SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 29, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

940

KAH 16-01170

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GERALD SMITH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHELLE ARTUS, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

GERALD SMITH, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HEATHER MCKAY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), dated February 26, 2015 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.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus, contending that County Court had lost jurisdiction to sentence him because of its unreasonable delay in imposing sentence, and that the sentencing judge had erred in failing to recuse himself. We conclude that Supreme Court properly denied the petition. As an initial matter, petitioner's contention in his pro se supplemental brief that respondent's return should have been disregarded and his petition granted because the return failed to comply with the requirements of CPLR 7008 is improperly raised for the first time on appeal (*see generally People ex rel. Peoples v New York State Dept. of Corr. Servs.*, 117 AD3d 1486, 1487, *lv denied* 23 NY3d 909), and it is without merit in any event (*see generally People ex rel. Caswell v New York State Div. of Parole*, 11 AD3d 1008, 1008-1009, *lv denied* 4 NY3d 701). With respect to the merits of the petition, habeas corpus relief is unavailable because petitioner's contentions "can be raised on his pending direct appeal from the judgment of conviction or by way of a CPL article 440 motion" (*People ex rel. Thomas v Dray*, 197 AD2d 853, 853, *lv denied* 82 NY2d 663, *rearg denied* 83 NY2d 847; *see People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312, *lv denied* 20 NY3d 853; *People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, 1351, *lv denied* 12 NY3d 714). Moreover, petitioner's recusal contention would not entitle him to immediate release even if it had

merit (*see generally People v Warren*, 100 AD3d 1399, 1401), and it therefore is unavailable as a basis for habeas corpus relief for that reason as well (*see People ex rel. Douglas v Vincent*, 50 NY2d 901, 903; *People ex rel. Cole v Graham*, 147 AD3d 1350, 1351, *lv denied* 29 NY3d 914). We have reviewed petitioner's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

941

TP 17-00420

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

IN THE MATTER OF PAUL J. CHISOLM, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY 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 28, 2017) 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Initially, we conclude that there is substantial evidence to support the determination with respect to inmate rule 113.15 (7 NYCRR 270.2 [B] [14] [v]), inasmuch as petitioner pleaded guilty to violating that rule (*see Matter of Liner v Fischer*, 96 AD3d 1416, 1417). Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions because he failed to raise those contentions in his administrative appeal, and this Court "has no discretionary power to reach" them (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834; *see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

942

KA 15-00321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. SARACENI, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 5, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking as a condition of probation the requirement that defendant consent to the waiver of his Fourth Amendment right protecting him from unreasonable searches and seizures of his person, home, and personal property and to submit to chemical tests of his breath, blood or urine, and by striking special condition nine as a condition of probation, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]). We reject defendant's contention that County Court erred in failing to state its reasons for denying youthful offender status (*see People v Minemier*, 29 NY3d 414, 419-421). The valid waiver of the right to appeal forecloses defendant's challenge to the court's discretionary determination to deny youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024; *People v Daigler*, 148 AD3d 1685, 1686; *People v Bailey*, 137 AD3d 1620, 1621, *lv denied* 27 NY3d 1128). Contrary to defendant's contention, the court was not required to explain that the waiver of the right to appeal would specifically encompass the court's discretionary determination on youthful offender status (*see generally People v Kemp*, 94 NY2d 831, 833). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Agee*, 140 AD3d 1704, 1704-1705, *lv denied* 28 NY3d 925).

Defendant next contends that various conditions of his probation are not authorized by Penal Law § 65.10. We agree with defendant that his contention is not precluded by the waiver of the right to appeal and does not require preservation inasmuch as his challenges to those conditions implicate the legality of the sentence (*see People v King*, 151 AD3d 1651, 1652; *see generally People v Letterlough*, 86 NY2d 259, 263 n 1). We agree with defendant that the document he signed requiring him to consent to waive his Fourth Amendment right protecting him from unreasonable searches and seizures of his person, home, and personal property, and to submit to chemical tests of his breath, blood, or urine, is not enforceable because it was not related to the probationary goal of rehabilitation (*see People v Mead*, 133 AD3d 1257, 1258). The waiver and consent to search was ostensibly based on defendant's acknowledgment that his criminal behavior was related to drug/alcohol abuse, but in fact there was no evidence that defendant was under the influence of alcohol or drugs when he committed the offense or had a history of drug or alcohol abuse (*see id.*; *cf. King*, 151 AD3d at 1653). For similar reasons, we agree with defendant that special condition nine of the conditions of probation, which required him to abstain from the use or possession of alcoholic beverages and to submit to appropriate alcohol testing, is also not enforceable and must be stricken.

Contrary to defendant's contention, special condition four of the conditions of probation is taken verbatim from Penal Law § 65.10 (2) (b) and is therefore a lawful condition of probation. Likewise, special conditions 17, 18, and 21 are lawful conditions of probation pursuant to section 65.10 (4-a) (b). Defendant's remaining challenges to the legality of certain other conditions of probation are without merit. Finally, defendant's constitutional challenges to certain conditions of probation are not preserved for our review (*see King*, 151 AD3d at 1654; *People v Rawson*, 125 AD3d 1323, 1324, *lv denied* 26 NY3d 934; *see generally People v Pena*, 28 NY3d 727, 730), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

943

KA 15-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. SARACENI, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered March 11, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points under risk factors one and four of the risk assessment instrument. Defendant's contentions are not preserved for our review (*see People v Gillotti*, 23 NY3d 841, 854; *People v Wilson*, 117 AD3d 1557, 1558, *lv denied* 24 NY3d 902; *People v Law*, 94 AD3d 1561, 1562, *lv denied* 19 NY3d 809), however, because at the SORA hearing he only contested the points assessed under risk factor 12.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

946

KA 15-00263

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK PERSON, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 4, 2014. The judgment convicted defendant, upon a jury verdict, of robbery 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 robbery in the first degree (Penal Law § 160.15 [4]). The conviction arises from an incident in which defendant and a codefendant robbed the victim at gunpoint and left the scene in a vehicle driven by another codefendant (*see People v Thompson*, 147 AD3d 1298, 1299, *lv denied* 29 NY3d 1037; *People v Evans*, 142 AD3d 1291, 1291, *lv denied* 28 NY3d 1144). Defendant and the codefendants were apprehended after a high-speed police pursuit, the gun used in the robbery was found near several bullets and a magazine along the pursuit route, and the victim identified defendant and one codefendant in showup identification procedures. At trial, Supreme Court charged the jury on the affirmative defense that the gun "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (§ 160.15 [4]), but the jury nonetheless convicted all three defendants of robbery in the first degree.

We reject defendant's contention that the evidence established as a matter of law that the gun was not loaded during the robbery and thus is legally insufficient to support his conviction. As we previously determined on the appeal of a codefendant, the presence of ammunition in the vicinity of the gun when it was recovered supports a reasonable inference that it "was 'loaded at the time of the crime, but unloaded at the time it was recovered' " (*Thompson*, 147 AD3d at 1300). Defendant's remaining challenges to the legal sufficiency of

the evidence are not preserved for our review inasmuch as he failed to raise them in his motion for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19-21). Defendant contends that, because the evidence was undisputedly sufficient to establish a lesser included offense and the court thus could not have issued a trial order of dismissal (*see* CPL 290.10 [1] [a]; *People v Vaughan*, 48 AD3d 1069, 1070, *lv denied* 10 NY3d 845, *cert denied* 555 US 910), the preservation rule set forth in *Gray* should not apply here. We reject that contention, and conclude that he remained obligated to raise his sufficiency challenges in his motion in order to preserve them for our review (*see* CPL 470.05 [2]; *People v Whited*, 78 AD3d 1628, 1629, *lv denied* 17 NY3d 810). Notably, the court could have afforded defendant relief by declining to submit the charged degree of offense to the jury on the ground of insufficient evidence if his challenges had merit (*see* CPL 300.30 [1]; *People v Mayo*, 48 NY2d 245, 248-249).

Notwithstanding defendant's failure to preserve all of his sufficiency contentions for our review, "we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of [his] challenge regarding the weight of the evidence" (*People v Stephenson*, 104 AD3d 1277, 1278, *lv denied* 21 NY3d 1020, *reconsideration denied* 23 NY3d 1025 [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), however, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495), including with respect to the affirmative defense (*see Thompson*, 147 AD3d at 1300), as well as with respect to whether the gun specifically appeared to be a rifle when it was displayed to the victim, as required by the jury charge.

We also reject defendant's contention that he was deprived of his Sixth Amendment right of confrontation by the victim's invocation of his privilege against self-incrimination on cross-examination. The victim invoked the privilege in response to questions about a collateral matter, i.e., the underlying facts of an unrelated conviction pending on appeal, and we therefore conclude that the court properly declined to preclude his testimony in favor of charging the jury that it could consider his refusal to answer questions in evaluating his credibility (*see People v Joaquin*, 150 AD3d 618, 619; *People v Hickman*, 60 AD3d 865, 866, *lv denied* 12 NY3d 916; *see generally People v Siegel*, 87 NY2d 536, 544; *People v Chin*, 67 NY2d 22, 28-29). It was not " 'patently clear' " that the victim's answers could not have been used against him in the future (*People v Grimes*, 289 AD2d 1072, 1073, *lv denied* 97 NY2d 755; *see generally People v Cantave*, 21 NY3d 374, 380, *clarification denied* 21 NY3d 1070), and the People were not obligated to offer the victim immunity in exchange for his testimony (*see generally Chin*, 67 NY2d at 32-33; *People v Adams*, 53 NY2d 241, 247-248). In addition, we conclude that defendant was not deprived of his right of confrontation by the admission in evidence of statements made by a codefendant. Because "[t]he statements incriminated defendant, if at all, only in light of other

evidence produced at trial . . . , and the court directed the jury to consider the statements only against the codefendant who made them" (*Thompson*, 147 AD3d at 1300-1301), the codefendant "is not considered to be a witness against . . . defendant within the meaning of the Sixth Amendment" (*id.* at 1301 [internal quotation marks omitted]; *see Richardson v Marsh*, 481 US 200, 206-209; *People v Cedeno*, 27 NY3d 110, 117-118, *cert denied* ___ US ___, 137 S Ct 205).

Defendant has not established that he was denied effective assistance of counsel. Counsel's failure to preserve all of defendant's legal sufficiency challenges does not constitute ineffective assistance because those challenges would not have been meritorious (*see People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997). Defendant's contention that counsel failed to investigate the DNA evidence introduced at trial involves matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Blocker*, 132 AD3d 1287, 1287-1288, *lv denied* 27 NY3d 992; *People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* 565 US 910). Contrary to defendant's contention, we do not view certain comments made by counsel during cross-examination of the DNA witnesses as proof that counsel was unfamiliar with the subject matter of their testimony. We further conclude that defendant has not demonstrated the absence of a legitimate explanation for counsel's alleged error in failing to move to reopen the suppression hearing when the victim gave testimony at trial tending to establish that the showup identification procedures were unduly suggestive (*see People v Gray*, 27 NY3d 78, 83-84; *People v Robles*, 116 AD3d 1071, 1071, *lv denied* 24 NY3d 1088; *People v Elamin*, 82 AD3d 1664, 1665, *lv denied* 17 NY3d 794; *see generally People v Carver*, 27 NY3d 418, 420-421). Even construing counsel's posttrial assertion that he had been "somewhat asleep at the switch" with respect to the possibility of reopening the hearing as an admission that he did not make a conscious decision to forgo the motion, we conclude that his subjective reasoning is immaterial, and that declining to make the motion was consistent with the actions of a reasonably competent attorney (*see generally People v Ambers*, 26 NY3d 313, 317-318; *People v Alicea*, 229 AD2d 80, 85-86, *lv denied* 90 NY2d 890). Furthermore, in view of the ample evidence apart from the victim's pretrial identification establishing defendant's identity as one of the perpetrators of the robbery, we conclude that any error by counsel in failing to move to reopen the hearing "was not so egregious and prejudicial as to deprive defendant of a fair trial" (*People v Coley*, 148 AD3d 1651, 1652, *lv denied* 29 NY3d 1030 [internal quotation marks omitted]; *see generally People v Benevento*, 91 NY2d 708, 713-714).

Defendant further contends that the court improperly influenced the jury's deliberations by instructing the jury to resume deliberating after it returned an incomplete, and therefore legally defective, verdict relative to codefendant Evans. That contention is not preserved for our review because defendant did not join in the mistrial motion made by codefendant Thompson or otherwise specifically object to the court's handling of the issue (*see generally* CPL 470.05 [2]; *People v Buckley*, 75 NY2d 843, 846). In any event, we conclude

that the court acted within its discretion in directing the jury to resume deliberations (*see* CPL 310.50 [2]; *Thompson*, 147 AD3d at 1299). Defendant's reliance on *People v Rivera* (15 NY3d 207) is misplaced because that case involved a partial verdict rather than a defective verdict (*see id.* at 210-212; *compare* CPL 310.50 [2] *with* CPL 310.70 [1]). Defendant's contention that the verdict sheet contained improper annotations is likewise both unpreserved for our review (*see People v Belvett*, 105 AD3d 538, 538, *lv denied* 21 NY3d 1040; *People v Boyd*, 50 AD3d 1578, 1578-1579, *lv denied* 11 NY3d 785), and without merit (*see People v Cole*, 85 NY2d 990, 991-992).

Finally, we conclude that defendant was not denied a fair trial by the cumulative effect of the alleged errors and that the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

947

KA 11-00481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINNTARIUS WHITE, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON 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 (Frank P. Geraci, Jr., J.), rendered September 15, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant was arrested in 2003 and charged with two counts of murder in the second degree (Penal Law § 125.25 [1] [intentional murder], [2] [depraved indifference murder]). He was originally convicted upon his guilty plea of depraved indifference murder, and was sentenced to an indeterminate term of imprisonment of 15 years to life. On a prior appeal, this Court concluded, under the then-evolving case law applicable to that crime (*see People v Gonzalez*, 1 NY3d 464, 467-468), that the factual allocution failed to establish that defendant acted recklessly or with depraved indifference, and we therefore reversed the judgment, vacated the plea, and remitted the matter to County Court for further proceedings on the indictment (*People v White*, 70 AD3d 1343, *lv denied* 14 NY3d 894). Upon remittal, defendant was offered a plea bargain on the intentional murder charge with the same sentence as that previously imposed, but the matter proceeded to trial when he indicated that he did not shoot the victim and was not present when the crime occurred. Defendant now appeals from a judgment convicting him upon a jury verdict of intentional murder.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his guilt as an accomplice because the People were bound by the doctrine of collateral estoppel to accept that the codefendant, who pleaded guilty to depraved indifference murder (Penal Law § 125.25 [2]), did not intend to kill the victim (*see* CPL 470.05 [2]). In any event, that

contention is without merit. Defendant was charged as a principal and an accomplice and, regardless of the evidence of accomplice liability, the evidence is legally sufficient to establish defendant's liability as a principal (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the contention of defendant that, in view of his justification defense, the verdict is against the weight of the evidence (*see People v Cook*, 270 AD2d 915, 916, *lv denied* 95 NY2d 795; *People v White*, 168 AD2d 962, 963, *lv denied* 77 NY2d 968; *see also People v Johnson*, 103 AD3d 1226, 1226-1227, *lv denied* 21 NY3d 944). The jury's credibility assessments are entitled to great deference, and it cannot be said here that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the court abused its discretion in admitting in evidence photographs of the victim's body because, although they concededly were relevant, they were highly prejudicial. We reject that contention (*see People v Pobliner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; *People v Payton*, 147 AD3d 1354, 1354). Furthermore, "the trial court balanced the photographs' probative value against their potential for prejudice by limiting the number of photographs admitted" in evidence (*People v Llamas*, 186 AD2d 685, 686, *lv denied* 81 NY2d 842), and "the court issued prompt instructions that the jury avoid emotion when viewing the exhibits" (*People v Timmons*, 78 AD3d 1241, 1245, *lv denied* 16 NY3d 837; *see People v Francis*, 83 AD3d 1119, 1122, *lv denied* 17 NY3d 806). Contrary to defendant's contention, "[t]he People were not bound to rely entirely on the testimony of the medical expert to prove [defendant's intent] and the photographs were admissible to elucidate and corroborate that testimony" (*People v Stevens*, 76 NY2d 833, 836).

We reject defendant's contention that the longer sentence imposed after his successful appeal from the prior judgment of conviction is a vindictive punishment for exercising his right to appeal. "It is a well-settled principle that criminal defendants should not be penalized for exercising their right to appeal. To punish a person because he [or she] has done what the law plainly allows him [or her] to do is a due process violation of the most basic sort . . . In order to insure that trial courts do not impose longer sentences to punish defendants for taking an appeal, a presumption of vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences after their retrials than were imposed after their initial convictions" (*People v Young*, 94 NY2d 171, 176, *rearg denied* 94 NY2d 876 [internal quotation marks omitted]), regardless of whether the prior conviction was by plea or trial (*see e.g. People v Miller*, 103 AD2d 808, 809, *affd* 65 NY2d 502, *cert denied* 474 US 951; *cf. Alabama v Smith*, 490 US 794, 799-803). Nevertheless, "[i]t is . . . no more than a presumption and may be overcome by evidence that the higher sentence rests upon a legitimate and reasoned basis" (*Miller*, 65 NY2d at 508).

Here, in originally pleading guilty to the depraved indifference

murder charge, defendant stated during the plea colloquy that he and a codefendant "searched for the victim and, upon locating him, shot him at close range. Defendant also stated that he fired at the victim" (*White*, 70 AD3d at 1343). Nevertheless, during the interview that was conducted by a probation officer who prepared the presentence report after the postappeal trial on the intentional murder charge, defendant "emphasized that he had not intended to shoot the victim," and he told the court at the postappeal sentencing proceeding that he "wanted to just talk to [the victim] and that was that. [He] didn't mean for any of this to happen at all." It is well settled that a defendant's failure to accept responsibility for his or her actions is a factor upon which the court may rely in imposing sentence (*see e.g. People v Simcoe*, 75 AD3d 1107, 1109, *lv denied* 15 NY3d 924), and indeed the court in the case before us specifically noted in imposing sentence that defendant was "not taking responsibility. I believe that can be taken into consideration and differs from what occurred back in 2004." Thus, the "presumption [of vindictiveness] was rebutted by the sentencing court, which affirmatively placed on the record 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding,' such as his . . . lack of genuine remorse" (*People v Ocampo*, 52 AD3d 741, 742, *lv denied* 11 NY3d 792; *see People v Casanova*, 152 AD3d 875, 879-880).

In addition, the increased sentence is justified by "defendant's election, after his successful appeal, of a jury trial which imposed upon the victim['s family] the trauma of publicly reliving the events of the attack. The Supreme Court has recognized . . . 'that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process' " (*Miller*, 65 NY2d at 509). Here, the court initially agreed to exercise its discretion to impose a lesser sentence upon defendant's plea of guilty in order, inter alia, to bring closure to the victim's family and obviate the need for them to relive the gruesome events of the victim's death. Having rejected a plea upon remittal and chosen to exercise his right to a trial, defendant "should not be heard to complain that a higher sentence is imposed after conviction" because, by exercising his right to a trial in which those events were described in detail, "he has removed from consideration the element of discretion involved" (*id*.).

Finally, defendant contends that the sentence is unduly harsh and severe. Contrary to the People's contention, and as we have previously noted, it is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783), and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). Nevertheless, we conclude

that the term of incarceration is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

948

KA 14-00663

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS L. PETERKIN, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 3, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree, attempted burglary in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), attempted burglary in the second degree (§§ 110.00, 140.25 [2]), and resisting arrest (§ 205.30). As the People correctly concede, defendant's written waiver of the right to appeal is invalid because the record establishes that County Court did not explain the written waiver to defendant or ascertain that he understood its contents (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Callahan*, 80 NY2d 273, 283; *People v Terry*, 138 AD3d 1484, 1484, *lv denied* 27 NY3d 1156). Indeed, "[a] written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his [or her] right to appeal" (*Terry*, 138 AD3d at 1484 [internal quotation marks omitted]).

Contrary to defendant's contention, the court did not err in denying that part of his omnibus motion seeking to suppress the identification testimony of two witnesses on the ground that the photo array used in the pretrial identification procedures was unduly suggestive. "The composition and presentation of the photo array were such that there was no reasonable possibility that the attention of the witness[es] would be drawn to defendant as the suspect chosen by the police" (*People v Sylvester*, 32 AD3d 1226, 1227, *lv denied* 7 NY3d 929; *see generally People v Chipp*, 75 NY2d 327, 335-336, *cert denied* 498 US 833). We reject defendant's contention that the police should have shown the witnesses a photo array without defendant's photograph in it, in addition to the photo array that contained his

photograph.

Defendant contends that the court erred in denying that part of his omnibus motion seeking to suppress evidence obtained after his arrest because the police officer did not have probable cause to believe that defendant had committed a crime when he approached him. We reject that contention. The court properly determined that the actions of the officer were justified at his initial encounter with defendant and every subsequent stage thereafter (*see generally People v Bradley*, 137 AD3d 1611, 1611, *lv denied* 27 NY3d 1128). The officer viewed surveillance videos of a suspect in a burglary that had occurred the day before, and later that day he saw defendant walking along a street, wearing the same clothing and carrying the same backpack as the man in the videos. The officer therefore had an " 'objective credible reason' " to approach defendant and ask him his name (*People v Garcia*, 20 NY3d 317, 322; *see People v Hollman*, 79 NY2d 181, 190). When defendant gave a false identification, the officer had a founded suspicion that criminal activity was afoot, thus permitting him to ask defendant what he had in an orange bag from Kinney Drugs (*see People v Battaglia*, 86 NY2d 755, 756; *see generally Hollman*, 79 NY2d at 191-192). Defendant showed the officer the contents of the bag, which the officer believed to be an item stolen in the burglary. Defendant dropped the bag and stuck his hand in his pocket, and refused to remove it when asked to do so by the officer. When the officer tried to remove defendant's hand from his pocket, defendant struck the officer and then fled. Defendant's actions in striking the officer gave the officer probable cause to arrest defendant and search him incident to the arrest (*see generally People v De Bour*, 40 NY2d 210, 223). In addition, the items recovered from the discarded backpack and the Kinney Drugs bag were lawfully obtained by the police inasmuch as defendant abandoned them (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108).

Defendant's contention that he was coerced into pleading guilty is without merit. In his motion to withdraw the plea, defendant stated that he was under the impression that, if he was convicted of the offenses, he was facing a mandatory minimum sentence of 16 years to life. The preplea proceedings, however, showed that defendant was advised that he would receive that minimum sentence only if he was convicted of the offenses *and* found to be a persistent violent felony offender. Defendant's remaining challenge to the voluntariness of the plea is not preserved for our review because it was not raised in his motion to withdraw the guilty plea (*see People v Zuliani*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894), and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). Finally, the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

952

CA 17-00231

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

TAMMY PREP, PLAINTIFF-RESPONDENT,

V ORDER

SODEXO MANAGEMENT, INC., DEFENDANT-APPELLANT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

FLYNN WIRKUS YOUNG, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 10, 2016. The order granted the motion of plaintiff for bifurcation.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 28 and August 1, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

953

CA 17-00548

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

LASZLO BIRO AND MARY BIRO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HARRY KEEN AND DONNA KEEN, DEFENDANTS-APPELLANTS.

ANTHONY J. VILLANI, P.C., LYONS (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WELCH, DONLON & CZARPLES PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), dated August 5, 2016. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly arising from an incident in which Laszlo Biro (plaintiff) stepped on one of several bricks or blocks (hereafter, bricks) that he had placed on an exterior landing of an apartment building owned by defendants, where plaintiffs resided, and he fell when the brick moved. In the complaint, as amplified by the bill of particulars, plaintiffs alleged that the incident was caused by several dangerous conditions on the premises, including that the step from the landing to the doorway was too high, that plaintiff was forced to place bricks on the landing to permit plaintiffs to enter and exit the apartment, that there was no hand rail on one side of the door, that defendants installed a screen door that blocked the hand rail on the other side of the door, and that defendants had actual and constructive notice of those conditions but failed to remedy them. Defendants moved for summary judgment dismissing the complaint, contending that plaintiff created the dangerous condition on the premises by placing the bricks on the landing, and that plaintiff's conduct was a superseding intervening act that was the sole proximate cause of the accident. Defendants now appeal from an order denying their motion, based on the court's determination that there are triable issues of fact whether the injuries were the foreseeable result of defendants' negligence. We affirm.

Plaintiffs allege that defendants are liable, as landlords, for the dangerous conditions on the property. It is well settled that "a

landlord may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises [where, as here,] the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs" (*Chapman v Silber*, 97 NY2d 9, 19). "Thus, in a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the defective condition nor had actual or constructive notice of its existence" (*Friedman v 1753 Realty Co.*, 117 AD3d 781, 783; *see Anderson v Justice*, 96 AD3d 1446, 1447). Here, it is undisputed that defendants were aware of the high step, as well as the missing and blocked hand rails, and that plaintiff had placed the bricks on the landing under the door. We agree with the court, however, that defendants failed to eliminate all triable issues of fact whether plaintiff's conduct in placing the bricks on the landing was a superseding intervening cause of the accident, i.e., defendants failed to meet their burden of establishing that the accident was not "a normal or foreseeable consequence of the situation created by [their] [alleged] negligence" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *see Gardner v Perrine*, 101 AD3d 1587, 1587-1588; *Graziadei v Mohamed*, 23 AD3d 1100, 1101). Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law, the court properly denied the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Finally, defendants' further contentions, which concern assumption of the risk and the allegedly open and obvious nature of the dangerous condition, are improperly raised for the first time on appeal (*see Oram v Capone*, 206 AD2d 839, 840).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

954

CA 16-01352

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

JASON KIRCHNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, CLAUDETTE CALDWELL, COUNTY OF ERIE, JAMES J. WOYTASH, M.D., AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (MATTHEW J. KIBLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES J. WOYTASH, M.D., AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNTY OF NIAGARA AND CLAUDETTE CALDWELL.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered October 29, 2015. The order, among other things, granted the motions of defendants for summary judgment dismissing plaintiff's amended complaint.

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

Memorandum: As set forth in a prior appeal, plaintiff commenced this malicious prosecution action after he was arrested and indicted for the death of his infant daughter (*Kirchner v County of Niagara*, 107 AD3d 1620). In appeal No. 1, Supreme Court, inter alia, granted defendants' motions for summary judgment dismissing the amended complaint and, in appeal No. 2, the court, inter alia, denied plaintiff's motion for leave to reargue and/or renew defendants' motions.

With respect to appeal No. 1, we conclude that defendants met their initial burden of establishing their entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In an

action for malicious prosecution, it must be shown that a criminal proceeding commenced against the plaintiff lacked probable cause, and defendants established that the criminal proceeding against plaintiff was supported by probable cause (*see generally Martinez v City of Schenectady*, 97 NY2d 78, 84; *Cantalino v Danner*, 96 NY2d 391, 394-395). Plaintiff was indicted by a grand jury, which creates a presumption of probable cause (*see Grucci v Grucci*, 20 NY3d 893, 898; *Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670). "If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" (*Colon*, 60 NY2d at 83; *see Grucci*, 20 NY3d at 898).

In the prior appeal, we held that the complaint sufficiently alleged fraud, perjury, and conduct undertaken in bad faith to survive defendants' motions to dismiss (*Kirchner*, 107 AD3d at 1622). By submitting the depositions of the parties and others in support of their instant motions for summary judgment, however, defendants established that there was no fraud, perjury, or conduct undertaken in bad faith. The evidence established that members of the police department, defendant Claudette Caldwell, Esq., an assistant district attorney with the Niagara County District Attorney's Office, and defendant James J. Woytash, M.D., the Chief Medical Examiner of defendant County of Erie, met to discuss Woytash's findings after the case was initially closed. Contrary to the earlier understanding of the police and Caldwell, Woytash found more than one injury to the infant's head and concluded that the infant died of craniocerebral blunt force injury and the complications due to it. He also determined, relying on a method set forth in a medical journal article, that the injuries were inflicted upon the infant within four to six hours of her death. Based on those findings and other evidence, the decision was made to present the matter to a grand jury. Defendants submitted evidence that, contrary to the allegations in the amended complaint, plaintiff's wife did not encourage or ask Caldwell to reopen the investigation, and Caldwell did not encourage or coach Woytash to provide false information to the police or grand jury regarding the infant's cause of death and the timing of her injuries. We reject plaintiff's contention that the minor discrepancies in the deposition testimony of Caldwell, Woytash, and a police captain raised a triable issue of fact whether Woytash gave false findings or provided false testimony to the grand jury.

We reject plaintiff's further contention that there is a triable issue of fact whether Woytash knowingly fabricated testimony because another forensic pathologist disagreed with Woytash regarding his findings and methodology in determining the timing of the infant's injuries. That dispute was the basis for the dismissal of the indictment against plaintiff after the People concluded that they would not be able to prove their case beyond a reasonable doubt. The fact that Woytash may have been wrong in his findings and conclusions, however, does not raise a triable issue of fact whether he provided false testimony to the grand jury.

With respect to appeal No. 2, the appeal from that part of the order denying that part of plaintiff's motion seeking leave to reargue must be dismissed because no appeal lies therefrom (*see Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627). The court did not abuse its discretion in denying that part of the motion seeking leave to renew (*see id.*). Plaintiff submitted the affidavits of two experts who concluded that the infant died of pneumonia and that there was no evidence of traumatic injury to the brain. Plaintiff failed to show that the new evidence "would change the prior determination" (CPLR 2221 [e] [2]; *see Chiappone*, 96 AD3d at 1628). As explained above, this evidence simply disputed Woytash's findings and conclusions, but did not raise a triable issue of fact on the issue whether he fabricated evidence.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

955

CA 16-01353

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

JASON KIRCHNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, CLAUDETTE CALDWELL, COUNTY OF ERIE, JAMES J. WOYTASH, M.D., AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (MATTHEW J. KIBLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES J. WOYTASH, M.D., AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNTY OF NIAGARA AND CLAUDETTE CALDWELL.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered April 25, 2016. The order, among other things, denied plaintiff's motion for leave to reargue and/or renew his opposition to the motions of defendants for summary judgment.

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

Same memorandum as in *Kirchner v County of Niagara* ([appeal No. 1] ___ AD3d ___ [Sept. 29, 2017]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

956

CA 16-02275

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

CAYSEA CONTRACTING CORP., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MASSA CONSTRUCTION, INC., DEFENDANT-APPELLANT, INTERNATIONAL FIDELITY INSURANCE, AND DUNDEE CENTRAL SCHOOL DISTRICT, DEFENDANTS.

SHEATS & BAILEY, PLLC, BREWERTON (JASON B. BAILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered October 3, 2016. The order denied the motion of defendants Massa Construction, Inc., and International Fidelity Insurance seeking to dismiss plaintiff's complaint as against them.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that defendant International Fidelity Insurance did not take an appeal from the order (*see* CPLR 5515 [1]) and, therefore, any contentions raised by it are beyond our review (*see Hecht v City of New York*, 60 NY2d 57, 61; *Matter of Sheldon v Jaroszynski*, 142 AD3d 762, 762-763).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

958

CA 17-00253

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

THERESA HECKER, PLAINTIFF-RESPONDENT,

V ORDER

EDEN CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (DANIEL T. CAVARELLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 3, 2016. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 22, 2017, and filed in the Erie County Clerk’s Office on July 10, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

959

CA 17-00447

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

IN THE MATTER OF ARBITRATION BETWEEN LEWIS COUNTY, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CSEA LOCAL 1000, AFSCME, AFL-CIO, LEWIS COUNTY SHERIFF'S EMPLOYEES UNIT #7250-03, LEWIS COUNTY LOCAL 825, RESPONDENT-APPELLANT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (JEREMY GINSBURG OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered July 5, 2016 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, granted the petition for a permanent stay of arbitration with respect to Denyse Hastwell.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied with respect to Denyse Hastwell, and the cross motion is granted with respect to her.

Memorandum: Petitioner's Sheriff made the determination to appoint one of three part-time dispatchers, who were members of respondent union, to the position of full-time dispatcher. Respondent filed grievances on behalf of the other two part-time dispatchers pursuant to the parties' collective bargaining agreement (CBA), alleging that they have more seniority and experience than the candidate selected by the Sheriff. Petitioner denied the grievances, and respondent filed demands for arbitration. Petitioner commenced this proceeding pursuant to CPLR article 75, seeking a permanent stay of arbitration, contending that the grievances were not the proper subject of arbitration. The demand for arbitration was subsequently withdrawn with respect to one of the part-time dispatchers, and respondent appeals from an order granting the petition and denying respondent's cross motion to compel arbitration with respect to Denyse Hastwell, the other part-time dispatcher. We agree with respondent that Supreme Court erred in granting the petition and denying the cross motion with respect to her.

The Court of Appeals has set forth a two-pronged test to

determine "whether a grievance is arbitrable" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [*Johnstown*]; *see Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143; *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509, 513). In the first prong of the test, known as "the 'may-they-arbitrate' prong," we "ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Johnstown*, 99 NY2d at 278). If we conclude that arbitration is not prohibited, we move to the second prong, known as "the 'did-they-agree-to-arbitrate' prong," in which we "examine the CBA to determine if the parties have agreed to arbitrate the dispute at issue" (*id*.).

Here, petitioner does not contend that arbitration of Hastwell's grievance is prohibited, and we therefore are concerned only with the second prong of the *Johnstown* test. With respect to that issue, "[i]t is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340). Furthermore, "[w]here, as here, there is a broad arbitration clause and a 'reasonable relationship' between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court 'should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them' " (*Matter of Van Scoy [Holder]*, 265 AD2d 806, 807-808; *see Matter of Ontario County [Ontario County Sheriff's Unit 7850-01, CSEA, Local 1000, AFSCME, AFL-CIO]*, 106 AD3d 1463, 1464-1465; *Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, *lv denied* 14 NY3d 712). Here, the grievance concerned the determination of which employee should be promoted from part time to full time, and a reasonable relationship exists between the subject matter of the grievance and the general subject matter of the CBA (*see Matter of Wilson Cent. Sch. Dist. [Wilson Teachers' Assn.]*, 140 AD3d 1789, 1790; *Matter of County of Herkimer v Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO*, 124 AD3d 1370, 1371). Thus, "it is for the arbitrator to determine whether the subject matter of the dispute falls within the scope of the arbitration provisions of the [CBA]" (*Matter of City of Watertown v Watertown Firefighters, Local 191*, 6 AD3d 1095, 1096; *see generally Niagara Frontier Transp. Auth.*, 71 AD3d at 1390-1391).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

961

CA 16-01911

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

IN THE MATTER OF THE PROBATE PROCEEDING, WILL
OF SHIRLEY MAE TEACHOUT, DECEASED.
---------- ORDER
ALMA P. HUSSAIN, PETITIONER-APPELLANT;

GARY H. TEACHOUT, RESPONDENT-RESPONDENT.

GUY LAW OFFICE, SYRACUSE (FREDERICK R. GUY OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered January 11, 2016. The order, among other things, denied the petition in part.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

962

CA 16-02351

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

DIAMOND ROOFING CO., INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PCL PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 8, 2016. The judgment, insofar as appealed from, awarded plaintiff attorney's fees and prejudgment interest.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the awards of attorney's fees and prejudgment interest at the rate of 18% per annum are vacated, and plaintiff is awarded prejudgment interest at the rate of 9% per annum from September 30, 2015 to August 16, 2016 in the sum of $18,934.40.

Memorandum: Plaintiff commenced this action to recover damages for breach of contract, alleging nonpayment by defendant of the costs of materials and labor supplied by plaintiff in connection with the repair of a commercial warehouse roof for defendant as contract-vendee. The parties executed a written proposal that included the agreed-upon price for the work to be performed and for payment upon completion of the work. After completing the work, plaintiff allegedly presented defendant with an invoice for the agreed-upon amount. The invoice included a provision for payment of plaintiff's attorney's fees if collection efforts were undertaken and for interest at the rate of 18% per annum on any balance due after 30 days of a demand therefor. According to defendant, payment was not due until it closed a purchase money loan for the building and plaintiff agreed to that payment condition before and after the execution of the written proposal.

Plaintiff moved for summary judgment on the complaint, which contained a single cause of action for breach of contract. The complaint did not reference the invoice, nor was it attached thereto.

Neither plaintiff's moving papers nor reply papers mentioned an "account stated" theory of recovery, a request for attorney's fees, or interest at the rate of 18%. That interest rate appeared in the boilerplate language on the invoice. Supreme Court issued a decision and order that granted plaintiff's motion for summary judgment on the breach of contract cause of action and sua sponte awarded plaintiff attorney's fees and interest at the rate of 18% per annum on an unpleaded "account stated" theory. Prior to the entry of judgment, defendant paid plaintiff the agreed-upon roof repair amount of $239,980.

Defendant, as limited by its brief, appeals from those parts of the judgment that awarded plaintiff attorney's fees in the amount of $2,525 and prejudgment interest at the rate of 18% per annum from October 29, 2015 to August 11, 2016 in the sum of $37,074.44.

We agree with defendant that the court erred in awarding attorney's fees and prejudgment interest at the rate of 18% based on an unpleaded account stated theory. The record establishes that plaintiff neither pleaded an account stated theory nor moved for summary judgment on that ground (*cf. Citibank [S.D.], N.A. v Brown-Serulovic*, 97 AD3d 522, 523; *Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572-573). It is well settled that, generally, a party may not obtain summary judgment on an unpleaded cause of action (*see generally Cohen v City Co. of N.Y.*, 283 NY 112, 117), but there is an exception to that general rule where the proof supports such a cause of action and the opposing party has not been misled to its prejudice (*see Torrioni v Unisul, Inc.*, 214 AD2d 314, 315). Here, we conclude that defendant was substantially prejudiced by the court's sua sponte reliance on the unpleaded account stated theory (*see Kramer v Danalis*, 49 AD3d 263, 263; *cf. Boyle v Marsh & McLennan Cos., Inc.*, 50 AD3d 1587, 1588, *lv denied* 11 NY3d 705). Indeed, we note that plaintiff's moving and reply papers did not even mention that theory, nor did they mention attorney's fees or interest at the rate of 18% per annum (*cf. Boyle*, 50 AD3d at 1588).

We conclude that the court further erred in searching the record pursuant to CPLR 3212 (b) and granting summary judgment on an account stated theory to plaintiff, the moving party. Although a court has the authority to search the record and grant summary judgment to a *nonmoving* party (*see id.*), that authority is applicable "only with respect to a [claim] or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430; *see Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 901-902). Here, plaintiff was the moving party and an account stated theory was not the subject of the motion before the court.

We therefore reverse the judgment insofar as appealed from, vacate the awards of attorney's fees and prejudgment interest at the rate of 18% per annum, and award plaintiff prejudgment interest at the statutory rate of 9% (*see* CPLR 5001 [a]; 5004), from September 30, 2015, the date on which payment was due, until August 16, 2016, the date of payment, in the sum of $18,934.40 (*see Levy, King & White Adv.*

v Gallery of Homes, 177 AD2d 967, 968).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

963

CA 17-00391

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

DIAMOND ROOFING CO., INC., PLAINTIFF-RESPONDENT,

V ORDER

PCL PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 15, 2016. The order denied the motion of defendant to reargue.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

964

CA 17-00392

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

DIAMOND ROOFING CO., INC., PLAINTIFF-RESPONDENT,

V ORDER

PCL PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 20, 2017. The order denied the motion of defendant to renew.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

965

TP 17-00285

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

IN THE MATTER OF NAKWON FOXWORTH, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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 8, 2017) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

967

KA 13-01761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VAN K. COTTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered June 27, 2013. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and 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 jury verdict of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in granting the People's request to charge the jury on manslaughter in the first degree as a lesser included offense of murder in the second degree (§ 125.25 [1]). We reject that contention inasmuch as there is " 'a reasonable view of the evidence to support a finding that . . . defendant committed the lesser offense but not the greater' " (*People v Ingram*, 140 AD3d 1777, 1778, quoting *People v Van Norstrand*, 85 NY2d 131, 135), i.e., that he intended to cause serious physical injury to the victim rather than to kill him (*see People v Atkinson*, 21 AD3d 145, 147, 154, *mod on other grounds* 7 NY3d 765; *People v Straker*, 301 AD2d 667, 668, *lv denied* 100 NY2d 587; *People v Stevens*, 186 AD2d 832, 832-833, *lv denied* 81 NY2d 766).

Contrary to defendant's further contention, the court properly admitted the testimony of an eyewitness concerning his pretrial photo identification of defendant for the purpose of correcting "a misapprehension created by the defense regarding the issue of identification" (*People v Robinson*, 5 AD3d 1077, 1078, *lv denied* 2 NY3d 805 [internal quotation marks omitted]; *see People v Williams*, 142 AD3d 1360, 1361, *lv denied* 28 NY3d 1128). We agree with defendant that, under the circumstances of this case, the testimony of the investigator who administered the photo array was not necessary to

correct the misapprehension, and thus the court erred in admitting the testimony of the investigator with respect to the details of the photo identification made by the eyewitness (*see People v Melendez*, 55 NY2d 445, 452; *see also People v Massie*, 2 NY3d 179, 182-183; *People v Boyd*, 189 AD2d 433, 441, *lv denied* 82 NY2d 714). We nevertheless conclude that the error is harmless (*see Boyd*, 189 AD2d at 441-442; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

968

KA 16-01998

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MEGAN L. SHIMBURSKI, DEFENDANT-APPELLANT.

PHIL MODRZYNSKI, BUFFALO, 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 June 20, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the seventh degree and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and tampering with physical evidence (§ 215.40 [2]). Contrary to defendant's contention, County Court did not err in refusing to suppress the drugs and drug paraphernalia seized by the police during the execution of a search warrant at defendant's residence.

Defendant contends that the search warrant was issued without probable cause. We reject that contention. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423, citing *People v McRay*, 51 NY2d 594, 602). Here, the information supporting the application for the search warrant established that three criminal complaints were filed on March 31, 2014, by three different victims alleging that personal items had been stolen from their vehicles. One of the victims reported that his Dunkin Donuts gift card had been stolen. The police determined that at least two perpetrators were involved in all three complaints inasmuch as one perpetrator left a larger footprint than the other in the snow. The modus operandi of the perpetrators was to use the wooded areas and backyards of the victims' homes to conceal their approach and egress

from the crime scenes. After the thefts, two men, one of whom was defendant's housemate and taller than the other, were observed using the stolen gift card to make purchases at two different Dunkin Donuts locations. We conclude that such information was sufficient to support a reasonable belief on the part of the police that evidence of the thefts could be found in defendant's residence (*see People v Pinkney*, 90 AD3d 1313, 1315; *People v Church*, 31 AD3d 892, 894, *lv denied* 7 NY3d 866).

We reject defendant's further contention that the information possessed by the police was insufficient to support the search warrant because it established nothing more than her housemate's innocent presence at Dunkin Donuts with another man who was engaging in criminal activity, i.e., the use of the stolen gift card (*cf. People v Martin*, 32 NY2d 123, 125; *People v LaDuke*, 206 AD2d 859, 860). We conclude, rather, that the information established that defendant's housemate was not a mere innocent bystander but a participant in the use of the stolen gift card.

Defendant further contends that the court erred in denying her suppression motion without a hearing, noting that it is unclear what documents and testimony were before the issuing judge at the time the search warrant was granted. We reject that contention. Defendant challenges only the facial sufficiency of the warrant application, and it is well established that a "challenge to the facial sufficiency of a written warrant application presents an issue of law that does not require a hearing, and the court properly determines the merits of such a challenge by reviewing the affidavits alone in order to determine whether they establish probable cause" (*People v Carlton*, 26 AD3d 738, 738 [internal quotation marks omitted]; *see People v Dunn*, 155 AD2d 75, 80-81, *affd* 77 NY2d 19, *cert denied* 501 US 1219). In any event, we note that the issuing judge noted in his decision what information he reviewed when deciding whether there was probable cause.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

969

KA 15-01684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH A. TONEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 17, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We reject defendant's contention that he did not knowingly waive his right to appeal. County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal" (*People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933 [internal quotation marks omitted]) and, contrary to defendant's contention, the record establishes that the court did not conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see id.*). The court also specifically explained that the waiver included any challenge to the severity of the sentence, thereby foreclosing any such challenge on appeal (*see People v Lopez*, 6 NY3d 248, 255-256).

Defendant further contends that his plea was not knowingly, intelligently, and voluntarily entered. Although a challenge to the voluntariness of the plea survives a valid waiver of the right to appeal (*see People v Shaw*, 133 AD3d 1312, 1313, *lv denied* 26 NY3d 1150), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415, *lv denied* 28 NY3d 929; *see generally People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 937). In any event,

defendant's " 'yes' and 'no' answers during the plea colloqu[y] do not invalidate his guilty plea[]" (*People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149; *see People v Alicea*, 148 AD3d 1662, 1663, *lv denied* ___ NY3d ___ [Aug. 3, 2017]; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

970

KA 15-00917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. LARKINS, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

RONALD J. LARKINS, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 21, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of robbery in the first degree (Penal Law § 160.15 [2], [3], [4]). The charges arose from an armed robbery of a Best Western hotel in Weedsport, Cayuga County. Defendant was convicted of the charges in 2011, but this Court reversed the judgment based on an improper *Molineux* ruling and granted a new trial (*People v Larkins*, 108 AD3d 1210, *lv denied* 23 NY3d 1022). Defendant was convicted of the same charges after the new trial.

Defendant contends that County Court abused its discretion in its *Sandoval* ruling. That contention is not preserved for our review (*see* CPL 470.05 [2]). The court ruled that its *Sandoval* determination from the first trial would apply at the second trial, and defendant did not object to that ruling (*see People v Henderson*, 212 AD2d 1031, 1031-1032, *lv denied* 86 NY2d 736; *see also People v Combo*, 291 AD2d 887, 887, *lv denied* 98 NY2d 650). In any event, we conclude that the court properly balanced the appropriate factors and did not abuse its discretion in permitting defendant to be cross-examined about certain of his prior convictions, allowing a *Sandoval* compromise regarding several other prior convictions, and precluding any questioning

regarding defendant's remaining prior convictions (*see generally People v Hayes*, 97 NY2d 203, 207-208).

Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495). In particular, we note with respect to the counts concerning criminal possession of a weapon that, although there is no direct evidence that defendant possessed a loaded weapon in Cayuga County, there is a "valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the [circumstantial] evidence at trial" (*People v Williams*, 84 NY2d 925, 926). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the showup identification procedure was not unduly suggestive, and thus the court properly denied his motion to suppress the evidence concerning it. Although showup procedures are generally disfavored (*see People v Ortiz*, 90 NY2d 533, 537), they are permitted where, as here, they are " 'conducted in close geographic and temporal proximity to the crime[,] and the procedure used was not unduly suggestive' " (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803, quoting *People v Brisco*, 99 NY2d 596, 597).

We reject defendant's contention that the court erred in denying, without a hearing, that part of his omnibus motion seeking to suppress evidence seized from his vehicle and his person on the ground that the police improperly stopped the vehicle. It is well settled that a request to suppress evidence obtained as the result of an allegedly unlawful search and seizure may be denied without a hearing where the defendant does not allege a proper legal basis for suppression or if the "sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [b]; *see People v Mendoza*, 82 NY2d 415, 421). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency [is to] be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422). Here, taking into account the information available to defendant, we conclude that his "papers fail to set forth sworn allegations of fact supporting the motion . . . Thus, defendant was not entitled to a hearing" (*People v Smythe*, 210 AD2d 887, 887, *lv denied* 85 NY2d 943; *see People v King*, 137 AD3d 1572, 1573, *lv denied* 27 NY3d 1134; *People v Battle*, 109 AD3d 1155, 1157, *lv denied* 22 NY3d 1038).

Defendant further contends that defense "counsel was ineffective in failing to more vigorously pursue the suppression issue." We reject that contention. Defendant has not shown that defense counsel was able to make a more detailed suppression motion, or that such a motion "if made, would have been successful," and thus he has not

"establish[ed] that defense counsel was ineffective in failing to make such a motion" (*People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923; *see People v Thomas*, 79 AD3d 1809, 1809, *lv denied* 16 NY3d 900). Defendant's contention that the court lulled him into a false sense that there was no need to make a more detailed motion is "raised for the first time in defendant's reply brief and thus is not properly before us" (*People v Jones*, 300 AD2d 1119, 1120, *lv denied* 2 NY3d 801; *see People v Daigler*, 148 AD3d 1685, 1686; *People v Harris*, 129 AD3d 1522, 1525, *lv denied* 27 NY3d 998).

Defendant contends that the court erred in its *Molineux* ruling by permitting the prosecutor to introduce evidence that he recently had committed another crime in a different county. We reject that contention. The evidence at issue, i.e., testimony from two New York State Thruway toll collectors that they heard a police bulletin concerning defendant's car, does not establish that defendant recently had committed another crime. Furthermore, even if we assume for the sake of argument that the jury could infer from the police bulletin that defendant recently had committed another crime, it is well settled that evidence of uncharged crimes is admissible where, as here, excluding the evidence "would have placed a mystery before the jury" (*People v Barnes*, 57 AD3d 289, 290, *lv denied* 12 NY3d 781; *see People v Morris*, 21 NY3d 588, 599), i.e., why Thruway Authority personnel took particular notice of defendant's vehicle as it exited and then reentered the Thruway and why they notified the State Police that they had observed it. Thus, the evidence was properly admitted because it was inextricably interwoven with the charged crimes, provided necessary background information, and completed the narrative of the two witnesses (*see People v Tarver*, 2 AD3d 968, 969; *see also People v Molyneaux*, 49 AD3d 1220, 1221, *lv denied* 10 NY3d 937), and the probative value of the evidence outweighed its potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242). In addition, the court gave prompt limiting instructions concerning the jury's use of the evidence at issue (*see Morris*, 21 NY3d at 598; *People v Matthews*, 142 AD3d 1354, 1355-1356, *lv denied* 28 NY3d 1125; *People v Jackson*, 100 AD3d 1258, 1261, *lv denied* 21 NY3d 1005, *reconsideration denied* 21 NY3d 1043).

We reject defendant's further contention that the People violated the court's *Molineux* ruling by asking a New York State Trooper during redirect examination a question indicating that the bulletin the toll collectors described concerned an incident in Onondaga County. There was no prejudice from the mention of the name of the county from which the bulletin emanated and, even assuming, arguendo, that "defendant was prejudiced at all, [we conclude that] such prejudice was minimal" (*People v Rivers*, 18 NY3d 222, 226; *cf. People v Crider*, 301 AD2d 612, 614).

Defendant further contends that he was denied a fair trial by two instances of alleged prosecutorial misconduct. Defendant's contention concerning an allegedly improper comment made by the prosecutor during cross-examination is not preserved for our review inasmuch as defense counsel "fail[ed] to request any further relief after the court sustained his objection" to the comment (*People v Reyes*, 34 AD3d 331,

331, *lv denied* 8 NY3d 884; *see People v Meacham*, 151 AD3d 1666, 1667; *see also People v Goodson*, 144 AD3d 1515, 1516, *lv denied* 29 NY3d 949). In addition, defendant made only "an untimely specific objection" after the prosecutor's summation ended (*People v Miller*, 59 AD3d 463, 464, *lv denied* 12 NY3d 856), and thus he also failed to preserve for our review his contention that the prosecutor committed a second act of misconduct by making an improper comment during summation. In any event, even if the two comments at issue exceeded the bounds of proper advocacy and thus constituted misconduct, we conclude that the "misconduct was not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Scott*, 163 AD2d 855, 855, *lv denied* 76 NY2d 944, *reconsideration denied* 77 NY2d 843; *see People v Layton*, 16 AD3d 978, 979-980, *lv denied* 5 NY3d 765). Moreover, "the court sustained defendant's objections to the improper comments and instructed the jury to disregard them, and the jury is presumed to have followed the court's instructions" (*People v Page*, 105 AD3d 1380, 1382, *lv denied* 23 NY3d 1023; *see Scott*, 163 AD2d at 855).

We reject defendant's contention that the court abused its discretion in adjudicating him a persistent felony offender, and, although we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Smart* [appeal No. 2], 100 AD3d 1473, 1475, *affd* 23 NY3d 213 [internal quotation marks omitted]; *see People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134), we conclude that the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

971

KA 15-00619

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN H. BUTLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered February 23, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06). Defendant contends that County Court erred in determining, following a *Darden* hearing, that there was probable cause supporting a search warrant in the case. By pleading guilty before the court issued a suppression ruling with respect to the evidence seized pursuant to that search warrant, defendant waived his right to raise the issue of probable cause on appeal (*see People v Taylor*, 43 AD3d 1400, 1400-1401, *lv denied* 9 NY3d 1039; *see generally People v Elmer*, 19 NY3d 501, 509; *People v Fernandez*, 67 NY2d 686, 688).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

973

CA 16-02228

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

TIMOTHY KOPASZ, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ERIE, ERIE COUNTY STADIUM CORPORATION, BUFFALO BILLS, INC., AND LPCIMINELLI, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MEGAN E. GRIMSLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered March 18, 2016. The order granted the motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 15, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

974

CA 17-00349

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

CAITLIN FERRARI, ALYSSA U., MARIA P., AND MELISSA M., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE NATIONAL FOOTBALL LEAGUE, BUFFALO BILLS, INC., CUMULUS RADIO COMPANY, FORMERLY KNOWN AS CITADEL BROADCASTING COMPANY, DEFENDANTS-APPELLANTS, STEPHANIE MATECZUN AND STEJON PRODUCTIONS CORPORATION, DEFENDANTS.

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (LOUIS ORBACH OF COUNSEL), FOR DEFENDANT-APPELLANT CUMULUS RADIO COMPANY, FORMERLY KNOWN AS CITADEL BROADCASTING COMPANY.

PROSKAUER ROSE LLP, NEW YORK CITY (STEVEN D. HURD OF COUNSEL), FOR DEFENDANT-APPELLANT THE NATIONAL FOOTBALL LEAGUE.

THE MARLBOROUGH LAW FIRM, P.C., MELVILLE (CHRISTOPHER MARLBOROUGH OF COUNSEL), DOLCE PANEPINTO, P.C., BUFFALO, AND LEVI & KORSINSKY, LLP, NEW YORK CITY, FOR PLAINTIFFS-RESPONDENTS.

Appeals from an amended order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 14, 2016. The amended order, inter alia, granted the motion of plaintiffs for class certification.

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

Memorandum: The “Buffalo Jills” was the name of a cheerleading squad that performed at professional football games for defendant Buffalo Bills, Inc. (Buffalo Bills), and also participated in charity and promotional events in the community. Plaintiffs are four persons who were members of the Buffalo Jills for varying periods between 2009 and 2014. In November 2015, plaintiffs commenced this action, individually and on behalf of similarly situated persons, seeking to recover hundreds of hours of wages that allegedly were not paid to them. In their third amended and supplemental class action complaint

(complaint), plaintiffs alleged, among other things, that they were deliberately misclassified as independent contractors rather than employees, and were made to sign similarly worded contracts misrepresenting them as such. The complaint asserts causes of action based upon, among other things, violations of the Labor Law and common-law fraud.

Plaintiffs subsequently moved for class certification. Each plaintiff submitted a reply affidavit in support of that motion. In those affidavits, each plaintiff averred that the members of the Buffalo Jills were not paid for performing at Buffalo Bills games or for any of the hundreds of hours of practice they engaged in. Furthermore, they were required to model for the annual Buffalo Jills swimsuit calendar and to sell a certain number of copies of the calendar, and they were not paid for those services either. They were also required to sell tickets to an annual golf tournament, instruct young girls at an annual cheerleading camp, and attend numerous promotional events for the Buffalo Bills and its sponsors. Plaintiffs further averred that they and the other members of the Buffalo Jills were paid for some of the promotional events, but not for anything else. Plaintiffs attached to their reply affidavits their contracts, which uniformly state that they were independent contractors and would be paid on a "per appearance" basis, but not for appearing or performing at Buffalo Bills football games. Plaintiffs also attached "Codes of Conduct," which set rigid standards for their personal conduct, dress, and physique, and which gave the Buffalo Bills the right to use or republish their photos for advertising purposes.

Additionally, plaintiffs submitted in support of their motion "appearance records" from the 2012-2013 season relating to five particular members of the Buffalo Jills, which records were obtained through discovery. Those records show that one of the nonparty members of the Buffalo Jills worked 360½ hours during that season and was paid for only 17½ hours. Another such person worked 372¾ hours and was paid for 16 hours. Plaintiff Alyssa U. worked 369 hours and was paid for 13 hours. Plaintiff Maria P. worked 368½ hours and was paid for five hours. Plaintiff Melissa M. worked 383 hours and was paid for nine hours. None of the five referenced cheerleaders were paid on average more than $2.60 per hour.

We conclude that Supreme Court properly granted the motion and certified the class. Contrary to the initial contention of the National Football League, the Buffalo Bills, and Cumulus Radio Company, formerly known as Citadel Broadcasting Company (Cumulus) (collectively, defendants), the court properly considered the evidence that plaintiffs submitted with their reply papers. Although it is generally improper for a moving party to submit evidence for the first time with its reply papers, the court may consider such evidence where the opposing party has the opportunity to submit a surreply (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879; *Park Country Club of Buffalo, Inc. v Tower Ins. Co. of N.Y.*, 68 AD3d 1772, 1774). Here, the parties had the opportunity to submit surreply papers and, indeed, the Buffalo Bills' attorney submitted a thorough surreply affirmation responding to the evidence in plaintiffs' reply papers.

We reject defendants' further contention that plaintiffs failed to meet the five requirements of CPLR 901 (a). Class action is appropriate only if all five of the requirements are met (*see Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229, *lv dismissed in part and denied in part* 10 NY3d 910), and the burden of establishing those requirements is on the party seeking certification (*see DeLuca v Tonawanda Coke Corp.*, 134 AD3d 1534, 1535, *lv denied* 137 AD3d 1633). The first prerequisite is that the class must be so numerous that joinder of all of its members is impracticable (*see* CPLR 901 [a] [1]). Here, the Buffalo Bills admit that the class has approximately 134 members, and classes of 53 to 500 members have been deemed "well above the numerosity threshold contemplated by the legislature and approved by courts" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399).

The second prerequisite is that there are common questions of law or fact that predominate over questions affecting only individual members (*see* CPLR 901 [a] [2]). That prerequisite requires predominance of common questions over individual questions, not identity or unanimity of common questions, among class members (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98). It is thus well established that "the amount of damages suffered by each class member typically varies from individual to individual, [and] that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class" (*Borden*, 24 NY3d at 399 [internal quotation marks omitted]; *see DeLuca*, 134 AD3d at 1536). Indeed, where " 'the same types of subterfuge[] [were] allegedly employed to pay lower wages,' commonality of the claims will be found to predominate, even though the putative class members have 'different levels of damages' " (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547; *see Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482). Here, the common questions include whether the putative class members were employees or independent contractors and whether defendants failed to pay them in accordance with the law, and we conclude that those questions predominate over individual questions of damages.

Insofar as defendants contend that plaintiffs' common-law fraud cause of action precludes class action because it involves individual questions of reliance, we reject that contention. Plaintiffs allege that defendants made uniform misrepresentations in the contracts that plaintiffs were made to sign, and thus reliance may be inferred from the nature of the representation and the acceptance by the plaintiffs (*see Norwalk v Manufacturers & Traders Trust Co.*, 80 AD2d 745, 745). To the extent that defendants contend that plaintiffs' quantum meruit and unjust enrichment claims involve individual questions that preclude class action, we conclude that the common questions predominate over any such individual questions (*see generally* CPLR 901 [a] [2]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 201).

The third prerequisite is that the class representatives' claims are typical of the claims of the class (*see* CPLR 901 [a] [3]). Plaintiffs' reply affidavits and the documents attached thereto

establish that they were subject to the same treatment during the 2009-2010, 2012-2013, and 2013-2014 seasons. Although none of the plaintiffs herein were members of the Buffalo Jills during the 2008-2009, 2010-2011, or 2011-2012 seasons, plaintiffs' evidence established that the Buffalo Jills had been under the same management since 2002. Moreover, plaintiffs submitted the affidavit of a putative class member who had been a member during the 2010-2011 and 2011-2012 seasons, and her averments are consistent with those of the plaintiffs in all relevant respects. We thus conclude that the third prerequisite is met because plaintiffs established that "the claims of the class representative[s] arose out of the same course of conduct and are based on the same theories as the other class members" (*DeLuca*, 134 AD3d at 1536 [internal quotation marks omitted]; *see Roberts v Ocean Prime, LLC*, 148 AD3d 525, 526).

The fourth prerequisite is that the class representatives will fairly and adequately protect the interest of the class (*see* CPLR 901 [a] [4]). In considering this prerequisite, a court should consider any potential conflicts of interest, the parties' familiarity with the lawsuit and financial resources, and the quality of class counsel (*see Cooper v Sleepy's, LLC*, 120 AD3d 742, 743-744). Here, plaintiffs averred in their reply affidavits that they have no conflicts of interest with any of the putative class members and that they are committed to prosecuting the case to its conclusion. Although, as defendants note, plaintiffs have waived their right to liquidated damages (*see generally* CPLR 901 [b]), that does not preclude class action inasmuch as putative class members who wish to pursue such damages may opt out of the class action and pursue them individually (*see Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89, *affd sub nom. Borden*, 24 NY3d at 402; *Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947, 947). Moreover, the court observed in its written decision that plaintiffs had pursued the action "with fortitude" and that counsel had pursued the case "vigorously," and we see no reason to disturb the court's determination in that regard.

The fifth prerequisite is that class action is the superior method to fairly and efficiently adjudicate the controversy (*see* CPLR 901 [a] [5]). "[A] class action is the 'superior vehicle' for resolving wage disputes '[where] the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court' " (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543; *see Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536). Notably, a class representative in a class action wage dispute is not required to have exhausted his or her administrative remedies (*see Nawrocki*, 82 AD3d at 536). Here, each plaintiff was a member of the Buffalo Jills for one season only, and each stated that some of the putative class members left "within a few months." Given the evidence that members of the Buffalo Jills worked fewer than 400 uncompensated hours in a single season, we conclude that this is a case where the cost of prosecuting individual actions would deprive many of the putative class members of their day in court. Although two putative class members have already elected to pursue their claims individually, the record demonstrates that those class members worked

for the Buffalo Jills for a longer period of time and made more personal appearances, which arguably entitles them to damages several times greater than the damages sought by other class members. Thus, the fact that two putative class members exercised their right to pursue individual remedies does not controvert plaintiffs' position that class action is the superior vehicle for adjudicating the claims herein (*cf. Rife*, 48 AD3d at 1230).

Contrary to the further contention of Cumulus, plaintiffs also met the requirements of CPLR 902. Once the section 901 (a) prerequisites have been met, a court must consider the class members' interest in prosecuting individual actions; the impracticality or inefficiency of prosecuting or defending separate actions; the extent and nature of any separate action already pending; the desirability of the forum; and the difficulties likely to be encountered in managing a class action (*see* CPLR 902; *Rife*, 48 AD3d at 1229). Upon reviewing those factors, we conclude that the court properly certified the class action.

Contrary to defendants' final contention, the court properly certified three law firms as class counsel. It is within the court's discretion to allow representation by more than one counsel (*see Koehnlein v Jackson*, 12 AD3d 1185, 1186), and we decline to disturb the court's determination in that regard.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

975

CA 17-00260

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

CAMERON HILL CONSTRUCTION, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

SYRACUSE UNIVERSITY, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, NEW YORK CITY (JENNIFER S. RECINE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 11, 2017. The order, among other things, denied the motions of defendant Syracuse University for summary judgment and to vacate a preliminary injunction.

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: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

977

CA 17-00238

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

BRIGHAM SMITH, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ONONDAGA AND C.O. FALTER CONSTRUCTION CORP., DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREENE & REID, PLLC, SYRACUSE (JEFFREY G. POMEROY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered June 21, 2016. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) and denied in part the cross motion of defendants for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 30, 2017, and filed in the Onondaga County Clerk’s Office on June 14, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

978

CA 16-02229

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

TIMOTHY KOPASZ, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ERIE, ERIE COUNTY STADIUM CORPORATION, BUFFALO BILLS, INC., AND LPCIMINELLI, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MEGAN E. GRIMSLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 4, 2016. The order granted the motion of plaintiff for a protective order.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 15, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

979

CA 17-00406

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

IN THE MATTER OF THOUSAND ISLANDS CENTRAL SCHOOL DISTRICT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOUSAND ISLANDS EDUCATION ASSOCIATION, RESPONDENT-APPELLANT.

ROBERT T. REILLY, LATHAM (HAROLD EISENSTEIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEFFERSON-LEWIS BOCES OFFICE OF INTER-MUNICIPAL LEGAL SERVICES, WATERTOWN (DOMINIC S. D'IMPERIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 4, 2016 in a proceeding pursuant to CPLR article 75. The order granted the amended petition to stay arbitration and denied the cross motion to compel arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration, and respondent, a labor organization that represents employees of petitioner, cross-moved to compel arbitration. The parties entered into a collective bargaining agreement (CBA) containing an arbitration clause allowing for the arbitration of "any alleged violation of this agreement or any dispute with respect to its meaning or application." In 2016, respondent filed a grievance on behalf of one of its members, a teacher, alleging that petitioner had violated the provisions of the CBA that require petitioner to maintain salary schedules in an ethical manner, to adjust teacher salaries based on graduate credits earned, and to abide by the salary schedules. Respondent alleged that, when the teacher was hired, petitioner mistakenly placed her on the salary schedule without properly taking into account the graduate credits that she had earned, and that the teacher had been underpaid since then as a result of the error. Supreme Court granted the amended petition and denied respondent's cross motion to compel arbitration. We reverse and direct the parties to proceed to arbitration.

It is well settled that courts must apply a two-part test to

determine whether a matter is subject to arbitration under a CBA (*see Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278). "First, the court must determine 'whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' " (*Matter of Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. [Onondaga-Cortland-Madison BOCES Fedn. of Teachers]*, 136 AD3d 1289, 1290). If there is no such prohibition, the court must examine the CBA to determine "whether the parties in fact agreed to arbitrate the particular dispute" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519). In other words, "the court must determine 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " (*id.*, quoting *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143). "If such a 'reasonable relationship' exists, it is the role of the arbitrator, and not the court, to 'make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them' " (*Matter of City of Syracuse [Syracuse Police Benevolent Assn., Inc.]*, 119 AD3d 1396, 1397, quoting *Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143).

As petitioner correctly concedes, the arbitration of disputes concerning public school teachers' salaries is not proscribed by law or public policy, and thus only the second prong is at issue (*see Matter of County of Herkimer v Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO*, 124 AD3d 1370, 1371).

With respect to that prong, we agree with respondent that the parties agreed to arbitrate this particular dispute. The dispute concerns whether petitioner placed the teacher at the correct step of the salary schedule and paid her properly based on the graduate credits that she earned, and thus it is reasonably related to the general subject matter of the CBA (*see Matter of Board of Educ. of Yorktown Cent. Sch. Dist. v Yorktown Congress of Teachers*, 98 AD3d 665, 667, *lv denied* 20 NY3d 851; *see also Matter of Alden Cent. Sch. Dist. v Watson*, 56 AD2d 713, 714). Issues concerning whether the CBA supports a grievance arising from the initial placement of a new employee on the salary schedule, as opposed to the proper payment of an existing employee, "are matters involving the scope of the substantive [CBA] provisions and, as such, are for the arbitrator" to resolve (*Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1234). Finally, contrary to petitioner's contention, the clause in the CBA stating that an arbitrator has "no power to alter, add to, or detract from" the CBA does not render the dispute nonarbitrable (*see Matter of Haessig [Oswego City Sch. Dist.]*, 90 AD3d 1657, 1658).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

980

CA 16-01349

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

IN THE MATTER OF ARBITRATION BETWEEN GERBER HOMES & ADDITIONS, LLC, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

MARK LANG, RESPONDENT-APPELLANT.

MARK LANG, RESPONDENT-APPELLANT PRO SE.

LACY KATZEN LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 4, 2016. The order granted the motion of petitioner to confirm the award of an arbitrator and directed that petitioner have judgment in the amount of $99,926.71, plus interest, costs and disbursements.

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

Memorandum: Respondent in this proceeding pursuant to CPLR article 75 appeals pro se from an order granting petitioner's motion to confirm an arbitration award in its favor. Respondent opposed the application and sought vacatur of the award or, alternatively, a reduction of the monetary amount awarded. We conclude that Supreme Court properly granted the motion.

We reject respondent's contention that he did not agree to binding arbitration. The plain language of the agreement between the parties states that "[a]ny dispute or controversy . . . shall be settled by binding arbitration." Respondent's contention that he did not read or notice that clause is unavailing inasmuch as "the law presumes that one who is capable of reading has read the document which he has executed . . . [,] and he is conclusively bound by the terms contained therein" (*Marine Midland Bank v Embassy E.*, 160 AD2d 420, 422; *see Pimpinello v Swift & Co.*, 253 NY 159, 162-163; *Baltzly v Sandoro*, 186 AD2d 1077, 1077). Moreover, "a party [who] participates in the arbitration may not later seek to vacate the award by claiming [he] never agreed to arbitrate the dispute in the first place" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79).

Respondent further contends that the arbitration was improperly

conducted in Monroe County, because the agreement called for arbitration in the Town of Ontario, which is located in Wayne County. Respondent waived that contention inasmuch as he failed to raise it until after he participated in the arbitration (*see Matter of D.M.C. Constr. Corp. v Nash Steel Corp.*, 41 NY2d 855, 856, *revg* 51 AD2d 1040 *on dissent of Shapiro, J.*). Respondent also contends that the arbitrator was selected solely by petitioner and thus was not impartial. Respondent failed to "raise the issue of the arbitrator's alleged partiality during the [arbitration] hearing and, thus, waived any challenge thereto" (*Matter of Eastman Assoc., Inc. [Juan Ortoo Holdings, Ltd.]*, 90 AD3d 1284, 1286; *see Matter of Atlantic Purch., Inc. v Airport Props. II, LLC*, 77 AD3d 824, 825). In any event, the record conclusively establishes that, at an earlier stage of the matter, the court rejected the arbitrator proposed by petitioner and independently selected another arbitrator.

Respondent failed to preserve for our review his further contention that the arbitration was improperly commenced against him personally rather than his LLC inasmuch as he did not raise that issue either before the arbitrator or the court (*see Matter of MBNA Am. Bank, N.A. [Cucinotta]*, 33 AD3d 1064, 1065). We have considered respondent's remaining contentions and, in light of the well-settled principle that "judicial review of an arbitration proceeding . . . is extremely limited . . . , as is judicial review of the resulting award" (*Marracino v Alexander*, 73 AD3d 22, 26; *see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, *cert dismissed* 548 US 940), we conclude that they do not require reversal or modification of the order.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

981

TP 17-00189

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

IN THE MATTER OF SAMUEL LICARI, DOING BUSINESS AS LACARI (SIC) MOTOR CAR, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

KURT D. SCHULTZ, SAUQUOIT, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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, Herkimer County [Erin P. Gall, J.], entered January 19, 2017) to review a determination of respondent. The determination suspended the automobile dealership license of petitioner.

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

Memorandum: Petitioner, who operates a used car dealership, commenced this CPLR article 78 proceeding seeking to annul the determination that he violated Vehicle and Traffic Law § 415 (9) (c). Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). At the vehicle safety hearing before the Administrative Law Judge (ALJ), a customer of petitioner testified that she paid a $200 deposit toward one of petitioner's vehicles, with completion of the sale pending a financing arrangement acceptable to her. The customer further testified that one of petitioner's salespeople had told her that she could obtain a refund of her deposit if she decided not to buy a vehicle from petitioner. Petitioner and his sales manager both admitted, however, that petitioner refused the customer's request to refund the deposit when she decided not to buy a vehicle from petitioner. Petitioner acknowledged that, at the time the customer sought the refund, there had been no agreement on certain terms of the sale, including financing. We conclude that the finding of the ALJ that petitioner's conduct in denying the refund constituted a fraudulent practice has a rational basis and is supported by substantial evidence (*see Matter of DeMarco v New York State Dept. of Motor Vehs.*, 150 AD3d 1671, 1673;

see also § 415 [9] [c]).

We reject petitioner's challenge to the penalty imposed, i.e., suspension of his dealer registration for 30 days. Given that petitioner has a history of violations (*see generally Matter of Lynch v New York State Dept. of Motor Vehs. Appeals Bd.*, 125 AD3d 1326, 1326-1327), and that "[t]he public has a right to be protected against deceitful practices by an auto dealer" (*Matter of Acer v State of N.Y. Dept. of Motor Vehs.*, 175 AD2d 618, 618), we conclude that the penalty is not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [internal quotation marks omitted]; *see Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854; *Matter of T's Auto Care, Inc. v New York State Dept. of Motor Vehs. Appeals Bd.*, 15 AD3d 881, 881-882).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

983

CA 17-00250

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

MICHAEL TORRANCE AND EILEEN TORRANCE,
PLAINTIFFS-RESPONDENTS,

V ORDER

DAVID CAPUTI AND RENEE CAPUTI,
DEFENDANTS-APPELLANTS.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (JOEL B. SCHECHTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (TODD M. SCHIFFMACHER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 12, 2016. The order denied the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 14, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

984

CA 17-00487

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

ROBERT CIESIELSKI, PLAINTIFF-RESPONDENT,

V ORDER

CAPOZZI INDUSTRIAL PARK, INC., AND CAPOZZI PAVING, INC., DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT CAPOZZI INDUSTRIAL PARK, INC.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANT-APPELLANT CAPOZZI PAVING, INC.

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

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 19, 2016. The order granted in part plaintiff's motion for partial summary judgment on the issue of liability and denied defendants' cross motions for summary judgment.

Now, upon the stipulation of partial discontinuance signed by the attorneys for the parties on May 2, 2017 and filed in the Erie County Clerk's Office on May 26, 2017, and the stipulation of discontinuance signed by the attorneys for the parties on September 25, 2017, and filed in the Erie County Clerk's Office on September 25, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

986

KA 16-00640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARY J. BARRETT, DEFENDANT-APPELLANT.

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

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (J. THOMAS FUOCO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered March 2, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution inasmuch as his motion to withdraw his plea was made on grounds different from those advanced on appeal (*see People v Gibson*, 140 AD3d 1786, 1787, *lv denied* 28 NY3d 1072; *People v Green*, 132 AD3d 1268, 1268-1269, *lv denied* 27 NY3d 1069, *reconsideration denied* 28 NY3d 930). We conclude that this case does not fall within the rare exception to the preservation requirement because defendant did not negate an element of the pleaded-to offense during the colloquy or otherwise cast significant doubt on his guilt or call into question the voluntariness of the plea (*see People v Lopez*, 71 NY2d 662, 666). In any event, defendant's contention is without merit (*see People v Madden*, 148 AD3d 1576, 1578, *lv denied* 29 NY3d 1034). Contrary to defendant's further contention, his " 'yes' and 'no' answers during the plea colloqu[y] do not invalidate his guilty plea[]" (*People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149).

Defendant also contends that the plea was not knowingly, intelligently and voluntarily entered because County Court misinformed him of the minimum sentence to which he was exposed. Defendant's contention is not preserved for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Morrison*, 78 AD3d 1615, 1616, *lv denied* 16 NY3d

834; *see also People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045), nor did the court expressly decide the question raised on appeal (*see* CPL 470.05 [2]; *People v Jackson*, 29 NY3d 18, 23).

Contrary to defendant's contention, the court did not abuse its discretion in denying his motion to withdraw his plea. Defendant made his motion on the ground that he had entered the guilty plea without considering or understanding the consequences thereof because he was emotionally distraught by the prospect of continued incarceration and would be released from custody pending sentencing, and because he had insufficient time to discuss the plea with defense counsel. " 'The determination whether to permit a defendant to withdraw a guilty plea rests within the sound discretion of the court' . . . , and 'a court does not abuse its discretion in denying a motion to withdraw a guilty plea where[, as here,] the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding' " (*People v Lewicki*, 118 AD3d 1328, 1329, *lv denied* 23 NY3d 1064).

Finally, defendant contends that the court erred in failing to conduct an evidentiary hearing before denying his further motion to withdraw his plea, which was made at sentencing on the ground that the prosecutor had a conflict of interest. We reject that contention. Here, defendant was "afforded [a] reasonable opportunity to present his contentions," and the court made "an informed determination" in denying the motion on the merits (*People v Tinsley*, 35 NY2d 926, 927). The record establishes that the prosecutor briefly represented defendant in an unrelated criminal matter several years before the instant action, and there is no indication of "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (*People v Martin*, 2 AD3d 1336, 1337, *lv denied* 1 NY3d 630 [internal quotation marks omitted]; *see People v Tyler*, 209 AD2d 1028, 1029, *lv denied* 85 NY2d 915).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

987

KA 15-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKEEM M. SIMMONS, ALSO KNOWN AS AKEEM M. SIMMON, ALSO KNOWN AS AKEEM SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 15, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and conspiracy 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 following a jury trial of burglary in the first degree (Penal Law § 140.30) and conspiracy in the fourth degree (§ 105.10), defendant contends that County Court should have held a hearing to determine whether there was an undisclosed plea agreement between the prosecutor and defendant's accomplice, who testified at defendant's trial. We reject that contention. At the start of the trial, the prosecutor stated on the record that "nothing has been offered [to the accomplice in return for his testimony]. There is no agreement. There's no promise." The accomplice later testified under oath that there was no agreement. Following the verdict but before sentencing, the accomplice pleaded guilty to a reduced charge. Alleging that the accomplice's plea was evidence of an undisclosed plea agreement, defense counsel sought an adjournment of sentencing to address that alleged *Brady* violation. Defense counsel acknowledged, however, that his claim of an undisclosed cooperation agreement was based solely on conjecture. The court denied the request for an adjournment, noting that defendant could later file a motion pursuant to CPL article 440 if he obtained any evidence to support his theory of an undisclosed cooperation agreement.

If a cooperation agreement exists between the People and a prosecution witness and the provisions of that agreement are not

disclosed to the court and jury, "such nondisclosure would require reversal" (*People v Littles*, 295 AD2d 369, 370; *see generally People v Novoa*, 70 NY2d 490, 496-498). Here, however, there is "no basis in the record upon which to find that there were any undisclosed agreements" (*People v Delgado*, 280 AD2d 431, 431; *cf. Littles*, 295 AD2d at 370; *People v Pons*, 236 AD2d 562, 563-564). Defendant's contention is thus "based entirely on speculation and unwarranted assumptions" (*Delgado*, 280 AD2d at 431).

We reject defendant's further contentions that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, considering defendant's criminal record, which includes two prior burglary convictions, we conclude that the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

989

KA 15-01394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD J. AIKEY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 19, 2015. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree, criminal trespass in the third degree, endangering the welfare of a child (two counts), harassment in the second degree and criminal contempt 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 nonjury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), criminal trespass in the third degree (§ 140.10 [a]), harassment in the second degree (§ 240.26 [1]), criminal contempt in the second degree (§ 215.50 [3]), and two counts of endangering the welfare of a child (§ 260.10 [1]). Viewing the evidence in the light most favorable to the prosecution, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that the conviction of criminal contempt in the first degree is not supported by legally sufficient evidence and the verdict with respect to that crime is against the weight of the evidence because the People failed to establish that he had physical contact with the victim and that he had the requisite intent to harass, annoy, threaten or alarm the victim (*see* Penal Law § 215.51 [b] [v]). We reject that contention. The evidence is legally

sufficient with respect to physical contact inasmuch as the victim testified that defendant pushed her, causing her to fall down. With respect to defendant's intent, it is well established that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682), and here the evidence at trial established that defendant repeatedly and continuously engaged in obsessive and violent behavior when the victim attempted to start a new relationship with another person. Thus, there is a "valid line of reasoning and permissible inferences which could lead a rational person" to conclude that defendant intended to annoy or harass the victim when he entered her apartment and pushed her in an attempt to find the victim's new boyfriend (*Bleakley*, 69 NY2d at 495). Moreover, upon our review of the conflicting testimony and inferences to be drawn from the evidence, we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally id.)*. For the same reasons, we reject defendant's contention that the conviction of harassment in the second degree is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence.

With respect to criminal trespass in the third degree, defendant contends that the conviction is not supported by legally sufficient evidence and the verdict is against the weight of the evidence because the People failed to establish that he knowingly entered or remained unlawfully on the premises. We reject that contention. Although the evidence established that defendant and the victim are the parents of two children and defendant was initially invited to the victim's apartment complex to drop off the children, the evidence further established that the victim warned defendant not to enter her apartment and that she raised her hand to prevent him from walking past her and into the apartment. Thus, we conclude that the evidence is legally sufficient to establish that defendant knew that he was not permitted to enter the building, and we also conclude that the verdict with respect to that crime is not against the weight of the evidence.

We further conclude that the evidence is legally sufficient to support the conviction of criminal contempt in the second degree and that the verdict with respect to that crime is not against the weight of the evidence. The evidence established that defendant violated an order of protection when he drove past the victim's apartment complex while making an obscene gesture (*see People v Roman*, 13 AD3d 1115, 1115-1116, *lv denied* 4 NY3d 802).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of two counts of endangering the welfare of a child. The victim testified at trial that defendant pushed her while she was holding one child and was in proximity to the other child. That evidence is legally sufficient to establish that defendant knowingly acted in a manner that would likely be injurious to the physical, mental or moral welfare of the two children (*see People v Johnson*, 95 NY2d 368, 371). Contrary to defendant's further contention, the verdict with respect to the counts of endangering the welfare of a child is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that he was denied a fair trial by prosecutorial misconduct. Specifically, we conclude that the prosecutor's comments with respect to defendant's failure to present a witness did not constitute an impermissible effort to shift the burden of proof inasmuch as defendant elected to present a defense (*see People v Tankleff*, 84 NY2d 992, 994; *People v Rivera*, 292 AD2d 549, 549, *lv denied* 98 NY2d 654).

The sentence imposed is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

990

KA 12-00895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARSHALL D. JACKSON, 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 (Michael L. Dwyer, J.), rendered March 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of stolen property 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 of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that trial counsel was ineffective in failing to proffer evidence in support of the affirmative defense of extreme emotional disturbance (*see* § 125.25 [1] [a]). In support of that contention, defendant relies primarily upon gaps in the trial record, i.e., the absence of testimony from a psychiatric expert for the defense and defense counsel's failure to introduce in evidence defendant's military or medical records. It is not apparent from the record, however, whether defense counsel undertook an adequate investigation into the affirmative defense of extreme emotional disturbance or whether the decision not to present the testimony of a psychiatric expert or defendant's military or medical records was part of a reasonable trial strategy. Inasmuch as defendant's contention is based upon matters outside the record, it is not properly before us on his direct appeal and must be pursued by way of a motion pursuant to CPL article 440 (*see People v Barbuto*, 126 AD3d 1501, 1504, *lv denied* 25 NY3d 1159; *People v Williams*, 124 AD3d 1285, 1286, *lv denied* 25 NY3d 1078).

We reject defendant's further contention that the sentence is

unduly harsh and severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

991

KA 13-00816

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON JOHNSON, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), rendered December 18, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]) and rape in the third degree (§ 130.25 [3]). We reject the contention of defendant that Supreme Court erred in admitting in evidence the medical opinion testimony of the sexual assault nurse examiner who conducted an examination of the victim. " 'The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion' " (*People v Owens*, 70 AD3d 1469, 1470, *lv denied* 14 NY3d 890). Here, the court properly determined that the nurse examiner's testimony describing her extensive education, training, and experience established that she was qualified to render a medical opinion (*see People v Morehouse*, 5 AD3d 925, 928-929, *lv denied* 3 NY3d 644). The court was not required to declare or certify on the record that the nurse examiner was an expert before permitting her to provide her medical opinion (*see People v Valentine*, 48 AD3d 1268, 1269, *lv denied* 10 NY3d 871).

Contrary to defendant's further contention, we conclude that the victim's statement to one of her neighbors that she had been raped was properly admitted under the prompt outcry exception to the rule against hearsay. The statement was made " 'at the first suitable opportunity,' " within moments of the incident and without accompanying details (*People v McDaniel*, 81 NY2d 10, 17; *see People v*

Walek, 28 AD3d 1246, 1247, *lv denied* 7 NY3d 764; *People v Renner*, 269 AD2d 843, 843-844).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, although an acquittal would not have been unreasonable given that the testimony of the People's witnesses, including the victim, conflicted with the testimony of defendant (*see People v Imes*, 107 AD3d 1577, 1578), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, while there were minor inconsistencies between the victim's trial testimony and her statement to the police, we conclude that "nothing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of [the] crimes" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765; *see People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913). The other " 'complained of inconsistencies did not relate to whether the alleged sexual conduct occurred' " (*Childres*, 60 AD3d at 1279). The jury was entitled to credit the testimony of the victim that defendant had vaginal sexual intercourse with her by forcible compulsion, over her protests, and, contrary to defendant's further contention, the victim's testimony is corroborated by the medical evidence (*see People v Jemes*, 132 AD3d 1361, 1362, *lv denied* 26 NY3d 1110). The People introduced evidence that the DNA in the sperm obtained from a vaginal swab of the victim matched that of defendant (*see People v Justice*, 99 AD3d 1213, 1214, *lv denied* 20 NY3d 1012). Moreover, although the gynecological exam of the victim revealed no evidence of lacerations, bruising, abrasions, redness or swelling, the nurse examiner testified that, in her medical opinion, the blood found in the victim's vaginal vault was an abnormal finding and consistent with trauma. Additionally, the victim's testimony that defendant raped her was supported by the testimony of her neighbors who heard the incident and comforted the victim immediately thereafter. We thus conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

992

KA 12-00373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYREIK A. BOYD, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered November 18, 2011. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a weapon in the second degree and attempted 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 following a jury trial of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [3]), defendant contends that the evidence is legally insufficient to support the conviction. We reject that contention. The evidence established that defendant was the front seat passenger in a vehicle that was stopped by the police. He appeared anxious and nervous when he first observed the officers, and he acted in a suspicious manner when asked for the vehicle's registration. Instead of looking at the documents he pulled from the glove box, defendant let them fall to the ground and began moving them with his feet. When asked to identify himself, defendant refused to provide anything other than his first name. Given the suspicious nature of defendant's behavior, the officers asked him to exit the vehicle. As soon as the passenger door opened, the officers observed the handle of the firearm "sticking out from underneath the seat" between the seat and the door. Defendant thereafter "tried to pull away" when he was handcuffed by the police officers.

Contrary to defendant's contention, the evidence is legally sufficient to establish that defendant constructively possessed the firearm, i.e., that he exercised " 'dominion and control over the area in which [the firearm was] found' " (*People v Ward*, 104 AD3d 1323,

1324, *lv denied* 21 NY3d 1011). Based on the location and position of the firearm, which was visible as it protruded from under the right side of the passenger seat (*see People v Lynch*, 116 AD2d 56, 61, citing *People v Lemmons*, 40 NY2d 505, 509-510), and the fact that defendant was seated in that passenger seat, we conclude that "the jury was . . . entitled to accept or reject the permissible inference that defendant possessed the weapon" (*People v Carter*, 60 AD3d 1103, 1106, *lv denied* 12 NY3d 924). The fact that a defense witness testified that the firearm belonged to him "presented an issue of credibility for the jury to resolve" (*id.* at 1107).

Contrary to defendant's further contention, although there is no dispute that the firearm at issue was not operable, it is well settled that a defendant may be convicted of attempted criminal possession of a weapon when he or she believes that the firearm is operable (*see Matter of Lavar D.*, 90 NY2d 963, 965; *People v Saunders*, 85 NY2d 339, 342; *Matter of David H.*, 255 AD2d 264, 264). Here, the evidence establishing that the firearm was loaded, that defendant appeared to be nervous and anxious when he was seen and stopped by the police and that defendant attempted to flee is sufficient "to support the inference that [defendant] believed and intended the firearm to be operable" (*Lavar D.*, 90 NY2d at 963).

Defendant also contends that his conviction of attempted criminal possession of a weapon in the third degree is not supported by legally sufficient evidence because there is no evidence that the firearm was "defaced for the purpose of the concealment or prevention of the detection of a crime or misrepresenting the identity of such . . . firearm" (Penal Law § 265.02 [3]). 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" deficiency in the proof (*People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention lacks merit. The evidence at trial established that the firearm was defaced intentionally, and that the destruction of the serial number was "open and obvious" (*People v Ridore*, 273 AD2d 154, 154, *lv denied* 95 NY2d 907). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that the firearm was defaced for illicit purposes (*People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

We have reviewed defendant's remaining contention and conclude

that it does not warrant reversal or modification of the judgment.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

993

CA 17-00280

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

AMALFI, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

428 CO., INC., 4516 MAIN STREET, INC., FIRST AMHERST DEVELOPMENT GROUP, LLC, AND SS RESTAURANT BUILDING, LLC, DEFENDANTS-RESPONDENTS.

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

BARCLAY DAMON, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS 428 CO., INC. AND 4516 MAIN STREET, INC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHARLES C. RITTER, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FIRST AMHERST DEVELOPMENT GROUP, LLC AND SS RESTAURANT BUILDING, LLC.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 9, 2016. The order and judgment, insofar as appealed from, granted the motions of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, defendants' motions are denied, and the complaint is reinstated.

Memorandum: Pursuant to an agreement with defendant 428 Co., Inc. (428 Co.), plaintiff held a right of first refusal to purchase a commercial building "at the same price and on the same terms" as any "bona fide" offer. Plaintiff commenced the instant action to enforce that contractual right after 428 Co. allegedly sold the subject property to defendant SS Restaurant Building, LLC (SS) pursuant to a bona fide transaction without honoring plaintiff's right of first refusal. Supreme Court subsequently granted defendants' respective motions for summary judgment dismissing the complaint against them and denied plaintiff's cross motion for summary judgment. Plaintiff, as limited by its brief, appeals from the order and judgment insofar as it granted defendants' motions. We reverse the order and judgment insofar as appealed from.

Under the doctrine of tax estoppel, " '[a] party to litigation may not take a position contrary to a position taken in [a] tax

return' " (*Matter of Elmezzi*, 124 AD3d 886, 887, quoting *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422). Here, 428 Co. and SS jointly submitted a Real Property Transfer Report (RPT report), also known as an RP-5217 form, to the Department of Taxation and Finance in which they certified that the transfer of the subject property was not a "sale between related companies or partners in business." The instructions for that tax form define a "sale between related companies or partners in business" as any sale in which both the buyer entity and seller entity are, inter alia, "controlled by the same person." Thus, by certifying that the sale was not "between related companies or partners in business," both 428 Co. and SS swore that they were not "controlled by the same person." Defendants are therefore estopped from taking a contrary position in this action, namely, that the transfer of the subject property was not a bona fide sale because 428 Co. and SS were actually controlled by the same person (*see Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453, 454).

The sworn statements made in the RPT report further estop defendants from asserting that various mortgage assumptions worth over $2 million constituted part of the purchase price, and that plaintiff was therefore unwilling to purchase the property "at the same price and under the same terms" as SS (*see id.*). The instructions for the tax form require that any mortgage assumptions be listed as part of the "Full Sale Price" on the RPT report, and 428 Co. and SS did not do so here. Indeed, 428 Co. and SS listed only a cash sale price of $238,493 as the "Full Sale Price" on the RPT report, and it is undisputed that plaintiff was ready, willing, and able to purchase the property for that amount.

Finally, plaintiff did not waive its right of first refusal, given defendants' undisputed failure to follow the procedure set forth in the contract with respect to that right (*see Cipriano v Glen Cove Lodge #1458, B.P.O.E.*, 1 NY3d 53, 60; *Cortese v Connors*, 1 NY2d 265, 268-269).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

995

CA 17-00335

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

BOARD OF MANAGERS OF WEST AMHERST OFFICE PARK CONDOMINIUM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RMFSG, LLC, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

PHILLIPS LYTLE LLP, ROCHESTER (ANTHONY J. IACCHETTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RODNEY A. GIOVE, NIAGARA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 10, 2016. The order denied plaintiff's motion seeking, inter alia, summary judgment.

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

Memorandum: Plaintiff commenced these actions to foreclose on common charge assessment liens filed with respect to units at the West Amherst Office Park Condominium (Condominium) that are owned by RMFSG, LLC (defendant). In appeal No. 1, plaintiff appeals from an order that denied its motion seeking summary judgment foreclosing on the lien filed with respect to units 7 and 8 at the Condominium, and also seeking, inter alia, an order directing that the action be referred to a referee to compute the amount due to plaintiff. In appeal No. 2, plaintiff appeals from an order denying its motion seeking identical relief concerning unit 1.

We conclude that Supreme Court properly denied the respective motions. In each motion, plaintiff met its burden of establishing that, pursuant to the declaration establishing and governing the Condominium, plaintiff had the authority to collect common charges from the owners of units and, in the event of nonpayment, to add late fees, interest, attorneys' fees and other costs of collection to the assessment. Plaintiff, however, failed to demonstrate the reliability of the amounts it claims were due (*see Board of Mgrs. of Natl. Plaza Condominium I v Astoria Plaza, LLC*, 40 AD3d 564, 565-566). The ledgers submitted by plaintiff in support of the motions are not self-explanatory, inasmuch as they consist of only columns of dates, indecipherable codes, and dollar amounts, and plaintiff's submissions

are thus insufficient to establish its prima facie entitlement to summary judgment (*see id.* at 565-566; *Board of Mgrs. of 229 Condominium v J.P.S. Realty Co.*, 308 AD2d 314, 315).

Further, even assuming, arguendo, that plaintiff met its initial burden, we conclude that defendant raised triable issues of fact whether the common charges were properly assessed by plaintiff or had been paid by defendant. Plaintiff correctly contends that, as a general rule, a dispute regarding the amount due does not constitute a defense in a foreclosure action (*see Wells Fargo Bank, N.A. v Deering*, 134 AD3d 1468, 1469; *1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567, 568). Defendant, however, does not dispute only the amount of the common charges, but also disputes the legitimacy of those charges, including, in particular, charges for attorneys' fees and related costs of collection that were allegedly assessed when defendant was current in its payments.

We reject defendant's alternative contention that summary judgment is premature. Defendant " 'failed to demonstrate that facts essential to oppose the motion[s] were in plaintiff's exclusive knowledge and possession and could be obtained by discovery' " (*M&T Bank v HR Staffing Solutions, Inc*. [appeal No. 2], 106 AD3d 1498, 1499; *see* CPLR 3212 [f]). Finally, apart from the affirmative defense of payment, which is discussed above, we do not address plaintiff's contentions with respect to the affirmative defenses raised in the answers. In its motions for summary judgment, plaintiff did not expressly challenge those affirmative defenses and, in opposition to the motions, defendant did not rely upon them. We may not search the record and award relief based upon a claim or defense that is not related to the subject of the motion (*see Baron v Brown*, 101 AD3d 915, 916-917; *Quizhpe v Luvin Constr*., 70 AD3d 912, 914).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

996

CA 17-00336

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

BOARD OF MANAGERS OF WEST AMHERST OFFICE PARK CONDOMINIUM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RMFSG, LLC, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

PHILLIPS LYTLE LLP, ROCHESTER (ANTHONY J. IACCHETTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RODNEY A. GIOVE, NIAGARA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 10, 2016. The order denied plaintiff's motion seeking, inter alia, summary judgment.

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

Same memorandum as in *Board of Mgrs. of W. Amherst Off. Park Condominium v RMFSG, LLC* ([appeal No. 1] ___ AD3d ___ [Sept. 29, 2017]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

997

CA 16-02205

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

DANIELLE KELLER, INDIVIDUALLY, AND AS PARENT
AND NATURAL GUARDIAN OF LEXIS KELLER,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT KELLER AND PATRICIA KELLER,
DEFENDANTS-RESPONDENTS.

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FITZGERALD & ROLLER, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 27, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff, individually and as parent and natural guardian of her daughter, commenced this negligence action seeking damages for injuries sustained by her daughter when she slipped and fell in defendants' bathroom. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint.

Defendants met their initial burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants' submissions established that the daughter slipped on the bathroom floor when she stepped out of the shower to retrieve a brush while the water was running. The daughter stated during her deposition that, although the shower curtain had been closed and no water was falling outside the bathtub prior to the accident, as a result of her opening the curtain while the water was running, there was some water on the floor around the bathtub when she stepped out of the bathtub. Contrary to plaintiff's contention, " 'a wet floor—especially in a bathroom where one can expect some water to make its way out of the shower to the floor—is not enough, standing alone, to establish negligence' " (*Jackson v State of New York*, 51 AD3d 1251, 1253; *see Barron v Eastern Athletic, Inc.*, 150 AD3d 654, 655; *Noboa-Jaquez v Town Sports Intl.,*

LLC, 138 AD3d 493, 493). Here, defendants established that the amount of water present on the floor "was a condition that was 'necessarily incidental' to the use of the shower[] . . . and thus that it did not by itself constitute a dangerous condition" (*O'Neil v Holiday Health & Fitness Ctrs. of N.Y.*, 5 AD3d 1009, 1009; *see Seaman v State of New York*, 45 AD3d 1126, 1127; *Todt v Schroon Riv. Campsite*, 281 AD2d 782, 783). Defendants further established that the accident was not attributable to a defect in the floor or the bath towel that they provided to the daughter, which she placed on the floor beside the bathtub (*see Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445; *Azzaro v Super 8 Motels, Inc.*, 62 AD3d 525, 526; *Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 758-759, *lv denied* 95 NY2d 765). Furthermore, even assuming, arguendo, that a dangerous condition existed, we conclude that defendants met their burden by establishing that they neither created the dangerous condition nor had actual or constructive notice thereof (*see Barron*, 150 AD3d at 655-656; *cf. O'Neil*, 5 AD3d at 1010).

Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman*, 49 NY2d at 562). Plaintiff did not submit any evidence that there was a defect in either the bathroom floor or the towel that defendants provided to the daughter (*see Azzaro*, 62 AD3d at 526; *Portanova*, 270 AD2d at 759). Contrary to plaintiff's contention, we conclude that she failed to identify any common law, statutory or other applicable standard imposing upon defendants a duty to supply a nonskid bath mat in the area adjacent to the bathtub (*see Azzaro*, 62 AD3d at 526; *see also Kalish*, 114 AD3d at 445-446; *Portanova*, 270 AD2d at 758; *see generally Noboa-Jaquez*, 138 AD3d at 493). Moreover, plaintiff presented no evidence that defendants created a dangerous condition in the bathroom or that they were aware of such a condition (*see generally Noboa-Jaquez*, 138 AD3d at 493; *Savage v Anderson's Frozen Custard, Inc.*, 100 AD3d 1563, 1564-1565).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1005

CA 17-00385

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

FRANK E. FOWLER, JR., DOING BUSINESS AS
SONSHINE CLEANING SERVICES,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

FRANK SYLVESTER, INDIVIDUALLY AND IN OFFICIAL
CAPACITY AS BUILDING MANAGER FOR: SUMMIT
REALTY MANAGEMENT, LLC, CHUCK PATTISON,
INDIVIDUALLY AND IN OFFICIAL CAPACITY AS CHIEF
EXECUTIVE OFFICER FOR: DERMATOLOGY & ASSOCIATES
OF CENTRAL NEW YORK, PLLC, AND SUMMIT REALTY
MANAGEMENT, LLC,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BARCLAY DAMON, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS FRANK SYLVESTER, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS BUILDING MANAGER FOR: SUMMIT REALTY MANAGEMENT, LLC AND SUMMIT REALTY MANAGEMENT, LLC.

UNDERBERG & KESSLER, LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT CHUCK PATTISON, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER FOR: DERMATOLOGY & ASSOCIATES OF CENTRAL NEW YORK, PLLC.

LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), dated August 29, 2016. The order, among other things, granted the motions of defendants for leave to reargue and/or renew their motions for summary judgment and, upon reargument, denied in part the motions of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 24, and May 5 and 9, 2017,

It is hereby ORDERED that said appeals and cross appeal are unanimously dismissed without costs upon stipulation.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1006

CA 17-00232

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

TRIPI FOODS, INC., PLAINTIFF-RESPONDENT,

V ORDER

M.W.S. ENTERPRISES, INC., DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN BIRYLA LLP, BUFFALO (RICHARD J. BIRYLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 9, 2016. The order denied the motion of defendant to dismiss the second cause of action of the amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 14, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1008

KA 15-00205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER V. LEWIS, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Dennis M. Kehoe, A.J.), rendered January 28, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted robbery in the first degree (three counts), attempted robbery in the second degree, conspiracy in the fourth degree, and perjury in the first degree.

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 the statements made by defendant at the police station on December 7, 2009 is granted, and a new trial is granted on counts 1 through 6 and 10 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]) and three counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1], [2], [4]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court erred in denying that part of his omnibus motion seeking to suppress the statements he made to a detective at the police station after he asserted his right to counsel. When the detective asked defendant if he would come to the police station to discuss the investigation of the crimes herein, defendant responded that he would not go “without a

family member or a lawyer present." When the detective asked defendant whom he would like to accompany him, defendant gave the name of a man whom he considered to be like a father to him. The police drove defendant to the man's house, and the man agreed to accompany defendant and the detective to the police station. At the police station, after defendant and the man spoke alone for about 15 minutes, defendant made an incriminating statement to the detective. The detective then advised defendant of his *Miranda* rights, which defendant waived. Defendant spoke to the detective for about 20 minutes and signed a written statement.

In *People v Stroh* (48 NY2d 1000, 1001), the defendant told the police that "he 'would like to have either an attorney or a priest to talk to, to have present.' " The Court held that, "[b]y making this request, [the defendant] asserted his right to counsel" (*id.*). We see no relevant distinction in the facts presented in this case, and we are therefore constrained to conclude that the statements made by defendant to the detective at the police station must be suppressed because defendant asserted his right to counsel. The People contend that the right to counsel did not attach indelibly inasmuch as defendant was not in custody at the time he made his request (*see generally People v Davis*, 75 NY2d 517, 521-523), and that defendant's subsequent waiver of the right to counsel after receiving *Miranda* warnings was therefore valid. Here, unlike in *Davis*, however, there was no break in the interrogation. Thus, contrary to the contention of the People, defendant's subsequent waiver was not valid (*cf. id.* at 523-524; *People v White*, 27 AD3d 884, 886, *lv denied* 7 NY3d 764).

We conclude that the court's error is not harmless inasmuch as there is a "reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237). We therefore grant that part of the omnibus motion seeking to suppress the statements made by defendant at the police station on December 7, 2009, and we grant a new trial on counts 1 through 6 and 10 of the indictment.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1011

KA 15-00992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT W. DAVIS, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered December 3, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. County Court engaged defendant in an adequate colloquy " 'to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Bridges*, 144 AD3d 1582, 1582, *lv denied* 28 NY3d 1143), and that he had " 'a full appreciation of the consequences' " of the waiver (*People v Bradshaw*, 18 NY3d 257, 264). Contrary to defendant's contention, there is no requirement that the colloquy concerning the waiver of the right to appeal precede the factual plea allocution (*see People v Bryant*, 28 NY3d 1094, 1096). In light of the court's adequate colloquy, we conclude that defendant validly waived his right to appeal, and that such valid waiver encompasses his challenge to the severity of the sentence (*see People v Morales*, 148 AD3d 1638, 1639, *lv denied* 29 NY3d 1083; *see also People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo,* 91 NY2d 733, 737).

Although defendant's contentions concerning the validity of the orders of protection issued at sentencing survive his waiver of the right to appeal in this case (*see People v Russell*, 120 AD3d 1594, 1594, *lv denied* 24 NY3d 1046; *see also People v Victor*, 20 AD3d 927, 928, *lv denied* 5 NY3d 833, *reconsideration denied* 5 NY3d 885), he did not preserve those contentions for our review by challenging the issuance of the orders of protection (*see People v Nieves*, 2 NY3d 310, 315-317; *People v Smith*, 122 AD3d 1420, 1421, *lv denied* 25 NY3d 1172;

Russell, 120 AD3d at 1594-1595; *see also People v Collins*, 117 AD3d 1535, 1535, *lv denied* 24 NY3d 1082, *reconsideration denied* 24 NY3d 1218). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1012

KA 14-00582

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO ORTIZ, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered January 22, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in failing to charge the jury on the defense of mistake of fact (*see* § 15.20 [1] [a]). Defendant failed to preserve that contention for our review (*see People v Streeter*, 21 AD3d 1291, 1291-1292, *lv denied* 6 NY3d 898), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1013

KA 14-01029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALARICO YOUNG, DEFENDANT-APPELLANT.

HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 29, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and perjury 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, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that County Court should have suppressed all of his statements to the police, and not just a portion thereof, because he invoked his right to counsel and his right to remain silent at several points during the police interrogation. We reject that contention. The court properly determined that defendant did not make at any time an unequivocal request for the assistance of an attorney during the interrogation (*see People v Glover*, 87 NY2d 838, 839; *People v Schluter*, 136 AD3d 1363, 1364, *lv denied* 27 NY3d 1138; *People v Davis*, 193 AD2d 1142, 1142). The court also properly determined that defendant did not invoke his right to remain silent until approximately 6:38 p.m., and all statements thereafter were suppressed. " 'It is well settled . . . that, in order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified' " (*People v Zacher*, 97 AD3d 1101, 1101, *lv denied* 20 NY3d 1015). Although defendant initially indicated when he was given the *Miranda* warnings that he did not want to talk to the officers, he then asked them "what's going on" and, when one of the officers repeated the warnings, defendant waived them and indicated that he was willing to talk to the officers. Under the circumstances, we conclude that, contrary to defendant's contention, he waived his *Miranda* rights and did not make an unequivocal assertion of his right to remain silent at that time (*see*

People v Ingram, 19 AD3d 101, 102, *lv denied* 5 NY3d 806; *see also People v Valverde*, 13 AD3d 658, 659, *lv denied* 4 NY3d 836). In any event, we conclude that any error is harmless. The evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that any error in admitting defendant's statements contributed to his conviction (*see People v Reid*, 34 AD3d 1273, 1273, *lv denied* 8 NY3d 884; *see generally People v Crimmins*, 36 NY2d 230, 237).

Contrary to defendant's contention, the court properly denied his *Batson* challenge. Defendant failed to meet his burden of making out a prima facie case of "purposeful discrimination with respect to the prosecutor's exercise of a peremptory challenge to a black prospective juror" inasmuch as he failed to articulate "any facts or circumstances that would raise an inference that the prosecutor excused the prospective juror for an impermissible reason" (*People v Bryant*, 12 AD3d 1077, 1079, *lv denied* 4 NY3d 761).

Defendant contends that he was denied a fair trial by several instances of alleged prosecutorial misconduct. Defendant objected to only two instances of alleged misconduct, thereby rendering the remaining instances unpreserved for our review (*see People v Barnes*, 139 AD3d 1371, 1374, *lv denied* 28 NY3d 926). We note that, in any event, none of the unpreserved instances constitutes misconduct. Specifically, we conclude that the prosecutor did not engage in misconduct during his opening remarks, and he did not violate the court's suppression ruling. In addition, all of the unpreserved instances of alleged misconduct during summation were either fair comment on the evidence or fair response to defense counsel's summation (*see People v Carducci*, 143 AD3d 1260, 1262, *lv denied* 28 NY3d 1143; *People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975).

Turning to the two preserved instances of alleged misconduct, we agree with defendant that a comment by the prosecutor during summation constituted impermissible burden-shifting (*see People v LaPorte*, 306 AD2d 93, 96). The court, however, instructed the jury after defendant's objection that defendant did not have the burden of proof, and that instruction alleviated any prejudice to defendant (*see People v Green*, 144 AD3d 589, 590, *lv denied* 28 NY3d 1184). We further agree with defendant that the prosecutor improperly denigrated the defense and defense counsel during summation (*see People v Morgan*, 111 AD3d 1254, 1255). Thus, the prosecutor engaged in two instances of misconduct, one of which was addressed by the court's instruction of the jury, but we conclude that such misconduct was not so pervasive or egregious as to deny defendant a fair trial (*see Barnes*, 139 AD3d at 1374).

Defendant further contends that he was denied effective assistance of counsel. Defense counsel objected to the two instances of prosecutorial misconduct during summation. Inasmuch as we have concluded that there were no other instances of prosecutorial misconduct, defendant was not denied effective assistance of counsel

by counsel's alleged failure to object to the claimed misconduct (*see People v Barber-Montemayor*, 138 AD3d 1455, 1456, *lv denied* 28 NY3d 926; *People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806). Defendant was also not denied effective assistance of counsel by counsel's alleged failure to object to the use of restraints on defendant while he testified before the grand jury. The "overwhelming nature of the evidence adduced before the grand jury eliminated the possibility that defendant was prejudiced as a result of [any] improper shackling" (*People v Brooks*, 140 AD3d 1780, 1781; *see People v Morales*, 132 AD3d 1410, 1410, *lv denied* 27 NY3d 1072). Defendant's remaining claims of ineffective assistance of counsel are without merit.

Finally, the sentence is not unduly harsh or severe.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1016

CAF 16-01227

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

IN THE MATTER OF MATTHEW E. MAGILL,
PETITIONER-RESPONDENT,

V ORDER

LINDSAY A. ESPOSITO, RESPONDENT-APPELLANT.

PAUL B. WATKINS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-APPELLANT.

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT, APPELLANT PRO SE.

THE WARD FIRM, PLLC, BALDWINSVILLE (MATTHEW E. WARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 16, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the subject child shall primarily reside with petitioner.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1017

CAF 16-00361

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

IN THE MATTER OF HALBERT BROOKS, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PAULA GREENE, RESPONDENT-RESPONDENT.

IN THE MATTER OF PAULA GREENE,
PETITIONER-RESPONDENT,

V

HALBERT BROOKS, JR., RESPONDENT-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered February 11, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject child to respondent-petitioner.

It is hereby ORDERED that said appeal insofar as it concerns supervised visitation is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father appeals from an order that, inter alia, awarded respondent-petitioner mother sole custody of the parties' child and directed that a third party supervise the father's overnight visitation with the child. Subsequently, Family Court issued orders that allowed the father to exercise unsupervised, overnight visitation at his apartment with the child, thereby rendering this appeal moot insofar as it concerns that part of the order requiring supervised visitation (*see generally Matter of Dawley v Dawley* [appeal No. 2], 144 AD3d 1501, 1502). We conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Inasmuch as the subsequent orders did not resolve the custody issues, however, we reject the contention of the Attorney for the Child (AFC) that the father's appeal is moot in its entirety (*cf. Matter of Pugh v Richardson*, 138 AD3d 1423, 1424).

Contrary to the father's contention, the court properly denied his recusal motion. "Absent a legal disqualification . . . , a Judge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495; *see* Judiciary Law § 14), and the decision whether to recuse is committed to the Judge's discretion (*see Murphy*, 82 NY2d at 495; *Matter of Trinity E. [Robert E.]*, 144 AD3d 1680, 1681). Although recusal is required where the "impartiality [of the Judge] might reasonably be questioned" (22 NYCRR 100.3 [E] [1]), a party's unsubstantiated allegations of bias are insufficient to require recusal (*see Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316). Here, the record does not support the father's allegations that the Judge treated attorneys differently based on their respective racial backgrounds, or that the Judge was biased against him because of her alleged familiarity with his social worker. Furthermore, the record does not indicate that any alleged bias influenced the Judge's rulings relating to the father's attempt to subpoena the testimony of the mother's other minor children or to his cross-examination of the mother.

Contrary to the father's further contention, the court properly denied his motion to remove the AFC inasmuch as the motion was based solely on "unsubstantiated allegations of bias" (*Matter of Leichter-Kessler v Kessler*, 71 AD3d 1148, 1149). Here, the AFC advocated for the best interests of the child (*see Matter of Carballeira v Shumway*, 273 AD2d 753, 755, *lv denied* 95 NY2d 764; *see generally* Family Ct Act § 241), and the fact that she took a position contrary to that of the father does not indicate bias (*see Matter of Aaliyah Q.*, 55 AD3d 969, 971; *Matter of Jason A.C. v Lisa A.C.*, 30 AD3d 1110, 1110).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1018

CAF 16-00105

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

IN THE MATTER OF KAMERON V.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EVA V., RESPONDENT,
AND JAMEL L., RESPONDENT-APPELLANT.

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

KATE S. NOWADLY, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 17, 2015 in a proceeding pursuant to Family Court Act article 10. The order found that respondent Jamel L. had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition against respondent Jamel L. is dismissed.

Memorandum: In this proceeding brought pursuant to Family Court Act article 10, Jamel L. (respondent) appeals from an order of fact-finding determining that he neglected the subject child. We agree with respondent that the evidence does not support Family Court's determination that he is a person legally responsible for the child (*see* § 1012 [g]), and the court therefore erred in determining that he neglected the child (*see* § 1012 [f] [i]). Even giving deference to the court's credibility determinations (*see Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1611-1612, *lv denied* 15 NY3d 705), we conclude that petitioner's witnesses established that respondent and the mother of the child had been living together for some unspecified period of time, but there was nothing further to show that respondent acted "as the functional equivalent of a parent in a familial or household setting" (*Matter of Yolanda D.*, 88 NY2d 790, 796; *see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004). There was no testimony that respondent, the mother, and the child were "living together as a family" (*Donell S.*, 72 AD3d at 1612), or that respondent provided childcare or financial support, or performed any household duties (*cf. Matter of Mackenzie P.G. [Tiffany P.]*, 148 AD3d 1015, 1017; *Matter of Keniya G. [Avery P.]*, 144 AD3d 532, 533; *Matter of*

Jayline R. [Jose M.], 110 AD3d 419, 420; *Matter of Tyler MM. [Stephanie NN.]*, 82 AD3d 1374, 1375, *lv denied* 17 NY3d 703).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1019

CAF 16-00880

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

IN THE MATTER OF STEVEN MORALES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH MORALES, RESPONDENT-APPELLANT.

LAW OFFICE OF PETER VASILION, ESQ., WILLIAMSVILLE (PETER P. VASILION OF COUNSEL), FOR RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR PETITIONER-RESPONDENT.

JOSEPH C. BANIA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Brenda Freedman, J.), entered April 28, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the parties' child to petitioner and supervised visitation to respondent.

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

Memorandum: Respondent mother appeals from an order that modified a prior order of custody by granting petitioner father sole custody of the subject child and requiring the mother's visitation to be supervised. We affirm for reasons stated in the decision at Family Court. We add only that, contrary to the mother's contention, the court was authorized to modify the prior custody order inasmuch as the father moved for such relief by order to show cause (*see* Family Ct Act § 651 [b]; *cf. Matter of Kieffer v DeFrain*, 147 AD3d 1539, 1540, *lv denied* 29 NY3d 910; *Matter of Majuk v Carbone*, 129 AD3d 1485, 1485-1486).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1030

CA 17-00373

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

LISA M. MILLIGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BIFULCO AND AALMOST THERE TOWING, LLC,
DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 24, 2016. The order, inter alia, denied in part the cross motion of defendants to compel plaintiff to produce certain authorizations.

It is hereby ORDERED that said appeal from the order insofar as it relates to the seventh ordering paragraph is unanimously dismissed and the order is modified on the law by granting those parts of the cross motion seeking to compel plaintiff to provide authorizations for disclosure of plaintiff's health insurance records, plaintiff's school records, including specific authorization for the release of "special education, educational plans, IEP, [and] Section 504 records," except to the extent that such school records pertain to mental health and counseling, and plaintiff's ITT Tech records, and as modified the order is affirmed without costs in accordance with the following memorandum: In this personal injury action, defendants appeal from an order that, among other things, denied those parts of their cross motion seeking authorizations for, inter alia, records from plaintiff's health insurance carriers, as well as plaintiff's school and mental health records.

We agree with defendants that, based on the broad and all-encompassing allegations of physical injury, the records sought from plaintiff's health insurance carriers are " 'material and necessary' to the defense of this action (CPLR 3101 [a]), inasmuch as they may contain information 'reasonably calculated to lead to relevant evidence' " (*Goetchius v Spavento*, 84 AD3d 1712, 1713). We therefore modify the order by granting that part of the cross motion seeking to compel plaintiff to provide authorizations for the disclosure of those records. We conclude, however, that disclosure should be made to Supreme Court "in camera so that irrelevant information is not

disclosed to defendants" (*id.*).

We further agree with defendants that they established that plaintiff's "special education, educational plans, IEP, [and] Section 504 records" (special education records), as sought in demands 33 through 37, are relevant, or likely to lead to evidence that would be relevant to plaintiff's claims of a loss of "economic capacity" (*cf. McGuane v M.C.A., Inc.*, 182 AD2d 1081, 1082). For similar reasons, we conclude that defendants established that plaintiff's records from ITT Tech may contain information " 'reasonably calculated to lead to relevant evidence' " (*Goetchius*, 84 AD3d at 1713). We therefore further modify the order by granting those parts of the cross motion seeking to compel plaintiff to provide authorizations for the disclosure of those records. We note again that, because "the records may contain some privileged material, they should be reviewed in camera by the . . . [c]ourt[,] and privileged material, if any, should be redacted before giving [defendants] access to the records" (*Rojas-Onofre v Lutheran Med. Ctr.*, 35 AD3d 832, 833).

Contrary to plaintiff's contention, the court was not bound by the law of the case to follow an earlier order denying disclosure of the special education records. "The prior motion[s] preceded [plaintiff's] deposition, which introduced additional evidence and raised further issues, 'thereby precluding application of the law of the case doctrine' " (*Ziolkowski v Han-Tek, Inc.*, 126 AD3d 1431, 1432; *cf. Francisco v General Motors Corp.*, 277 AD2d 975, 976). "In any event, the law of the case is not binding upon this Court's review of the order" (*Ziolkowski*, 126 AD3d at 1432).

We conclude, however, that the court properly denied that part of the cross motion seeking authorizations for plaintiff's preaccident mental health records. In seeking disclosure of those records, defendants contended that such evidence was relevant to plaintiff's claims for "a head injury with alleged cognitive deficits and memory loss." Inasmuch as plaintiff has since withdrawn all claims related to her cognitive deficits and memory loss, we agree with plaintiff that she should not be compelled to disclose her mental health and counseling records, including those contained in her school records (*see Alford v City of New York*, 116 AD3d 483, 484; *Cruci v General Elec. Co.*, 33 AD3d 840, 840).

Contrary to the further contention of defendants, the court did not abuse its discretion in declining to award them sanctions or counsel fees inasmuch as the conduct of plaintiff's attorney "was not 'completely without merit in law' " (*Childs v Cobado*, 302 AD2d 914, 915, quoting 22 NYCRR 130-1.1 [c] [1]; *see generally Vogt v Witmeyer*, 212 AD2d 1013, 1014, *affd* 87 NY2d 998). Finally, although defendants contend that the court erred in refusing to direct plaintiff to answer certain questions at a future deposition, that part of the order is not appealable as of right (*see Di Chiara v Kaleida Health*, 306 AD2d 901, 901-902; *see also Mayer v Hoang*, 83 AD3d 1516, 1518). We decline to treat the notice of appeal as an application for leave to appeal under CPLR 5701 (c) with respect to that issue inasmuch as there is nothing in the record that would warrant the granting of leave to

appeal on our own motion (*see Braverman v Bendiner & Schlesinger, Inc.*, 85 AD3d 1074, 1074; *Nappi v North Shore Univ. Hosp.*, 31 AD3d 509, 510-511; *cf. Mayer*, 83 AD3d at 1518; *Roggow v Walker*, 303 AD2d 1003, 1003-1004).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1031

CA 17-00351

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

IN THE MATTER OF ARBITRATION BETWEEN TOWN OF GREECE, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 828, AFSCME, AFL-CIO, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (EDWARD A. TREVVETT OF COUNSEL), FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 8, 2016 in a proceeding pursuant to CPLR article 75. The order, among other things, denied the petition seeking a permanent stay of arbitration and directed petitioner to hold a step two hearing within 30 days.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the order directing petitioner to hold a step two hearing within 30 days and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration of a grievance arising from petitioner's termination of one of respondent's members. Petitioner appeals from an order that, inter alia, denied its application for a permanent stay and directed petitioner to hold a hearing pursuant to step two of the three-step grievance procedure set forth in the collective bargaining agreement (CBA) within 30 days.

Contrary to petitioner's contention, we conclude that Supreme Court properly denied petitioner's request for a permanent stay of arbitration. We agree with petitioner, however, that the court erred in directing it to hold a step two hearing, and we therefore modify the order accordingly. Contrary to the court's determination, a step two hearing is not a condition precedent to arbitration under the terms of the CBA. Where, as here, the CBA contains a broad arbitration clause and does not expressly identify any conditions precedent to arbitration, the alleged failure of a party to comply strictly with the contractual grievance procedures or time limits is not a proper ground for a stay of arbitration because such issues are

to be resolved by the arbitrator (*see Matter of Kachris [Sterling]*, 239 AD2d 887, 888; *see also Matter of Enlarged City Sch. Dist. of Troy [Troy Teachers Assn.]*, 69 NY2d 905, 907; *Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358, 363-364). Inasmuch as a step two hearing is a permissive and not a mandatory part of the CBA's grievance and arbitration procedure, strict compliance with each step in the procedure is not a condition precedent to arbitration (*see Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1496).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1032

CA 17-00266

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

ALPHONSO ANDERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLORIA ANDERSON, ALSO KNOWN AS GLORIA MORGAN,
DEFENDANT-RESPONDENT.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (MARGARET MCMULLEN RESTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered June 20, 2016. The order, insofar as appealed from, denied the motion of plaintiff for his marital share of the value of the degree defendant earned during the course of the marriage.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs by vacating the first ordering paragraph, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: As limited by his brief, plaintiff appeals from that part of an order that denied his motion to recover his marital interest in a master's degree earned by defendant during the course of their marriage. An oral stipulation of settlement, which was incorporated but not merged into the judgment of divorce, included a provision that entitled plaintiff to an interest in defendant's master's degree. The parties, however, did not stipulate to the valuation of the degree or the extent of plaintiff's interest in the degree. Nine years after the entry of the judgment of divorce, plaintiff moved to recover his interest in the degree. In support of his motion, he submitted a valuation by an accountant who opined that "the calculated value of $223,116 fairly represents the marital portion of the increased earnings capacity due to [defendant's] master's degree." In opposition to the motion, defendant contested only the valuation of her master's degree and the extent of plaintiff's marital interest therein, and submitted a valuation by an accountant who opined that her enhanced earnings capacity "equates to a total present value of $18,529." Nevertheless, Supreme Court denied plaintiff's motion on the ground that there was "no enforceable stipulation" with respect to the degree. That was error.

It is well settled that a party to a stipulation that is incorporated but not merged into a judgment of divorce "cannot challenge the [enforceability of the] stipulation by way of motion but, rather, must do so by commencement of a plenary action" (*Marshall v Marshall*, 124 AD3d 1314, 1317; *see Verna v Verna*, 134 AD3d 1438, 1438). Conversely, a party *seeking to enforce* the terms of such a stipulation may do so either by a motion to enforce the judgment (*see generally Marshall*, 124 AD3d at 1317), or by a plenary action (*see Sacks v Sacks*, 220 AD2d 736, 737). In this case, the issue whether the stipulation was enforceable was not properly before the court because defendant did not commence a plenary action challenging its enforceability. Rather, plaintiff moved to enforce the judgment incorporating the stipulation, and defendant effectively conceded that the stipulation was enforceable when she asserted that the only questions before the court were the valuation of her master's degree and the extent of plaintiff's marital interest therein. Thus, we conclude that the court erred in denying plaintiff's motion on the ground that the stipulation was unenforceable (*see generally Marshall*, 124 AD3d at 1317; *Barany v Barany*, 71 AD3d 613, 615). We therefore reverse the order insofar as appealed from, and we remit the matter to Supreme Court for a hearing to determine the value of plaintiff's interest in defendant's degree.

Defendant's contention concerning the defense of laches is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1035

KA 14-01481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT A. WALTERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 15, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his guilty plea of robbery in the first degree (§ 160.15 [3]). In both appeals, defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in refusing to suppress his statements to police (*see People v Kemp*, 94 NY2d 831, 833; *People v Lynn*, 144 AD3d 1491, 1492, *lv denied* 28 NY3d 1186; *People v Rosado*, 26 AD3d 891, 892, *lv denied* 6 NY3d 838), as well as his contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *People v Morales*, 148 AD3d 1638, 1639, *lv denied* 29 NY3d 1083).

Although defendant's contention in both appeals that the pleas were not knowingly, voluntarily, and intelligently entered survives his valid waiver of the right to appeal (*see People v Green*, 122 AD3d 1342, 1343), that contention is not preserved for our review (*see People v Darling*, 125 AD3d 1279, 1279, *lv denied* 25 NY3d 1071). Contrary to defendant's further contention, his youthful age, on its own, did not deny him the capacity either to plead guilty or to subsequently seek to withdraw his pleas such that the preservation rule should not apply (*see generally People v Peque*, 22 NY3d 168, 182;

People v Lopez, 71 NY2d 662, 665-666). In any event, the record establishes that defendant's pleas were knowing, voluntary, and intelligent (*see Green*, 122 AD3d at 1343).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1036

KA 14-01482

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT A. WALTERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 15, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Same memorandum as in *People v Walters* ([appeal No. 1] ___ AD3d ___ [Sept. 29, 2017]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1037

KA 15-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS V. VULLO, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 21, 2015. The judgment convicted defendant, upon a jury verdict, of 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, upon a jury verdict, of robbery in the third degree (Penal Law § 160.05). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Two department store security guards testified that they watched defendant remove an item from its packaging, secrete it in his pants pocket, and then leave the store without paying for the item. The store surveillance video corroborates the guards' account. When the security guards pursued him outside the store, defendant shoved one of the guards, attempted to punch both guards, and ultimately escaped in a car. Thus, on this record, the jury reasonably inferred that defendant forcibly stole property (*see* § 160.05), based upon evidence that he used physical force in order to "prevent[ ] or overcom[e] resistance to the taking of the property or to the retention thereof" (§ 160.00 [1]; *see People v Gordon*, 119 AD3d 1284, 1285-1286, *lv denied* 24 NY3d 1002). Moreover, viewing the facts in the light most favorable to the People, we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*Danielson*, 9 NY3d at 349 [internal quotation marks omitted]). Contrary to defendant's contention, the failure to recover the stolen item does not preclude a robbery conviction (*see People v Gordon*, 23 NY3d 643, 650-651). We have examined and rejected defendant's remaining contentions.

Finally, we note that the Ontario County District Attorney was obligated to file a brief in opposition to this appeal unless he

conceded that the judgment on appeal should be reversed (*see People v Coger*, 2 AD3d 1279, 1280, *lv denied* 2 NY3d 738; *see generally* County Law § 700 [1]). No such concession was made by the District Attorney. Here, the District Attorney neither filed a brief nor notified this Court of his election not to submit a brief (*see* 22 NYCRR 1000.2 [d]). The District Attorney thus failed "to perform his duty to the people of his county" (*People v Herman*, 187 AD2d 1027, 1028; *see People v Wright,* 22 AD2d 754, 754, *affd* 16 NY2d 736, *cert denied* 384 US 972), and we emphasize that such "duty . . . is in no way diminished or excused by reason of the fact that we have affirmed the conviction after a careful consideration of the record and law" (*Coger*, 2 AD3d at 1280 [internal quotation marks omitted]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1038

KA 14-02227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG DAVIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 11, 2014. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (two counts), criminal sexual act in the second degree (two counts), endangering the welfare of a child and sexual abuse in the third degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts each of rape in the second degree (Penal Law § 130.30 [1]), criminal sexual act in the second degree (§ 130.45 [1]), and sexual abuse in the third degree (§ 130.55), and one count of endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that he met his initial burden on his *Batson* application by demonstrating that the prosecution exercised a peremptory challenge to remove a member of a cognizable racial group from the venire, "and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenge[] to exclude [that] potential juror[] because of [her] race" (*People v Childress*, 81 NY2d 263, 266; *see People v James*, 99 NY2d 264, 270; *see generally Batson v Kentucky*, 476 US 79, 96). We note that "the first-step burden in a *Batson* challenge is not intended to be onerous" (*People v Hecker*, 15 NY3d 625, 651, *cert denied* 563 US 947; *see Johnson v California*, 545 US 162, 170), and that the initial burden is met when " 'the totality of the relevant facts gives rise to an inference of discriminatory purpose' " (*Hecker*, 15 NY3d at 651, quoting *Batson*, 476 US at 94; *see People v Jones*, 63 AD3d 758, 758). Here, defendant is African-American, and the first prospective juror to be peremptorily challenged by the People was the only African-

American on the panel. Neither the People nor defendant asked any questions of the prospective juror at issue during voir dire, and County Court's general questioning of the panel raised no issues that would distinguish her from the other prospective jurors. Inasmuch as there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner, the burden shifted to the People to articulate a nondiscriminatory reason for striking the juror, and the court then should have determined whether the proffered reason was pretextual (*see James*, 99 NY2d at 271). We therefore hold the case, reserve decision, and remit the matter to County Court for that purpose (*see People v Bolling*, 79 NY2d 317, 325; *People v Jenkins*, 75 NY2d 550, 559-560; *Jones*, 63 AD3d at 758).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1039

KA 15-01922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEMAR WALLACE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 (Thomas P. Franczyk, J.), rendered September 14, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of marihuana in the first degree (Penal Law § 221.30) defendant contends that County Court erred in refusing to suppress the subject marihuana and his statements to police. Even assuming, arguendo, that the court's description of the plea agreement did not amount to a sentencing commitment and thus that defendant's purported waiver of the right to appeal is unenforceable for lack of consideration (*see People v Mitchell*, 147 AD3d 1361, 1362; *People v Crump*, 107 AD3d 1046, 1047, *lv denied* 21 NY3d 1014; *cf. People v Deprosperis*, 132 AD3d 692, 693, *lv denied* 26 NY3d 1108), we nevertheless affirm the judgment.

The police officer who stopped the vehicle in which defendant was a passenger was entitled to do so upon observing that the vehicle was traveling with its taillights off at night, in violation of the Vehicle and Traffic Law (*see* § 375 [2] [a] [3]), even if the officer's primary motivation may have been to investigate some other matter (*see People v Robinson*, 97 NY2d 341, 348-349; *People v Cuffie*, 109 AD3d 1200, 1201, *lv denied* 22 NY3d 1087; *People v Donaldson*, 35 AD3d 1242, 1242-1243, *lv denied* 8 NY3d 984). There is no basis to disturb the court's determination to credit the officer's testimony that the vehicle's taillights were off (*see People v Frazier*, 52 AD3d 1317, 1317, *lv denied* 11 NY3d 788; *People v Richardson*, 27 AD3d 1168, 1169; *see generally People v Prochilo*, 41 NY2d 759, 761). Defendant, as a

mere passenger in the vehicle, failed to establish standing to challenge the ensuing search of the vehicle that resulted in the discovery of the marihuana (*see People v Rosario*, 64 AD3d 1217, 1218, *lv denied* 13 NY3d 941; *People v Robinson*, 38 AD3d 572, 573). Contrary to defendant's contention, he did not have automatic standing inasmuch as the People's theory of possession was not based on the statutory automobile presumption (*see Robinson*, 38 AD3d at 573; *cf.* Penal Law § 220.25 [1]; *People v Millan*, 69 NY2d 514, 518-519), which does not apply to marihuana offenses (*see People v Dan*, 55 AD3d 1042, 1043-1044, *lv denied* 12 NY3d 757; *People v Gabbidon*, 40 AD3d 776, 777).

Inasmuch as defendant has not established that the stop or search was unlawful, his statements are not subject to suppression as the fruit of illegal police conduct (*see People v Feliciano*, 140 AD3d 1776, 1777, *lv denied* 28 NY3d 1027; *People v White*, 128 AD3d 1457, 1460, *lv denied* 26 NY3d 1012; *cf. People v Mobley*, 120 AD3d 916, 919). Furthermore, the statements that he made during the traffic stop were not obtained in violation of his *Miranda* rights because he "was not in custody for *Miranda* purposes" at that time (*People v Feili*, 27 AD3d 318, 319, *lv denied* 6 NY3d 894; *see People v Bennett*, 70 NY2d 891, 893-894; *People v Shelton*, 111 AD3d 1334, 1336-1337, *lv denied* 23 NY3d 1025). To the extent that defendant challenges the validity of his *Miranda* waiver with respect to his later statements at the police station, we conclude that he implicitly waived his rights by agreeing to speak to an investigator after he had received *Miranda* warnings from the arresting officer and confirmed that he understood his rights (*see People v Davis*, 55 NY2d 731, 733; *People v Harris*, 129 AD3d 1522, 1523, *lv denied* 27 NY3d 998; *see also People v Nunez*, 176 AD2d 70, 72, *affd* 80 NY2d 858).

Finally, we note that the certificate of conviction incorrectly recites that criminal possession of marihuana in the first degree is a class E felony, and it must therefore be amended to reflect that defendant was convicted of a class C felony (*see* Penal Law § 221.30; *People v Young*, 74 AD3d 1864, 1865, *lv denied* 15 NY3d 811).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1040

KA 13-00648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY GRAHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 11, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [2]) and rape in the third degree (§ 130.25 [2]). Defendant contends that Supreme Court failed to make a minimal inquiry into his requests for new counsel, and that he showed good cause for substitution. We reject that contention. A defendant may be entitled to new assigned counsel "upon showing 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824). Where a defendant makes a "seemingly serious request[]" for new assigned counsel, the court is obligated to "make some minimal inquiry" (*id.* at 824-825; *see People v Porto*, 16 NY3d 93, 99-100; *People v Gibson*, 126 AD3d 1300, 1301-1302). Here, the record establishes that "the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669, *lv denied* 29 NY3d 996).

We reject defendant's contention that the court erred in refusing to suppress the statements and the DNA sample that he gave to the police. We agree with the court that defendant was not in custody when he gave statements to the police and thus *Miranda* warnings were not required (*see People v McGuay*, 120 AD3d 1566, 1567, *lv denied* 25 NY3d 1167; *see generally People v Yukl*, 25 NY2d 585, 589, *cert*

denied 400 US 851). Defendant voluntarily drove himself to the police station, was not handcuffed or restrained in any way while at the station, was advised he could leave at any time, and was allowed to go home after only approximately half an hour of questioning (*see People v Brown*, 111 AD3d 1385, 1385-1386, *lv denied* 22 NY3d 1155). We further agree with the court that defendant voluntarily agreed to give a DNA sample (*see People v Parker*, 133 AD3d 1300, 1300, *lv denied* 27 NY3d 1154, *reconsideration denied* 28 NY3d 1030; *People v Dallas*, 119 AD3d 1362, 1363, *lv denied* 24 NY3d 1083).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1043

CA 17-00323

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

SUZANNE PEARCE, ADMINISTRATRIX OF THE ESTATE OF MITCHELL PEARCE, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, ALSO KNOWN AS ERIE-WYOMING JOINT WATERSHED BOARD, ET AL., DEFENDANTS, AND COUNTY OF ERIE, DEFENDANT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 7, 2016. The order denied the motion of defendant County of Erie to dismiss a portion of the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, insofar as it alleges that defendant County of Erie was negligent in "improperly advising" defendant Joint Board of Directors of Erie-Wyoming County Soil Conservation District, also known as Erie-Wyoming Joint Watershed Board, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against, inter alia, defendants County of Erie (County) and the Joint Board of Directors of Erie-Wyoming County Soil Conservation District, also known as Erie-Wyoming Joint Watershed Board (Board), seeking damages for the death of her son as the result of a drowning accident in the vicinity of a dam on Buffalo Creek in defendant Town of West Seneca. The Board had previously planned to install signs warning that the dam area was hazardous, but the County, which provides legal services to the Board pursuant to Soil and Water Conservation Districts Law § 9 (13), advised the Board not to install warning signs. In her bill of particulars to the County, plaintiff alleged in relevant part that the County was negligent in "improperly advising" the Board not to install the signs, and that the County "was further negligent in an ultra

vires appropriation of power assigned to" the Board and other entities. The County moved pursuant to CPLR 3211 (a) (7) to dismiss that part of the complaint with respect to those allegations for failure to state a cause of action, and Supreme Court denied the motion. At the outset, we note that the County has not raised any issues in its brief concerning plaintiff's "ultra vires appropriation of power" theory of liability, and we therefore deem any such issues abandoned (*see Micro-Link, LLC v Town of Amherst*, 73 AD3d 1426, 1427; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with the County, however, that the court erred in denying that part of the motion seeking to dismiss the complaint insofar as it alleges that the County was negligent in improperly advising the Board, and we therefore modify the order accordingly. "[A]bsent fraud or other special circumstances [not present here], an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client" (*Levine v Graphic Scanning Corp.*, 87 AD2d 755, 755; *see Estate of Schneider v Finmann*, 15 NY3d 306, 308-309; *Kumar v American Tr. Ins. Co.*, 49 AD3d 1353, 1354-1355), and we thus conclude that the County's legal advice to the Board did not give rise to a duty to decedent (*see Harder v Arthur F. McGinn, Jr., P.C.*, 89 AD2d 732, 733, *affd for reasons stated* 58 NY2d 663). Contrary to plaintiff's contention, the County argued in support of its motion that no duty to decedent arose from its legal advice to the Board, and it is therefore not advancing that argument for the first time on appeal (*see Anderson v Weinberg*, 70 AD3d 1438, 1440; *Luthringer v Luthringer*, 59 AD3d 1028, 1030).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1046

CA 17-00304

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

IN THE MATTER OF ARBITRATION BETWEEN MONROE COUNTY SHERIFF POLICE BENEVOLENT ASSOCIATION, INC., PETITIONER-APPELLANT,

AND ORDER

COUNTY OF MONROE AND MONROE COUNTY SHERIFF, RESPONDENTS-RESPONDENTS.

BLITMAN & KING, LLP, ROCHESTER (JULES L. SMITH OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 22, 2016. The order and judgment denied the petition to vacate an arbitration award and confirmed such award.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 22, 2017,

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1051

CA 16-02178

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

ROBERT F. ROSSI, AS EXECUTOR OF THE ESTATE OF
ALBERTA M. ROSSI, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. MORSE, DEFENDANT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, ROME, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 2, 2016. The order, inter alia, determined the rights of the parties to various financial accounts.

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

Memorandum: Alberta M. Rossi (decedent) commenced this action seeking to impose a constructive trust on money held by her daughter, defendant. After a nonjury trial, decedent died and plaintiff was thereafter substituted as executor of decedent's estate. Supreme Court issued an order (liability order) determining that decedent was entitled to a constructive trust on the funds that were transferred to defendant and ordering an accounting. After receiving the audit that was performed by an accountant chosen by the parties, the court issued an order (damages order) that, inter alia, granted decedent possession of certain accounts. Defendant now appeals from the damages order.

Initially, we reject plaintiff's contention that, having failed to appeal from the liability order, defendant has waived her right to pursue an appeal from any part of that order. The appeal from the damages order, although not titled a judgment, brings up for review the non-final liability order (*see generally* CPLR 5501 [a] [1]). We therefore address the merits of defendant's contentions.

Viewing the evidence in the light most favorable to decedent, we conclude that a fair interpretation of the evidence supports the court's determination in the liability order to impose a constructive trust (*see Beason v Kleine*, 96 AD3d 1611, 1613; *see generally A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286). In general, a constructive trust may be imposed where there is "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4)

unjust enrichment" (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940, *rearg denied* 50 NY2d 929; *see Sharp v Kosmalski*, 40 NY2d 119, 121; *Matter of Thomas*, 124 AD3d 1235, 1237). "Inasmuch as a constructive trust is an equitable remedy, however, 'courts do not rigidly apply the elements but use them as flexible guidelines' " (*Beason*, 96 AD3d at 1613).

Contrary to defendant's contention, the record establishes that "a relationship of trust and confidence did exist between the parties" (*Sharp*, 40 NY2d at 121; *see Matter of Grasta*, 61 AD2d 1120, 1121, *affd* 45 NY2d 999). Before their relationship became strained and decedent commenced this action, it was undisputed that decedent and defendant lived together and were close, and decedent trusted defendant to handle her financial affairs when decedent no longer wanted to continue doing so or was unable to do so. Also contrary to defendant's contention, the evidence established that a promise was made that defendant would use the money only for decedent's needs during her lifetime and that decedent transferred her money to accounts in defendant's name based on that promise (*see generally Matter of Chicola*, 224 AD2d 1005, 1006). Decedent made or was involved with all the investment decisions regarding the transferred money, and the withdrawals from the accounts were given to decedent for her use and were not for defendant's use. We therefore reject defendant's contention that the transfers were a gift to her.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1060

KA 14-00409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAFAEL VADELL, ALSO KNOWN AS RAFAEL IRIZARRY,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CATHERINE H. JOSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 17, 2013. The judgment convicted defendant, upon his plea of guilty, 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, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Contrary to defendant's contention, County Court properly refused to suppress physical evidence seized by the police from defendant after a traffic stop. The officers lawfully stopped the vehicle in which defendant was a passenger because the driver was operating the vehicle with no headlights and was not wearing a seat belt (*see generally People v Robinson*, 74 NY2d 773, 775, *cert denied* 493 US 966). Defendant was properly asked to exit the vehicle *(see id.; People v Henderson*, 26 AD3d 444, 445, *lv denied* 6 NY3d 895). Based on defendant's movements while inside and when exiting the vehicle, the officers reasonably suspected that defendant was armed and posed a threat to their safety (*see People v Fagan*, 98 AD3d 1270, 1271, *lv denied* 20 NY3d 1061, *cert denied* ___ US ___, 134 S Ct 262). Contrary to defendant's contention, the use of handcuffs during a frisk by one of the officers did not transform his detention into an arrest (*see id.*; *see also People v Allen*, 73 NY2d 378, 379-380). The officers thereafter acquired probable cause to arrest defendant when a gun fell to the ground from his pant leg (*see Fagan*, 98 AD3d at 1271).

We agree with defendant, however, that the court failed to fulfill its obligation to advise him at the time of his plea that the sentence imposed upon his conviction would include a period of postrelease supervision (*see People v Catu*, 4 NY3d 242, 244-245). We therefore reverse the judgment and vacate defendant's plea (*see People v Cornell*, 16 NY3d 801, 802).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1062

KA 15-01494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR HAILEY, DEFENDANT-APPELLANT.

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

ARTHUR HAILEY, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 26, 2015. The judgment convicted defendant, upon a nonjury verdict, 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 following a nonjury trial of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). According to the victim's testimony, defendant, who was seated in the backseat of the victim's cab, demanded that the victim "give it up" and stated that he had a gun to the victim's head. The victim then felt a "metal object" on the back of his head. The victim subsequently drove his cab to a convenience store for purposes of withdrawing money from an automated teller machine. While entering the store together, defendant reminded the victim that he had a gun and directed the victim to avoid drawing attention to them.

Based on the above testimony, we reject defendant's contention that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence is legally sufficient to establish that defendant displayed what appeared to the victim to be a firearm (*see* Penal Law § 160.10 [2] [b]; *People v Howard*, 92 AD3d 176, 179-180, *affd* 22 NY3d 388; *People v Groves*, 282 AD2d 278, 278, *lv denied* 96 NY2d 901; *People v Jackson*, 180 AD2d 756, 756-757, *lv denied* 80 NY2d 832), and that defendant came " 'dangerously near' " to forcibly depriving the victim of property (*People v Naradzay*, 11 NY3d 460, 466; *see People v Lamont*, 25 NY3d

315, 319; *People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010). Defendant's intent to rob the victim could reasonably be inferred from defendant's conduct and the surrounding circumstances (*see Lamont*, 25 NY3d at 319; *Bracey*, 41 NY2d at 301-302; *People v Gordon*, 119 AD3d 1284, 1286, *lv denied* 24 NY3d 1002). Viewing the evidence in light of the elements of the crime of attempted robbery in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence with respect to that crime (*see generally Bleakley*, 69 NY2d at 495). We see no basis to disturb Supreme Court's credibility determinations (*see generally id.*).

We reject defendant's further contention that the court erred in refusing to suppress the statements he made to the police while seated in the back of a patrol car, before he was advised of his *Miranda* rights. It is well settled that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33; *see People v Spirles*, 136 AD3d 1315, 1316, *lv denied* 27 NY3d 1007, *cert denied* ___ US ___, 137 S Ct 298). Here, defendant's statements were not the product of police interrogation inasmuch as the officer asked defendant only preliminary questions that "were investigatory and not accusatory" (*People v Parulski*, 277 AD2d 907, 908; *see Spirles*, 136 AD3d at 1316; *People v Brown*, 23 AD3d 1090, 1092, *lv denied* 6 NY3d 810).

Defendant further contends that he was denied effective assistance of counsel. We note, however, that the sole alleged instance of ineffective assistance specified by defendant, i.e., that defense counsel failed to utilize certain exculpatory evidence, is based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896; *People v Wilson*, 49 AD3d 1224, 1225, *lv denied* 10 NY3d 966).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1067

CAF 16-00805

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

IN THE MATTER OF KEVIN DRAKE,
PETITIONER-APPELLANT,

V ORDER

TERRI CARPENTER, RESPONDENT-RESPONDENT.

BERNADETTE M. HOPPE, BUFFALO, FOR PETITIONER-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-RESPONDENT.

LEIGH E. ANDERSON, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered April 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order denied the petition in its entirety.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1068

CAF 16-00148

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

IN THE MATTER OF BRYAN O. AND ARASH A.O.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ZABIULLAH O., RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

JAMES HARMON, BUFFALO, FOR PETITIONER-RESPONDENT.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 29, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected subject child Bryan O.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the finding that respondent failed to address the child's minimal needs while the child's mother was away, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order determining that he neglected Bryan O. (subject child). We note that Arash A.O. attained the age of majority before the order herein was issued. We conclude that the finding of neglect by excessive corporal punishment is supported by a preponderance of the evidence adduced at the fact-finding hearing (*see* §§ 1012 [f] [i] [B]; 1046 [b] [i]). "In reviewing a determination of neglect, we must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106; *see Matter of Emily W. [Michael S.–Rebecca S.]*, 150 AD3d 1707, 1709). Here, the court was presented with substantial credibility issues that it resolved against the father, and we perceive no reason to disturb the court's resolution of those issues.

Contrary to the father's contention, the subject child's out-of-court statements that the father had caused his bruises and scratches by pushing him to the ground and dragging him to bed were sufficiently

corroborated by the caseworker's and his mother's observations of his injuries (*see Matter of Dante W. [Norman W.]*, 136 AD3d 473, 473-474), the out-of-court statements of his siblings who had seen or heard the altercation (*see Matter of Isaiah S.*, 63 AD3d 948, 949), and photographic evidence of the injuries (*see Matter of Dylan TT. [Kenneth UU.]*, 75 AD3d 783, 783-784).

Contrary to the father's further contention, petitioner established that the subject child was in "imminent danger of injury or impairment" because of the father's behavior (*Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509). "Actual impairment or injury is not required but, rather, only 'near or impending' injury or impairment is required" (*Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680, *lv denied* 18 NY3d 810). The subject child's mother testified that the child was "hysterical" and cried uncontrollably when asked about the incident of excessive corporal punishment, and there was considerable testimony that the child became upset on other occasions because of the father's verbal abuse and threats.

We agree with the father, however, that the court erred in finding that he neglected the subject child by inadequately caring for his minimal needs when the mother was absent from the home (*see* Family Ct Act § 1012 [f] [i] [A]), and we therefore modify the order accordingly. That finding is not supported by a preponderance of the evidence (*see* § 1046 [b] [i]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1072

TP 17-00329

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

IN THE MATTER OF BUFFALO TEACHERS FEDERATION, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AND BUFFALO CITY SCHOOL DISTRICT, RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (TIMOTHY CONNICK OF COUNSEL), FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BETHANY CENTRONE OF COUNSEL), FOR RESPONDENT BUFFALO CITY SCHOOL DISTRICT.

DAVID P. QUINN, ALBANY (ELLEN M. MITCHELL OF COUNSEL), FOR RESPONDENT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Tracey A. Bannister, J.], entered February 14, 2017) to review a determination of respondent New York State Public Employment Relations Board. The determination, among other things, partially reversed the determination of the Administrative Law Judge.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to annul a determination of respondent New York State Public Employment Relations Board (PERB), which, inter alia, reversed a determination of an administrative law judge (ALJ) insofar as he ordered the reinstatement of 88 teachers with back pay. We confirm the determination and dismiss the petition.

In May 2005, respondent Buffalo City School District (District) passed a resolution naming a single health insurance carrier for the teachers in its employ. The resolution effectuated a change to the existing collective bargaining agreement (CBA) between the District and petitioner, the teachers' bargaining representative. In a subsequent letter to the teachers, the District explained that it was forced either to make that change to the CBA or to make "massive cuts" in other areas. Petitioner filed a grievance the same month seeking to prevent that change to the CBA. In July 2005, the District sent a

letter to 88 teachers informing them that they were to be laid off because the failure to reach an agreement on a single health insurance carrier had forced the District to make budgetary cuts elsewhere. The District's superintendent met with the affected teachers in August 2005 and, according to the testimony of one of the teachers, the superintendent announced that they would have their jobs back if they pressured petitioner to withdraw the grievance. When petitioner refused to withdraw the grievance, the District discharged the 88 teachers and implemented the proposed change to the CBA. Thereafter, petitioner filed an improper practice charge alleging violations of the Taylor Law (Civil Service Law art 14). In particular, petitioner alleged violations of Civil Service Law section 209-a (1) (a) and (d). This proceeding arises from that improper practice charge.

While that charge was pending, the grievance proceeded to arbitration. In an October 2006 award, the arbitrator concluded, inter alia, that the District had discharged the teachers "wrongfully, in furtherance of its ill-conceived effort to force the Union into submissive acceptance of the unilateral modification" to the CBA. The award directed the District to reinstate the teachers with back pay. Supreme Court confirmed the arbitration award. On appeal, however, we concluded that "the arbitrator acted in excess of the power granted to him with respect to that part of the award concerning the teachers" (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City Sch. Dist. of City of Buffalo*, 50 AD3d 1503, 1506, *lv denied* 11 NY3d 708). We therefore vacated that part of the award with respect to the reinstatement of the teachers (*id.* at 1504).

Thereafter, the improper practice charge proceeded on a stipulated record before an ALJ. The ALJ concluded, inter alia, that the discharge of the 88 teachers was "the final step in the preconceived scheme designed to pressure [petitioner] to drop the single carrier grievance" and thus violated the statute. Like the arbitrator had done, the ALJ ordered the District to reinstate the teachers with back pay. The District filed exceptions with PERB, which reversed that part of the ALJ's determination with respect to the reinstatement of the teachers. In doing so, PERB highlighted the long-recognized distinction "between a threat of retaliation because either a union or covered employee[] exercises protected rights and a statement that there might be layoffs if the exercise of protected rights results in cost increases for the employer" (*Matter of City of Albany [Albany Police Officers Union, Local 2841]*, 17 PERB ¶ 3068). Applying that precedent, PERB concluded that the July 2005 letters from the District announced the layoffs as a decision that had already been made and explained the underlying reason for the layoffs, i.e., the need to cut costs, and thus the discharge of the teachers did not violate the statute. Petitioner then commenced this proceeding seeking to annul PERB's determination.

Our review is limited to whether PERB's determination was affected by an error of law, arbitrary and capricious or an abuse of discretion, or unsupported by substantial evidence (*see Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 23 NY3d 482, 492; *Matter of Chenango Forks Cent. Sch. Dist. v New York State Pub. Empl.*

Relations Bd., 21 NY3d 255, 265). " 'As the agency charged with implementing the fundamental policies of the Taylor Law, [PERB] is presumed to have developed an expertise and judgment that requires us to accept' its decisions with respect to matters within its competence" (*Chenango Forks Cent. Sch. Dist.*, 21 NY3d at 265, quoting *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404).

Petitioner contends that the determination was arbitrary and capricious inasmuch as PERB departed from its own precedent in refusing to defer to the arbitration award. We reject that contention. Although an administrative body acts arbitrarily and capriciously in departing from its own precedent and failing to explain the reasons for the departure (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519-520), we conclude that PERB's determination here was consistent with its own precedent. Notably, PERB will defer to an arbitration award only in limited circumstances (*see generally Matter of New York City Tr. Auth. [Bordansky]*, 4 PERB ¶ 3031), and it usually does not do so where the charging party alleges a violation of Civil Service Law section 209-a (1) (a) (*see Matter of Police Benevolent Assn. of the New York State Troopers, Inc. [State of New York (Division of State Police)]*, 36 PERB ¶ 3048 n 3; *Matter of Schuyler-Chemung-Tioga Educ. Assn. [Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.]*, 34 PERB ¶ 3019; *Matter of Addison Cent. Sch. Dist. [Addison Teachers' Assn., NEA/NY]*, 17 PERB ¶ 3076). Inasmuch as petitioner alleged violations of section 209-a (1) (a) and (d), it was the precedent of PERB to refuse to defer to the arbitration award in this case. Moreover, to the extent that the arbitrator made findings with respect to the layoffs, it was reasonable for PERB not to defer to the arbitration award because the arbitrator exceeded the scope of his authority and his findings were inconsistent with PERB's interpretation of the statute (*see Chenango Forks Cent. Sch. Dist.*, 21 NY3d at 265).

Contrary to petitioner's further contention, the determination is supported by substantial evidence. " 'An administrative agency's determination need not be the only rational conclusion to be drawn from the record[, and] the existence of other, alternative rational conclusions does not warrant annulment of the agency's conclusion' " (*Matter of Klimov v New York State Div. of Human Rights*, 150 AD3d 1677, 1677, quoting *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239). Insofar as relevant here, it is unlawful for a public employer "to interfere with, restrain or coerce public employees in the exercise of [certain] rights," such as their right to participate in organizing activity, "for the purpose of depriving them of such rights" (Civil Service Law § 209-a [1] [a]; *see* § 202). In the July 2005 letters, the District explained that layoffs were a cost-cutting measure made necessary by the failure to reach an agreement on health insurance. Based upon our review of the record, we conclude that it was rational for PERB to determine that the layoffs were not motivated by an improper purpose.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1073

CA 16-02309

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

TIMOTHY C. HEWITT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, RAYMOND R. WHITACRE, INDIVIDUALLY AND AS PARENT OF BRENDYN J. WHITACRE, AND BRENDYN J. WHITACRE, DEFENDANTS-RESPONDENTS.

TIMOTHY C. HEWITT, PLAINTIFF-APPELLANT PRO SE.

WEBSTER SZANYI LLP, BUFFALO (BRITTANY JONES OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF CHAUTAUQUA.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RAYMOND R. WHITACRE, INDIVIDUALLY AND AS PARENT OF BRENDYN J. WHITACRE, AND BRENDYN J. WHITACRE.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered September 8, 2016. The order granted the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he was struck by the metal head of a rake while at the transfer station owned by defendant County of Chautauqua. We affirm the order for reasons stated in the decision at Supreme Court. We write only to note that plaintiff failed to address in his brief that part of the order granting the individual defendants' motion for summary judgment, and thus we do not review that part of the order.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1076

CA 16-02308

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

IN THE MATTER OF BASIL SZLAPAK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
FORD MOTOR COMPANY, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER-APPELLANT.

KIENBAUM OPPERWALL HARDY & PELTON, P.L.C., BIRMINGHAM, MICHIGAN (ERIC J. PELTON, OF THE MICHIGAN BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR RESPONDENT-RESPONDENT FORD MOTOR COMPANY.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 7, 2016. The order denied the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 challenging the determination of respondent New York State Division of Human Rights (SDHR), which dismissed, after an investigation, petitioner's employment discrimination complaint against respondent Ford Motor Company (Ford). SDHR determined that there was no probable cause to believe that Ford engaged in an unlawful discriminatory practice against petitioner. Supreme Court denied the relief sought by petitioner, thereby upholding SDHR's determination, and we affirm.

We conclude that SDHR conducted a proper investigation and afforded petitioner a full and fair opportunity to present evidence on his behalf and to rebut the evidence presented by Ford (*see Matter of Witkowich v New York State Div. of Human Rights*, 56 AD3d 1170, 1170, *lv denied* 12 NY3d 702), and we further conclude that the determination "is supported by a rational basis and is not arbitrary or capricious" (*Matter of Majchrzak v New York State Div. of Human Rights*, 151 AD3d 1856, 1857; *see Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747; *see also Matter of McDonald v New York*

State Div. of Human Rights, 147 AD3d 1482, 1483).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1077

CA 17-00383

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

LINDA SNYDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BERNARD W. ASHER, M.D., AND BERNARD W. ASHER, M.D. AND LILLIAN L. ORBA, M.D., P.C., DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (DEANNA D. RUSSELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN, GRUTTADARO, GAUJEAN & PRATO, LLC, ROCHESTER (JEFFREY ALBANESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered October 28, 2016. The order, insofar as appealed from, granted the motion of defendants insofar as it sought to compel plaintiff to provide unlimited authorizations for primary care, Social Security disability and pharmaceutical records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion to the extent that defendants seek unlimited authorizations for plaintiff's primary care, Social Security disability, and pharmaceutical records, and granting the motion to the extent that defendants seek an in camera review of those records, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Genesee County, for further proceedings in accordance with the following memorandum: In this medical malpractice action, plaintiff appeals from an order that granted defendants' motion insofar as defendants sought to compel her to provide unlimited authorizations for primary care, Social Security disability, and pharmaceutical records. Contrary to plaintiff's contention, based upon the record before us, we conclude that those records are "material and necessary" to the defense of the action inasmuch as they are likely to contain relevant information about plaintiff's prior medical conditions (CPLR 3101 [a]; *see Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338). We note, however, that defendants in the alternative sought an in camera review of those records, and we agree with plaintiff that Supreme Court should have granted that alternative relief. We thus conclude that "the records should not be released to defendants until the court has conducted an in camera review thereof, so that irrelevant information is redacted" (*Nichter*, 93 AD3d at 1338; *see generally Barnes v Habuda*, 118 AD3d 1443, 1444). We therefore modify the order accordingly, and we remit

the matter to Supreme Court for an in camera review of the subject records and the redaction of any irrelevant information.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1080

KA 15-00840

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN FLEMING, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER 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 (Robert B. Wiggins, J.), rendered April 21, 2015. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and sexual abuse in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and sexual abuse in the second degree (§ 130.60 [2]), defendant contends that County Court failed to comply with the requirements of CPL 310.30, as set forth in *People v O'Rama* (78 NY2d 270, 276-277), in responding to an inquiry by the jury during deliberations. We conclude that defendant failed to preserve his contention for our review (*see generally* CPL 470.05 [2]), and we reject his assertion that preservation was not required under these circumstances (*see People v Williams*, 142 AD3d 1360, 1362, *lv denied* 28 NY3d 1128). It is well settled that "[c]ounsel's knowledge of the precise content of the [jury] note . . . removes the claimed error from the very narrow class of mode of proceedings errors for which preservation is not required" (*People v Morris*, 27 NY3d 1096, 1098) and, here, the court "read the precise content of the note into the record in the presence of counsel, defendant, and the jury" (*id.* at 1097; *see People v Nealon*, 26 NY3d 152, 154). We likewise reject defendant's further contention that the court's response to a juror's one-word inquiry was a mode of proceedings error. "Defense counsel was aware of the content of the juror['s] comment[], which [was] made out loud in open court, and did not object to anything the judge or prosecutor did in response" (*People v Mays*, 20 NY3d 969, 971; *see People v Mostiller*, 145 AD3d 1466, 1467-1468, *lv denied* 29 NY3d 951). Therefore, the court did not violate its core *O'Rama* responsibilities,

and preservation was required (*see Mostiller*, 145 AD3d at 1467-1468). We decline to exercise our power to review defendant's *O'Rama* contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1081

TP 17-00422

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

IN THE MATTER OF LUIS NUNEZ, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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 28, 2017) 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). We conclude that there is substantial evidence to support the determination inasmuch as petitioner pleaded guilty to the violation of that rule (*see Matter of Liner v Fischer*, 96 AD3d 1416, 1417). Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions because he failed to raise them in his administrative appeal, and "this Court has no discretionary authority to reach th[ose] contention[s]" (*Matter of Johnson v Lempke*, 144 AD3d 1677, 1678 [internal quotation marks omitted]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1082

TP 17-00549

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

IN THE MATTER OF JENNIFER WADE, PETITIONER,

V MEMORANDUM AND ORDER

D. VENETTOZZI, DIRECTOR OF SPECIAL HOUSING, INMATE DISCIPLINARY PROGRAM, P. BARHITE, SORC/HEARING OFFICER, R. GOODMAN, CAPTAIN/HEARING OFFICER, AND D. SARRATORI, CORRECTION OFFICER, RESPONDENTS.

JENNIFER WADE, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James P. Punch, A.J.], entered March 20, 2017) to review a determination that found, after a tier III hearing, that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul a determination finding her guilty, following a tier III hearing, of violating inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). Contrary to petitioner's contention, the testimony and evidence presented at the hearing, including the positive results of two urinalysis tests indicating the presence of opiates, constitute substantial evidence to support the determination (*see Matter of Lahey v Kelly*, 71 NY2d 135, 138). The conflicting testimony on the issue whether the positive test results were caused by the alleged consumption of poppy seed dressing raised an issue of credibility for resolution by the Hearing Officer (*see e.g. Matter of Gonzalez v Selsky*, 301 AD2d 1019, 1019-1020; *Matter of Wood v Selsky*, 240 AD2d 876, 877; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Petitioner failed to raise at the hearing her present contention that the correction officer who testified at the hearing concerning the results of the urinalysis tests was not a valid expert on the reliability of the drug testing process and thus failed to preserve

that contention for our review (*see Matter of Reeves v Goord*, 248 AD2d 994, 994-995, *lv denied* 92 NY2d 804). Furthermore, petitioner's contention concerning the withholding of her good time allowance at a subsequent proceeding is not properly before us. We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1084

KA 15-01434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE J. ROBERITES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), dated January 27, 2015. The order imposed restitution.

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

Memorandum: Defendant appeals from an order of restitution arising from a judgment convicting him upon his plea of guilty of attempted arson in the third degree (Penal Law §§ 110.00, 150.10). Initially, we note that, "[a]s a general rule, a defendant may not appeal as of right from a restitution order in a criminal case . . . Here, however, [County C]ourt bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing" (*People v Brusie*, 70 AD3d 1395, 1396). We therefore "view the appealed-from restitution order as an appealable amendment to the judgment of conviction," thereby obviating the need for defendant to seek leave to appeal from the instant restitution order (*People v Russo*, 68 AD3d 1437, 1437 n 2).

Contrary to defendant's contention, however, we conclude that the court properly ordered restitution "in an amount sufficient to compensate the victims for their 'actual out-of-pocket loss' caused by defendant's criminal conduct" (*People v Rivera*, 70 AD3d 1484, 1485, *lv denied* 15 NY3d 756, quoting Penal Law § 60.27 [1]; *see generally People v Horne*, 97 NY2d 404, 412). Defendant failed to preserve for our review his further contention that the court erred in ordering him to pay restitution to an entity that was not a victim of the crime (*see* § 60.27 [4] [b]; *People v Daniels*, 75 AD3d 1169, 1171, *lv denied* 15 NY3d 892; *see generally Horne*, 97 NY2d at 414 n 3). In any event, the insurance company and the adjuster that investigated defendant's claim were victims within the meaning of the statute (*see e.g. People v Pagan*, 87 AD3d 1181, 1181, *lv denied* 18 NY3d 885; *People v McLean*, 71 AD3d 1500, 1501, *lv denied* 14 NY3d 890).

Defendant's contention that the court erred in admitting hearsay evidence at the restitution hearing is without merit. It is well settled that "[a]ny relevant evidence, not legally privileged, may be received [at such a hearing] regardless of its admissibility under the exclusionary rules of evidence" (CPL 400.30 [4]; *see* Penal Law § 60.27 [2]; *People v Francis L.M.*, 278 AD2d 919, 919, *lv denied* 97 NY2d 754). Defendant failed to preserve for our review his further contention that the court erred in failing to consider his inability to make the restitution payments (*see People v Pugliese*, 113 AD3d 1112, 1112, *lv denied* 23 NY3d 1066; *People v Shortell*, 30 AD3d 837, 838). 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]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1085

KA 15-00193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK C. MILLER, DEFENDANT-APPELLANT.

MARTIN J. MCGUINNESS, SARATOGA SPRINGS, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (WENDY EVANS LEHMANN, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 3, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court erred in granting the People's motion to amend the indictment, inasmuch as the amendment "did not change the theory of the prosecution, nor did it otherwise tend to prejudice the defendant on the merits" (*People v Spencer*, 83 AD3d 1576, 1577, *lv denied* 17 NY3d 822 [internal quotation marks omitted]). Rather, the amendment "served simply to conform the indictment to the evidence presented to the grand jury, and to accurately reflect the criminal acts for which the grand jury intended to indict the defendant" (*People v Jabbour*, 73 AD3d 950, 950; *see generally People v Clonick*, 289 AD2d 1031, 1032, *lv denied* 97 NY2d 728), regardless of whether the court erred in considering a report that was not in evidence at the grand jury proceeding when granting the People's motion.

Defendant also contends that the court erred in denying his challenge for cause with respect to a prospective juror on the ground that she was biased in favor of a potential witness. We reject that contention. Even assuming, arguendo, that the prospective juror initially made "statements [that] raise[d] a serious doubt regarding [her] ability to be impartial" (*People v Campanella*, 100 AD3d 1420, 1421, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]), we conclude that the record establishes that the court thereafter obtained her "unequivocal assurance that [she could] set aside any

bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614). Defendant further contends that the court erred in denying his challenge for cause to the same prospective juror on the ground that she "made numerous statements during jury selection which established her heavy bias towards law enforcement." That contention is raised for the first time on appeal and thus is not preserved for our review (*see People v Horton*, 79 AD3d 1614, 1615, *lv denied* 16 NY3d 859). 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]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1086

CAF 16-00997

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

IN THE MATTER OF MARTIN ROACHE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAKICIA M. HUGHES-ROACHE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

MELISSA A. REESE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 29, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the children upon the default of respondent.

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

Memorandum: Respondent mother appeals from two orders in a proceeding pursuant to Family Court Act article 6. By the order in appeal No. 1, Family Court granted, on the mother's default, petitioner father's petition seeking sole custody of the parties' minor children. By the order in appeal No. 2, the court denied the mother's motion to vacate the prior order.

The order in appeal No. 1 was entered upon the mother's default, and "it is well settled that no appeal lies from an order that is entered upon the default of the appealing party" (*Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627). We therefore dismiss the appeal from the order in appeal No. 1. With respect to the order in appeal No. 2, we conclude that the court did not abuse its discretion in denying the mother's motion to vacate the order entered on her default. We reject the mother's contention that the court failed to comply with the notice requirement in CPLR 3215 (g) and thus that the order should be vacated on that ground. The record establishes that the mother did not appear for a proceeding in July 2015 and that the court issued the required notice of an application for default (*see* CPLR 3215 [g] [1]). Although the mother was present for the subsequent proceeding in September 2015, she did not appear at the adjourned proceeding the next month. Because the mother received the default notice and was put on actual notice of the new date for the hearing, we conclude that there was no procedural bar to awarding the father relief on default

when neither the mother nor her attorney appeared for the October 2015 proceeding (*see generally Matter of Neupert v Neupert*, 145 AD3d 1643, 1643; *Matter of Geoffrey Colin D. v Janelle Latoya A.*, 132 AD3d 438, 438-439). We likewise reject the mother's contention that her motion should have been granted because she had a reasonable excuse for her default and a meritorious defense. Even assuming, arguendo, that the mother established a reasonable excuse for her failure to appear for the proceeding, we conclude that she failed to establish the requisite meritorious defense (*see* CPLR 5015 [a] [1]; *Matter of Shehatou v Louka*, 145 AD3d 1533, 1534; *Matter of Strumpf v Avery*, 134 AD3d 1465, 1466).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1087

CAF 16-01309

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

IN THE MATTER OF DONALD BROCKEL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE MARTIN, RESPONDENT-APPELLANT.

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

MARK S. WILLIAMS, PUBLIC DEFENDER, OLEAN (DARRYL R. BLOOM OF COUNSEL), FOR PETITIONER-RESPONDENT.

LINDA M. SCHNELL, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered May 4, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order that modified the parties' existing custody arrangement by awarding petitioner father sole custody of the parties' daughter, with supervised visitation with the mother. Pursuant to a consent order entered in 2013, the parties had joint custody of the child, with primary physical placement awarded to the mother. In August 2015, the father commenced this Family Court Act article 6 proceeding seeking sole custody of the child. The basis for the requested modification was an investigation by the Cattaraugus County Department of Social Services (DSS), and the resulting four neglect petitions filed by DSS against the mother and her paramour for maltreatment and neglect. The original DSS petition alleged that the mother and her paramour had been negligent in the supervision of their two-year-old child, the subject child's half sister, based on the fact that the child had broken first one wrist and then the other on two occasions in June 2015. DSS filed three more amended petitions, each time alleging that the mother and her paramour used illicit drugs and refused to cooperate with DSS for drug testing. After a joint hearing on the DSS neglect petitions and the father's custody modification petition, Family Court, among other things, granted the father's petition for sole custody, with supervised visitation to the mother

"as is determined by the Department of Social Services."

"The threshold inquiry in a custody modification proceeding is whether there has been a change in circumstances since the prior custody order warranting a review of the issue of custody to ensure the continued best interests of the child" (*Matter of Joseph Q. v Jessica R.*, 144 AD3d 1421, 1422). Here, the allegations of neglect by DSS constitute the requisite change in circumstances to warrant an inquiry into the best interests of the child (*see generally Matter of Mark RR. v Billie RR.*, 95 AD3d 1602, 1602-1603; *Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036). In making a best interests determination, a court must consider, among other factors, " 'the relative fitness, stability, past performance, and home environment of the parents, as well as their ability to guide and nurture the child[ ] and foster a relationship with the other parent' " (*Matter of Parchinsky v Parchinsky*, 114 AD3d 1040, 1041; *see Matter of Blagg v Downey*, 132 AD3d 1078, 1079-1080).

Here, the court failed to "set forth the essential facts of its best interests determination, either orally or in writing" (*Matter of Martin v Mills*, 94 AD3d 1364, 1366; *see* CPLR 4213 [b]), and the record is insufficient to enable us to make an independent determination with respect to the child's best interests (*see Martin*, 94 AD3d at 1366). The record is silent on the issue of the well-being of the subject child and, specifically, the impact that the actions of the mother and her paramour as alleged by DSS had on the subject child. We therefore reverse the order and remit the matter to Family Court for a hearing on the best interests of the subject child (*see Matter of Mills v Rieman*, 128 AD3d 1486, 1487; *Martin*, 94 AD3d at 1366).

The mother's remaining argument is rendered academic by our determination.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1088

CAF 16-00499

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

IN THE MATTER OF PAMELA JACKSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DESIRE M. EUSON, RESPONDENT-APPELLANT,
AND ANTWAN ADSIDE, RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered October 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order awarded sole custody of the subject children to petitioner.

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

Memorandum: Petitioner, the paternal grandmother, commenced this proceeding pursuant to Family Court Act article 6 seeking custody of two of respondents' children. At the time petitioner commenced this proceeding, a petition pursuant to Family Court Act article 10 had been filed by the Niagara County Department of Social Services (DSS), alleging that the subject children had been neglected by respondent mother. Family Court heard both matters together, but conducted the fact-finding hearing for the neglect petition first. The court sustained the neglect petition based upon excessive corporal punishment and, following a dispositional hearing, initially awarded custody of one child to DSS, and custody of the other child to petitioner and respondent father. The hearing on the custody petition was then conducted, following which the court awarded custody of both children to petitioner.

We reject the mother's contention that the order awarding custody to petitioner lacks a sound and substantial basis in the record. Here, "[the] finding of neglect . . . supplied the threshold extraordinary circumstances needed by the [petitioner] grandmother" (*Matter of Donna KK. v Barbara I.*, 32 AD3d 166, 169). The court's finding of extraordinary circumstances was further supported by evidence that the mother had virtually no insight into her mental health problems or the inappropriateness of her disciplinary methods (*see generally Matter of Marcia ZZ. v April A.*, 151 AD3d 1303, 1304-

1305; *Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568, *lv denied* 28 NY3d 916), and that she had refused to comply with the court's prior order directing her to obtain a mental health evaluation and enroll in parenting classes (*see Matter of Barnes v Evans*, 79 AD3d 1723, 1724, *lv denied* 16 NY3d 711). Contrary to the mother's further contention, the record supports the court's determination that the award of custody to petitioner was in the children's best interests (*see Matter of Foster v Bartlett*, 59 AD3d 976, 977, *lv denied* 12 NY3d 710). Finally, we reject the mother's contention that the court was biased against her. Both the mother and petitioner proceeded pro se at the custody hearing, and the record establishes that the court treated them evenhandedly and did not undertake the function of an advocate (*see Matter of Yehudah v Yehudah*, 144 AD3d 1046, 1047).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1089

CAF 16-00679

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

IN THE MATTER OF CHEYENNE E. SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHERYL E. VISKER, RESPONDENT-APPELLANT.

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

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an amended order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 18, 2016 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted custody of the subject child to petitioner.

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

Memorandum: Petitioner mother stipulated to a prior order awarding shared custody of the subject child to the mother, respondent, who is the child's paternal grandmother (grandmother), and the child's father, who is not a party to this proceeding. That order also granted the grandmother primary physical custody of the child. After several other attempts to regain primary custody of the child, the mother commenced this proceeding. The grandmother, as limited by her brief, now appeals from that part of an amended order that confirmed the Referee's report recommending granting the petition, based upon the Referee's findings that the grandmother failed to establish extraordinary circumstances warranting an examination of whether custody of the child could be awarded to a nonparent. We dismiss the appeal.

The sole contention of the grandmother on appeal is that this Court should conclude that she established extraordinary circumstances warranting a review of the child's best interests. In the amended order on appeal, however, the court also confirmed that part of the Referee's report in which the Referee found that, even assuming, "arguendo, [that the grandmother] established the existence of extraordinary circumstances, the mother has established . . . that the

best interests of the child will be served by awarding custody of the child to the mother," and the grandmother does not challenge that confirmed finding on appeal. "Because the only relief sought by [the grandmother] is a [remittal] for a [best interests hearing], and because [the grandmother] has *already received* the benefit of [such a hearing] (albeit one that resulted in an unfavorable outcome), we hold that [her] appeal is moot and must be dismissed" (*Gibson v Brooks,* 175 Fed Appx 491, 491 [2nd Cir]; *see Matter of Angel RR. [Gloria RR.—Pedro RR.]*, 145 AD3d 1136, 1137; *Matter of Joshua OO*., 254 AD2d 519, 519; *cf. Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1090

TP 17-00389

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

IN THE MATTER OF ERIE COUNTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC., AND TODD R. JONES, PETITIONERS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND TIMOTHY B. HOWARD, SHERIFF OF ERIE COUNTY, RESPONDENTS.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (ADAM J. WOLKOFF OF COUNSEL), FOR PETITIONERS.

HAMBERGER & WEISS, BUFFALO (KRISTEN M. MACHELOR OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered February 24, 2017) to review a determination of respondents. The determination adjudged that petitioner Todd R. Jones is not entitled to benefits pursuant to General Municipal Law § 207-c.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging the determination that Todd R. Jones (petitioner), a deputy sheriff, was not injured in the line of duty and thus is not entitled to General Municipal Law § 207-c benefits. After a hearing, the Hearing Officer issued a report recommending that petitioner's application for such benefits be denied on the ground that there was no causal link between petitioner's alleged injuries and his struggle with a defendant he was transporting three days prior to his back spasm. We reject petitioners' contention that petitioner was entitled to benefits. "The Hearing Officer was entitled to weigh the parties' conflicting medical evidence and to assess the credibility of the witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clouse v Allegany County*, 46 AD3d 1381, 1382; *see Matter of Barkor v City of Buffalo*, 148 AD3d 1655, 1656; *Matter of Anderson v City of Buffalo*, 114 AD3d 1160, 1161).

We have reviewed petitioners' remaining contentions, including their assertion that the Hearing Officer applied the incorrect standard of review, and conclude that they are without merit.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1091

CAF 16-00998

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

IN THE MATTER OF MARTIN ROACHE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAKICIA M. HUGHES-ROACHE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

MELISSA A. REESE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 24, 2016 in a proceeding pursuant to Family Court Act article 6. The order denied the motion to vacate an order entered upon respondent's default.

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

Same memorandum as in *Matter of Roache v Hughes-Roache* ([appeal No. 1] ___ AD3d ___ [Sept. 29, 2017]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1092

CA 16-01848

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

ALOSTAR BANK OF COMMERCE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRETT SANOIAN, DEFENDANT-APPELLANT.

BRETT SANOIAN, DEFENDANT-APPELLANT PRO SE.

SCHILLER, KNAPP, LEFKOWITZ & HERTZEL, LLP, LATHAM (GARY A. LEFKOWITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 26, 2015. The order denied the motion of defendant to vacate a default order and judgment, determined that plaintiff has established jurisdiction over defendant and directed that plaintiff is allowed to enforce its judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion is granted, the order and judgment dated September 25, 2014 is vacated and the amended complaint is dismissed in accordance with the following memorandum: Plaintiff commenced this breach of contract action seeking the remaining principal plus interest, attorney's fees, and costs of an unpaid home equity line of credit that defendant obtained on a home located in Niagara Falls, New York. After defendant failed to appear or answer in the action, a default order and judgment (default judgment) was entered against him in September 2014. In August 2015, defendant moved to vacate the default judgment based, inter alia, upon a lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). We conclude that Supreme Court erred in denying defendant's motion.

CPLR 5015 (a) (4) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . lack of jurisdiction to render the judgment or order." "Where, as here, a defendant moves to vacate a judgment entered upon his or her default in appearing or answering the complaint on the ground of lack of personal jurisdiction, the defendant is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense" (*Prudence v Wright*, 94 AD3d 1073, 1073). While "[o]rdinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served . . . , a sworn

denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit" (*Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984, 985).

In opposition to defendant's motion, plaintiff submitted two affidavits of service. The first affidavit indicated that, on March 24, 2014, plaintiff's process server served a copy of the summons and amended complaint on defendant by posting them on the front door of an apartment in Washington, D.C. (D.C. address), where plaintiff believed that defendant was residing at the time (*see* CPLR 302 [4]; 308 [4]; 313). The process server also mailed a copy of the summons and amended complaint to defendant at that same address. Prior to posting those documents on the door of the D.C. address, the process server made several attempts at personal service upon defendant at the D.C. address.

The second affidavit of service indicated that, on May 14, 2014, plaintiff's process server served another copy of the summons and amended complaint on defendant's mother at her home in Youngstown, New York (mother's address). The process server indicated that he left process with a person of suitable age and discretion at defendant's "Last Known Address within the state" and mailed the summons and amended complaint to that same address.

Although those two affidavits establish prima facie that defendant was validly served, defendant submitted evidence that rebuts the presumption and establishes as a matter of law that he was improperly served, which obviates the need for a traverse hearing (*see generally Wachovia Bank, N.A.*, 138 AD3d at 985). Namely, defendant presented evidence establishing that he was residing in Virginia at the time the summons and amended complaint were served at the D.C. address and at the mother's address. Plaintiff failed to submit any evidence demonstrating otherwise. Thus, we conclude that, inasmuch as plaintiff failed to serve defendant at his actual address, as is required by both CPLR 308 (2) and (4), the court lacked personal jurisdiction over defendant (*see Feinstein v Bergner*, 48 NY2d 234, 240-241; *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523; *Olscamp v Fasciano*, 118 AD3d 1472, 1472-1473).

We reject plaintiff's contention that defendant received actual notice of the action and thus was properly served. It is well settled that "notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court" (*Feinstein*, 48 NY2d at 241; *see Matter of Country Side Sand & Gravel Inc. v Town of Pomfret Zoning Bd. of Appeals*, 57 AD3d 1501, 1502-1503).

We therefore reverse the order and grant defendant's motion to vacate the default judgment. Because the court never acquired personal jurisdiction over defendant, we dismiss the amended complaint (*see Empire of Am. Realty Credit Corp. v Smith*, 227 AD2d 931, 932),

without prejudice.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1096

CA 17-00552

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

SHELTRICE N. RHODES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNY SCOTT, DEFENDANT,
AND DARRYL EPPS, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (EMILY M. COBB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 2, 2016. The order denied the motion of defendant Darryl Epps for summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she was struck, in a hit and run accident, by a vehicle owned by Darryl Epps (defendant) and allegedly driven by defendant Jenny Scott. Defendant moved for summary judgment dismissing the complaint against him on the ground that Scott operated his vehicle without his permission. We conclude that Supreme Court properly denied the motion inasmuch as defendant failed to meet his initial burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "It is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary" (*Liberty Mut. Ins. Co. v General Acc. Ins. Co.*, 277 AD2d 981, 981-982 [internal quotation marks omitted]; *see Murdza v Zimmerman*, 99 NY2d 375, 380; *Margolis v Volkswagen of Am., Inc.*, 77 AD3d 1317, 1320). " 'The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use' " (*Talat v Thompson*, 47 AD3d 705, 706; *see Ellis v Witsell*, 114 AD3d 636, 637; *Power v Hodge*, 37 AD3d 1078, 1078-1079; *Lewis v Caldwell*, 236 AD2d 896, 896-897). Contrary to defendant's contention, Scott's unsworn statement that she was not driving the subject vehicle on the night of the accident and that she did not know him constituted inadmissible

proof and could not be considered in support of his motion (*see generally Holloman v City of New York*, 74 AD3d 750, 751; *La Frenire v Capital Dist. Transp. Auth.*, 96 AD2d 664, 665).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1097

CA 17-00544

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

SHANIQUE TAYLOR, PLAINTIFF,

V MEMORANDUM AND ORDER

DARLENE DEUBELL, DEFENDANT,
FIRST STUDENT, INC., FIRSTGROUP AMERICA, INC.,
DEFENDANTS-RESPONDENTS,
AND MASTERS EDGE, INC., DEFENDANT-APPELLANT.

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE LONG FIRM, LLP, BUFFALO (WILLIAM A. LONG, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 3, 2016. The order granted the motion of defendants First Student, Inc., and Firstgroup America, Inc. to amend their answer and add a cross claim.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained in May 2012 while she was a passenger in a bus driven by defendant Darlene Deubell and owned by defendants First Student, Inc. and Firstgroup America, Inc. (collectively, First defendants). The bus allegedly hit a pile of gravel left in the road by defendant Masters Edge, Inc. (Masters Edge) and struck a nearby house. The First defendants' answer, which was timely served on October 5, 2012, included a cross claim seeking indemnification and contribution from Masters Edge. After the trial on liability in 2015, the First defendants sought leave to amend their answer to include a second cross claim against Masters Edge for property damage and loss of use of the bus. Although the statute of limitations for the proposed cross claim had expired over seven months earlier (*see* CPLR 214 [4]), the First defendants contended that it should be permitted because it relates back to the original pleading (*see* CPLR 203 [f]). Supreme Court granted the motion. We affirm.

The determination whether to grant leave to amend a pleading rests within the court's sound discretion and will not be disturbed absent a clear abuse of that discretion (*see e.g. Raymond v Ryken*, 98 AD3d 1265, 1266), and we conclude that the court did not abuse its

discretion here. Although the amended answer added a new theory of recovery against Masters Edge, it arose out of the same occurrence set forth in the original pleadings, i.e., a motor vehicle accident allegedly caused by the negligence of Masters Edge (*see* CPLR 203 [f]; *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 476-477; *Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1736; *Curiale v Ardra Ins. Co.*, 223 AD2d 445, 446).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1100

KA 16-00070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID V. SNYDER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 10, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted 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 his plea of guilty of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). County Court's "statement at sentencing that defendant had 30 days to appeal does not vitiate defendant's otherwise valid waiver of the right to appeal" (*People v West*, 239 AD2d 921, 921, *lv denied* 90 NY2d 944). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1102

KA 16-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JORGE D. DEJESUS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered May 16, 2016. 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 for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1106

KA 13-01183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE WASHINGTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 25, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that County Court erred in refusing to suppress a handgun recovered from a vehicle in which defendant was a passenger as the fruit of an unlawful traffic stop inasmuch as the police lacked probable cause to believe that the driver of that vehicle violated Vehicle and Traffic Law § 375 (40) (b). We reject that contention. "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, *lv denied* 26 NY3d 1088, *reconsideration denied* 27 NY3d 998 [internal quotation marks omitted]). Here, we conclude that there is no basis to disturb the court's determination to credit the testimony of the police officer. We also conclude that the record supports the court's determination that the officer had probable cause to believe that the driver committed a traffic violation based upon the officer's observation that the vehicle had a cracked taillight that displayed a white light when the brakes were applied rather than a "red to amber" light as required by Vehicle and Traffic Law § 375 (40) (b) (*see People v John*, 119 AD3d 709, 710, *lv denied* 24 NY3d 1003). Furthermore, it is well established that "a suppression determination must be based solely on the evidence presented at the suppression hearing" and thus, contrary to defendant's contention, he may not rely upon a police report and a photograph of the vehicle that were not

entered in evidence to challenge the court's determination (*People v Evans*, 291 AD2d 868, 869; *see People v Carmona*, 82 NY2d 603, 610 n 2; *People v Gonzalez*, 55 NY2d 720, 721-722, *rearg denied* 55 NY2d 1038, *cert denied* 456 US 1010).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1107

KA 14-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEWAYNE BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CRAIG P. SCHLANGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 25, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a firearm.

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 firearm (Penal Law § 265.01-b). Contrary to defendant's contention, Supreme Court properly refused to suppress defendant's statements to the police, which included an admission that he accidentally shot himself with a firearm, inasmuch as defendant was not in custody at the time that he made the statements and *Miranda* warnings therefore were not required (*see generally Miranda v Arizona*, 384 US 436, 467). "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963, quoting *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, the evidence at the suppression hearing established that defendant voluntarily sought medical treatment at a walk-in clinic for a gunshot wound to his leg. The treatment provider reported defendant's gunshot injury to police, as required by Penal Law § 265.25, and the provider instructed defendant to wait for the police to arrive. A detective responded to the clinic and briefly questioned defendant in a patient room where defendant was waiting with his mother. The detective testified that he thought that defendant was a victim, rather than a suspect, and thus his initial questions were investigatory in nature. During the questioning, defendant was not placed under arrest, and was not handcuffed or

otherwise restrained. Under these circumstances, we conclude that "a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" (*People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830; *see People v Thomas*, 292 AD2d 549, 550). The fact that the detective's questions became accusatory after he observed gunpowder burns on defendant's leg, the presence of which seemed to conflict with defendant's initial statement that he did not see the person who shot him, did not render the questioning custodial in nature (*see People v Davis*, 48 AD3d 1086, 1087, *lv denied* 10 NY3d 861).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1109

CAF 16-01096

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

IN THE MATTER OF THE ADOPTION OF KOLSON

JANNA A. AND STEVEN A., PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

V

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LUCILLE M. RIGNANESE, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered April 25, 2016 in an adoption proceeding. The order, inter alia, determined that consent of respondent to the adoption of Kolson is not required.

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

Memorandum: In appeal No. 1, respondent, the biological father of the subject child, appeals from an order that, inter alia, adjudged that he is a father whose consent is not required for the adoption of the subject child pursuant to Domestic Relations Law § 111. In appeal No. 2, the biological father appeals from an order dismissing his petition for modification of a prior order of custody and visitation.

Contrary to the biological father's contention in appeal No. 1, Family Court properly determined that his consent was not required for the adoption to proceed. A child born to unmarried parents may be adopted without the consent of the child's biological father unless the father shows that he "maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child . . . , and either (ii) the father's visiting the child at least monthly when physically and financially able to do so . . . , or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so" (Domestic Relations Law § 111 [1] [d]). Here, it is undisputed that the biological father made no child support payments since 2012, despite the existence of an order directing him to pay at least $50 per month, and that he is

thousands of dollars in arrears. Thus, regardless whether the biological father regularly visited or communicated with the child, we conclude that the court properly determined that he is "a mere notice father whose consent is not required for the adoption of the subject child[ ]" (*Matter of Makia R.J. [Michael A.J.]*, 128 AD3d 1540, 1540; *see Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 473, *lv denied* 22 NY3d 864). In any event, giving deference to the court's credibility determinations (*see Matter of Nickie M.A. [Pablo F.]*, 144 AD3d 1576, 1577; *Matter of Angelina K. [Eliza W.–Michael K.]*, 105 AD3d 1310, 1312, *lv denied* 21 NY3d 860), we further conclude that the court's determination that the biological father failed to visit the child or communicate with him regularly is supported by clear and convincing evidence (*see Makia R.J.*, 128 AD3d at 1540-1541; *see also Matter of Bella FF. [Margaret GG.–James HH.]*, 130 AD3d 1187, 1188-1189).

In light of our determination in appeal No. 1, we conclude that the court properly dismissed the petition in appeal No. 2 (*see Matter of John Q. v Erica R.*, 104 AD3d 1097, 1099; *Matter of Ethan S. [Tarra C.–Jason S.]*, 85 AD3d 1599, 1600, *lv denied* 17 NY3d 711).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1110

CAF 16-01322

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

IN THE MATTER OF MICHAEL T., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JANNA R., ALSO KNOWN AS JANNA A.,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR PETITIONER-APPELLANT.

LUCILLE M. RIGNANESE, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 10, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior order of custody and visitation.

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

Same memorandum as in *Matter of Kolson* ([appeal No. 1] ___ AD3d ___ [Sept. 29, 2017]).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1113

CAF 15-01928

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

IN THE MATTER OF KEMARI W., JAMARI W., AND EMMANUEL W., II.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA J., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered November 17, 2015 in a proceeding pursuant to, inter alia, Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: In this permanent neglect proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights with respect to the subject children. The mother contends that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen her parental relationship with the children, as required by Social Services Law § 384-b (7) (a). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parent[] to overcome problems that prevent the discharge of the child[ren] into [his or her] care, and informing the parent[] of [the children's] progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901; *see* § 384-b [7] [f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142). Here, in addition to other efforts, petitioner "arranged for a psychological assessment of the mother" (*Matter of Cayden L.R. [Melissa R.]*, 108 AD3d 1154, 1155, *lv denied* 22 NY3d 886), and developed "an appropriate service plan tailored to the situation" and based upon that assessment (*Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1543 [internal quotation marks omitted]). Petitioner also notified the mother of the children's medical appointments, conducted service plan review meetings, and encouraged the mother to engage in regular visitation. The mother,

however, frustrated petitioner's efforts by, among other things, insisting that visitation occur in her home but refusing to allow petitioner to conduct a home inspection. Petitioner is not required to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385), and the parent must "assume a measure of initiative and responsibility" (*Matter of Jamie M.*, 63 NY2d 388, 393). We conclude that, "[g]iven the circumstances, [petitioner] provided what services it could" (*Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776 [internal quotation marks omitted]).

Contrary to the mother's further contention, she was not denied effective assistance of counsel. "The record, viewed in its totality, establishes that the [mother] received meaningful representation" (*Matter of Heffner v Jaskowiak*, 132 AD3d 1418, 1418; *see generally People v Benevento*, 91 NY2d 708, 712).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1114

CA 16-00994

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

IN THE MATTER OF LUIS MARTINEZ,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 4, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1116

CA 16-02000

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

HILARY LESNIAK, AS ADMINISTRATOR OF THE ESTATE OF KATHRYN PODESWIK, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

WELLS FARGO BANK, NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2, ET AL., DEFENDANTS, AND PETER T. ROACH & ASSOCIATES, P.C., DEFENDANT-APPELLANT-RESPONDENT.

PETER T. ROACH & ASSOCIATES, P.C., SYOSSET (MICHAEL C. MANNIELLO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAURIE A. LESNIAK, WHITE PLAINS, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered November 17, 2015. The order granted the motion of plaintiff seeking leave to amend the complaint to, inter alia, change the name of party defendant Peter T. Roach, Esq., to Peter T. Roach & Associates, P.C., and granted the cross motion of defendant Peter T. Roach, Esq., for summary judgment dismissing the complaint against him.

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

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1118

OP 16-02254

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

IN THE MATTER OF BOB BRUNO EXCAVATING, INC., AND ROBERT BRUNO, AS SHAREHOLDER OF BOB BRUNO EXCAVATING, INC., PETITIONERS,

V MEMORANDUM AND ORDER

ROBERTA REARDON, COMMISSIONER OF LABOR, STATE OF NEW YORK, RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (BENJAMIN M. KOPP OF COUNSEL), FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (SETH KUPFERBERG OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to Labor Law § 220 [8]), to review a determination of respondent. The determination, inter alia, found that petitioners had underpaid their workers on certain public works projects.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding, initiated in this Court pursuant to Labor Law § 220 (8), seeking to annul a determination of respondent that, inter alia, found that petitioners had underpaid their workers on certain public works projects for the City of Auburn. We conclude that the petition must be dismissed. There is no dispute that respondent's determination was made upon petitioners' default, and it is well settled that a petitioner "is not aggrieved by an administrative determination made on his [or her] default and may not seek to review such a determination" (*Matter of Brisbon v New York City Hous. Auth.*, 133 AD3d 746, 747 [internal quotation marks omitted]; *see Matter of Matsos Contr. Corp. v New York State Dept. of Labor*, 80 AD3d 924, 925; *see also* CPLR 5511). The proper remedy for petitioners is to make an application to respondent to reopen the administrative hearing and/or vacate the default (*see Interboro Mgt. Co. v State Div. of Human Rights*, 139 AD2d 698, 698). We note that it appears from the parties' submissions to this Court that petitioners have made such an application and that respondent's determination thereon is currently pending. In the event that respondent denies the application, petitioners may commence a new CPLR article 78 proceeding to challenge

that denial (*see generally Matter of Yarbough v Franco*, 95 NY2d 342, 347; *Matter of Tony's Towing Serv., Inc. v Swarts*, 109 AD3d 475, 476). At this stage of the litigation, however, the petition must be dismissed (*see Matsos Contr. Corp.*, 80 AD3d at 925-926; *see also Brisbon*, 133 AD3d at 747; *Matter of Brooks v New York City Hous. Auth.*, 58 AD3d 836, 837-838).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1140

CA 16-01858

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

JAMIE L. CAMPBELL, PLAINTIFF-APPELLANT,

V ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order, inter alia, granted the motions of defendants Sheldon Silver, the New York State Assembly, and the State of New York to dismiss the amended complaint against them, denied that part of the motion of defendant Dennis Gabryszak to dismiss the amended complaint against him with respect to the first and fourth causes of action, and sua sponte dismissed the amended complaint against defendant Adam Locher.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1141

CA 16-01864

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

KRISTY L. MAZUREK, PLAINTIFF-APPELLANT,

V ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order granted the motions of defendants Dennis Gabryszak, Sheldon Silver, the New York State Assembly and the State of New York to dismiss the amended complaint against them, sua sponte dismissed the amended complaint against defendant Adam Locher and denied the motion of plaintiff for leave to further amend the amended complaint.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1142

CA 16-01870

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

KIMBERLY SNICKLES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order, inter alia, granted the motions of defendants Sheldon Silver, the New York State Assembly, and the State of New York to dismiss the amended complaint against them, denied that part of the motion of defendant Dennis Gabryszak to dismiss the amended complaint against him with respect to the first and fourth causes of action, and sua sponte dismissed the amended complaint against defendant Adam Locher.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1143

CA 16-01876

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

EMILY C. TRIMPER, PLAINTIFF-APPELLANT,

V ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order granted the motions of defendants Dennis Gabryszak, Sheldon Silver, the New York State Assembly and the State of New York to dismiss the amended complaint against them, sua sponte dismissed the amended complaint against defendant Adam Locher and denied the motion of plaintiff for leave to further amend the amended complaint.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1144

CA 16-01882

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

ANNALISE C. FRELING, PLAINTIFF-APPELLANT,

V ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 5.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order, inter alia, granted the motions of defendants Sheldon Silver, the New York State Assembly, and the State of New York to dismiss the amended complaint against them, denied that part of the motion of defendant Dennis Gabryszak to dismiss the amended complaint against him with respect to the first and fourth causes of action, and sua sponte dismissed the amended complaint against defendant Adam Locher.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

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

1145

CA 16-01889

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

TRINA TARDONE, PLAINTIFF-APPELLANT,

V ORDER

DENNIS GABRYSZAK, ADAM LOCHER, SHELDON SILVER, NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 6.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DENNIS GABRYSZAK.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM LOCHER.

HOGAN LOVELLS US LLP, NEW YORK CITY (KENNETH KIRSCHNER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHELDON SILVER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NEW YORK STATE ASSEMBLY AND STATE OF NEW YORK.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 23, 2015. The order granted the motions of defendants Dennis Gabryszak, Sheldon Silver, the New York State Assembly and the State of New York to dismiss the amended complaint against them, sua sponte dismissed the amended complaint against defendant Adam Locher and denied the motion of plaintiff for leave to further amend the amended complaint.

It is hereby ORDERED that said appeal from so much of the order as sua sponte dismissed the amended complaint against defendant Adam Locher is unanimously dismissed (*see Mohler v Nardone*, 53 AD3d 600, 600; *see generally Sholes v Meagher*, 100 NY2d 333, 335), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court

MOTION NO. (1108/82) KA 17-01218. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., NEMOYER, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (475/83) KA 17-00807. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY KEVIN RENDELL, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (843/95) KA 06-00150. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE IVY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (1570/98) KA 17-01404. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARIO ZANGHI, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (626/02) KA 00-03001. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY YOUNGBLOOD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (1472/04) KA 02-00850. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SAULTERS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (852/06) KA 03-00547. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTOINE PARRIS, ALSO KNOWN AS ANTOINE LENOIR PARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue that the evidence for his murder conviction was legally insufficient. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the order of June 9, 2006 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before December 28, 2017. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (738/07) KA 03-00814. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (239/11) KA 10-00023. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE HALL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (391/11) KA 07-02491. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TUREMAIL MCCULLOUGH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (796/12) KA 11-00972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (1450/12) KA 11-00847. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM M. DEAN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CARNI, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (800/13) KA 11-00358. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL L. SCHROCK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., LINDLEY, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (948/13) KA 11-01987. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CIRITO M. CORDERO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (933/14) KA 12-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE E. SCARVER, ALSO KNOWN AS "C," DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (9/16) KA 12-01362. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD J. TORTORICE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (384/16) KA 13-01138. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BERNARD J. BUTLER, ALSO KNOWN AS BERNARD FAULKS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied.

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (1199/16) CA 16-00511. -- IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC, PETITIONER-PLAINTIFF-APPELLANT, V CHAUTAUQUA COUNTY, CITY OF DUNKIRK, VILLAGE OF BROCTON, VILLAGE OF WESTFIELD, BROCTON CENTRAL SCHOOL DISTRICT, DUNKIRK CITY SCHOOL DISTRICT, FREDONIA CENTRAL SCHOOL DISTRICT, RIPLEY CENTRAL SCHOOL DISTRICT, AND WESTFIELD CENTRAL SCHOOL DISTRICT, RESPONDENTS-DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (85/17) CA 16-00947. -- IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. DONALD J. TERWILLIGER, ADMINISTRATOR OF THE ESTATE OF DONALD R. TERWILLIGER, DECEASED, PLAINTIFF-RESPONDENT, V BEAZER EAST, INC., THE COMPANY, FORMERLY KNOWN AS KOPPERS COMPANY, INC., ET AL., DEFENDANTS, AND HONEYWELL INTERNATIONAL, INC., SUCCESSOR IN INTEREST TO WILPUTTE COKE OVEN DIVISION OF ALLIED CHEMICAL CORPORATION, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (206/17) CA 16-00324. -- ERIE INSURANCE EXCHANGE, PLAINTIFF-APPELLANT, V J.M. PEREIRA & SONS, INC., RPC, INC., ALSO KNOWN AS RUBBER POLYMER CORPORATION, RICARDO VEGA AND ROBERT MARCHESE, AS ADMINISTRATOR OF THE ESTATES OF ANTONIO TAPIA, DECEASED, AND GILBERTO VEGA-SANCHEZ, DECEASED, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (255/17) CA 16-01300. -- CHRISTINE M. MICHAEL, PLAINTIFF-RESPONDENT, V GINA M. WAGNER, DEFENDANT-APPELLANT, AND LAKESHORE TIRE & AUTO, INC., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (327/17) CA 16-00572. -- JANE HASTEDT, AS TESTATRIX OF THE ESTATE OF MARK HASTEDT, DECEASED, AND JANE HASTEDT, INDIVIDUALLY, PLAINTIFF-RESPONDENT, V BOVIS LEND LEASE HOLDINGS, INC., GEORGE A. NOLE & SON, INC., AND CAMDEN CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS-APPELLANTS. BOVIS LEND LEASE HOLDINGS, INC., AND CAMDEN CENTRAL SCHOOL DISTRICT, THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS, V K.C. MASONRY, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT. GEORGE A. NOLE & SON, INC., THIRD-PARTY

PLAINTIFF-RESPONDENT-APPELLANT, V K.C. MASONRY, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (371/17) CA 16-01222. -- PAUL MARINACCIO, SR., PLAINTIFF-APPELLANT, V TOWN OF CLARENCE, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (452/17) CA 16-00373. -- WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE, FORMERLY KNOWN AS NORWEST BANK MINNESOTA, N.A., AS TRUSTEE FOR CERTIFICATE HOLDERS OF SACO1 SERIES, 1999-2, PLAINTIFF-RESPONDENT, V BONNIE M. DYSINGER, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (473/17) KA 15-01067. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD HOUGH, JR., DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (482/17) CA 16-01843. -- MARDI JOHN, BY THE PARENT AND NATURAL GUARDIAN, CHERYL KENDALL, PLAINTIFF-RESPONDENT, V DANIEL CASSIDY, DEFENDANT, AND PAUL KLEINDIENST, DEFENDANT-APPELLANT. DANIEL CASSIDY AND PAUL KLEINDIENST, THIRD-PARTY PLAINTIFFS, V DANIEL A. MESSINA AND DIKK SCHRADER, THIRD-PARTY DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (486/17) CA 16-02050. -- SANDRA J. SLACER, PLAINTIFF-RESPONDENT, V JOHN M. KEARNEY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (533/17) TP 16-01684. -- IN THE MATTER OF JEAN OLIVER, PETITIONER, V JOSEPH A. D'AMICO, SUPERINTENDENT, NEW YORK STATE DIVISION OF STATE POLICE, RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (570/17) CA 16-01185. -- WM. SCHUTT & ASSOCIATES ENGINEERING & LAND SURVEYING P.C., PLAINTIFF-RESPONDENT, V ST. BONAVENTURE UNIVERSITY, ET AL., DEFENDANTS, AND JAMES W. MANGUSO, DOING BUSINESS AS LAUER-MANGUSO & ASSOCIATES ARCHITECTS, DEFENDANT-APPELLANT. -- Motion for reargument be and

the same hereby is granted in part and, upon reargument, the memorandum and order entered June 9, 2017 (151 AD3d 1634) is amended by deleting "St. Bonaventure" from the eighth sentence of the memorandum and substituting "defendant Bonaventure Square, LLC." PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (669/17) CA 16-01712. -- TODD SPRING, PLAINTIFF-RESPONDENT, V COUNTY OF MONROE, MONROE COMMUNITY HOSPITAL, MAGGIE BROOKS, AS MONROE COUNTY EXECUTIVE, DANIEL M. DELAUS, JR., ESQ., WILLIAM K. TAYLOR, ESQ., BRETT GRANVILLE, ESQ., MERIDETH H. SMITH, ESQ., AND KAREN FABI, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (694/17) CA 16-01498. -- PETER HAMMOND, PLAINTIFF-APPELLANT, V BRUCE W. SMITH, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (696/17) CA 17-00099. -- DALLAS M. GROVE, PLAINTIFF-RESPONDENT, V CORNELL UNIVERSITY, SKANSKA USA BUILDING, INC., DEFENDANTS-RESPONDENTS-APPELLANTS, SKYWORKS EQUIPMENT LEASING, LLC, SKYWORKS, LLC, AND JLG INDUSTRIES, INC., DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motions for reargument denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY,

AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (747/17) CA 16-02258. -- WILLIAM C. SAGER, SR., INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF WILLIAM C. SAGER, JR., DECEASED, PLAINTIFF-RESPONDENT, V CITY OF BUFFALO, ET AL., DEFENDANTS, NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION, NORMAN HABIB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION AND MICHAEL MIRANDA, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed August 24, 2017.)

MOTION NO. (754/17) KA 15-00916. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TODD A. EDWARDS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (761/17) CA 16-02048. -- CHARLES F. DAMICK, JR., PLAINTIFF-APPELLANT, V CITY OF GENEVA, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ. (Filed Sept. 29,

2017.)

MOTION NO. (783/17) CA 16-02279. -- DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLANT, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, INTERVENOR-PLAINTIFF-RESPONDENT, V ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (805/17) CA 16-02066. -- IN THE MATTER OF THE APPLICATION OF JON Z. AND VICTOR Z. FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY AND/OR PERSON OF MARGARET Z., AN ALLEGED INCAPACITATED PERSON. JON Z., PETITIONER-APPELLANT; THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, AND CURRAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (819/17) KA 15-00911. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE STEWART, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (832/17) CA 16-01929. -- JAMIE LOBELLO, PLAINTIFF-APPELLANT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals and for a stay granted. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 29, 2017.)

MOTION NO. (873/17) CA 16-01727. -- IN THE MATTER OF THE ARBITRATION BETWEEN CITY OF WATERTOWN, PETITIONER-APPELLANT-RESPONDENT, AND WATERTOWN PROFESSIONAL FIREFIGHTERS' ASSOCIATION LOCAL 191, RESPONDENT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)

KA 15-02118. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DERRICK R. WILLIAMS, JR., DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). Upon our review of the record, we conclude that there is a nonfrivolous issue as to whether defendant's plea was knowing, voluntary and intelligent (*see People v Cornell*, 16 NY3d 801, 802). Therefore, we relieve counsel of his assignment and assign new counsel to brief this

issue, as well as any other issues that counsel’s review of the record may disclose. (Appeal from a Judgment of the Oswego County Court, Spencer J. Ludington, J. - Criminal Possession of a Controlled Substance, 4th Degree). PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Sept. 29, 2017.)