvious and, thus, it had no duty to warn Terumo. We reject that contention. Although "[t]here is no duty to warn of an open and obvious danger of which the product user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense" (*O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 514 [2d Dept 2007]; *see Jones v W + M Automation Inc.*, 31 AD3d 1099, 1101-1102 [4th Dept 2006], *lv denied* 8 NY3d 802 [2007]), defendant failed to meet its initial burden on its motion of establishing that the potential risk that the Quick Disconnect could unintentionally disconnect is the type of danger that may be deemed open and obvious such that defendant did not have a duty to warn (*see McArdle v Navistar Intl. Corp.*, 293 AD2d 931, 933 [3d Dept 2002]).

Defendant further contends that, as a component part manufacturer whose component part was not defective, it did not have a duty to warn about the dangers arising from the Quick Disconnect's integration into Terumo's tubing pack. We similarly reject that contention. Unlike the situation in *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289 [1992]), upon which defendant relies, the product alleged to be defective here is the Quick Disconnect, which plaintiff alleges was made defective due to defendant's failure to warn Terumo that it was unsafe to use as a medical device for the flow of blood. As the manufacturer of the Quick Disconnect, defendant "ha[d] a duty to warn against latent dangers resulting from foreseeable uses of [the Quick Disconnect] . . . of which it knew or should have known" (*Liriano v*

Hobart Corp., 92 NY2d 232, 237 [1998]; *see Matter of New York City Asbestos Litig.*, 27 NY3d 765, 788 [2016]), and defendant's own submissions in support of its motion established that it knew that the Quick Disconnect was utilized by Terumo for the flow of liquid, including blood, and that blood would be flowing through the Quick Disconnect.

Defendant's further contention that it did not owe Terumo a duty to warn of the availability of an alternative product with additional safety features because Terumo was aware of its availability and decided not to incorporate it into the tubing pack is improperly raised for the first time in defendant's reply papers, and we therefore do not consider it (*see Whitley v Pieri*, 48 AD3d 1175, 1176 [4th Dept 2008]).

Finally, we have considered defendant's remaining contentions and conclude that they lack merit.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1076

CA 20-00398

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF THE FINAL ACCOUNTING OF
MARCIA J. NAJJAR, AS CO-EXECUTOR OF THE
ESTATE OF ROSAMOND M. NAJJAR, DECEASED,
RESPONDENT-APPELLANT-RESPONDENT. MEMORANDUM AND ORDER

DONNA SANZONE AND ROBERT NAJJAR,
PETITIONERS-RESPONDENTS-APPELLANTS.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT.

ADAMS LECLAIR LLP, ROCHESTER (PAUL L. LECLAIR OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a decree (denominated order) of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 25, 2019. The decree granted in part the motion of respondent for partial summary judgment, granted the cross motion of petitioners for partial summary judgment and declared that four bank accounts are assets of the estate.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by denying the cross motion, vacating the declaration, denying those parts of the motion seeking partial summary judgment dismissing the first and second causes of action and reinstating those causes of action, and granting that part of the motion seeking a declaration with respect to the Chase Bank account ending in x1702, and judgment is granted in favor of respondent as follows:

> It is ORDERED, ADJUDGED AND DECREED that respondent is entitled to 100% of the proceeds of the Chase Bank account ending in x1702,

and as modified the decree is affirmed without costs.

Memorandum: Petitioners and respondent are decedent's children, and respondent and petitioner Donna Sanzone are the co-executors of decedent's estate. Petitioners commenced the instant proceeding seeking, among other things, a compulsory accounting of decedent's estate and a declaration that certain property belonged to the estate, and they asserted, inter alia, causes of action for unjust enrichment and breach of fiduciary duty. Respondent moved for partial summary judgment seeking, inter alia, a declaration that she is entitled to

all of the proceeds of four bank accounts that she held jointly with decedent — two KeyBank accounts, one ESL Federal Credit Union account and one Chase Bank account — and the dismissal of petitioners' causes of action for unjust enrichment and breach of fiduciary duty. Petitioners cross-moved for partial summary judgment seeking a declaration that the funds in the ESL Federal Credit Union account and the two KeyBank accounts are assets of the estate. The Surrogate granted respondent's motion in part and, inter alia, dismissed the unjust enrichment and breach of fiduciary duty causes of action and denied respondent's motion with respect to the four bank accounts. The Surrogate also granted petitioners' cross motion and declared that all four bank accounts are assets of the estate. With respect to the four bank accounts, the Surrogate reasoned that respondent failed to show that she was a joint tenant with a right of survivorship pursuant to Banking Law § 675 and petitioners established those accounts were mere convenience accounts held by respondent and decedent as tenants in common. Respondent appeals and petitioners cross-appeal.

We agree with respondent on her appeal that the Surrogate erred in granting petitioners' cross motion and declaring that all four of the bank accounts are assets of the estate, and in denying that part of her motion seeking a declaration that she is entitled to the proceeds of the Chase Bank account. Under Banking Law § 675, "[w]hen two or more persons open a bank account, making a deposit of cash, securities, or other property, a presumption of joint tenancy with right of survivorship arises" (*Matter of New York Community Bank v Bank of Am., N.A.*, 169 AD3d 35, 38 [1st Dept 2019], *lv denied* 33 NY3d 908 [2019]). In order for that statutory presumption to apply, "words of survivorship must appear on the signature card or ledger that creates the bank account" (*Matter of Camarda*, 63 AD2d 837, 838 [4th Dept 1978], citing *Matter of Fenelon*, 262 NY 308 [1933] and *Matter of Coddington*, 56 AD2d 697 [3d Dept 1977]; *see Matter of Grancaric*, 91 AD3d 1104, 1105 [3d Dept 2012]; *Matter of Costantino*, 31 AD3d 1097, 1099 [4th Dept 2006]). Absent the necessary survivorship language, the statutory presumption contained in Banking Law § 675 does not apply, even if the documents creating the account provide that it is a "joint" account (*see Matter of Randall*, 176 AD2d 1219, 1219 [4th Dept 1991]; *Matter of Coon*, 148 AD2d 906, 907 [3d Dept 1989]). Here, on her motion, respondent failed to establish that the statutory presumption created under Banking Law § 675 is applicable because she failed to submit signature cards or ledgers of the accounts that included the required survivorship language.

Because respondent "could not invoke the statutory presumption, [she] had the burden of establishing that the [bank] accounts were joint tenancies or a gift entitling [her] to rights as the survivor" (*Matter of Seidel*, 134 AD2d 879, 880 [4th Dept 1987]). Respondent averred in an affidavit that decedent placed her name on the accounts with the stated intention of gifting them to her. Respondent also submitted related account documents, including bank documents for all four accounts that reference both respondent and decedent's names and include survivorship or joint tenancy language. Thus, respondent submitted evidence establishing that the four accounts were joint

accounts with right of survivorship, and the burden then shifted to petitioners.

In opposition to respondent's motion, petitioners submitted evidence with respect to the ESL Federal Credit Union account and the two KeyBank accounts; they did not oppose respondent's motion with respect to the Chase Bank account, and did not seek a declaration with respect to that account on their cross motion. Thus, we agree with respondent that the Surrogate erred in denying her motion with respect to the Chase Bank account and declaring that the account was an asset of the estate, and we therefore modify the decree accordingly.

In opposition to respondent's motion with respect to the ESL Federal Credit Union account and the two KeyBank accounts, petitioners submitted decedent's will, which left the estate to the three children. Thus, the intent of decedent, as evidenced by her will, is inconsistent with respondent's contention that the three bank accounts were gifts to respondent or joint tenancies with survivorship rights (*see Seidel*, 134 AD2d at 880). Moreover, petitioners submitted respondent's deposition testimony that those three accounts were funded solely by decedent, that one of the KeyBank accounts was used as decedent's primary checking account, and that payments out of that account were for only decedent's benefit. Further, respondent, who became joint owner of those three accounts when decedent was in her mid to late eighties, testified that she helped decedent with her banking. Therefore, we conclude that petitioners raised questions of fact whether the ESL Federal Credit Union account and the two KeyBank accounts were convenience accounts, and thus, contrary to respondent's contention, the Surrogate properly denied respondent's motion with respect to those three accounts.

We agree with respondent, however, that, inasmuch as there are questions of fact with respect to the ESL Federal Credit Union account and the two KeyBank accounts, the Surrogate erred in granting petitioners' cross motion and declaring that those three bank accounts are assets of the estate. We therefore further modify the decree accordingly.

In light of our determination that there are triable questions of fact raised with respect to the ESL Federal Credit Union account and the two KeyBank accounts, we agree with petitioners on their cross appeal that respondent did not establish that there was no unjust enrichment on her part and that she did not breach any fiduciary duty (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore further modify the decree by denying those parts of respondents' motion seeking to dismiss the causes of action for breach of fiduciary duty and unjust enrichment and reinstating those causes of action.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1133

KA 19-01365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY L. BAILEY, JR., DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered June 18, 2019. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree (four counts) and sexual abuse in the third degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of four counts of sexual abuse in the first degree (Penal Law § 130.65 [1]) and five counts of sexual abuse in the third degree (§ 130.55) involving two victims. Defendant contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the denial of his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). A failure of defense counsel to assert a meritorious statutory speedy trial claim "is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; *see People v St. Louis*, 41 AD3d 897, 898 [3d Dept 2007]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). We conclude, however, that "[t]he record on appeal is inadequate to enable us to determine whether [a CPL 30.30] motion would have been successful and whether defense counsel's failure to make that motion deprived defendant of meaningful representation" (*People v Youngs*, 101 AD3d 1589, 1589 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]; *see People v Oliver*, 24 AD3d 1305, 1305 [4th Dept 2005], *lv denied* 6 NY3d 836 [2006]; *see generally People v Henderson*, 28 NY3d 63, 66 [2016]). Defendant's contention must be raised, if at all, by way of a motion pursuant to CPL article 440 (*see Youngs*, 101 AD3d at 1589; *Oliver*, 24 AD3d at 1305).

Defendant's remaining claims of ineffective assistance of counsel are without merit. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see Caban*, 5 NY3d at 152). Defendant contends that defense counsel was ineffective in failing to cross-examine the victims using alleged prior inconsistent statements. Those statements, however, revealed only minor discrepancies with the victims' trial testimony, and they alleged additional bad acts by defendant. It thus cannot be said that there was no strategic or other legitimate explanation for defense counsel's failure to use those prior statements when cross-examining the victims (*see generally Caban*, 5 NY3d at 152). Likewise, defendant did not establish the absence of a legitimate explanation for defense counsel's failure to object to certain leading questions by the prosecutor (*see People v Robinson*, 158 AD3d 1263, 1264 [4th Dept 2018], *lv denied* 32 NY3d 1067 [2018]; *People v Pottorff*, 145 AD3d 1095, 1097-1098 [3d Dept 2016], *lv denied* 30 NY3d 1063 [2017]; *People v Washington*, 122 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]), or for defense counsel's failure to pursue an intoxication defense (*see People v Quinn*, 182 AD3d 1019, 1020 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *People v Russell*, 133 AD3d 1199, 1201 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Upon viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sentence is not unduly harsh or severe. Finally, defendant's contention that the People committed a *Rosario* violation is raised for the first time in his reply brief and is thus not properly before us (*see People v Baxtrum*, 170 AD3d 1535, 1536 [4th Dept 2019], *lv denied* 33 NY3d 1102 [2019]; *People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]; *People v Legister*, 184 AD2d 734, 735 [2d Dept 1992], *lv denied* 81 NY2d 764 [1992]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1139

CA 20-00741

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

PATRICK RAMSDEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM GEARY, DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 18, 2019. The order denied the motion of plaintiff for partial summary judgment, granted the cross motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell while installing a metal roof on a single-family home owned by defendant. Defendant purchased the home in 1998 for his daughter and her future husband, plaintiff. The parties had a verbal rent-to-own agreement that was later reduced to writing in 2009. Pursuant to that agreement, defendant's daughter and plaintiff made monthly payments to defendant consisting of the mortgage, insurance, and taxes on the property and, when the balance of the mortgage was paid in full, defendant would sign the house over to plaintiff. In 2012, defendant was notified by the homeowner's insurance company that a new roof was needed on the house, and defendant informed plaintiff of that fact. Plaintiff decided to install a metal roof on the property and purchased the materials. In October 2014, plaintiff was installing the new roof with the assistance of his brothers when he stepped on an unsecured metal roofing panel and fell to the ground below.

Supreme Court properly granted defendant's cross motion insofar as it sought summary judgment dismissing the complaint. Plaintiff does not raise any issue with respect to the dismissal of the Labor Law § 200 and common-law negligence causes of action and has therefore abandoned them (*see Gimeno v American Signature, Inc.*, 67 AD3d 1463, 1465 [4th Dept 2009], *lv dismissed* 14 NY3d 785 [2010]). With respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, defendant

established his entitlement to the benefit of the statutory homeowner's exemption from liability (*see generally Lombardi v Stout*, 80 NY2d 290, 296 [1992]). The legislature exempted "owners of one and two-family dwellings who contract for but do not direct or control the work" from the duties imposed by Labor Law §§ 240 (1) and 241 (*see Bartoo v Buell*, 87 NY2d 362, 367 [1996]; *Lombardi*, 80 NY2d at 296). Here, defendant's submissions in support of his cross motion establish that plaintiff purchased the materials, was the beneficiary of the work, and controlled when and how the work was performed. Contrary to plaintiff's contention, it is not determinative that defendant did not reside on the property inasmuch as that is not a requirement under the statute (*see Castro v Mamaes*, 51 AD3d 522, 522-523 [1st Dept 2008]). The exemption "was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes" (*Lombardi*, 80 NY2d at 296). Here, defendant established that he did not derive a commercial benefit from the property or use the property for a commercial purpose (*see Morocho v Marino Enters. Contr. Corp.*, 65 AD3d 675, 675-676 [2d Dept 2009]; *Castro*, 51 AD3d at 523; *cf. Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]). In opposition to the cross motion, plaintiff failed to raise a triable issue of fact with respect to the homeowner's exemption (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further conclude in any event that defendant established his entitlement to summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action on the ground that plaintiff was a volunteer (*see generally Stringer v Musacchia*, 11 NY3d 212, 215-216 [2008]; *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]; *Luthringer v Luthringer*, 59 AD3d 1028, 1029 [4th Dept 2009]). Defendant's submissions in support of his cross motion establish that plaintiff was not hired by defendant inasmuch as he was not paid for his work and was not fulfilling an obligation to defendant at the time of the accident (*see Luthringer*, 59 AD3d at 1029; *Fuller v Spiesz*, 53 AD3d 1093, 1094 [4th Dept 2008]). In addition, defendant's submissions establish that he did not direct or supervise the manner and method of the work, and that he would not determine whether the roof was installed satisfactorily (*see generally Stringer*, 11 NY3d at 215-216). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Any obligation that plaintiff perceived he had to install the roof was the result of the homeowner's insurance company threatening to cancel the insurance if a new roof were not installed, which in turn would, according to plaintiff and defendant's daughter, require defendant to sell the house and cause plaintiff to lose his investment. Contrary to plaintiff's contention, the new roof installation was not an obligation imposed by defendant (*cf. Thompson v Marotta*, 256 AD2d 1124, 1125 [4th Dept 1998]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1140

CA 20-00305

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

DARNELLE BRADY AND RONALDO PARKER,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF NORTH TONAWANDA, DEFENDANT-APPELLANT,
AND ANTHONY D. REGALLA, DEFENDANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 24, 2019. The judgment apportioned liability between the defendants upon a jury verdict.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 23, 2021,

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

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1144

KA 17-00128

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDYN J. SINGLETON-PRADIA, ALSO KNOWN AS
BRENDYN SINGLETON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Daniel J. Doyle, J.), rendered February 10, 2015. The appeal was held by this Court by order entered March 15, 2019, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (170 AD3d 1520 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We previously held the case, reserved decision, and remitted the matter to Supreme Court to make and state for the record a determination whether to adjudicate defendant a youthful offender (*People v Singleton-Pradia*, 170 AD3d 1520, 1521 [4th Dept 2019]), inasmuch as such a determination is required "even where the defendant . . . agrees to forgo it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501 [2013]). Upon remittal, the court declined to adjudicate defendant a youthful offender. Contrary to defendant's contention, we conclude that the court did not abuse its discretion in denying him youthful offender status (*see People v McCall*, 177 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see id.*; *cf. People v Keith B.J.*, 158 AD3d 1160, 1161 [4th Dept 2018]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1188

CA 20-00352

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

GLORIA BORRELLI, AS EXECUTRIX OF THE ESTATE OF DANIEL J. THOMAS, DECEASED, AND DERIVATIVELY AS A SHAREHOLDER OF NEW YORK STATE FENCE CO., INC., PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOM THOMAS, INDIVIDUALLY AND AS A DIRECTOR AND OFFICER OF NEW YORK STATE FENCE CO., INC., AND NEW YORK STATE FENCE CO., INC., DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.)

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, ROCHESTER (ALAN J. BOZER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 11, 2020. The order, inter alia, granted the motion of defendants for leave to reargue their motion to dismiss the amended complaint.

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

Memorandum: In August 2019, plaintiff Gloria Borrelli, as the executrix of the estate of Daniel J. Thomas and derivatively as a shareholder of New York State Fence Co., Inc. (NYSFC), brought this action seeking damages for, inter alia, breach of fiduciary duty against defendants Tom Thomas (Tom), individually and as director and officer of NYSFC, and NYSFC. Anthony Thomas (Anthony) and Dorothy Thomas (Dorothy) founded NYSFC in 1958. Initially, Anthony owned 51 shares in NYSFC, and Dorothy owned 49. During the 1980s and 1990s, Dorothy began gifting her shares to two of her sons, Tom and the decedent, Daniel J. Thomas. As of 1997, Anthony held 51 shares, Tom held 29 and the decedent held 20. In 2012, Anthony and Dorothy died, which resulted in several years of litigation regarding their estates. Specifically, a Surrogate's Court proceeding (hereafter, estate litigation) was commenced in 2013 by plaintiff and Joseph Thomas, who are also children of Anthony and Dorothy. The estate litigation has been before this Court on several prior appeals (*Matter of Thomas*, 179 AD3d 98 [4th Dept 2019]; *Matter of Thomas*, 148 AD3d 1763 [4th Dept

2017]; *Matter of Thomas*, 148 AD3d 1764 [4th Dept 2017]; *Matter of Thomas*, 124 AD3d 1235 [4th Dept 2015]; *Matter of Thomas*, 124 AD3d 1246 [4th Dept 2015]). Most recently, we affirmed the Surrogate's determination that Anthony's shares in NYSFC were sold and transferred to Tom prior to Anthony's death (*see Thomas*, 179 AD3d at 100).

In this action, defendants moved, inter alia, to dismiss the amended complaint pursuant to CPLR 3211 (a) (3) and (5). In support of their motion, defendants submitted, among other things, the affidavit of an attorney who represented the decedent in 1998 during a matrimonial action. Plaintiff opposed the motion and cross moved to strike the affidavit of the decedent's former attorney. Supreme Court granted defendants' motion in part, dismissed plaintiff's claims insofar as they accrued more than six years prior to the commencement of this action, and denied the remainder of the motion. The court also granted plaintiff's cross motion and struck the affidavit of the decedent's former attorney and all of the attachments thereto, including a statement of the decedent's net worth that had been submitted to the court during the matrimonial litigation.

Defendants thereafter moved pursuant to CPLR 2221 for leave to renew or reargue the motion. Defendants now appeal and plaintiff cross-appeals from an order that, inter alia, granted that part of defendants' motion seeking leave to reargue and, upon reargument, denied plaintiff's cross motion to strike the affidavit of the decedent's former attorney, determined that the statement of net worth attached to that affidavit is admissible in this action and directed that a hearing be held on the issue of plaintiff's standing. The court otherwise adhered to its prior determination.

We reject defendants' contention on their appeal that the court erred in refusing to dismiss the amended complaint as untimely. Specifically, defendants contend that the six-year statute of limitations for breach of fiduciary duty against a corporate officer expired prior to the commencement of this action in August 2019. According to defendants, the limitations period began to run no later than March 6, 2013, when plaintiff commenced the estate litigation, inasmuch as the decedent knew at that time that Tom had allegedly breached his fiduciary duty by claiming to be the sole shareholder of NYSFC. "In moving to dismiss the complaint on statute of limitations grounds, the defendant has the initial burden of establishing prima facie that the time in which to sue has expired . . . , and thus [is] required to establish, inter alia, when the plaintiff's cause of action accrued" (*U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020] [internal quotation marks omitted]). "If the defendant meets that burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*id.* [internal quotation marks omitted]). The breach of fiduciary duty cause of action "is subject to a six-year statute of limitations . . . , and . . . accrues when the fiduciary openly repudiates his or her obligation or the fiduciary relationship has otherwise been terminated" (*Matter of Trombley*, 137 AD3d 1641, 1642 [4th Dept 2016]). Here, defendants

failed to meet their burden regarding when plaintiff's cause of action accrued inasmuch as there is no evidence in the record that Tom actually repudiated his obligations to the decedent, or when that alleged repudiation occurred (*see generally Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011]). Furthermore, to the extent that the petition filed in 2013 in the estate litigation could be read to affirmatively allege that Tom claimed to own all of the shares in NYSFC, those allegations cannot be imputed to the decedent because decedent was not a named party to the estate litigation and did not verify that petition.

Contrary to defendants' further contention, the court did not err in refusing to dismiss the amended complaint on the ground that plaintiff lacks standing. Standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). "Where, as here, a defendant makes a pre-answer motion to dismiss based on lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied' " (*Matter of Violet Realty, Inc. v County of Erie*, 158 AD3d 1316, 1317 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018]). "In order '[t]o defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing' " (*id.*). There is no dispute that, during the matrimonial action in 1998, the decedent signed a statement of net worth that did not list any interest in NYSFC. Even assuming, arguendo, that, by submitting the statement of net worth in support of their motion, defendants satisfied their initial burden with respect to standing because the breach of fiduciary duty cause of action can be asserted only "by a holder of shares or of voting trust certificates on the corporation" (Business Corporation Law § 626 [a]), we conclude that plaintiff raised triable issues of fact whether the decedent's estate owns shares in NYSFC. Notably, plaintiff provided the affidavit of the decedent's ex-wife who stated that, at the time she filed for divorce, she knew that the decedent owned shares in NYSFC. The ex-wife stated that her attorney recommended that she pursue an interest in the decedent's shares in NYSFC, but she refused and her attorney followed that directive. The ex-wife further stated that, "[a]ccordingly, the separation agreement, which was incorporated but not merged into the judgment of divorce, did not make any distribution based on [the decedent's] shares to [NYSFC]." Plaintiff also submitted excerpts from the decedent's deposition testimony from the estate litigation in which the decedent testified that he never gave up his shares of NYSFC and that he and Tom owned shares of the company.

We similarly reject defendants' contention that plaintiff lacks standing based upon judicial estoppel. "The doctrine of judicial estoppel, also known as the 'doctrine of estoppel against inconsistent positions[,] . . . precludes a party from framing his [or her] pleadings in a manner inconsistent with a position taken in a prior judicial proceeding' " (*Secured Equities Invs. v McFarland*, 300 AD2d

1137, 1138 [4th Dept 2002]). "The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding" (*Bihn v Connelly*, 162 AD3d 626, 627 [2d Dept 2018]; *see Matter of Mukuralinda v Kingombe*, 100 AD3d 1431, 1432 [4th Dept 2012]). Based upon the affidavit of the decedent's ex-wife, we cannot conclude that the decedent and plaintiff, as the representative of his estate, have taken inconsistent positions in the matrimonial action and the current action (*see generally Fixler v Reisman*, 133 AD3d 709, 709-710 [2d Dept 2015]; *Matter of Costantino*, 67 AD3d 1412, 1413 [4th Dept 2009]; *Mikkelson v Kessler*, 50 AD3d 1443, 1444-1445 [3d Dept 2008]). Furthermore, the decedent did not secure a judgment in his favor in the matrimonial action (*cf. Bihn*, 162 AD3d at 628). Generally, " 'a settlement does not constitute a judicial endorsement of either party's claims or theories and thus does not provide the prior success necessary for judicial estoppel' " (*Costantino*, 67 AD3d at 1413; *cf. Manhattan Ave. Dev. Corp. v Meit*, 224 AD2d 191, 192 [1st Dept 1996], *lv denied* 88 NY2d 803 [1996]), and here, in support of their motion to dismiss the amended complaint, defendants submitted evidence that the underlying matrimonial action ended in a settlement. Specifically, defendants submitted the judgment of divorce, which reflects that the decedent and his ex-wife entered into an oral stipulation, which was incorporated by reference, but not merged into the judgment of divorce, that resolved all issues with respect to equitable distribution, including any "claims by [the decedent's ex-wife] for any interest [decedent] may or may not have in any business."

We have reviewed the remaining contentions of the parties, including those presented by the plaintiff in her cross appeal, and conclude that none warrants reversal or modification of the order.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1189

CA 20-00664

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

GLORIA BORRELLI, AS EXECUTRIX OF THE ESTATE OF DANIEL J. THOMAS, DECEASED, AND DERIVATIVELY AS A SHAREHOLDER OF NEW YORK STATE FENCE CO., INC., PLAINTIFF-RESPONDENT,

V ORDER

TOM THOMAS, INDIVIDUALLY AND AS A DIRECTOR AND OFFICER OF NEW YORK STATE FENCE CO., INC., AND NEW YORK STATE FENCE CO., INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (ALAN J. BOZER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 22, 2019. The order, inter alia, denied in part the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1209

CA 20-00106

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

MICHELE A. HAGGERTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

CONWAY & KIRBY, PLLC, DELMAR (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, LLP, BUFFALO (BREANNA C. REILLY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered November 6, 2019. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: On August 6, 2010, plaintiff, while driving a vehicle owned by her mother, was involved in a motor vehicle accident with another vehicle. The driver of the other vehicle was not its owner, and that vehicle was not current with its registration. Several years later, in March 2019, plaintiff commenced this action to recover damages under the uninsured motorist endorsement of her mother's insurance policy with defendant, Allstate Insurance Company (Allstate). In its answer, Allstate asserted, inter alia, that the action was time-barred by the six-year statute of limitations for actions to recover damages for breach of contract (*see* CPLR 213 [2]). Supreme Court granted Allstate's motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the ground that the action was time-barred. We affirm.

"Claims made under the uninsured motorist endorsement of automobile insurance policies are governed by the six-year statute of limitations applicable to contract actions" (*Jenkins v State Farm Ins. Co.*, 21 AD3d 529, 530 [2d Dept 2005]). "The claim accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured" (*id.*).

Here, Allstate met its prima facie burden on the motion of establishing that the action was untimely by submitting plaintiff's complaint, which demonstrated that, while the accident occurred on

August 6, 2010, the action was not commenced until more than six years later on March 4, 2019 (*see Matter of New York City Tr. Auth. v Hill*, 107 AD3d 897, 898 [2d Dept 2013]; *Jenkins*, 21 AD3d at 530). In opposition, plaintiff failed "to come forward with evidence of an accrual date later than the date of the accident" (*New York City Tr. Auth.*, 107 AD3d at 898; *see Jenkins*, 21 AD3d at 530).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1227

KA 15-00981

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT W. SWIFT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 26, 2015. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), aggravated criminal contempt, criminal contempt in the first degree and strangulation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant of strangulation in the second degree and granting a new trial on count five of the indictment and by reducing the sentences of imprisonment imposed for burglary in the first degree under counts one and two of the indictment to determinate terms of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of strangulation in the second degree (§ 121.12), among other offenses. Although defendant failed to preserve for our review his contention that the evidence is not legally sufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19 [1995]), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]) and conclude that the evidence is legally sufficient to support the conviction. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that could lead a reasonable person to conclude that defendant unlawfully entered the apartment he once shared with the complainant (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). The complainant testified that she had kicked defendant out of the apartment some time

before the night of the incident, and the evidence at trial established that defendant had to physically break two different doors to access the apartment.

Contrary to defendant's further contention, we conclude that the evidence is legally sufficient to establish that the complainant sustained a physical injury (*see* Penal Law § 10.00 [9]; *People v Ruvalcaba*, 187 AD3d 1553, 1556 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *People v McKelvey*, 180 AD3d 494, 494 [1st Dept 2020], *lv denied* 35 NY3d 994 [2020]; *cf. People v Case*, 150 AD3d 1634, 1635-1636 [4th Dept 2017]; *People v White*, 100 AD3d 1397, 1399 [4th Dept 2012]). The complainant testified that defendant punched and choked her, causing her to gasp for air and, at some point during the incident, to urinate on herself. Following the incident, the complainant's neck "was really sore" and "[i]t really hurt to even move it." Additionally, her "back was sore, [her] side was sore," and her pain level was a seven out of ten, prompting her to go to the hospital for treatment. In pictures displayed to the jury, the complainant identified bruises and marks from defendant's fingers on her neck.

We further conclude, after viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

With respect to the issue of physical injury, defendant further contends that County Court erred in denying his request to charge attempted strangulation in the second degree as a lesser included offense of strangulation in the second degree. We agree. To be entitled to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that he or she committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]; *see People v Glover*, 57 NY2d 61, 63 [1982]).

Here, there is no question that the first prong of the test has been met; the disputed issue is whether there is a reasonable view of the evidence supporting a determination of guilt on the lesser count but not the higher count. Strangulation in the second degree requires proof that the victim suffered stupor, loss of consciousness, or physical injury or impairment (Penal Law § 121.12). Inasmuch as there was no evidence that the complainant suffered stupor or loss of consciousness, defendant's guilt of this offense rested entirely on the evidence that the complainant sustained a physical injury. Viewing the evidence in the light most favorable to defendant (*see People v Rivera*, 23 NY3d 112, 120-121 [2014]), we conclude that a reasonable view of the evidence would have supported a determination that the complainant did not sustain a physical injury and thus that defendant was guilty of only the lesser offense and not the greater (*cf. People v Moreno*, 187 AD3d 449, 450 [1st Dept 2020], *lv denied* 36 NY3d 974 [2020]; *People v Pietoso*, 168 AD3d 1276, 1280 [3d Dept 2019], *lv denied* 33 NY3d 1034 [2019]). We therefore modify the judgment by reversing that part convicting defendant of strangulation in the

second degree, and we grant defendant a new trial on count five of the indictment.

Contrary to defendant's further contention, the court did not err in permitting the People to introduce *Molineux* evidence related to two prior incidents of domestic violence between defendant and the complainant. That evidence provided background information related to the parties' relationship and put defendant's charged conduct in context (*see People v Leonard*, 29 NY3d 1, 7 [2017]; *People v Frankline*, 27 NY3d 1113, 1115 [2016]; *People v Colbert*, 60 AD3d 1209, 1212 [3d Dept 2009]). In addition, the first incident was relevant to establish the existence and defendant's knowledge of the order of protection that he allegedly violated (*see People v Anderson*, 120 AD3d 1548, 1548-1549 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]; *People v Thomas*, 26 AD3d 241, 241 [1st Dept 2006], *lv denied* 6 NY3d 898 [2006]).

Defendant raises several issues in contending that he was denied effective assistance of counsel, but we conclude that his contention lacks merit. Although defendant did not receive error-free representation, "[t]he test is 'reasonable competence, not perfect representation' " (*People v Oathout*, 21 NY3d 127, 128 [2013]). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we agree with defendant that the sentence is unduly harsh and severe under the circumstances of this case. Defendant has no prior criminal record, has been hospitalized numerous times for severe mental illness, and was offered an aggregate sentence of five years by the People in their pretrial plea offer. Thus, as a matter of discretion in the interest of justice, we further modify the judgment by reducing the sentences of imprisonment imposed for burglary in the first degree under counts one and two of the indictment to determinate terms of 10 years, to be followed by the five years of postrelease supervision imposed by the court (*see* CPL 470.15 [6] [b]).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1237

CA 19-02019

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

ADAM O'SHEI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY,
DEFENDANT-APPELLANT.

FARBER BROCKS & ZANE L.L.P., GARDEN CITY (ANDREW J. MIHALICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE CAVALL LAW FIRM, PLLC, WILLIAMSVILLE (DIANA B. CAVALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 29, 2019. The order, among other things, denied the cross motion of defendant for summary judgment and granted in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety and vacating the award of judgment to plaintiff, and as modified the order is affirmed without costs.

Memorandum: This action involves a dispute over insurance coverage arising from an incident in which William Sager, Jr. (decedent) sustained fatal injuries when a bar manager at a nightclub shoved him, causing him to fall down an entire flight of stairs. The bar manager ultimately pleaded guilty to manslaughter in the first degree (Penal Law § 125.20 [1]) and was sentenced to 18 years in prison. We affirmed the judgment of conviction (*People v Basil*, 156 AD3d 1416 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018], *reconsideration denied* 31 NY3d 1114 [2018]). The nightclub at issue was operated by NHJB, Inc., doing business as Molly's Pub (NHJB), whose sole shareholder was Norman Habib. Plaintiff was an off-duty police officer providing security for the nightclub.

At all relevant times, NHJB and Habib were insured by a policy issued by defendant, which disclaimed coverage when initially notified about the incident within days of its occurrence. After an action was commenced against plaintiff, NHJB, Habib, and other parties (*Sager v City of Buffalo*, 151 AD3d 1908 [4th Dept 2017]), plaintiff sought coverage from defendant, which disclaimed coverage relying on, inter alia, an assault and battery exclusion contained within the policy.

Plaintiff thereafter commenced this declaratory judgment action. NHJB and Habib also commenced an action seeking, among other things, a declaration that defendant was required to defend and indemnify them in the underlying lawsuit. After the parties in the NHJB and Habib action filed summary judgment motions, Supreme Court granted in part the motion of NHJB and Habib for partial summary judgment, denied defendant's cross motion, and ordered, among other things, that defendant was obligated to defend NHJB and Habib in the underlying action "through the completion of discovery." On appeal, however, we determined that defendant was entitled to summary judgment in the declaratory judgment action brought by NHJB and Habib, and we adjudged and declared that defendant was not obligated to defend or indemnify them in the underlying action (*NHJB, Inc. v Utica First Ins. Co.* [appeal No. 4], 187 AD3d 1498, 1499 [4th Dept 2020]).

In the instant action, plaintiff moved for summary judgment seeking, inter alia, a declaration that defendant is obligated to defend him in the underlying action. Defendant cross-moved for summary judgment on its counterclaims and sought, inter alia, dismissal of the complaint. As it did in the action brought by NHJB and Habib, the court granted in part plaintiff's motion for summary judgment, denied defendant's cross motion, and ordered, inter alia, that defendant was obligated to defend plaintiff in the underlying action through the completion of discovery. Defendant now appeals.

Although we concluded in *NHJB, Inc.* that the assault and battery exclusion in the policy issued by defendant precluded insurance coverage for NHJB and Habib (187 AD3d at 1500), we do not reach the same result here. We cannot say that all of the claims in the underlying action against plaintiff are based on or arise out of the bar manager's assault (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 351 [1996]; *U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]). Among other causes of action, the plaintiff in the underlying action alleged that plaintiff here unlawfully arrested decedent following the bar manager's assault, and this cause of action is separate and distinct from the conduct to which the assault and battery exclusion would apply. Stated another way, the cause of action would still exist notwithstanding the assault (*cf. Mount Vernon Fire Ins. Co.*, 88 NY2d at 350). For the same reason, we reject defendant's contention that the policy's dram shop exclusion precludes insurance coverage for plaintiff.

Although we reject defendant's further contention that the incident does not constitute an occurrence under the terms of the policy (*see Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]; *NHJB, Inc.*, 187 AD3d at 1500), we nevertheless agree with defendant insofar as it contends that plaintiff did not, as a matter of law, establish that he is entitled to coverage (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862 [2d Dept 2010]). Specifically, there is an issue of fact whether plaintiff is an insured as that term is defined in the policy, i.e., whether, at the time of the incident, he was an employee of the nightclub acting within the scope of his employment. We therefore modify the order by

denying plaintiff's motion in its entirety. Inasmuch as we conclude that an issue of fact exists whether plaintiff is entitled to coverage under the policy, we reject defendant's further contention that it is entitled to summary judgment on that issue.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1239

CA 20-00826

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF ROCHESTER POLICE LOCUST CLUB, INC., MICHAEL MAZZEO AND KEVIN SIZER, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

CITY OF ROCHESTER, LOVELY A. WARREN, AS MAYOR OF THE CITY OF ROCHESTER, ET AL., RESPONDENTS-DEFENDANTS, AND COUNCIL OF CITY OF ROCHESTER, RESPONDENT-DEFENDANT-APPELLANT.

EMERY CELLI BRINCKERHOFF & ABADY, LLP, NEW YORK CITY (ANDREW G. CELLI, JR., OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

KEVIN R. BRYANT, CORPORATION COUNSEL, KINGSTON, FOR CITY OF KINGSTON, AMICUS CURIAE.

MICHAEL SISITZKY, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 19, 2020 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, declared invalid, void and unenforceable the "portions of Local Law No. 2 which authorize and empower the Police Accountability Board to conduct disciplinary hearings and discipline officers of the City of Rochester Police Department."

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

Opinion by NEMOYER, J.:

The Rochester City Charter has been amended to grant virtually all authority for disciplining police officers to a new entity called the "Police Accountability Board" (*see* Local Law No. 2 [2019] of the City of Rochester). The politics swirling around this provision are weighty and fraught, but its legality is not. Local Law No. 2 is invalid insofar as it takes police discipline outside the realm of

collective bargaining.

FACTS

In 2019, Local Law No. 2 was adopted by respondent-defendant Council of City of Rochester (City Council) and approved by the voters at a referendum. Local Law No. 2 created the Police Accountability Board (PAB) as a body consisting of nine Rochester residents. Current and former Rochester police officers are permanently barred from serving on PAB, as are all immediate family members of a current or former Rochester police officer. Local Law No. 2 also bars the appointment of more than one PAB member that has, or is related to someone that has, any form of law enforcement experience.

Conversely, four PAB members must be appointed from a list compiled by an "Executive Committee" of 53 groups called the "Alliance." The constituent members of this "Alliance" are mostly unincorporated entities, but they also include certain political parties and specific religious organizations. Local Law No. 2 specifies no procedure for selecting the individual members of the "Executive Committee" through which the "Alliance" constructs its nominating list, nor is there any specified procedure for updating the constituent members of the "Alliance." Relatedly, Local Law No. 2 prohibits the removal of any PAB member without a majority vote of his or her fellow members.

Local Law No. 2 vests PAB with exclusive authority to conduct disciplinary hearings for police officers accused of misconduct and to decide whether the accused officer is guilty. The complainant, but not the accused officer, is granted a right to appeal certain rulings by a PAB panel to the full board. If PAB convicts an officer of misconduct, it imposes punishment. The Chief of Police (police chief or chief) is explicitly obligated by Local Law No. 2 to execute PAB's decreed discipline without reduction or reprieve. The only discretion retained by the police chief in disciplinary matters is the power to impose *additional* punishment above that imposed by PAB.

There is no dispute that the police-discipline process created by Local Law No. 2 was never subject to collective bargaining and is irreconcilable with the police-discipline process set forth in the governing collective bargaining agreement. Petitioners-plaintiffs (plaintiffs) – the Rochester police union, its president, and an individual Rochester police officer – therefore commenced this hybrid CPLR article 78 proceeding and declaratory judgment action against, among others, respondents-defendants City of Rochester (City), Lovely A. Warren as Mayor of the City of Rochester (Mayor), and the City Council. Insofar as relevant here, the petition (complaint) alleged that, by transferring virtually all disciplinary authority to PAB in the absence of collective bargaining and in contravention of the terms of the governing collective bargaining agreement, Local Law No. 2 violated the Taylor Law (Civil Service Law art 14). The complaint further alleged that Local Law No. 2 violated Civil Service Law § 75 and McKinney's Unconsolidated Laws of NY § 891 by empowering PAB to hear and adjudicate disciplinary charges against police officers. As

a remedy, plaintiffs sought, inter alia, a declaration that Local Law No. 2 was invalid insofar as it transferred disciplinary authority to PAB.

Supreme Court agreed with plaintiffs and held that Local Law No. 2 violated the Taylor Law, Civil Service Law § 75, and Unconsolidated Laws § 891. The court therefore declared that "those portions of Local Law No. 2 which authorize and empower [PAB] to conduct disciplinary hearings and discipline officers of the City of Rochester Police Department are determined and declared to be invalid, void and unenforceable." The court also sua sponte "referred [Local Law No. 2] back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter."

The City Council now appeals. Neither the Mayor nor the City itself has appealed, however.

DISCUSSION

I

Two preliminary technical issues require some brief discussion.

First, although this case was filed as a hybrid CPLR article 78 proceeding and declaratory judgment action, it is actually proper only as a declaratory judgment action (*see Parker v Town of Alexandria*, 138 AD3d 1467, 1467-1468 [4th Dept 2016]; *Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56 AD3d 1129, 1129 [4th Dept 2008]). The gravamen of plaintiffs' lawsuit is that Local Law No. 2 is invalid in certain key aspects, and "it is well established that an article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment" (*Kamhi v Town of Yorktown*, 141 AD2d 607, 608 [2d Dept 1988], *affd* 74 NY2d 423 [1989]).

Second, plaintiffs' decision to name the City Council as a party in this action obviates any need to examine whether that legislative body has the capacity to take an appeal for the purpose of defending a law that the executive branch has abandoned (*see generally Virginia House of Delegates v Bethune-Hill*, — US —, 139 S Ct 1945, 1949-1956 [2019]; *United States v Windsor*, 570 US 744, 755-763 [2013]; *I.N.S. v Chadha*, 462 US 919, 939-940 [1983]; *cf. Hernandez v State of New York*, 173 AD3d 105, 110 [3d Dept 2019]). After all, capacity is a waivable objection that does not implicate our subject matter jurisdiction to entertain an appeal, and by naming the City Council as a party to this action, plaintiffs waived any challenge to that body's capacity to appeal from the resulting judgment that now aggrieves it (*see Matter of County of Chautauqua v Shah*, 126 AD3d 1317, 1320 [4th Dept 2015], *affd* 28 NY3d 244 [2016]).

We now reach the merits of plaintiffs' challenges to Local Law No. 2.

II

The Legislature re-chartered the City of Rochester in 1907 (*see* L 1907, ch 755). At that time, all municipalities – with the possible exception of the City of Albany – were subject to Dillon's Rule, the well-known common law principle by which, among other things, municipalities could not vary their structure or powers without State approval (*see* 1894 NY Const, art III, §§ 26, 27; art X, § 2; art XII, §§ 1, 2; *see generally Olesen v Town of Hurley*, 691 NW2d 324, 328 n 6 [SD 2004] ["Judge Foster Dillon was a late nineteenth century Iowa jurist and government law scholar. The appellation 'Dillon's Rule' is derived from two cases he authored"]; David C. Hammack, *Reflections on the Creation of the Greater City of New York and Its First Charter, 1898*, 42 NY L Sch L Rev 693, 698-700 [1998]).[1] As a result of an amendment to the State Constitution in 1923 and the Legislature's subsequent adoption of the former City Home Rule Law (L 1924, ch 363), Dillon's Rule was relaxed somewhat to allow cities to amend their own charters in certain respects without State approval (*see generally Matter of Warden [Police Dept. of City of Newburgh]*, 300 NY 39, 41-43 [1949]; *Johnson v Etkin*, 279 NY 1, 4-5 [1938]; *Van Orman v Slade*, 126 AD2d 282, 284-285 [3d Dept 1987]). And in 1964, the voters amended the State Constitution "to expressly repudiate[] the prevailing . . . Dillon's rule" (*City of New York v State of New York*, 76 NY2d 479, 491 n 4 [1990]). Consequently, municipalities may now adopt local laws – including charter revisions – governing "the removal of [their] employees, subject to the requirement of consistency with the Constitution and general laws" (*Matter of Gizzo v Town of Mamaroneck*, 36 AD3d 162, 165 [2d Dept 2006], *lv denied* 8 NY3d 806 [2007]; *see* NY Const, art IX, § 2 [c] [ii] [1]; Municipal Home Rule Law § 10 [1] [i], [ii] [a] [1]; [c] [1]; *see generally* Municipal Home Rule Law § 2 [5] [defining "general law" as any "state statute which in terms and in effect applies alike to all [municipalities or types thereof]"]).

As enacted by the Legislature, the Rochester City Charter of 1907 granted the Commissioner of Public Safety the sole and exclusive power to discipline police officers and firefighters (*see* L 1907, ch 755, § 330 [entitled "charges and trials of policemen and firemen"]). The Commissioner's power in that regard was "final and conclusive, and not subject to review by any court" (*id.*). Upon the relaxation and eventual abolition of Dillon's Rule in New York, section 330 of the City Charter was altered in several minor respects between 1925 and 1963. Among these alterations was the division of section 330 into

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[1] The City of Albany was perhaps not subject to all facets of Dillon's Rule as of 1907 because, at that time, the capital city still operated under a pre-statehood charter granted in 1686 by His Excellency Governor Thomas Dongan that derived not from modern notions of popular consent but rather from the *dei gratia rex* prerogative of the Lord Proprietor, His Majesty King James II (*see* 1894 NY Const, art I, § 17; *Aikin v Western R.R. Corp.*, 20 NY 370, 374-376 [1859]; *see generally People ex rel. Howell v Jessup*, 160 NY 249, 258-264 [1899]).

separate yet substantively identical provisions for police officers (section 8A-7) and firefighters (section 8B-6).

In 1967, the Legislature ushered in a new era of collective bargaining for public employees by enacting the Taylor Law (Civil Service Law art 14; *see* L 1967, ch 392). In describing the purpose of the Taylor Law, the Legislature declared that "the public policy of the state [was] best effectuated by . . . granting to public employees the right of organization and representation" (Civil Service Law § 200 [a]). Accordingly, subject to certain exceptions not relevant here, municipalities became "required to negotiate collectively with [the various unions] in the determination of, and administration of grievances arising under, the *terms and conditions of employment of the public employees*" (§ 204 [2] [emphasis added]). There is no dispute that section 204 (2) constitutes a "general law" within the meaning of Municipal Home Rule Law § 2 (5).

The Court of Appeals has repeatedly held that police discipline falls *presumptively* within the broad category of "terms and conditions of [public] employment" for which collective bargaining is mandatory under Civil Service Law § 204 (2) (*see Matter of City of Schenectady v New York State Pub. Empl. Relations Bd.*, 30 NY3d 109, 115 [2017] [hereinafter, "*Schenectady*"]; *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 571, 574 [2006] [hereinafter, "*PBA*"]; *see also Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. [Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836]*, 19 NY3d 1066, 1069 [2012] [hereinafter, "*Wallkill*"]). The high Court has recognized, however, a certain "kind" of legislation that "overcomes the presumption in favor of collective bargaining where police discipline is concerned" (*PBA*, 6 NY3d at 574), to wit: "preexisting laws that expressly provide for control of police discipline" by local officials without regard to collective bargaining (*Schenectady*, 30 NY3d at 114, citing *PBA*, 6 NY3d at 573). Such "preexisting laws" are "grandfathered," held the Court of Appeals; consequently, in any municipality with such a "grandfathered" law, the subject of police discipline is exempt from the presumption of collective bargaining that would otherwise prevail by virtue of Civil Service Law § 204 (2) (*PBA*, 6 NY3d at 573; *see Schenectady*, 30 NY3d at 114; *Wallkill*, 19 NY3d at 1069). To fashion this exception from section 204 (2) for preexisting police-discipline legislation, the *PBA* court borrowed from a similarly worded exception in section 76 (4), which says that "nothing contained in section seventy-five or seventy-six of [the Civil Service Law, which prescribe detailed default rules for certain public-employee disciplinary hearings] shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers" (*see PBA*, 6 NY3d at 573).

Importantly, and contrary to the parties' assumptions in this case, the question before the Court of Appeals in *PBA*, *Wallkill*, and *Schenectady* was not whether the respective municipality's refusal to collectively bargain over police discipline violated either Civil

Service Law §§ 75 or 76 *in and of themselves*. Rather, the question in *PBA* and its progeny was whether the respective municipality's refusal to collectively bargain over police discipline violated the statutory obligation to collectively bargain over the "terms and conditions of [public] employment" as set forth in section 204 (2). To decide *that* question, the Court of Appeals weighed the "tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law . . . and a competing policy . . . favoring strong disciplinary authority for those in charge of police forces" (*PBA*, 6 NY3d at 571 [internal quotation marks omitted]), and it ultimately crafted a judicial compromise: police discipline would be subject to collective bargaining, except in municipalities with a preexisting law that vested local officials with the sole and exclusive power to discipline police officers (*see id.* at 571-575).

With this compromise, the Court of Appeals gave force to the default-preference for collective bargaining enshrined in the Taylor Law without displacing any preexisting law concerning police discipline that remained in force (*see Schenectady*, 30 NY3d at 117). True, the collective bargaining exemption announced in *PBA* was *inspired* by a similarly-worded limitation in Civil Service Law § 76 (4) that tempered the immediate impact of the default rules specified in sections 75 and 76, but the *PBA* court was not directly *applying* either section 75 or 76 to resolve the parties' dispute concerning the mandatory scope of collective bargaining under section 204 (2). In short, while section 76 (4) was the juridical muse for the section 204 (2) exception created by the Court of Appeals in *PBA*, it is section 204 (2) – not section 75 or 76 – that demarcates the analytical parameters within which this case must primarily be decided.

III

Here, all parties agree that, when the Taylor Law was adopted in 1967, the 1907 City Charter provision constituted a "preexisting law" on the subject of police discipline in Rochester within the meaning of *PBA*. Thus, at the time of its adoption, the Taylor Law neither displaced Rochester's then-existing practices for disciplining police officers nor required collective bargaining of that topic going forward.

That is not the end of the story, however, for there is an important caveat to the preexisting-law exception created by *PBA*: the preexisting law in question must be " 'in force' " when the municipality refuses to collectively bargain over police discipline (*Schenectady*, 30 NY3d at 115, quoting *PBA*, 6 NY3d at 571-572; *see Wallkill*, 19 NY3d at 1069). The "in force" requirement was satisfied in *Schenectady*, *PBA*, and *Wallkill*, but it is not satisfied here. And *that* is because the 1907 City Charter provision governing police discipline in Rochester was formally *repealed* by the City Council in 1985 – almost 20 years *after* the Taylor Law was adopted and almost 35 years *before* PAB was created (*see* Local Law No. 2 [1985] of the City of Rochester § 1 [City Charter "is hereby amended by repealing Section 8A-7, Charges and trials of policemen, for the reason that this

subject matter is covered by the Civil Service Law"]). Consequently, the 1985 City Council explicitly surrendered its grandfathered prerogative to exempt police discipline from collective bargaining.

Thus, because the 1907 City Charter provision was not "in force" when the voters approved Local Law No. 2 in 2019, we hold that Rochester no longer qualifies for the *PBA*-created exception to mandatory collective bargaining over police discipline. And without the *PBA* exception, the challenged Local Law No. 2 necessarily falls insofar as it takes police discipline out of collective bargaining because, in that respect, it conflicts with the general law mandating collective bargaining over police discipline (*see* Civil Service Law § 204 [2]; *see generally* Municipal Home Rule Law § 10 [1] [i], [ii] [no local law, including a charter revision, may contravene any "general law"]). As the Court of Appeals has explained, "a local law is inconsistent [with the general law] where local laws prohibit what would be permissible under State law" (*Eric M. Berman, P.C. v City of New York*, 25 NY3d 684, 690 [2015] [internal quotation marks omitted]), and by creating a permanent administrative apparatus for disciplining police officers that is impervious to alteration or modification at the bargaining table, Local Law No. 2 necessarily and structurally prohibits something that, ever since the 1985 repeal of the 1907 City Charter provision, is statutorily *mandated* for the City of Rochester: collective bargaining of police discipline. The court therefore properly invalidated Local Law No. 2 insofar as it imbues PAB with disciplinary authority over Rochester police officers without regard to collective bargaining.

IV

We reject the City Council's contrary arguments.

First, the City Council says that police discipline is not *and has never been* a proper subject of collective bargaining in Rochester given the Legislature's decision, in the 1907 City Charter, to effectively exempt police discipline from collective bargaining. As such, the City Council reasons, the 1907 City Charter provision governing police discipline remains "in force" because the 1985 City Council had no power to repeal it. We disagree. By their incremental relaxation and eventual abolition of Dillon's Rule, the voters and the Legislature collectively transferred the power to amend city charters from the Legislature to the cities themselves, subject only (in substantive matters) to the requirement of conformity with the State Constitution and the general laws (*see* NY Const, art IX, § 2 [c] [ii] [1]; Municipal Home Rule Law § 10 [1] [i], [ii]; *Gizzo*, 36 AD3d at 165). That is precisely what the City Council did in 1985: it exercised its home rule powers to overturn the Legislature's 1907 policy determination. And given the Legislature's 1967 enactment of the Taylor Law and its presumption of collective bargaining for police discipline, it defies reason to suggest – as the City Council does now – that the 1985 repeal of the 1907 provision somehow contravened any general law in effect in 1985. Quite the opposite, the 1985 repeal actually aligned Rochester with the modern-day Legislature's policy

favoring collective bargaining of police discipline.

Nothing in the *Schenectady*, *Wallkill*, or *PBA* decisions even remotely suggests that a grandfathered law concerning police discipline must be forever fossilized in the municipal codebooks, never to be abrogated by the municipality in the valid exercise of its home rule powers. To the contrary, the *Schenectady* decision specifically emphasized that the qualifying preexisting law in that case had *not* been repealed, and it even contrasted the continued effectiveness of Schenectady's local law with the Legislature's repeal of a similar preexisting statute that had limited collective bargaining for State Police officers (*see* 30 NY3d at 116-118, citing L 2001, ch 587).[2] *Schenectady* thus clearly contemplates the potential repeal of a preexisting law concerning police discipline that would have otherwise qualified for the *PBA*-created exception to mandatory collective bargaining. Indeed, by insisting on the eternal sanctity of the policy choices of the 1907 Legislature, the City Council embraces the very specter of dead-hand control that its brief repeatedly decries.

The City Council's reasoning on this point suffers from an additional flaw. If, as the current City Council insists, the Legislature's 1907 policy determination to commit police discipline to the exclusive discretion of the executive branch was so important and fundamental that it barred the 1985 City Council from subjecting police discipline to collective bargaining, then the paramount import of that 1907 policy would also logically bar the current City Council from transferring the executive's latent disciplinary authority to an unelected body like PAB. Simply stated, the 1907 City Charter provision cannot logically preclude collective bargaining of police discipline yet simultaneously permit an independent board to fire police officers over the objection of the executive's appointed police chief. The very rationale that the City Council deploys to invalidate the 1985 repeal would equally doom its own 2019 legislation. Thus, by winning the battle over the validity of the 1985 repeal, the City Council would ineluctably lose the war over the validity of the 2019 local law.

Second, there is absolutely no record support for the current City Council's speculation that its 1985 predecessor unwittingly repealed the 1907 City Charter provision while laboring under a comprehensive misapprehension of the Taylor Law and its workings. And even if the current City Council has correctly conjured its predecessor's motivations and underlying suppositions back in 1985, they would be irrelevant. What matters is that the 1907 City Charter provision was explicitly and unambiguously repealed in 1985, and "no amount of legislative history can overcome that fact" (*National Labor Relations Bd. v Alaris Health at Castle Hill*, 811 Fed Appx 782,

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[2] Each of the Second Department cases cited by the City Council in footnote 7 of its opening brief, we note, featured a "preexisting law" that remained in force at all relevant times.

786-787 [3d Cir 2020]; *see Triple A Intl., Inc. v Democratic Republic of Congo*, 721 F3d 415, 418 [6th Cir 2013], *cert denied* 571 US 1024 [2013] ["no amount of legislative history can rescue an interpretation that does as much damage to the enacted text as [the plaintiff's] interpretation does here"]).

Third, citing the general proposition that a legislative body that "violently disagrees with its predecessor . . . may modify or abolish its predecessor's acts" (*Farrington v Pinckney*, 1 NY2d 74, 82 [1956] [internal quotation marks omitted]), the City Council insists upon its absolute right to undo the 1985 repeal of the 1907 City Charter provision. As a generic platitude of democratic governance, of course, the City Council's position is unassailable. But the City Council's undisputed right to, in essence, repeal the 1985 repeal does not correspondingly confer that body with unfettered power to enact whatever it wants in place of the now-repealed 1985 provision. To the contrary, in designing a replacement for the 1985 provision, the City Council was barred from enacting anything in contravention of a "general law" (Municipal Home Rule Law § 10 [1] [i], [ii]), and *that* includes the Taylor Law's mandate of collective bargaining for police discipline in the absence of a contrary preexisting law that remains in force (*see* Civil Service Law § 204 [2]). Put simply, the City Council's newfound preference for the 1907 legislative judgment does not allow it to resurrect that policy in defiance of the currently-prevailing legislative judgment.

We recognize that the current City Council is frustrated to have fewer policy options at its disposal than did its predecessor in 1985. That frustration, to some extent, is understandable. But it is also inherent in the nature of grandfathering. By abandoning a grandfathered right or privilege, the abandoner necessarily deprives its successors of the ability to revive or reclaim that right or privilege at some future point. As Maine's highest court aptly explained, once "lost . . . [a] grandfathered status . . . could not be revived" (*Day v Town of Phippsburg*, 110 A3d 645, 649 [Me 2015]). Not every legislative decision can be undone, and the City Council's 1985 decision to repeal the 1907 provision simply cannot be undone in the manner attempted in 2019. If the City Council wants to turn back the clock on its 1985 decision and grant final authority over police discipline to an entity like PAB without a conforming collective bargaining agreement, then it must go to Albany and persuade either the Court of Appeals to revisit its policy compromise in *PBA* or the Legislature to recede from its robust preference for collective bargaining. Neither of those options, of course, are within the ken of the Appellate Division.

V

Two final issues require brief discussion.

First, we reject Supreme Court's distinct conclusion that transferring disciplinary power from the police chief to PAB violates an officer's right under Civil Service Law § 75 (2) and Unconsolidated

Laws § 891 to a hearing before "the officer or body having the power to remove the [officer] . . . or by a deputy" thereof. The court reasoned that, because Local Law No. 2 places the onus upon the police chief to *implement* and *enforce* PAB's disciplinary determinations, the

chief technically remains the official "having the power to remove the [charged officer]" such that disciplinary hearings must still be conducted before the chief or a deputy pursuant to sections 75 (2) and 891. That reasoning, however, is unduly pedantic. The whole purpose of Local Law No. 2 was to transfer the *power* to remove police officers from the police chief to PAB. Consistent with that goal, the local law requires the police chief to implement PAB's decreed penalty in each and every case without reduction of any kind. That PAB's members are not also tasked with personally escorting a fired officer out of the precinct does not change the fact that the termination decision was made by PAB, not by the police chief. The court's determination on this point is akin to saying that, in a capital case, the jury is not the "body having the power" to impose the death penalty simply because the jurors are not personally tasked with executing the condemned prisoner. Thus, because Local Law No. 2 makes PAB the primary body "having the power to remove the [officer]," PAB's designation as the disciplinary hearing panel does not violate sections 75 (2) and 891.[3] We acknowledge, of course, that our holding on this tangential point is of limited practical consequence given Local Law No. 2's fundamental incompatibility with the Taylor Law.

Second, we agree with the City Council that the court erred by referring Local Law No. 2 "back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter." That referral was improper, and plaintiffs do not suggest otherwise. The court's judicial function was limited to determining whether and to what extent Local Law No. 2 was void as inconsistent with the general law. The court did just that, and its role ended at that point. The court had no power to "refer" the challenged law back to the legislative body that enacted it for amendment or correction (*see generally People v LaValle*, 3 NY3d 88, 131 [2004], citing *People v Gersewitz*, 294 NY 163, 169 [1945], *cert dismissed* 326 US 687 [1945]; *cf.* Christine Bateup, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 Hastings Intl & Comp L Rev 529, 543-546 [2009] [discussing the declare-incompatible and refer-back model of statutory judicial review in the United Kingdom]). If the City Council wishes to amend Local Law No. 2 in

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[3] The police chief's theoretical power to fire an officer notwithstanding PAB's imposition of a lesser penalty does not change the fact that, under the administrative scheme established by Local Law No. 2, PAB is the primary "body having the power to remove" an officer for purposes of sections 75 (2) and 891. At most, sections 75 (2) and 891 might entitle an officer to another hearing before the chief or a deputy chief in the event that the chief sought to terminate that officer notwithstanding PAB's imposition of a lesser penalty.

response to a judicial ruling, it is more than capable of doing so on its own initiative. Accordingly, the judgment appealed from should be modified by vacating the fourth decretal paragraph and, as so modified, affirmed.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court

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

1241

CA 20-00639

PRESENT: LINDLEY, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

GALSTER ROAD PROPERTIES, LLC, AND MICHAEL A. SANTARO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PENSKE TRUCK LEASING CO., L.P., DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered April 28, 2020. The order denied the motion of defendant to dismiss plaintiffs' first cause of action.

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

Memorandum: Plaintiffs commenced this action asserting, inter alia, a cause of action for breach of contract arising from defendant's alleged failure to pay real estate taxes pursuant to a lease agreement between the parties. Defendant moved to dismiss that cause of action, submitting in support of its motion a general release that the parties signed upon termination of the lease, which purported to be a "full and complete release of all claims." Supreme Court denied the motion, and we affirm.

"[A] general release is governed by principles of contract law" (*Mangini v McClurg*, 24 NY2d 556, 562 [1969]) and " 'should not be set aside unless plaintiff demonstrates duress, illegality, fraud, or mutual mistake' " (*Schroeder v Connelly*, 46 AD3d 1439, 1440 [4th Dept 2007]). Notably, "one who executes a plain and unambiguous release cannot avoid its effect by merely stating that [he or] she misinterpreted its terms" (*Koster v Ketchum Communications*, 204 AD2d 280, 280 [2d Dept 1994], *lv dismissed* 85 NY2d 857 [1995]).

However, a motion pursuant to CPLR 3211 to dismiss a cause of action on the basis of a release must be denied where a court "cannot definitively determine whether the scope of a release was intended to cover the allegations in a complaint" (*Desiderio v Geico Gen. Ins. Co.*, 107 AD3d 662, 663 [2d Dept 2013]; *see also Kaprall v WE: Women's*

Entertainment, LLC, 74 AD3d 1151, 1152 [2d Dept 2010]). We conclude here that the language of the release is ambiguous and that it cannot be determined as a matter of law whether the release was intended to discharge defendant's obligation to pay the real estate taxes on the leased property (*see Dury v Dunadee*, 52 AD2d 206, 208-209 [4th Dept 1976], *appeal dismissed* 40 NY2d 845 [1976]; *see also Doldan v Fenner*, 309 AD2d 1274, 1275 [4th Dept 2003]). Questions of fact exist whether, after the general release was signed, defendant represented to plaintiffs that the general release did not cover those claims and whether the release was signed in the context of environmental problems at the leased property (*see generally Camperlino v Bargabos*, 96 AD3d 1582, 1583-1584 [4th Dept 2012]). Thus, we conclude that the court properly denied defendant's motion because the court could not "definitively determine whether the scope of [the] release was intended to cover" the cause of action (*Desiderio*, 107 AD3d at 663).

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court