SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 9, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED OCTOBER 9, 2020

_____	1243	KA 18 01563	PEOPLE V PAUL EDWARDS
_____	284	CA 18 02042	STATE OF NEW YORK V JUAN U.
_____	328	CAF 19 00279	Mtr of ETHAN F.
_____	329	CAF 19 00280	Mtr of ETHAN F.
_____	347	CAF 19 01510	JOYCE M. M. V ROBERT J. G.
_____	348	CAF 19 01511	JOYCE M. M. V ROBERT J. G.
_____	358	KA 15 00980	PEOPLE V JAMES E. QUICK, JR.
_____	368	CA 19 01315	TIMOTHY J. KING V JAKE OWEN KLOCEK
_____	396	CA 18 02292	CARRIER CORPORATION V ALLSTATE INSURANCE COMPANY
_____	412	CA 19 01975	JAMES STOCK, JR. V AIR & LIQUID SYSTEMS CORP.
_____	419	CA 19 00964	DAWN AYERS V PIONEER CENTRAL SCHOOL DISTRICT
_____	420	CA 19 00534	JUDITH L. BAUER V COUNTY OF ERIE
_____	440	CA 19 00800	TARGETED LEASE CAPITAL, LLC V WHEEL EQUIPMENT LEASING LLC
_____	441	CA 19 00802	TARGETED LEASE CAPITAL, LLC V WHEEL EQUIPMENT LEASING LLC
_____	442	CA 19 01711	CHRISTINE O'CONNELL In the Matter of Arbitration B STATE FARM MUTUAL AUTOMOBILE INSURA
_____	443	CA 19 01712	CHRISTINE O'CONNELL In the Matter of Arbitration B STATE FARM MUTUAL AUTOMOBILE INSURA
_____	444	CA 19 01713	CHRISTINE O'CONNELL In the Matter of Arbitration B STATE FARM MUTUAL AUTOMOBILE INSURA
_____	445	CA 19 01994	ALLY FINANCIAL INC. V LARUE F. JONATHAN
_____	446	CA 19 01996	ALLY FINANCIAL INC. V LARUE F. JONATHAN
_____	485	CA 19 01410	NATIONSTAR MORTGAGE, LLC V MARIE L. GOODMAN
_____	496	KA 12 00996	PEOPLE V CHEYENNE J. KOONS
_____	497	KA 12 00997	PEOPLE V CHEYENNE J. KOONS

_____	550	CA 19 01190	LAWRENCE PEREZ V ANTHONY ANNUCCI
_____	551	CA 19 01148	HARVARD STEEL SALES, LLC V DANIEL BAIN
_____	571	KA 18 00495	PEOPLE V MATTHEW J. WOOD
_____	607	CA 19 02071	DOWNSTAIRS CABARET, INC. V WESCO INSURANCE COMPAN
_____	608	CA 19 01404	JAMES HARMON V CITY OF BUFFALO
_____	609.3	KA 15 02178	PEOPLE V JEFFREY BLUNT
_____	611	KA 20 00119	PEOPLE V JAMES MACK
_____	627	CA 19 01243	U.S. BANK NATIONAL ASSOCIATION V PHYLLIS REAMER
_____	630.4	CA 19 00873	JOSEPH ROESCH V STATE OF NEW YORK
_____	633	KA 19 01615	PEOPLE V ISAIAH SMITH
_____	634	KA 18 00308	PEOPLE V ISAIAH SMITH
_____	658.1	KA 19 00791	PEOPLE V ALEXANDRA GRIFFIN
_____	661	KA 19 01305	PEOPLE V HOWARD BRYANT
_____	662	KA 18 01093	PEOPLE V STEVEN CROMIE
_____	693	CA 19 01036	DALAINE M. PIESKER V PRICE LEASING CORPORATION
_____	695.2	KA 18 01273	PEOPLE V JARREL WHITEN
_____	712	CA 19 01361	KEVIN KNETSCH V DEL MONTE CORPORATION
_____	713	CA 19 02232	MARK A. SHAW V SCEPTER, INC.
_____	762	CA 20 00057	VIRGINIA F. KLEIST V DANIEL STERN
_____	773	KA 14 02245	PEOPLE V KESEAN R. MCKENZIE-SMITH
_____	774	CAF 19 01010	RICHARD PHALEN V JOLYNN M. GORSKI
_____	775	CAF 19 00907	RANDOLPH GORSKI V RICHARD PHALEN
_____	821	TP 20 00254	CHRISTIAN CABALLERO V ANTHONY ANNUCCI
_____	827	KA 18 02045	PEOPLE V SHARRY HABBERFIELD
_____	827.1	KA 20 01138	PEOPLE V SHARRY HABBERFIELD
_____	832	CA 19 01813	BRYAN G. BROCKWAY V COUNTY OF CHAUTAUQUA
_____	850	CAF 19 01997	LAURIE PARSONS-O'DELL V ANTHONY HEAD
_____	851	CAF 20 00011	SUSAN Y. HILKERT V ANTHONY HEAD
_____	863	KA 16 00425	PEOPLE V CLIFFORD L. SALTERS, JR.
_____	882.1	CAF 19 01343	Mtr of MATILDA B.

_____	887	TP 20 00263	SALVATORE CUPPUCCINO V JOHN HARPER
_____	894	CA 19 02265	RUSSELL E. BROOKS, II V ROBERT M. PALMIERI
_____	903	KA 19 01027	PEOPLE V PAUL VALENTINE
_____	905	KA 17 01821	PEOPLE V RAEQUAN P. MCCALL
_____	909	KA 18 01929	PEOPLE V SHALAND S.
_____	923	CAF 19 00708	Mtr of BRYLEIGH E. N.
_____	924	CAF 19 00709	Mtr of BRYLEIGH E. N.
_____	925	CAF 19 01611	Mtr of BRYLEIGH E. N.

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

1243

KA 18-01563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL EDWARDS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered November 2, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), defendant contends that he was improperly seized by the police based on information from an anonymous source and thus Supreme Court erred in refusing to suppress tangible property and statements obtained following the seizure. We reject that contention. It is well settled that "[a]n identified citizen informant is presumed to be reliable" (*People v Hillard*, 79 AD3d 1757, 1758 [4th Dept 2010], *lv denied* 17 NY3d 796 [2011] [internal quotation marks omitted]; *see People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]), and " 'information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest' " (*People v Brito*, 59 AD3d 1000, 1001 [4th Dept 2009], *lv denied* 12 NY3d 819 [2009]). Furthermore, where an informant is unidentified but the police have face-to-face contact with the informant and an opportunity to evaluate his or her reliability, the information may provide the police with reasonable suspicion to conduct a stop and frisk (*see People v DeJesus*, 169 AD2d 521, 522 [1st Dept 1991], *lv denied* 77 NY2d 994 [1991]).

In this case, the testimony of a police officer during the suppression hearing established that a citizen informant walked into a police station at 4:30 a.m. and reported that two men had "ripped him off" during "a drug deal gone wrong." The informant, who identified himself by name to the officer but whose identity was not disclosed to defendant, appeared to be angry and upset and did not seem to be intoxicated. The informant alleged, inter alia, that the two men were in a purple minivan at a specific address on Stevens Street in the City of Buffalo, and that "there were drugs in the vehicle" and one of the men "was holding [a] handgun in his lap." The police officer interviewed the informant for 10 to 15 minutes, during which time the officer had an opportunity to evaluate his reliability on the basis of his appearance and demeanor (*see People v Letriz*, 103 AD3d 446, 446 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Bruce*, 78 AD2d 169, 173 [1st Dept 1980], *lv denied* 52 NY2d 1074 [1981]). The informant's reliability was enhanced because he identified himself to the officer and reported that he had attempted to take part in a drug transaction, thus making a declaration against penal interest and subjecting himself to potential prosecution for his own criminal activity (*see People v Mendez*, 44 AD3d 302, 303 [1st Dept 2007], *lv denied* 9 NY3d 1036 [2008]). The informant also waited at the police station while officers investigated the allegations, thereby subjecting himself to "the criminal sanctions attendant upon falsely reporting information to the authorities" (*People v Chipp*, 75 NY2d 327, 340 [1990], *cert denied* 498 US 833 [1990]; *see generally* Penal Law § 240.50 [3]). Thus, we conclude that the People established the reliability of the informant by establishing that the officer obtained information from him during a face-to-face encounter (*see People v Habeeb*, 177 AD3d 1271, 1272-1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v Rios*, 11 AD3d 641, 642 [2d Dept 2004], *lv denied* 4 NY3d 747 [2004]), and that information did not constitute an anonymous tip (*see Habeeb*, 177 AD3d at 1273; *see generally People v McCutcheon*, 125 AD2d 603, 603-604 [2d Dept 1986], *lv denied* 70 NY2d 651 [1987]).

Immediately after the interview with the informant, officers responded to Stevens Street where they observed, at about 4:50 a.m., a purple minivan with two occupants parked across the street from the house number specified by the informant. The officers approached the purple minivan, in which defendant was a passenger, on the basis of the information provided by the citizen informant, and the officers were justified in approaching defendant based on that information (*see People v Dixon*, 289 AD2d 937, 937-938 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]). Upon observing the two male occupants inside the purple minivan, the officers directed the driver and defendant to step out of the minivan. It is well settled that a police officer may, as a precautionary measure and even without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the vehicle (*see People v Gates*, 152 AD3d 1222, 1223 [4th Dept 2017], *affd* 31 NY3d 1028 [2018]; *People v Garcia*, 20 NY3d 317, 321 [2012]). Defendant, however, refused to exit the van as directed. Instead, defendant turned his body away from the officer who was standing outside the passenger door and began to reach his right arm across his

body toward his left side, where an officer on the driver's side of the vehicle observed a silver handgun in the left side of defendant's waistband. Upon seeing the handgun, the officers had probable cause to arrest defendant (*see People v Coon*, 212 AD2d 1009, 1010 [4th Dept 1995], *lv denied* 85 NY2d 937 [1995]), and to search the van (*see People v Johnson*, 159 AD3d 1382, 1382-1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]), which led to the discovery of drugs on the floorboard between the driver seat and the passenger seat and inside the glove box.

Finally, inasmuch as the officers' conduct was lawful, the court also properly refused to suppress the oral statements that defendant made to the police after his arrest (*see People v Daniels,* 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

All concur except WHALEN, P.J., and BANNISTER, J., who dissent and vote to reverse in accordance with the following memorandum: In our view, Supreme Court erred in refusing to suppress the tangible property and defendant's statements. For that reason, we dissent and vote to reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress tangible property and statements, dismiss the indictment, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Initially, where reasonable suspicion of criminal activity is premised on an informant's tip, even an identified informant, that tip "must carry sufficient indicia of reliability to justify the forcible encounter" (*People v Moore*, 32 NY2d 67, 70 [1973], *cert denied* 414 US 1011 [1973]). Thus, although even an unknown informant who gives information to the police during a face-to-face interaction has in some circumstances been considered reliable, those cases involved an informant that gave specific, detailed information to the police that the police themselves were able to corroborate with their own observations (*see e.g. People v Castro*, 115 AD2d 433, 435 [1st Dept 1985], *affd* 68 NY2d 850 [1986]; *People v Sattan*, 200 AD2d 640, 640 [2d Dept 1994], *lv denied* 83 NY2d 876 [1994]; *People v Thorne*, 184 AD2d 797, 798 [2d Dept 1992], *lv denied* 80 NY2d 977 [1992]).

Here, although the majority relies on the ability of the police "to evaluate [the] reliability [of the informant]" during face-to-face contact (*People v DeJesus*, 169 AD2d 521, 522 [1st Dept 1991], *lv denied* 77 NY2d 994 [1991]), the testimony of the police officer who met the informant reveals that the officer lacked sufficient information to make such an evaluation. The officer believed that the informant appeared agitated, and conceded that he did not know whether the informant was sober. The informant offered the officer no description of the men who purportedly "ripped him off" or how the alleged drug deal had gone wrong, and the officer testified that he never even asked the informant when that incident took place. Instead, the informant offered no more than the description of the outside of a vehicle, i.e., a purple minivan, at a specific address, in which he believed that there were drugs and a handgun. The informant did not tell the officer whether he had at any time been

inside the van, whether he had personally observed the drugs, or even which individual purportedly had the gun (*cf. People v Habeeb*, 177 AD3d 1271, 1272-1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]).

Further, inasmuch as the informant failed to give any description of the individuals who purportedly ripped him off, such as physical attributes or clothing, the police officers lacked any basis to conclude that defendant and the other individual seized by the officers from the van that was discovered near, but not at, the location given by the informant were the same individuals the informant was accusing of possessing drugs and a handgun (*cf. People v Bruce*, 78 AD2d 169, 172-173 [1st Dept 1980], *lv denied* 52 NY2d 1074 [1981]). Similarly, because the informant failed to state when he observed the individuals in the van, or indeed whether they were in the van when they ripped him off, there was no basis for the officers to reasonably conclude that the people found in the van were the same individuals (*cf. People v Letriz*, 103 AD3d 446, 446 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]). Finally, when the officers arrived at the scene, they did not independently observe any indicia of criminal activity, inasmuch as the police found the van parked in a driveway with deflated tires and two men were sleeping inside the vehicle (*cf. Sattan*, 200 AD2d at 640).

Under these circumstances, we conclude that the People failed to establish the reliability of the informant’s tip and thus the police lacked justification to forcibly seize defendant by approaching the parked vehicle and ordering defendant to exit the vehicle (*see generally People v Harrison*, 57 NY2d 470, 476 [1982]; *People v Wright*, 158 AD3d 1125, 1126 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

284

CA 18-02042

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

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

V MEMORANDUM AND ORDER

JUAN U., RESPONDENT-APPELLANT,
FOR CIVIL MANAGEMENT PURSUANT TO MENTAL
HYGIENE LAW ARTICLE 10.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered August 30, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility. As a preliminary matter, we reject petitioner's contention that the current appeal has been rendered moot by the entry of an order of continued confinement during the pendency of this appeal. Respondent is appealing from an original order of confinement and, as a result, the subsequent order of continued confinement "was affected by the order challenged here, [directing]" his initial confinement (*Matter of State of New York v Michael M.*, 24 NY3d 649, 657 [2014]; *cf. Matter of Ernest V. v State of New York*, 150 AD3d 1434, 1436 [3d Dept 2017]).

With respect to the merits, respondent contends that he should be given the opportunity to withdraw his consent to a finding of mental abnormality (*see* Mental Hygiene Law § 10.03 [i]). The record establishes, however, that Supreme Court provided respondent with an opportunity to withdraw his consent to that finding and that respondent declined to do so. By expressly declining the opportunity to withdraw his consent, respondent waived any appellate contention

that he should now be afforded the opportunity to do so (*see generally Finley v Erie & Niagara Ins. Assn.*, 162 AD3d 1644, 1645 [4th Dept 2018]; *People v Harris*, 97 AD3d 1111, 1112 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]).

We reject respondent's contention that the evidence is not legally sufficient to establish that he requires confinement. Petitioner's experts opined that respondent suffers from pedophilia and is sexually attracted to young children. Although he was participating in treatment, respondent made only minimal progress and he lacked a relapse prevention plan. Moreover, when initially released to parole, respondent reoffended by grabbing the buttocks of an 11-year-old girl in a public area. The experts opined that respondent's impulsiveness and opportunistic conduct would make it extremely difficult to prevent a reoffense even if he were released to strict and intensive supervision and treatment (SIST). We thus conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of State of New York v James R.C.*, 165 AD3d 1612, 1615 [4th Dept 2019]; *Matter of State of New York v Scott W.*, 160 AD3d 1424, 1425-1426 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). Contrary to respondent's further contention, we conclude that the court's determination that respondent is a dangerous sex offender requiring confinement is not against the weight of the evidence (*see James R.C.*, 165 AD3d at 1615; *Scott W.*, 160 AD3d at 1426).

Although we agree with respondent that one of petitioner's experts at trial relied upon and testified about improper basis hearsay evidence, i.e., evidence concerning offenses for which respondent was never indicted (*see generally Matter of State of New York v Charada T.*, 23 NY3d 355, 361 [2014]), we conclude that reversal is not required. Notwithstanding the improper hearsay basis evidence, there was sufficient admissible evidence before the court from which it could determine that respondent is a dangerous sex offender requiring confinement, and there is " 'no reasonable possibility' " that the court would have reached a different determination had the hearsay evidence been excluded (*id.* at 362; *see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]; *Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Respondent's final contention, i.e., that he was denied effective assistance of counsel, is premised upon his claim that he should not have consented to the finding of a mental abnormality without some concession by petitioner. Although respondent did not receive any discernible benefit from that consent, it was noted by his attorney during the dispositional hearing to support the contention that he could be supervised on SIST. Thus, respondent failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies" (*Matter of State*

of New York v Leslie L., 174 AD3d 1326, 1327 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]).

Moreover, respondent "would not have succeeded if he disputed [his consent to a finding of a mental abnormality], and a respondent 'is not denied effective assistance of trial counsel merely because counsel [did] not make . . . an argument that ha[d] little or no chance of success' " (*Parrott*, 125 AD3d at 1439, quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Viewing "the evidence, the law, and the circumstances of [this] particular case, . . . in totality and as of the time of the representation," we conclude that respondent received meaningful representation (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see Leslie L.*, 174 AD3d at 1327).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

328

CAF 19-00279

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF ETHAN F. AND MICHAEL F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CORRIE L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

KATHRYN F. HARTNETT, UTICA, FOR RESPONDENT-APPELLANT.

DENISE MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

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

PAUL A. NORTON, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered September 6, 2018 in a proceeding pursuant to Family Court Act article 10. The order adjudged, inter alia, that respondent severely abused one of the subject children.

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

Memorandum: In appeal No. 1, respondent appeals from an order of fact-finding adjudging, inter alia, that he had severely abused one of the subject children and, in appeal No. 2, he appeals from the order of disposition. Inasmuch as the order at issue in appeal No. 2 was entered upon the consent of the parties, appeal No. 2 must be dismissed (*see Matter of Edward T. [Maria T.]*, 175 AD3d 1115, 1115 [4th Dept 2019]; *Matter of Lasondra D. [Cassandra D.—Victor S.]*, 151 AD3d 1655, 1655-1656 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

Respondent failed to preserve for our review his contention that Family Court erred in failing to conduct an inquiry into his legal and financial circumstances before denying his request to appear by telephone (*see Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). We reject respondent's further contention that his counsel was ineffective in failing to request such an inquiry inasmuch as respondent failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1563 [4th Dept 2018] [internal quotation marks omitted]).

Respondent next contends that the court erred in taking judicial notice of testimony from a custody hearing involving the children's biological parents from which his counsel was absent. Respondent also contends that his counsel was ineffective for failing to object. We reject those contentions. Both contentions are belied by the record, which reflects that counsel did object and that the court, in effect, sustained the objection and declined to take judicial notice of the testimony. In any event, any error by the court in taking judicial notice was harmless (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

329

CAF 19-00280

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF ETHAN F. AND MICHAEL F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CORRIE L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

KATHRYN F. HARTNETT, UTICA, FOR RESPONDENT-APPELLANT.

DENISE MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

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

PAUL A. NORTON, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered December 20, 2018 in a proceeding pursuant to Family Court Act article 10. The order adjudged that no further disposition was necessary because the court had issued a permanent order of protection directing respondent to have no contact with the subject children.

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

Same memorandum as in *Matter of Ethan F. (Corrie L.)* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

347

CAF 19-01510

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

IN THE MATTER OF JOYCE M.M., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT J.G., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL J. FRENTZEL, ESQ., GRAND ISLAND (MICHAEL F. MCPARTLAN OF COUNSEL), FOR PETITIONER-APPELLANT.

ANTHONY J. CERVI, BUFFALO, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), dated February 8, 2019 in a proceeding pursuant to Family Court Act article 5. The order dismissed the petition with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the petition is dismissed without prejudice and as modified the order is affirmed without costs.

Memorandum: Petitioner, the maternal grandmother and custodian of the subject child, filed a petition for paternity seeking a determination that respondent is the biological father of the child and alleging, inter alia, that respondent had sexual intercourse with the mother at the time of the child's conception. Respondent, a resident of North Carolina, moved to dismiss the petition on, inter alia, the grounds that petitioner failed to state a cause of action and that Family Court lacked personal jurisdiction over him. The court granted the motion and dismissed the petition, with prejudice, on the ground that the court lacked personal jurisdiction over respondent pursuant to Family Court Act § 519.

We agree with petitioner that the court erred in granting respondent's motion on the ground that it lacked personal jurisdiction over him pursuant to Family Court Act § 519. Section 519 was enacted to provide exceptions to the common-law rule that paternity proceedings customarily abate upon the unavailability of the putative father (*cf. Matter of Mary Ellen C. v Joseph William C.*, 79 AD2d 1024, 1024-1025 [2d Dept 1981]). It does not prevent personal jurisdiction from being established over an available party.

In a paternity proceeding, personal jurisdiction over a nonresident putative father may be established pursuant to Family Court Act § 580-201. Petitioner, however, admittedly failed to allege in her petition that respondent engaged in sexual intercourse with the mother in New York State at the time of conception, or that he had any other relevant ties to New York State, and no other grounds for jurisdiction apply (*see* Family Ct Act § 580-201 [6], [8]). Under the circumstances of this case, we conclude that the court should have granted the motion on the ground that petitioner failed to state a cause of action predicated upon respondent's sexual intercourse with the mother in New York State (*see generally Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Inasmuch as such a dismissal is not on the merits, however, we further conclude that the petition should be dismissed without prejudice (*see Herrmann v Bank of Am., N.A.*, 170 AD3d 1438, 1442 [3d Dept 2019]; *Lamar Outdoor Adv. v City Planning Commn. of Syracuse*, 296 AD2d 841, 842 [4th Dept 2002]). We therefore modify the order accordingly.

Mark W. Bennett

Entered: October 9, 2020

Clerk of the Court

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

348

CAF 19-01511

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

IN THE MATTER OF JOYCE M.M., PETITIONER-APPELLANT,

V ORDER

ROBERT J.G., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL J. FRENTZEL, ESQ., GRAND ISLAND (MICHAEL F. MCPARTLAN OF COUNSEL), FOR PETITIONER-APPELLANT.

ANTHONY J. CERVI, BUFFALO, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), dated February 8, 2019 in a proceeding pursuant to Family Court Act article 5. The order granted the motion of respondent to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Faison v Luong*, 122 AD3d 1268, 1269 [4th Dept 2014]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

358

KA 15-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. QUICK, JR., DEFENDANT-APPELLANT.

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

JAMES E. QUICK, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 20, 2015. The judgment convicted defendant upon a jury verdict of murder in the second 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 following a jury trial of intentional murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends in his main and pro se supplemental briefs that he was deprived of effective assistance of counsel because his trial attorneys failed to request that manslaughter in the second degree and criminally negligent homicide be submitted to the jury as lesser included offenses of intentional murder in the second degree. We reject that contention.

While attempting to exit a store, defendant and a companion were each punched by members of a group of six men. In response, defendant pulled out a gun and fired three shots toward the door where the group of men were gathered. One of those men was struck by one of the bullets and died as a result. That man had not thrown either of the punches, but he was with the group of men by the door. The shooting was captured on a store surveillance video that was played for the jury, and defendant admitted at trial that he shot the victim. Defense counsel argued to the jury that defendant did not intend to kill the victim and, in the alternative, that defendant was justified in doing so. We agree with defendant that there is a reasonable view of the evidence that he acted recklessly and not intentionally when he

shot the victim, and that defendant would thus have been entitled to a jury charge of manslaughter in the second degree as a lesser included offense if it had been requested (*see People v Garcia*, 114 AD2d 423, 423 [2d Dept 1985], *lv denied* 67 NY2d 651 [1986]; *see generally* CPL 300.50 [1]; *People v Glover*, 57 NY2d 61, 63 [1982]). It is a closer call whether defendant would also have been entitled to a jury charge of criminally negligent homicide as a lesser included offense. Regardless, we conclude that it was not unreasonable for defense counsel to adopt an " 'all-or-nothing' " strategy at trial (*People v Lane*, 60 NY2d 748, 750 [1983]; *see People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v McFadden*, 161 AD3d 1570, 1571 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]).

Indeed, had the jury concluded that defendant acted recklessly or negligently and not intentionally, it would have acquitted defendant of murder in the second degree and would not have been able to find him guilty of a lesser offense. Thus, defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*McFadden*, 161 AD3d at 1571, quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs that he was deprived of effective assistance of counsel and conclude that they are without merit. Viewing the evidence, the law, and the circumstances of this case in their totality at the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention in his main brief that Supreme Court, in charging the jury on justification, failed to instruct the jury that, in assessing whether defendant reasonably believed that the victim was using or about to use deadly physical force, consideration should be given to all the surrounding circumstances. Because the court read the justification charge verbatim from the pattern Criminal Jury Instructions (*see e.g. People v Burman*, 173 AD3d 1727, 1729 [4th Dept 2019]; *People v Muscarella*, 132 AD3d 1288, 1289 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]), we decline to exercise our power to address defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention in his main brief that his sentence is unduly harsh and severe.

In his pro se supplemental brief, defendant contends that he was constructively denied the right to counsel at the grand jury stage of the proceedings because defense counsel did not consult with him regarding whether he should testify before the grand jury. We agree with the People that defendant's contention involves matters that are outside the record on appeal and thus must be raised, if at all, by way of a CPL article 440 motion (*see People v Balenger*, 70 AD3d 1318, 1318 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]; *People v Frazier*, 63 AD3d 1633, 1634 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]).

Because the minutes of the grand jury proceeding are not included in the record on appeal, defendant's further contention in his pro se supplemental brief that the People should have instructed the grand jury on the justification defense is similarly based on matters outside the record.

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

Mark W. Bennett

Entered: October 9, 2020

Clerk of the Court

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

368

CA 19-01315

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

TIMOTHY J. KING AND CHRISTINA A. KING,
INDIVIDUALLY AND AS ADMINISTRATORS OF THE
ESTATE OF ANTHONY C. KING, DECEASED,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAKE OWEN KLOCEK, ET AL., DEFENDANTS-RESPONDENTS,
AND CABELA'S INC., DEFENDANT-APPELLANT.

RANZULLI LAW FIRM, LLP, WHITE PLAINS (SCOTT C. ALLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRADY CENTER TO PREVENT GUN VIOLENCE, LEGAL ACTION PROJECT, WASHINGTON, D.C. (JONATHAN E. LOWY, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), SHAW & SHAW, P.C., HAMBURG, AND JEFFREY F. VOELKL, ESQ., LL.M., WILLIAMSVILLE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 6, 2019. The order denied the motion of defendant Cabela's Inc. to dismiss the second amended complaint and all cross claims against it.

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

Memorandum: Defendant Jake Owen Klocek shot and killed Anthony C. King using a handgun that he allegedly found at the house where he was housesitting and ammunition that he allegedly purchased from Cabela's Inc. (defendant). Plaintiffs commenced this action against Klocek, the owners of the house where Klocek was housesitting, and defendant, alleging, inter alia, that defendant is liable for the shooting because defendant negligently sold handgun ammunition to Klocek. Relying on the Protection of Lawful Commerce in Arms Act ([PLCAA] 15 USC § 7901 *et seq*.) and CPLR 3211 (a) (7), defendant moved to dismiss the second amended complaint and all cross claims against it. We conclude that Supreme Court properly denied the motion.

The PLCAA prohibits the bringing of "qualified civil liability action[s]," rendering them subject to immediate dismissal (15 USC § 7902 [a], [b]). We agree with defendant that this action "falls within the PLCAA's general definition of a 'qualified civil liability action' " (*Williams v Beemiller, Inc.*, 100 AD3d 143, 147 [4th Dept

2012], *amended on rearg* 103 AD3d 1191 [4th Dept 2013], quoting § 7903 [5] [A]), inasmuch as it is a civil action brought by "any person" against a seller of a qualified product, i.e., ammunition, for damages resulting from the criminal or unlawful misuse of that product by a third party (§ 7903 [5] [A]; *see generally Ileto v Glock, Inc.*, 565 F3d 1126, 1131-1132 [9th Cir 2009], *cert denied* 560 US 924 [2010]). Nevertheless, a qualified civil liability action does not include, among other things, "an action brought against a seller for negligent entrustment or negligence per se" (§ 7903 [5] [A] [ii]) or "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought" (§ 7903 [5] [A] [iii]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, contrary to defendant's contention, the allegations of the second amended complaint are sufficient to withstand defendant's CPLR 3211 (a) (7) motion to dismiss.

In the second amended complaint, plaintiffs allege that defendant violated 18 USC § 922 (b) (1) and Penal Law § 270.00 (5) when defendant allegedly sold "handgun ammunition" to Klocek, who was 20 years old at the time. The federal statute prohibits the sale or delivery of ammunition "other than . . . ammunition for a shotgun or rifle" to anyone the seller or deliverer "knows or has reasonable cause to believe is less than twenty-one years of age" (18 USC § 922 [b] [1]). The state statute prohibits the sale of ammunition "designed exclusively for use in a pistol or revolver" to anyone not authorized to possess a pistol or revolver (Penal Law § 270.00 [5]). Plaintiffs' allegations, if true, establish that defendant committed a predicate offense under 15 USC § 7903 (5) (A) (ii) and, as a result, establish that this action is not a qualified civil liability action and not subject to immediate dismissal.

Defendant nonetheless contends that the court should have granted its request to take judicial notice of the purported fact that the ammunition sold to Klocek could be used interchangeably in rifles and shotguns, as supported by various commercial websites of firearm ammunition manufacturers and retailers. We reject that contention. Based on the record before us, we conclude that the purported fact is not "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (*Hamilton v Miller*, 23 NY3d 592, 603 [2014] [internal quotation marks omitted]; *see Matter of Murrah v Jain Irrigation, Inc.*, 157 AD3d 1088, 1089 [3d Dept 2018]). In any event, defendant's submissions in that regard are insufficient to conclusively establish that plaintiffs have no cause of action (*see Doe v Ascend Charter Schs.*, 181 AD3d 648, 650 [2d Dept 2020]; *see generally Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]). We thus conclude that defendant did not establish that

the second amended complaint failed to state a cause of action or was otherwise preempted by the PLCAA.

In light of our conclusion that the second amended complaint alleges sufficient facts to bring this action within the PLCAA's predicate exception (15 USC § 7903 [5] [A] [iii]), the "action" is not subject to dismissal at this stage of the proceeding (§ 7902 [b]), and we do not address defendant's contentions regarding the negligent entrustment and negligence per se exceptions to immunity (*see Williams*, 100 AD3d at 151; *Chiapperini v Gander Mtn. Co., Inc.*, 48 Misc 3d 865, 876 [Sup Ct, Monroe County 2014]; *Corporan v Wal–Mart Stores E., LP*, 2016 WL 3881341, *4 n 4 [D Kan, July 18, 2016, No. 16-2305-JWL]; *cf. Delana v CED Sales, Inc.*, 486 SW3d 316, 321 [Mo 2016]; *Estate of Kim v Coxe*, 295 P3d 380, 386 [Alaska 2013]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

396

CA 18-02292

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

CARRIER CORPORATION, ELLIOTT COMPANY,
PLAINTIFFS-RESPONDENTS-APPELLANTS,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, SOLELY AS
SUCCESSOR-IN-INTEREST TO NORTHBROOK EXCESS
AND SURPLUS INSURANCE COMPANY, FORMERLY
KNOWN AS NORTHBROOK INSURANCE COMPANY, ET AL.,
DEFENDANTS,
AND FIREMAN'S FUND INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

RIVKIN RADLER LLP, UNIONDALE (MICHAEL A. KOTULA OF COUNSEL), AND HARRIS BEACH PLLC, ALBANY, FOR DEFENDANT-APPELLANT-RESPONDENT.

COVINGTON & BURLING LLP, NEW YORK CITY (TERESA T. LEWI OF COUNSEL), AND HANCOCK ESTABROOK, LLP, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 21, 2018. The judgment granted five motions of plaintiffs Carrier Corporation and Elliott Company for partial summary judgment seeking specific declarations, and granted one motion and denied a second motion of defendant Fireman's Fund Insurance Company for partial summary judgment seeking specific declarations.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiffs' motion for partial summary judgment seeking a declaration that, as a matter of law, injury-in-fact in an asbestos action occurs from the date of first claimed exposure through death or the filing of suit, thereby triggering each policy in effect from the date of first claimed exposure, and vacating that declaration, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs Carrier Corporation (Carrier) and Elliott Company (Elliott) (collectively, plaintiffs), once-related corporate entities facing lawsuits claiming personal injuries arising from exposure to asbestos contained in their products, commenced this declaratory judgment and breach of contract action seeking, inter alia, declarations of the rights and obligations of the parties under

liability insurance policies issued by various insurers, including fifth-layer excess policies issued by Fireman's Fund Insurance Company (defendant). Defendant appeals from a judgment insofar as it granted several of plaintiffs' motions for partial summary judgment and denied one of defendant's motions for partial summary judgment, and plaintiffs cross-appeal from the judgment insofar as it granted one of defendant's motions for partial summary judgment.

Addressing first defendant's appeal, defendant contends that Supreme Court erred in granting plaintiffs' motion for partial summary judgment declaring that, pursuant to a corporate reorganization agreement that spun off Elliott's predecessor business, Carrier transferred to Elliott the right to insurance coverage for liabilities arising out of business activities conducted by Elliott's predecessor business prior to that date. We reject that contention.

Initially, the court properly concluded that plaintiffs were not collaterally estopped with respect to the issue of the transfer of insurance rights to Elliott by prior court decisions rendered several years ago that denied motions for summary judgment on that issue. "A summary judgment motion presents a snapshot of the proof at a moment in time," and the denial of such a motion "establishes nothing except that summary judgment is not warranted at [that] time" (Siegel, NY Prac § 287 at 542-543 [6th ed 2018]) and "does not constitute an adjudication on the merits" (*Jones v Town of Carroll*, 158 AD3d 1325, 1327 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]).

Further, we conclude that, following extensive discovery in the action before us, plaintiffs met their initial burden on the motion by establishing with extrinsic evidence in admissible form that, notwithstanding the ambiguity arising from the absence of an exhibit referred to in the reorganization agreement that ostensibly was to set forth the assets being transferred, the insurance rights were transferred to Elliott under the reorganization agreement (*see Wolfson v Faraci Lange, LLP*, 103 AD3d 1272, 1273 [4th Dept 2013]; *Curiale v DR Ins. Co.*, 198 AD2d 52, 52-53 [1st Dept 1993]). In particular, plaintiffs established through the submission of, inter alia, documents prepared contemporaneously with the reorganization, the deposition testimony of employees involved in the reorganization, and evidence of post-reorganization conduct, that the parties to the reorganization agreement, consistent with the language therein, intended to, and did, transfer assets including insurance rights to Elliott (*see Wolfson*, 103 AD3d at 1273). Defendant failed to raise a triable issue of fact in opposition (*see id.*; *Curiale*, 198 AD2d at 52-53; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendant also contends that the court erred in granting plaintiffs' motion for partial summary judgment declaring that, as a matter of law, injury-in-fact in an asbestos action occurs from the date of first claimed exposure through death or the filing of suit, thereby triggering each policy in effect from the date of first claimed exposure. The subject excess policies obligate defendant to indemnify the insured for its ultimate net loss—all sums actually paid

or which the insured is legally obligated to pay for covered damages after deduction of all recoveries or salvage—in excess of an umbrella policy, which covers personal injuries caused by or arising out of an occurrence. Following form of the umbrella policy, the subject excess policies define an occurrence to include "a continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury . . . during the policy period," and define personal injury, in relevant part, as "bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, [and] disability." The parties do not dispute that the applicable test in determining what event constitutes personal injury sufficient to trigger coverage is injury-in-fact, "which rests on when the injury, sickness, disease or disability actually began" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 651 [1993]; *see American Home Prods. Corp. v Liberty Mut. Ins. Co.*, 748 F2d 760, 764-765 [2d Cir 1984]). Rather, the parties dispute when an asbestos-related injury actually begins: plaintiffs assert that injury-in-fact occurs upon first exposure to asbestos, while defendant denies that assertion and instead maintains that injury-in-fact occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms. The court concluded, as a matter of law, that injury-in-fact occurs upon first exposure to asbestos. We agree with defendant for the reasons that follow that the court erred in that regard, and we therefore modify the judgment by denying the subject motion for partial summary judgment and vacating the declaration with respect to that motion.

Initially, the court improperly rejected defendant's contention that the coverage trigger issue under the injury-in-fact test presented a question of fact and, in doing so, incorrectly resolved the issue as a matter of law based on prior holdings in other cases. The court relied on inapposite cases where the parties stipulated or otherwise did not dispute that first exposure triggered coverage (*see Pacific Empls. Ins. Co. v Troy Belting & Supply Co.*, 2015 WL 5708360, *4 [ND NY, Sept. 29, 2015, No. 1:11–CV–912]; *United States Fid. & Guar. Co. v Treadwell Corp.*, 58 F Supp 2d 77, 95 [SD NY 1999]), or where the issue was not, in fact, specifically resolved on summary judgment and instead presented a factual question for resolution by the factfinder at trial based on medical evidence (*see Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, 1193 [2d Cir 1995], *op mod on denial of reh* 85 F3d 49 [2d Cir 1996]; *American Home Prods. Corp.*, 748 F2d at 765; *Fulton Boiler Works, Inc. v American Motorists Ins. Co.*, 828 F Supp 2d 481, 489 [ND NY 2011], citing *Stonewall Ins. Co.*, 73 F3d at 1194, 1196-1197; *In re Viking Pump, Inc.*, 148 A3d 633, 684 [Del 2016]; *see also Borel v Fibreboard Paper Prods. Corp.*, 493 F2d 1076, 1083 [5th Cir 1973], *cert denied* 419 US 869 [1974]).

Next, to the extent that the court resolved the subject motion for partial summary judgment upon its consideration of the parties' submissions, we likewise conclude that the court erred in granting the motion. Even assuming, arguendo, that plaintiffs met their initial burden on the motion by submitting evidence in admissible form that asbestos-related injury actually begins upon first exposure, we conclude that defendant raised a triable issue of fact in opposition

(*see generally Zuckerman*, 49 NY2d at 562). In particular, defendant submitted the affidavits of two medical experts contradicting the claim that damage from asbestos occurs immediately after initial exposure and averring instead that harm occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms. Plaintiffs' assertion that the opinions of defendant's experts are inconsistent with older scholarly publications authored by those experts, and with their prior testimony in another case, raised an issue of credibility, which the court improperly resolved on the motion for partial summary judgment by discounting the experts' affidavits on that basis (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Rew v County of Niagara*, 115 AD3d 1316, 1318 [4th Dept 2014]).

Plaintiffs nonetheless contend, as a properly raised alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that defendant is collaterally estopped from contending that personal injury does not occur upon first exposure to asbestos because defendant was a party to a case in California in which that issue was litigated and decided against multiple insurers, including defendant (*see Armstrong World Indus., Inc. v Aetna Cas. & Sur. Co.*, 45 Cal App 4th 1 [Cal Ct App 1996]). Upon applying the law of the rendering jurisdiction to determine the preclusive effect of the decision in the California case (*see Schultz v Boy Scouts of Am.*, 65 NY2d 189, 204 [1985]; *Bruno v Bruno*, 83 AD3d 165, 169 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012], *rearg denied* 19 NY3d 831 [2012]), we conclude that collateral estoppel is inapplicable to the coverage trigger issue here. Under California law, "where[, as here,] the previous decision rests on a 'different factual and legal foundation' than the issue sought to be adjudicated in the case at bar, collateral estoppel effect should be denied" (*Wimsatt v Beverly Hills Weight Loss Clinics Intl., Inc.*, 32 Cal App 4th 1511, 1517 [Cal Ct App 1995]; *see United States Golf Assn. v Arroyo Software Corp.*, 69 Cal App 4th 607, 616 [Cal Ct App 1999]). The issue in the case at bar is not identical to that litigated in the California case because, among other things, New York and California apply different substantive law in determining when asbestos-related injury occurs (*see California Hosp. Assn. v Maxwell-Jolly*, 188 Cal App 4th 559, 572-573 [Cal Ct App 2010], *cert denied* 565 US 815 [2011]; *compare Continental Cas. Co.*, 80 NY2d at 651 *with Montrose Chem. Corp. of Cal. v Admiral Ins. Co.*, 10 Cal 4th 645, 679 [1995]).

Defendant further contends that the court erred in granting plaintiffs' motion for partial summary judgment declaring that the all sums allocation and vertical exhaustion rules apply and in denying defendant's motion for partial summary judgment seeking a declaration that the policies underlying their fifth-layer excess policies are not exhausted. We reject that contention.

Initially, the court properly concluded that the losses among triggered policies must be allocated through the all sums method, which "permits the insured to collect its total liability . . . under any policy in effect during the periods that the damage occurred, up

to the policy limits" (*Matter of Viking Pump, Inc.*, 27 NY3d 244, 255 [2016] [internal quotation marks omitted]; *see Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 154 [2013]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 222 [2002]). The non-cumulation and prior insurance provisions incorporated in the fifth-layer excess policies "plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may 'also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date' of the instant polic[ies]," thus rendering all sums the appropriate allocation method (*Viking Pump*, 27 NY3d at 261; *see Matter of Liquidation of Midland Ins. Co.*, 171 AD3d 564, 564-565 [1st Dept 2019]). The court also properly concluded that vertical exhaustion—which "allow[s] the [i]nsureds to access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted"—is required here (*Viking Pump*, 27 NY3d at 264; *see Liquidation of Midland Ins. Co.*, 171 AD3d at 565).

Defendant nonetheless contends that the court's holding that plaintiffs can access coverage under the fifth-layer excess policies is erroneous because plaintiffs entered a settlement agreement with the umbrella and third-layer excess insurer providing for pro rata time-on-the-risk allocation and, therefore, the underlying policies are not, and may never be, "depleted" and thus the fifth-layer excess policies may not attach. We reject that contention. Defendant's obligations are governed by the terms of the fifth-layer excess policies and, contrary to defendant's contention, those policies follow form with respect to the umbrella policy's "loss payable" condition, which provides, in relevant part, that "[l]iability . . . with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurers, shall have paid the amount of the underlying limits on account of such occurrence." Thus, contrary to defendant's assertion that the underlying policies may be depleted only by payment by the insurer, the subject condition "plainly contemplates payment by *either* the insured *or* the underlying insurer to exhaust the policy's limits" (*Hopeman Bros., Inc. v Continental Cas. Co.*, 307 F Supp 3d 433, 476 [ED Va 2018] [emphasis added]; *cf. Forest Labs., Inc. v Arch Ins. Co.*, 38 Misc 3d 260, 263-267 [Sup Ct, NY County 2012], *affd* 116 AD3d 628 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]; *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 22-23 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). The other policy provisions upon which defendant relies do not warrant a different conclusion. We thus conclude that, contrary to defendant's contention, the court properly declared that the fifth-layer excess policies attach when the amounts paid by plaintiffs and the underlying insurers reach the attachment point for the fifth-layer excess policies.

Contrary to defendant's additional contention, we conclude that the court properly granted plaintiffs' motion for partial summary judgment declaring, with respect to defendant's limit reduction defense, that pursuant to the narrow definition of "loss" under the

subject non-cumulation and prior insurance provisions, the court would adopt a pro tanto approach to applying settlement credits, if any, and that the burden would be on defendant to establish the amount recovered on the particular claim at issue (*see Olin Corp. v OneBeacon Am. Ins. Co.*, 864 F3d 130, 149-151 [2d Cir 2017]; *Olin Corp. v Lamorak Ins. Co.*, 2018 WL 1901634, *8-9 [SD NY, Apr. 18, 2018, No. 84-CV-1968 (JSR)], *appeal dismissed* 2019 WL 2237477 [2d Cir, Jan. 14, 2019, Nos. 18-1532(L), 18-1655(XAP)]; *cf. Hopeman Bros.*, 307 F Supp 3d at 456-459).

Finally, addressing plaintiffs' cross appeal, we conclude that the court properly granted defendant's motion for partial summary judgment declaring that, pursuant to the provisions of the fifth-layer excess policies, defendant is not required to pay or reimburse any of plaintiffs' defense costs without defendant's consent, which has not been sought or given in this case (*see AstenJohnson v Columbia Cas. Co.*, 483 F Supp 2d 425, 480, 480 n 49 [ED Pa 2007], *affd in part and revd in part* 562 F3d 213 [3d Cir 2009], *cert denied* 558 US 991 [2009]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

412

CA 19-01975

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

IN THE MATTER OF EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

LYNN M. STOCK, INDIVIDUALLY AND AS EXECUTRIX OF
THE ESTATE OF JAMES G. STOCK, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

AIR & LIQUID SYSTEMS CORP., AS SUCCESSOR BY
MERGER TO BUFFALO PUMPS, INC., ET AL.,
DEFENDANTS,
AND JENKINS BROS., DEFENDANT-APPELLANT-RESPONDENT.

CLYDE & CO US LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 25, 2019. The order denied the posttrial motions of defendant Jenkins Bros. and plaintiff.

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

Memorandum: Lynn M. Stock (plaintiff) and her husband, James G. Stock (decedent), commenced this action seeking damages for injuries sustained by decedent as a result of his exposure to asbestos. Following a trial, the jury returned a verdict finding, inter alia, that decedent was exposed to asbestos products made by Jenkins Bros. (defendant), that defendant failed to exercise reasonable care by not providing a warning about the hazards of exposure to asbestos with respect to its products, and that its failure to warn was a substantial contributing factor in causing decedent's injuries. Defendant appeals and plaintiff cross-appeals from an order denying their respective motions pursuant to CPLR 4404 to set aside various aspects of the jury verdict. We note, initially, that decedent passed away during the pendency of this appeal, and plaintiff has been substituted as the executrix of his estate.

Contrary to defendant's contention on its appeal, the evidence is legally sufficient to establish that asbestos in products it

manufactured was a substantial factor in causing or contributing to decedent's injuries (*see Dominick v Charles Millar & Son Co.* [appeal No. 2], 149 AD3d 1554, 1555 [4th Dept 2017], *lv denied* 30 NY3d 907 [2017]). There is a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury based upon the evidence presented at trial (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Doolittle v Nixon Peabody LLP*, 155 AD3d 1652, 1654 [4th Dept 2017]). Although, to prove specific causation, plaintiff and decedent were required to establish that decedent "was exposed to sufficient levels of the toxin to cause" his alleged injuries, "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006], *rearg denied* 8 NY3d 828 [2007]; *see Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 808-809 [2016]). There simply "must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" (*Sean R.*, 26 NY3d at 809 [internal quotation marks omitted]; *see Dominick*, 149 AD3d at 1555). Such evidence may include an expert's use of estimates generated by mathematical models taking a plaintiff's work history into account, or the use of "more qualitative means" to determine the level of a plaintiff's exposure, such as comparing the plaintiff's exposure level "to the exposure levels of subjects of other studies" (*Parker*, 7 NY3d at 449).

Here, decedent testified at trial that, while performing work involving component parts of defendant's products, i.e., gaskets and packing, he was exposed to visible asbestos dust on a routine basis. In addition, his expert opined that, based in part on her review of studies of workers involved in tasks similar to those performed by decedent, decedent's exposure to such visible dust was a substantial contributing factor to the development of his mesothelioma. Contrary to defendant's contention, the expert's opinion, considered along with the rest of her testimony, was sufficient to establish specific causation (*see Dominick*, 149 AD3d at 1555-1556; *Matter of New York City Asbestos Litig.*, 143 AD3d 483, 484 [1st Dept 2016], *lv dismissed* 28 NY3d 1165 [2017], *rearg denied* 29 NY3d 992 [2017]; *Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]). We reject defendant's contention that the Court of Appeals' decision in *Matter of New York City Asbestos Litig.* (32 NY3d 1116 [2018]) compels a different result under the facts of this case, and we similarly reject defendant's contention that Supreme Court misapplied the applicable law. Thus, we reject defendant's contention that it is entitled to a new trial.

Finally, we also reject plaintiff's contention on her cross appeal that the court erred in failing to list her loss of decedent's future household services as a separate itemized question on the jury verdict sheet. Contrary to plaintiff's contention, the verdict sheet provided a line item for future "loss of [decedent's] services and society," and the court properly charged the jury regarding that item of damages and was not required to distinguish between loss of

services and loss of society as two separate items of damages (*see* PJI 2:315).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

419

CA 19-00964

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

DAWN AYERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PIONEER CENTRAL SCHOOL DISTRICT AND PIONEER MIDDLE SCHOOL, DEFENDANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered October 11, 2018. The order, insofar as appealed from, granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped on ice in the parking lot of defendant Pioneer Middle School (middle school), which is located in the Town of Yorkshire. Defendants moved for summary judgment dismissing the complaint, arguing that they had no duty to remove the hazardous condition because it formed during an ongoing storm. Plaintiff now appeals from an order that, inter alia, granted defendants' motion.

We conclude that defendants did not meet their initial burden of establishing that plaintiff's injuries were the result of "an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016] [internal quotation marks omitted]; *cf. Alvarado v Wegmans Food Mkts., Inc.*, 134 AD3d 1440, 1441 [4th Dept 2015]; *Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015]). Although defendants submitted an affidavit from a meteorologic expert, Doppler radar data, and deposition testimony establishing that it had been snowing and icy on the date of the accident from the early morning hours through 3:00 p.m., the time plaintiff fell, defendants also submitted conflicting evidence regarding how much snow actually accumulated in the area of the middle school. Defendants' expert

never set forth, by opinion or otherwise, any specific amount of snowfall in the Town of Yorkshire on the date of plaintiff's fall. The only data regarding snowfall was for the Buffalo Niagara International Airport, which showed only 0.9 inches of snowfall. Further, the deposition testimony submitted by defendants gave estimates of anywhere from one to three inches of snowfall during the day. Thus, defendants' own submissions raised a question of fact whether there was a storm in progress at the time of the fall.

Even assuming, arguendo, that defendants met their initial burden, plaintiff raised an issue of fact whether the ice upon which she fell preexisted the weather event (*cf. Alvarado*, 134 AD3d at 1441). Plaintiff submitted the affidavit of an expert meteorologist who averred that a thaw in the days prior to the accident, followed by a drop in temperatures from the night before into the morning hours of the accident, would account for the formation of the ice. Plaintiff also submitted deposition testimony establishing that there had been thick ice in the parking lot since the day before the accident, and that defendants' groundskeeper had plowed down to the ice (*see Gervasi v Blagojevic*, 158 AD3d 613, 614 [2d Dept 2018]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Candelier v City of New York*, 129 AD2d 145, 148-149 [1st Dept 1987]). We also conclude that plaintiff raised an issue of fact whether defendants had constructive notice of the condition (*see Washington v Trustees of the M.E. Church of Livingston Manor*, 162 AD3d 1368, 1370 [3d Dept 2018]; *Englerth v Penfield Cent. School Dist.*, 85 AD3d 1714, 1715 [4th Dept 2011]). We therefore reverse the order insofar as appealed from.

In light of our determination, plaintiff's remaining contention is academic.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

420

CA 19-00534

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

JUDITH L. BAUER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID M. DENEKE, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, STEVEN FORTUNATO, ET AL., DEFENDANTS, TOWN OF CHEEKTOWAGA AND CHEEKTOWAGA POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, PC, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 13, 2019. The order granted the motion of defendants Town of Cheektowaga and Cheektowaga Police Department for summary judgment dismissing the amended complaint against them.

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

Memorandum: On a morning in November 2014, shortly after defendant Town of Cheektowaga (Town) issued a travel ban due to a severe winter storm, David M. Deneke (decedent) was driving to work when his car became stuck in snow on a road in the Town and was thereafter rear-ended by a vehicle driven by defendant Steven Fortunato. Fortunato tried to help decedent free his car from the snow by pushing it, but was not successful. Fortunato offered decedent a ride, but decedent said that he wanted to stay with his vehicle. Fortunato did not call for emergency assistance inasmuch as decedent told Fortunato that he had already done so. Thereafter, as the storm continued and the road conditions worsened, decedent stayed with his vehicle and made three calls to the Town's 911 dispatcher over a period of approximately seven hours. Decedent was found deceased in his vehicle three days later. Plaintiff, individually and as the administrator of the estate of decedent, commenced this wrongful death action against, inter alia, the Town and defendant Cheektowaga Police Department (collectively, defendants) alleging, as relevant here, that defendants acted negligently in failing to rescue

decedent. Defendants moved for summary judgment dismissing the amended complaint against them, and Supreme Court granted the motion. Plaintiff appeals, and we affirm.

Preliminarily, we conclude that, during the events that led to decedent's unfortunate death, defendants were acting in a governmental capacity (*see Turturro v City of New York*, 28 NY3d 469, 479 [2016]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 423-424 [2013]). "Under the public duty rule, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created" (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]). Therefore, defendants cannot be held liable unless there existed a special relationship between them and decedent (*see id.*). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]; *see Applewhite*, 21 NY3d at 426). According to plaintiff, a special relationship was formed in this case by the second method, i.e., the voluntary assumption of a duty of care by defendants. That method requires plaintiff to establish "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Valdez*, 18 NY3d at 80 [internal quotation marks omitted]; *see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Here, only the first and fourth elements are at issue. We conclude that defendants met their burden on the motion by establishing as a matter of law that there was no voluntary assumption of a duty of care, and plaintiff failed to raise a triable issue of fact whether defendants assumed, through promise or action, any duty to act on decedent's behalf (*see Flynn v Town of Southampton*, 177 AD3d 855, 858 [2d Dept 2019]; *Bower v City of Lockport*, 115 AD3d 1201, 1203 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]). Moreover, even assuming, arguendo, that plaintiff raised a triable issue of fact with respect to that element, we conclude that defendants also met their initial burden by establishing that any alleged reliance upon representations made by defendants or their agents was not justifiable, and plaintiff failed to raise a triable issue of fact in that regard (*see Bower*, 115 AD3d at 1203; *see also Middleton v Town of Salina*, 108 AD3d 1052, 1054 [4th Dept 2013]).

In light of our determination, we need not address whether defendants are entitled to summary judgment based on the governmental function immunity defense for acts involving the exercise of

discretionary authority (*see Valdez*, 18 NY3d at 84).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

440

CA 19-00800

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

TARGETED LEASE CAPITAL, LLC, PLAINTIFF-RESPONDENT,

V ORDER

WHEEL EQUIPMENT LEASING, LLC, DOING BUSINESS AS
Y.E.S. LEASING, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BAUMEISTER DENZ, LLP, BUFFALO (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 25, 2019. The order, among other things, granted in part and denied in part plaintiff's motion for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

441

CA 19-00802

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

TARGETED LEASE CAPITAL, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WHEEL EQUIPMENT LEASING, LLC, DOING BUSINESS AS
Y.E.S. LEASING, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BAUMEISTER DENZ, LLP, BUFFALO (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 26, 2019. The judgment awarded plaintiff the sum of $114,219.06 as against defendant Wheel Equipment Leasing, LLC, doing business as Y.E.S. Leasing.

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

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, breach of warranties in a broker agreement (agreement) that it entered into with Wheel Equipment Leasing, LLC, doing business as Y.E.S. Leasing (defendant). Supreme Court granted plaintiff's motion insofar as it sought summary judgment on the complaint against defendant as well as dismissal of defendant's counterclaim, and awarded plaintiff a money judgment against defendant. Defendant appeals, and we affirm.

Plaintiff met its initial burden on the motion with respect to defendant by establishing, inter alia, that defendant submitted to it for financing a re-brokered and fraudulent transaction, which constituted a breach of various provisions of the agreement; that it sustained damages as a result of the breach; and that it was entitled to recover damages from defendant pursuant to the indemnification provision in the agreement. In opposition, defendant failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To the extent that defendant contends that there is an issue of fact concerning the applicability of the defense of estoppel, i.e., whether defendant justifiably relied on plaintiff to verify and collect an advance payment, we note that defendant

submitted no evidence of justification beyond nonprobative email correspondence (*see Inter-Power of N.Y. v Niagara Mohawk Power Corp.*, 213 AD2d 110, 114 [3d Dept 1995]; *see generally Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893 [4th Dept 2007]).

Defendant further contends that the court erred in granting the motion with respect to defendant inasmuch as defendant is entitled to additional discovery pursuant to CPLR 3212 (f). We conclude, however, that defendant did not make the requisite evidentiary showing that facts essential to justify opposition to the motion may exist but could not then be stated (*see Hewitt v Liverpool Cent. Sch. Dist.*, 134 AD3d 1507, 1509 [4th Dept 2015]; *see also M&T Bank v Benjamin* [appeal No. 2], 145 AD3d 1519, 1520 [4th Dept 2016]). Defendant's assertion that the parties intended the subject transaction to proceed outside of the purview of the agreement is based on hearsay (*see Lau v Rossi*, 150 AD2d 969, 970 [3d Dept 1989]) and, furthermore, that assertion is contradicted by the provision of the agreement stating that "all lease and financing documents and transactions" between the parties would be governed by the agreement. Defendant cannot use the extrinsic evidence it hopes to obtain from further discovery to vary that provision or to create an ambiguity with respect thereto (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]; *see also R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32-33 [2002], *rearg denied* 98 NY2d 693 [2002]; *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [2d Dept 1983]).

Contrary to its contention, defendant also failed to make an evidentiary showing that further discovery might yield facts substantiating its position that plaintiff waived its contractual protection against re-brokered transactions. Defendant submitted no evidence of a " 'clear manifestation of intent' " of waiver on the part of plaintiff (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *see Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1531-1532 [4th Dept 2017]). We likewise conclude that defendant did not make an evidentiary showing that further discovery might yield facts substantiating its position that plaintiff's damages were brought about by plaintiff's own negligence, or by plaintiff's alleged breach of contract due to plaintiff's failure to verify and collect an advance payment from the purported client before fully financing the transaction. Defendant's assertion of negligence is based on plaintiff's deviation from an alleged industry standard of care, but defendant failed to offer any evidence of such a standard (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]; *Preston v Castle Pointe, LLC*, 173 AD3d 1710, 1710-1711 [4th Dept 2019]; *Palmer v Barnes & Noble Booksellers, Inc.*, 34 AD3d 1287, 1288 [4th Dept 2006]). Defendant also failed to identify any covenant breached by plaintiff. Furthermore, inasmuch as defendant's counterclaim is based wholly on the alleged deviation from an industry standard of care, we reject defendant's contention that the existence of its counterclaim precludes an award of summary judgment against it.

We have examined defendant's remaining contentions and conclude

that none warrants modification or reversal of the judgment.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

442

CA 19-01711

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

IN THE MATTER OF ARBITRATION BETWEEN
CHRISTINE M. O'CONNELL, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR RESPONDENT-APPELLANT.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 1, 2019. The judgment awarded petitioner money damages upon an arbitration award.

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

Memorandum: This case arose from a motor vehicle accident that occurred when petitioner's vehicle was struck by a vehicle that failed to stop for a red light. Following petitioner's recovery of damages in an underlying action against the driver of the other vehicle, petitioner submitted a supplemental uninsured/underinsured motorist (SUM) coverage claim to respondent, State Farm Mutual Automobile Insurance Company (State Farm). The matter proceeded to compulsory arbitration, and the arbitrator awarded petitioner $2,250,000, less the setoff amount of $474,771.21, for a total of $1,775,228.79. Supreme Court granted petitioner's motion to confirm the arbitration award and denied State Farm's cross motion to vacate the award. In appeal No. 1, State Farm appeals from a judgment that, inter alia, confirmed the arbitration award. In appeal No. 2, State Farm appeals from an order that, inter alia, granted petitioner's motion to confirm the arbitration award and denied State Farm's cross motion to vacate the award. In appeal No. 3, State Farm appeals from an order denying its application, pursuant to CPLR 2601 and 5519 (c), for an order permitting payment of the judgment into court.

Preliminarily, inasmuch as the order appealed from in appeal No. 2 was subsumed in the judgment appealed from in appeal No. 1, appeal No. 2 must be dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140

AD2d 988, 988 [4th Dept 1988]; *see also Matter of Toussie v Coastal Dev., LLC*, 161 AD3d 533, 533 [1st Dept 2018]; *Deragon v Burkart*, 55 AD3d 1309, 1309 [4th Dept 2008]). Furthermore, inasmuch as State Farm does not challenge any aspect of the order appealed from in appeal No. 3, we dismiss that appeal as abandoned (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

We reject State Farm's contention in appeal No. 1 that the arbitration award is arbitrary and capricious, irrational and unsupported by the evidence. "It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Whitney v Perrotti*, 164 AD3d 1601, 1602 [4th Dept 2018]). As relevant here, a court may vacate an arbitration award if it finds that the rights of a party were prejudiced when "an arbitrator . . . exceeded his [or her] power" (CPLR 7511 [b] [1] [iii]). An arbitrator exceeds his or her power where, inter alia, the award is "irrational" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). "An award is irrational if there is no proof whatever to justify the award" (*Matter of Town of Scriba [Teamsters Local 317]*, 129 AD3d 1596, 1597 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). If the arbitrator "offers even a barely colorable justification for the outcome reached, the arbitration award must be upheld" (*Whitney*, 164 AD3d at 1602 [internal quotation marks omitted]; *see Matter of Town of Tonawanda [Town of Tonawanda Salaried Workers Assn.]*, 160 AD3d 1477, 1477 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]).

Where, as here, the parties are "subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny—it 'must have evidentiary support and cannot be arbitrary and capricious' " (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011], quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). " 'When reviewing compulsory arbitrations . . . , the court should accept the arbitrator's credibility determinations, even when there is conflicting evidence and room for choice exists' " (*Matter of Powell v Board of Educ. of Westbury Union Free School Dist.*, 91 AD3d 955, 955 [2d Dept 2012]).

Here, the record establishes that the findings of the arbitrator were rational, had evidentiary support, and were not arbitrary and capricious (*see Motor Veh. Acc. Indem. Corp.*, 89 NY2d at 223-224; *Matter of Bender [Lancaster Cent. Sch. Dist.]*, 175 AD3d 993, 996 [4th Dept 2019]). The arbitrator's decision reflects his review of the parties' submissions, the oral arguments of counsel, and the testimony of petitioner, and the arbitrator's evaluation of the testimony and analyzation of the medical, no-fault, and property damage records. The arbitrator noted that State Farm had conceded that petitioner had no prior relevant medical history but required an extensive three-

level spinal surgery at a very young age, and the arbitrator determined that the diagnosis of petitioner's spinal surgeon that petitioner's injuries were caused by the accident was supported by the opinions of the radiologists and other treating physicians. The arbitrator further determined that the diagnosis and opinions of petitioner's spinal surgeon and chiropractor were supported by the objective evidence, whereas the opinions of the neurosurgeon who conducted the independent medical examination of petitioner were at odds with the opinions of the radiologists and petitioner's surgeon regarding the severity and progression of petitioner's injuries. We thus conclude that there is evidentiary support for the arbitrator's conclusion that petitioner is entitled to collect the SUM benefits from State Farm.

We have considered the remaining contentions of State Farm and conclude that none warrants modification or reversal of the judgment.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

443

CA 19-01712

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

IN THE MATTER OF ARBITRATION BETWEEN
CHRISTINE M. O'CONNELL, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR RESPONDENT-APPELLANT.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 4, 2019. The order, among other things, granted the motion of petitioner to confirm an arbitration award and denied the cross motion of respondent to vacate an arbitration award.

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

Same memorandum as in *Matter of O'Connell (State Farm Mut. Auto. Ins. Co.)* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

444

CA 19-01713

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

IN THE MATTER OF ARBITRATION BETWEEN
CHRISTINE M. O'CONNELL, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR RESPONDENT-APPELLANT.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 22, 2019. The order denied the application of respondent for an order permitting payment into court.

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

Same memorandum as in *Matter of O'Connell (State Farm Mut. Auto. Ins. Co.)* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

445

CA 19-01994

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

ALLY FINANCIAL INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARUE F. JONATHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WESTERN NEW YORK LAW CENTER, BUFFALO (MATTHEW A. PARHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

KIRSCHENBAUM & PHILLIPS, P.C., FARMINGDALE (LOVE AHUJA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered February 5, 2019. The order granted the motion of plaintiff for summary judgment.

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

Same memorandum as in *Ally Fin. Inc. v Jonathan* ([appeal No. 2] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

446

CA 19-01996

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

ALLY FINANCIAL INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARUE F. JONATHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WESTERN NEW YORK LAW CENTER, BUFFALO (MATTHEW A. PARHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

KIRSCHENBAUM & PHILLIPS, P.C., FARMINGDALE (LOVE AHUJA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered February 15, 2019. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and vacating the award of damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action for a deficiency judgment to recover the balance allegedly due on a retail installment contract with respect to a motor vehicle that plaintiff repossessed and sold at an auction. In appeal No. 1, defendant appeals from an order granting plaintiff's motion for summary judgment on the complaint. In appeal No. 2, defendant appeals from a judgment awarding plaintiff damages as provided in the order.

We note at the outset that appeal No. 1 must be dismissed inasmuch as the order granting plaintiff's motion for summary judgment is subsumed in the final judgment (*see Wiedenhaupt v Hogan* [appeal No. 2], 89 AD3d 1525, 1526 [4th Dept 2011]).

With respect to appeal No. 2, we conclude, initially, that Supreme Court properly granted plaintiff's motion insofar as it sought summary judgment on the issue of liability. Plaintiff established on its motion that defendant stopped making the required payments under the contract and, in opposition, defendant did not dispute that she stopped making those payments (*see generally Ford Motor Credit Co., Inc. v Racwell Constr., Inc.*, 24 AD3d 500, 501 [2d Dept 2005]).

We agree, however, with defendant that the court should have

denied plaintiff's motion insofar as it sought summary judgment on the amount of damages. Plaintiff did not meet its initial burden of establishing the amount of the alleged deficiency as a matter of law (*cf. Central Natl. Bank, Canajoharie v Butler* [appeal No. 2], 294 AD2d 881, 882 [4th Dept 2002]; *see generally Ford Motor Credit Co. v Sawdey*, 286 AD2d 972, 972 [4th Dept 2001]; *Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282 [4th Dept 1997]). We note in particular that plaintiff failed to provide evidence of defendant's payment history, and failed to establish whether it applied certain applicable credits, including an unearned credit service charge pursuant to Personal Property Law §§ 305 and 315.

Moreover, plaintiff's moving papers failed to establish that the vehicle was sold in a commercially reasonable manner (*see Ford Motor Credit Co., Inc.*, 24 AD3d at 501). A "secured party seeking a deficiency judgment from the debtor after sale of the collateral bears the burden of showing that the sale was made in a commercially reasonable manner" (*GMAC v Jones*, 89 AD3d 985, 986 [2d Dept 2011] [internal quotation marks omitted]; *see generally* UCC 9-627 [b]). We conclude that, "[h]aving failed to set forth any of the facts and circumstances surrounding the sale, plaintiff failed to satisfy a prerequisite to obtaining a deficiency judgment and is not entitled to summary judgment" with respect to damages (*Ford Motor Credit Co. v Hernandez*, 210 AD2d 656, 657 [3d Dept 1994]; *see Ford Motor Credit Co., Inc.*, 24 AD3d at 501; *see also Mack Fin. Corp. v Knoud*, 98 AD2d 713, 714 [2d Dept 1983]). Thus, we modify the order accordingly.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

485

CA 19-01410

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

NATIONSTAR MORTGAGE, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARIE L. GOODMAN, ET AL., DEFENDANTS.

GREGORY GOODMAN, INTERVENOR-APPELLANT.

MUSCATO DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), FOR INTERVENOR-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), AND PINCUS LAW GROUP, PLLC, UNIONDALE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 24, 2018 in a foreclosure action. The order, among other things, granted plaintiff's motion for leave to reargue and renew its opposition to a prior motion of Gregory Goodman, and, upon reargument and renewal, rescinded Gregory Goodman's intervenor status, struck his answer and ordered that his claimed life estate in the subject premises is invalid and void.

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

Memorandum: Plaintiff commenced this action to foreclose on a reverse mortgage. Gregory Goodman, who alleged that he had a life estate in the subject property, moved for, inter alia, permission to intervene, which was granted by Supreme Court. Plaintiff thereafter moved for leave to reargue and renew its opposition to Goodman's motion. The court granted the motion and, upon reargument and renewal, rescinded, inter alia, Goodman's intervenor status, struck Goodman's answer with counterclaim, and ordered that Goodman's claimed life estate in the property was invalid and void. Goodman now appeals, and we affirm.

Contrary to Goodman's contention, the court did not abuse its discretion in granting plaintiff's motion seeking leave to reargue and renew (*see Smith v Cassidy*, 93 AD3d 1306, 1307 [4th Dept 2012]). With respect to that part of the motion seeking leave to renew, plaintiff submitted new facts—i.e., the affidavit of an attorney with the local county attorney's office, who explained the confusion that would result in title searches in the county clerk's office because of the

irregularities in the deed at issue—and showed that those new facts would change the prior determination (*see* CPLR 2221 [e] [2]). Additionally, the court properly granted that part of the motion seeking leave to reargue on the ground that it had mistakenly arrived at its earlier decision (*see Davis v Firman*, 53 AD3d 1101, 1102 [4th Dept 2008]; *see also* CPLR 2221 [d] [2]; *South Towns Surgical Assoc., P.C. v Steinig*, 165 AD3d 1630, 1631 [4th Dept 2018]). Moreover, and in any event, we agree with plaintiff that the court "retain[ed] continuing jurisdiction to reconsider its prior interlocutory order[] during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Carrington Mtge. Servs., LLC v Sudano*, 173 AD3d 1814, 1815 [4th Dept 2019]). Thus, even if plaintiff failed to present a reasonable justification for not presenting the new facts in opposition to Goodman's prior motion (*see* CPLR 2221 [e] [3]) and failed to raise an issue that was allegedly overlooked or misapprehended by the court (*see* CPLR 2221 [d] [2]), the court had the authority to sua sponte vacate its prior interlocutory order and issue a new order upon reconsideration. That discretion was properly exercised here (*see Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]).

Contrary to Goodman's further contention, the court properly in effect denied his motion seeking permission to intervene on the ground that Goodman has no interest in the property. The deed at issue showed that the grantors conveyed the property to the grantee, the Marie L. Goodman Trust (trust). The deed then stated that "**GRANTEE** hereby grants life use of the premises herein conveyed to Marie L. Goodman Trust to Marie L. Goodman, individually, and Greg Goodman during their natural lifetime." The trustee of the trust signed the deed on March 14, 2003, but the grantors did not sign the deed until six days later, on March 20, 2003. Thus, at the time the trust purported to grant the life estates, the trust did not have title to the property and could not convey any interest in it. "[A] grantor cannot convey what the grantor does not own," and "a deed from an entity that does not possess title or other conveyable interest is inoperative as a conveyance" (*Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 25 [1st Dept 2011]).

We reject Goodman's contention that the deed was not delivered by the trust until March 20, 2003. Real Property Law § 244 provides that "[a] grant takes effect, so as to vest the estate or interest intended to be conveyed only from its delivery; and all the rules of law, now in force, in respect to the delivery of deeds, apply to grants hereafter executed." There is a presumption that a deed was delivered and accepted as of its date, although that presumption "must yield to opposing evidence" (*Ten Eyck v Whitbeck*, 156 NY 341, 352 [1898]; *see Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370, 372 [1974]; *Lennar Northeast Partners Ltd. Partnership v Gifaldi*, 258 AD2d 240, 242-243 [4th Dept 1999], *lv denied* 94 NY2d 754 [1999]). Here, the court properly determined that the testimony at the fact-finding hearing did not rebut the presumption that the deed was delivered by the trust on March 14, the day it was signed by the trustee. After the trustee signed the deed, she mailed it back to the attorney who

had prepared the deed; that attorney had been hired by Goodman but was, the court found, acting as the attorney for all the parties. Regardless of who the attorney was representing in the transaction, nothing was done or said by the trustee that would indicate that there was no delivery of the deed at the time she sent it to the attorney (*see Crossland Sav. v Patton*, 182 AD2d 496, 496 [1st Dept 1992], *lv denied* 80 NY2d 755 [1992]; *Radecki v Radecki*, 279 App Div 1137, 1137-1138 [4th Dept 1952]; *cf. Manhattan Life Ins. Co.*, 33 NY2d at 372; *see generally National Bank of Sussex County v Betar*, 207 AD2d 610, 611-612 [3d Dept 1994]). There were no instructions given to the attorney to hold the deed in escrow (*see Lennar Northeast Partners Ltd. Partnership*, 258 AD2d at 243; *cf. Brackett v Barney*, 28 NY 333, 341 [1863]). A delivery of a deed cannot be made to the grantee conditionally (*see Hamlin v Hamlin*, 192 NY 164, 168 [1908]; *Blewitt v Boorum*, 142 NY 357, 363 [1894]; *TDNI Props., LLC v Saratoga Glen Bldrs., LLC*, 80 AD3d 852, 854-855 [3d Dept 2011]), and this is not a case where the deed was not to pass out of the possession of the trust until certain conditions were fulfilled (*see Hamlin*, 192 NY at 169; *cf. Coventry v McCreery*, 144 App Div 68, 70 [1st Dept 1911]).

As an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), plaintiff contends that the life estate is void because there cannot be more than one conveyance of property in a single deed. In light of our determination, we do not consider that contention.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

496

KA 12-00996

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. KOONS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 18, 2011. The appeal was held by this Court by order entered January 3, 2014, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (113 AD3d 1063 [4th Dept 2014]). The proceedings were held and completed.

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 criminal sexual act in the second degree (Penal Law § 130.45 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted rape in the second degree (§§ 110.00, 130.30 [1]). We previously held the cases, reserved decision, and remitted the matters to County Court to make and state for the record a determination whether to adjudicate defendant a youthful offender in both matters (*People v Koons*, 113 AD3d 1063, 1064 [4th Dept 2014]; *People v Koons*, 113 AD3d 1065, 1065 [4th Dept 2014]).

Upon remittal, the court declined to adjudicate defendant a youthful offender. Contrary to defendant's contention in both appeals, we conclude that the court did not abuse its discretion in denying him youthful offender status (*see People v Gibson*, 134 AD3d 1517, 1518 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*cf. People v Shrubsall*, 167 AD2d 929, 930-931 [4th Dept 1990]).

We further conclude in both appeals that defendant was afforded due process with respect to the imposition and revocation of interim

probation and that the court properly determined that defendant violated the conditions of his interim probation. Under the terms of defendant's plea agreement, he was placed on a one-year period of interim probation, which, if successfully completed, would be followed by concurrent sentences of 10 years' probation. The court explained the conditions of the interim probation to defendant during the plea colloquy and provided defendant with a written copy of those conditions, which defendant acknowledged and signed. During the period of interim probation, the probation department filed a petition charging defendant with violations of the conditions. Following a hearing, the court determined that defendant had violated the conditions of his interim probation and sentenced him to concurrent determinate terms of incarceration to be followed by a period of postrelease supervision.

Contrary to defendant's contention, "[t]he procedures set forth in CPL 410.70 do not apply where, as here, there has been no sentence of probation" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]). Instead, because interim probation is imposed prior to sentencing, the presentence procedures set forth in CPL 400.10 apply (*see Rollins*, 50 AD3d at 1536). Here, the "hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate' " (*id.*, quoting *People v Outley*, 80 NY2d 702, 712 [1993]; *see People v Wissert*, 85 AD3d 1633, 1634 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]; *People v Saucier*, 69 AD3d 1125, 1126 [3d Dept 2010]). Further, while defendant now claims that the court improperly relied on hearsay in making its determination, he failed to preserve that contention for our review inasmuch as he did not make that claim when the court gave him an opportunity to do so (*see People v Dissottle*, 68 AD3d 1542, 1544 [3d Dept 2009], *lv denied* 14 NY3d 799 [2010]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

497

KA 12-00997

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. KOONS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 18, 2011. The appeal was held by this Court by order entered January 3, 2014, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (113 AD3d 1065 [4th Dept 2014]). The proceedings were held and completed.

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

Same memorandum as in *People v Koons* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

550

CA 19-01190

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

IN THE MATTER OF LAWRENCE PEREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND 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.

LETITIA JAMES, 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 24, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that denied his inmate grievance, in which he challenged respondent's determination that he must participate in a sex offender counseling and treatment program (SOCTP). Petitioner appeals from a judgment that dismissed the petition. We affirm.

During the proceedings in Supreme Court, petitioner did not challenge the inclusion of his presentence report (PSR) in the record submitted to the court, and thus he failed to preserve for our review his contention that the court erred in receiving and reviewing the PSR in making its determination (*see generally Matter of Arrazola v State Dept. of Motor Vehs., Appeals Bd.*, 129 AD3d 1444, 1445 [4th Dept 2015]; *Matter of Brown v Feehan*, 125 AD3d 1499, 1502 [4th Dept 2015]; *Matter of Adams v Superintendent Bollinier*, 118 AD3d 1351, 1351 [4th Dept 2014]). Petitioner's contention that he was unaware that the PSR had been submitted is belied by the answer, in which respondent stated that his determination should be affirmed based on, among other things, "a review of the petitioner's [PSR], which is a confidential report and submitted to the Court for in camera review." In any event, inasmuch as respondent was required to submit to the court the entire administrative record upon which he made the determination at

issue (*see Matter of Collins v Behan*, 285 NY 187, 188 [1941]; *Matter of Tolliver v Fischer*, 125 AD3d 1023, 1023-1024 [3d Dept 2015], *lv denied* 25 NY3d 908 [2015]; *Matter of Gilbert v Endres*, 13 AD3d 1104, 1104 [4th Dept 2004]), respondent was required to provide the court with the PSR and any other evidence upon which the determination was based, regardless of its confidential nature (*see e.g. Matter of Watson v Annucci*, 173 AD3d 1606, 1606-1607 [4th Dept 2019]; *Matter of Cordova v Annucci*, 162 AD3d 1573, 1574 [4th Dept 2018]).

Petitioner further contends that the court erred in dismissing the petition because petitioner was acquitted of the murder in the first degree count in the indictment that charged him with committing the specific acts upon which respondent relied in determining that he must participate in SOCTP, and therefore respondent must conclude that petitioner did not commit those acts. We disagree. "It is hornbook law that an acquittal in a criminal proceeding is not binding on an administrative agency because of the differences in the burden of proof and rules of evidence" (*Matter of Webster v Van Lindt*, 117 AD2d 555, 558 [1st Dept 1986]; *see People ex rel. Dowdy v Smith*, 48 NY2d 477, 484 [1979]). Contrary to petitioner's further contention that respondent acted irrationally in imposing the SOCTP requirement, we conclude that, under the circumstances presented here, "it was rational both for respondent[] to refer petitioner to [SOCTP] and to deny his grievance in that regard" (*Matter of Harris v Granger*, 64 AD3d 837, 838 [3d Dept 2009], *lv denied* 13 NY3d 710 [2009]; *see Matter of Matos v Goord*, 27 AD3d 940, 941 [3d Dept 2006]).

Petitioner further contends that respondent originally concluded that he did not require SOCTP, and therefore the subsequent imposition of that requirement under the same circumstances is arbitrary and capricious. We conclude that, because "petitioner did not properly raise this issue in his grievance and . . . it was not administratively addressed, his failure to exhaust administrative remedies regarding this issue mandated dismissal of that portion of his petition" (*Matter of Clarke v Senkowski*, 255 AD2d 848, 849 [3d Dept 1998]; *see Matter of Henderson v Annucci*, 175 AD3d 976, 977 [4th Dept 2019]). Furthermore, petitioner failed to preserve that contention for our review because he failed to raise it in the petition (*see Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375 [4th Dept 2012]; *see generally Matter of Blue Lawn v County of Westchester*, 293 AD2d 532, 534 [2d Dept 2002], *lv denied* 98 NY2d 607 [2002]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

551

CA 19-01148

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

HARVARD STEEL SALES, LLC, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

DANIEL BAIN, DEFENDANT-RESPONDENT.

GARVEY LAW, P.C., BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ANTHONY M. KROESE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 13, 2019. The order granted defendant's motion to change the place of trial.

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

Opinion by TROUTMAN, J.:

Plaintiff commenced this action in Erie County seeking damages for a fraud allegedly perpetrated by defendant, who thereafter moved pursuant to CPLR 510 (1) to change the place of trial to New York County. We reject plaintiff's contention that Supreme Court abused its discretion in granting the motion. Accordingly, we affirm.

I

Plaintiff is a company based in Cleveland, Ohio, that purchases steel, has it galvanized, and resells it. Galvanization involves applying a protective zinc coating to steel. On May 3, 2013, plaintiff entered into an agreement with Galvstar, LLC, a company that operated a steel galvanizing plant in the City of Buffalo, Erie County. Galvstar's sole member is defendant, who is a resident of New York County. Pursuant to the agreement, Galvstar agreed to galvanize plaintiff's steel at its Buffalo plant.

Plaintiff's complaint asserts a single cause of action sounding in fraud, alleging that defendant fraudulently induced plaintiff to enter into the agreement through certain misrepresentations and omissions. More particularly, on or about November 7, 2012, defendant met in person with plaintiff's sole member, Jeremy Jacobs, and falsely told him that Galvstar had the ability to galvanize ".018 x 60 wide

steel" and to consistently produce "prime" quality galvanized steel. Those allegedly false representations were made for the purpose of inducing plaintiff to enter into the agreement. In addition, defendant allegedly concealed Galvstar's perilous financial condition. Based upon those misrepresentations and omissions, plaintiff entered into the agreement, bought steel, and subsequently shipped the steel to Galvstar, which processed it using deficient processes, thereby devaluing the steel.

Defendant moved pursuant to CPLR 510 (1) to change the place of trial to New York County on the ground that Erie County was not a proper county. In support of the motion, defendant submitted his own affidavit in which he averred that the November 7, 2012 meeting mentioned in the complaint, at which defendant made the allegedly false statements to Jacobs, took place not in New York State, but in Cleveland, Ohio. Thus, defendant contended that, because he is the only party who resides within New York State, venue is proper under CPLR 503 (a) only in the county in which he resides, i.e., New York County. In opposition to the motion, plaintiff submitted the affidavit of Jacobs, who averred that he met with defendant in Buffalo "multiple times" during "the relevant time period (late 2012 through mid-2013)," that defendant "misrepresented that Galvstar could consistently produce 'prime' quality galvanzied steel from its Buffalo facility," and that Galvstar subsequently devalued plaintiff's steel at its Buffalo facility. Plaintiff contended, moreover, that venue was proper in Erie County because a majority of the material witnesses resided therein. In further support of the motion, defendant submitted a reply affidavit in which he averred that any meetings that took place between himself and Jacobs in Erie County occurred after the agreement was executed, and thus had no bearing on the occurrence of the alleged fraud.

II

The decision whether to grant a change of venue is committed to the sound discretion of the trial court, and will not be disturbed absent a clear abuse of discretion (*see Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1735 [4th Dept 2016]). Three grounds are available for a change of venue: (1) "the county designated for that purpose is not a proper county"; (2) "there is reason to believe that an impartial trial cannot be had in the proper county"; or (3) "the convenience of material witnesses and the ends of justice will be promoted by the change" (CPLR 510). " 'To effect a change of venue pursuant to CPLR 510 (1), a defendant must show both that the plaintiff's choice of venue is improper and that its choice of venue is proper' " (*Matter of Zelazny Family Enters., LLC v Town of Shelby*, 180 AD3d 45, 47 [4th Dept 2019]; *see Marrero v Mamkin*, 170 AD3d 1159, 1160 [2d Dept 2019]). Venue is proper in the first instance in a county where one of the parties resides, a county where "a substantial part of the events or omissions giving rise to the claim occurred," or, if none of the parties resides in the state, any county designated by the plaintiff (CPLR 503 [a]).

Here, New York County is indisputably a proper county based upon

defendant's residence therein (*see* CPLR 503 [a]). Because none of the parties resides in Erie County, the sole question before the trial court was whether "a substantial part of the events or omissions giving rise to the claim occurred" in Erie County (*id.*). We note that plaintiff did not cross-move to retain venue in Erie County pursuant to CPLR 510 (3), and thus its averments and arguments related to the convenience of material witnesses are irrelevant (*see Hoskins v Kung*, 237 AD2d 988, 989 [4th Dept 1997]; *Bauer v Facilities Dev. Corp.*, 210 AD2d 992, 992-993 [4th Dept 1994]).

The legislature only recently added a provision to CPLR 503 (a) that allows venue based on the location of the events underlying the claim (*see* L 2017, ch 366), but the Federal Rules of Civil Procedure contain an identical provision (*see* 28 USC § 1391 [b] [2]), doubtless the model for the amended language in CPLR 503 (a). In determining whether venue is proper under that provision, the Second Circuit applies a two-part inquiry. First, the court must "identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims" (*Daniel v American Bd. of Emergency Medicine*, 428 F3d 408, 432 [2d Cir 2005]; *see Gulf Ins. Co. v Glasbrenner*, 417 F3d 353, 357 [2d Cir 2005]). Second, the court must "determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether 'significant events or omissions material to [those] claim[s] . . . have occurred in the district in question' " (*Daniel*, 428 F3d at 432). In a fraud claim, the act giving rise to the claim is the alleged making of the fraudulent statement (*see generally* PJI 3:20). Consistent with that, federal courts have found venue to be proper based upon "where the defendant allegedly made the fraudulent statements" (*Borumand v Assar*, 192 F Supp 2d 45, 52 [WD NY 2001]; *see Trois v Apple Tree Auction Ctr., Inc.*, 882 F3d 485, 493 [5th Cir 2018]; *Nabong v Paddayuman*, 289 F Supp 3d 131, 136 [D DC 2018]; *Siegel v Ford*, 2017 WL 4119654, *7 [SD NY, Sept. 15, 2017, No. 16-CV-8077 (JPO)]; *PI, Inc. v Quality Products, Inc.*, 907 F Supp 752, 762 [SD NY 1995]).

The question thus becomes whether defendant made fraudulent statements in Erie County that materially contributed to plaintiff's decision to enter into the agreement (*see generally Daniel*, 428 F3d at 432). Defendant showed in the first instance that the critical misrepresentations attributed to him on November 7, 2012 were actually made in Cleveland, Ohio—a fact that plaintiff does not dispute. Plaintiff, in opposition, failed to show that material, fraudulent statements were made in Erie County. Plaintiff's affidavit does not attribute specific false statements to defendant, other than that defendant "misrepresented that Galvstar could consistently produce 'prime' quality galvanized steel from its Buffalo facility." That averment is ambiguous, however. The "Buffalo facility" may refer to the place where defendant was when he made the allegedly false statements or to the place where the steel was to be produced. Without unambiguous allegations of specific false statements made by defendant in Erie County that contributed to plaintiff's decision to enter into the agreement, we cannot conclude that the court abused its discretion in granting defendant's motion to change the place of trial

to New York County.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

571

KA 18-00495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW J. WOOD, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 24, 2017. The judgment convicted defendant, upon a jury verdict, of unlawful imprisonment in the first degree and obstructing governmental administration 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 unlawful imprisonment in the first degree (Penal Law § 135.10) and obstructing governmental administration in the second degree (§ 195.05). Defendant's challenges to the legal sufficiency of the evidence underlying his conviction are unpreserved for appellate review (*see People v Geddis*, 173 AD3d 1724, 1725 [4th Dept 2019]). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that the verdict is not against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, we reject defendant's contention that he was denied meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

607

CA 19-02071

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

DOWNSTAIRS CABARET, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WESCO INSURANCE COMPANY, DEFENDANT-APPELLANT.

MOUND COTTON WOLLAN & GREENGRASS LLP, NEW YORK CITY (KEVIN F. BUCKLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order (denominated decision) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 20, 2019. The order denied the motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint insofar as it seeks to recover for actual loss of business income is dismissed.

Memorandum: Plaintiff commenced this breach of contract action contending, inter alia, that defendant was required pursuant to the terms of its insurance contract with plaintiff to pay for damage to plaintiff's property caused by flooding and for plaintiff's loss of business income. Defendant appeals from a decision denying its motion for partial summary judgment dismissing plaintiff's claim to recover its actual loss of business income on the grounds that the insurance contract was ambiguous and that issues of fact exist whether defendant is estopped from denying business income coverage. As a preliminary matter, although "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see generally* CPLR 5501 [c]; 5512 [a]), we conclude that the paper appealed from meets the essential requirements of an order (*see Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]). We therefore treat it as such (*see id.*), and we reverse.

"An insurance agreement is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). "Whether a contractual term is ambiguous must be determined by looking within the four corners of the document and not to extrinsic sources" (*Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]). "Ambiguity in a contract arises

when the contract, read as a whole, fails to disclose its purpose and the parties' intent" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]), or where its terms are subject to more than one reasonable interpretation (*see generally Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]).

We agree with defendant that the insurance contract unambiguously does not include coverage for actual loss of business income. The contract provides coverage "as described and limited" for certain categories of loss "for which a Limit Of Insurance is shown in the Declarations." Actual loss of business income, however, is neither described nor limited by the declarations. Thus, there is no actual loss of business income coverage "by reason of 'lack of inclusion' " (*Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982]), and "the policy as written could not have covered the liability in question under any circumstances" (*id.* at 134; *see Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 403 [1st Dept 2016]).

We agree with defendant's further contention that it is not estopped from denying coverage. "Where, as here, there is no coverage under the policy, the doctrines of waiver and estoppel may not operate to create such coverage" (*Charlestowne Floors, Inc. v Fidelity & Guar. Ins. Underwriters, Inc.*, 16 AD3d 1026, 1027 [4th Dept 2005]; *see generally Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1182 [4th Dept 2005]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

608

CA 19-01404

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

JAMES HARMON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT,
TERRY CISZEK, STEPHEN MIKAC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 24, 2019. The order granted the motion of defendants City of Buffalo, Buffalo Police Department, Terry Ciszek and Stephen Mikac for summary judgment dismissing plaintiff's complaint against them.

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

Memorandum: Plaintiff commenced this action asserting claims for, inter alia, false arrest, malicious prosecution, and the violation of his civil rights pursuant to 42 USC § 1983. This action stems from plaintiff's arrest for trespass (Penal Law § 140.05) and criminal mischief in the fourth degree (§ 145.00 [1]) for, among other things, pushing two garbage totes onto a neighboring driveway, thereby damaging sealant that had just been applied. The charges against plaintiff were eventually dismissed in Buffalo City Court because the misdemeanor information contained the incorrect address regarding where the incident occurred. City Court granted the People leave to re-present, but the People never did so. Plaintiff now appeals from an order granting the motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them, and we affirm.

As a preliminary matter, inasmuch as plaintiff raised in his appellate brief contentions concerning only the three claims identified above, he abandoned any contentions with respect to his other causes of action or claims (*see Vassenelli v City of Syracuse*, 138 AD3d 1471, 1476 [4th Dept 2016]; *see generally Ciesinski v Town of*

Aurora, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to plaintiff's contention, we conclude that Supreme Court properly granted the motion with respect to the claims for false arrest and malicious prosecution. "The existence of probable cause constitutes a complete defense to causes of action alleging false arrest . . . and malicious prosecution" (*Paulos v City of New York*, 122 AD3d 815, 817 [2d Dept 2014]; *see Gisondi v Town of Harrison*, 72 NY2d 280, 283 [1988]). "Generally, probable cause is established where an identified crime victim 'communicates to the arresting officer information affording a credible ground for believing the offense was committed and identifies the accused as the perpetrator' " (*Paulos*, 122 AD3d at 817). "[T]he issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts. Where there is 'conflicting evidence, from which reasonable persons might draw different inferences[,] . . . the question [is] for the jury' " (*Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991]; *see Burgio v Ince*, 79 AD3d 1733, 1734 [4th Dept 2010]).

Here, we conclude that defendants met their initial burden with respect to the false arrest and malicious prosecution claims of establishing that the officers had probable cause to arrest plaintiff (*see Paulos*, 122 AD3d at 817; *Burgio*, 79 AD3d at 1734; *Martinez v Wegmans Food Mkts.*, 270 AD2d 834, 834 [4th Dept 2000], *lv denied* 95 NY2d 757 [2000]). Defendants' evidence on the motion, including the officers' deposition testimony, established that the officers had probable cause to arrest plaintiff based on the complainant's statements to them and plaintiff's own admissions to the officers that he had walked over and damaged the neighboring property. Defendants also submitted the deposition and General Municipal Law § 50-h hearing testimony of plaintiff, wherein plaintiff admitted that he cut away yellow caution tape that cordoned off the driveway, and that he both pushed the garbage totes and tossed a plastic children's pool onto the driveway.

In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Specifically, plaintiff's self-serving, exculpatory testimony at his deposition and at the section 50-h hearing that, inter alia, he had not known there was sealant on the driveway and had no specific intent to cause damage did not raise an issue of fact with respect to probable cause (*see Quigley v City of Auburn*, 267 AD2d 978, 979-980 [4th Dept 1999]; *see also Rasheed v New Star Fashions*, 262 AD2d 623, 623 [2d Dept 1999]).

In light of the foregoing, we further conclude that defendants established that the officers are entitled to immunity from suit (*see Morris v City of Buffalo*, 151 AD3d 1723, 1723-1724 [4th Dept 2017]). We also note that plaintiff cannot establish a claim for malicious prosecution on the additional basis that "the dismissal [of the underlying criminal action] was not final and thus cannot support" such a claim (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956,

962 [4th Dept 2014]; *see also MacFawn v Kresler*, 88 NY2d 859, 860 [1996]; *Ward v Silverberg*, 85 NY2d 993, 994 [1995]). Therefore, based on the above, the court properly granted the motion with respect to the false arrest and malicious prosecution claims.

Finally, we reject plaintiff's contention that the court erred in granting the motion with respect to the 42 USC § 1983 claim on the ground that issues of fact exist whether he was deprived of his constitutional rights when he was jailed overnight instead of being released with a desk appearance ticket. The issuance of a desk appearance ticket is not constitutionally required (*see Bryant v City of New York*, 404 F3d 128, 138 [2d Cir 2005]). We have examined plaintiff's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

609.3

KA 15-02178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY BLUNT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Victoria M. Argento, J.), rendered September 16, 2014. The appeal was held by this Court by order entered July 31, 2019, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (174 AD3d 1504 [4th Dept 2019]). The proceedings were held and completed (John L. DeMarco, J.).

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]) and conspiracy in the second degree (§ 105.15). When this appeal was previously before us, we held that County Court (Argento, J.) erred in summarily denying defendant's motion to set aside the verdict pursuant to CPL 330.30 (2) (*People v Blunt*, 174 AD3d 1504, 1506 [4th Dept 2019]). "The sworn allegations in support of defendant's motion, including those in the affidavit of his mother, indicated that a juror may have had an undisclosed, potentially strained relationship with the mother resulting from attending high school and working together, possibly knew about defendant's criminal history, and purportedly attempted to speak with the mother's husband during a lunch break at trial, and that the alleged misconduct was 'not known to . . . defendant prior to the rendition of the verdict' " (*id.*, quoting CPL 330.30 [2]). We concluded that "the allegations required a hearing on the issue whether the juror's alleged misconduct prejudiced a substantial right of defendant" (*id.* [internal quotation marks omitted]). Upon remittal, the court (DeMarco, J.) conducted a hearing and thereafter denied the motion.

CPL 330.30 (2) provides that a verdict may be set aside on the ground "[t]hat during the trial there occurred, out of the presence of

the court, improper conduct by a juror, . . . which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict." Upon a hearing pursuant to CPL 330.30, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40 [2] [g]). When determining a motion to set aside a jury verdict based upon juror misconduct, "the facts must be examined to determine . . . the likelihood that prejudice would be engendered" (*People v Brown*, 48 NY2d 388, 394 [1979]; *see People v Neulander*, 34 NY3d 110, 113 [2019]; *People v Maragh*, 94 NY2d 569, 573-574 [2000]). "The trial court is invested with discretion and posttrial fact-finding powers to ascertain and determine whether the activity . . . constituted misconduct and whether the verdict should be set aside and a new trial ordered" (*Maragh*, 94 NY2d at 574).

We reject defendant's contention that the court abused its discretion in denying his motion to set aside the verdict on the ground of juror misconduct. Here, upon our review of the record, we conclude that " '[t]here is no basis to disturb the court's fact-findings and credibility determinations, which are entitled to great deference on appeal' " (*People v Dizak*, 93 AD3d 1182, 1185 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]). As the court properly concluded, the evidence adduced at the hearing established that the juror and the mother had nothing more than a superficial relationship—which arose from knowing each other during childhood and thereafter having minimal, sporadic personal and professional contact over the course of several decades—such that they recognized each other enough to occasionally engage in brief conversation during public encounters. There was no evidence of a history of enmity between the juror and the mother, and we defer to the court's assessment that the demeanor of the juror and the mother when they each testified did not suggest the existence of any past or present acrimony. We note that both the mother and her husband were present in the courtroom during the trial, but the interaction between the juror and the mother's husband during a recess amounted to nothing more than a mutual exchange of greetings in passing. We also agree with the court that defendant failed to establish that the juror engaged in misconduct by deliberately concealing her relationship with the mother (*see People v Hernandez*, 107 AD3d 504, 504 [1st Dept 2013], *lv denied* 22 NY3d 1199 [2014]; *cf. People v Rodriguez*, 100 NY2d 30, 33 [2003]). Instead, the juror's failure to disclose the relationship, and her testimony at the hearing in that regard, appeared to be the byproduct of her minimal contacts with the mother combined with the courtroom setting, thus evincing inadvertence rather than an attempt to deceive the court or conceal the relationship (*see Hernandez*, 107 AD3d at 504; *People v Adams*, 278 AD2d 920, 921 [4th Dept 2000], *lv denied* 96 NY2d 825 [2001]; *cf. Neulander*, 34 NY3d at 113-115).

We further agree with the court that, even assuming, arguendo, that the juror engaged in improper conduct by intentionally concealing the subject relationship, defendant failed to establish that such misconduct "may have affected a substantial right" (CPL 330.30 [2]; *see Rodriguez*, 100 NY2d at 34; *People v West*, 4 AD3d 791, 793 [4th

Dept 2004]; *Adams*, 278 AD2d at 921). In particular, nothing in the record suggests that the juror harbored any bias against the mother that may have been imputed to defendant inasmuch as the evidence at the hearing did not even establish that the juror was aware that defendant was related to the mother (*see People v Coles*, 27 AD3d 830, 831-832 [3d Dept 2006], *lv denied* 7 NY3d 757 [2006]). Moreover, there is no evidence to support defendant's speculative assertion that the juror likely obtained unfavorable information about him while working for the same employer as the mother or while occasionally attending gatherings that included members of defendant's family (*see Hernandez*, 107 AD3d at 504).

Finally, contrary to defendant's remaining contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

611

KA 20-00119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MACK, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), entered October 16, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order determining him to be a level two risk based on his conviction in federal court, upon his plea of guilty, of knowingly possessing child pornography (18 USC § 2252A [a] [5] [B]; [b] [2]). Contrary to defendant's contention, County Court's determination to assess points against him under risk factors 3 and 7 is supported by clear and convincing evidence (*see generally People v Tutty*, 156 AD3d 1444, 1444 [4th Dept 2017]). In connection with his federal conviction, defendant admitted to possessing more than 600 images and videos, the majority of which had been deleted from his computer and hard drives but were recovered through forensic analysis. Further, the case summary establishes that defendant received such images and videos through his involvement in an "online community of individuals who regularly sent and receive[d] child pornography via a website that operated on an anonymous online network." The case summary also describes the material recovered as including, inter alia, "children engaged in sexual conduct with adults," a video of a "pre-teen or early teenage girl," and another video of "two pre-teen girls." Based on the descriptions of the individuals depicted in the images and videos that were recovered, the number of images and videos recovered, and the fact that the material was obtained through an anonymous online network, we conclude that there is clear and convincing evidence that the images and videos depicted three or more different victims, as required for the assessment of points under risk factor 3, and that the victims were strangers to defendant, as required for the assessment of points under risk factor 7 (*see People v Gillotti*, 23

NY3d 841, 854-855 [2014]; *People v Foerster*, 173 AD3d 1686, 1687 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Tutty*, 156 AD3d at 1444-1445).

We likewise reject defendant's contention that the court erred in assessing 30 points under risk factor 5. Although defendant is correct that his guilty plea alone did not establish that the images and videos depicted victims less than 11 years old (*see generally People v Spratley*, 175 AD3d 962, 962 [4th Dept 2019]; *People v Hayes*, 166 AD3d 1533, 1533-1534 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]), defendant submitted to the court, and did not dispute, the evaluation of his sex offender treatment provider, who specifically recommended assessing defendant 30 points under risk factor 5 "due to his acknowledgment of images of children under 10 years of age." Further, the case summary establishes that defendant accessed material depicting a sexual act involving a four- or five-year-old child.

Contrary to defendant's additional contention, upon examining all of the relevant circumstances, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see generally People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]; *People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

627

CA 19-01243

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

U.S. BANK, NATIONAL ASSOCIATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHYLLIS J. REAMER, DEFENDANT-RESPONDENT
ET AL., DEFENDANTS.

RAS BORISKIN, LLC, WESTBURY (LEAH LENZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 13, 2018. The order denied the motion of plaintiff to vacate an order dated January 20, 2015, to restore the action to the calendar and for a default judgment.

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

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order of Supreme Court that denied its motion to vacate an order of the same court, which had, sua sponte, dismissed the complaint as abandoned. We affirm.

"If [a] plaintiff fails to take proceedings for the entry of judgment in one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215 [c]). "The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if sufficient cause is shown why the complaint should not be dismissed" (*BAC Home Loans Servicing, L.P. v Bertram*, 171 AD3d 994, 995 [2d Dept 2019] [internal quotation marks omitted]; *see Zenzillo v Underwriters at Lloyd's London*, 78 AD3d 1540, 1541 [4th Dept 2010]). In order to establish " 'sufficient cause,' plaintiff was required to present a valid excuse for [its] delay in proceeding with the action and to demonstrate a meritorious claim" (*Morton v Morton*, 136 AD2d 902, 902 [4th Dept 1988]; *see BAC Home Loans Servicing, L.P.*, 171 AD3d at 995).

Here, plaintiff failed to initiate proceedings for the entry of a default judgment within one year of the default, and indeed had not "taken the preliminary step toward obtaining a default judgment of

foreclosure and sale by moving for an order of reference within one year of the defendant's default" (*BAC Home Loans Servicing, LP v Maestri*, 134 AD3d 1593, 1593 [4th Dept 2015]; *cf. HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 839 [2d Dept 2015]). Plaintiff's proffered excuses for its delay failed to explain the multi-year delay in seeking a default judgment, and thus plaintiff failed to establish sufficient cause regardless of whether plaintiff established that it had a potentially meritorious claim (*see Bank of Am., N.A. v Santos*, 175 AD3d 449, 451 [2d Dept 2019]; *see generally Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

630.4

CA 19-00873

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

IN THE MATTER OF JOSEPH ROESCH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

JOSEPH ROESCH, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 1, 2019 in a CPLR article 78 proceeding. The judgment denied petitioner's application for poor person status and dismissed the petition.

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

Memorandum: Petitioner, a resident at Central New York Psychiatric Center, commenced this CPLR article 78 proceeding seeking the assignment of counsel to represent him. He appeals from a judgment in which Supreme Court, inter alia, dismissed the petition sua sponte. Initially, we note that, although denominated an order, the court's determination dismissing the petition is properly a judgment (*see* CPLR 7806) and, despite the fact that the judgment was entered sua sponte, the appeal from the judgment is properly before us inasmuch as "[a]n appeal may be taken to the appellate division as of right in an action, originating in the [S]upreme [C]ourt or any [C]ounty [C]ourt . . . from any final or interlocutory judgment" (CPLR 5701 [a] [1]; *cf. Sholes v Meagher*, 100 NY2d 333, 335 and n 1 [2003]; *see generally Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.*, 159 AD3d 1560, 1560 [4th Dept 2018]). Nevertheless, we affirm.

Although "[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances" (*Associated Gen. Contrs. of NYS, LLC*, 159 AD3d at 1560 [internal quotation marks omitted]), such circumstances exist here (*see generally Matter of Almonte v New York State Div. of Parole*, 2 AD3d 1239, 1240 [3d Dept 2003], *lv dismissed* 2 NY3d 758 [2004]). The instant petition seeks only the assignment of counsel, and sets forth no cause of action upon which any other relief is sought. Moreover, there is no indication in the petition that this respondent is responsible for any of the litany

of wrongdoing that petitioner wishes an attorney to investigate, nor does the petition allege that there is a pending action in which the assignment of counsel might be justified. Consequently, we conclude that "the petition is wholly without merit inasmuch as petitioner is not entitled to [the] relief" he seeks (*Matter of Monroe County Fedn. of Social Workers, IUE-CWA Local 381 v Stander*, 169 AD3d 1479, 1480 [4th Dept 2019]) and, "[u]nder these circumstances, [the court] properly dismissed the petition" (*Matter of Richards v Cuomo*, 88 AD3d 1043, 1044 [3d Dept 2011], *lv dismissed* 18 NY3d 830 [2011]; *see generally Matter of Escalera v State of New York*, 67 AD3d 1137, 1137-1138 [3d Dept 2009]). Furthermore, "the court did not abuse its discretion in denying [petitioner's] application to proceed as a poor person because the [CPLR article 78] petition does not have arguable merit" (*People ex rel. Charles B. v McCulloch*, 155 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 31 NY3d 906 [2018] [internal quotation marks omitted]; *see Jefferson v Stubbe*, 107 AD3d 1424, 1424 [4th Dept 2013], *appeal dismissed and lv denied* 22 NY3d 928 [2013]; *cf. Popal v Slovis*, 82 AD3d 1670, 1671 [4th Dept 2011], *lv dismissed* 17 NY3d 842 [2011]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

633

KA 19-01615

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAH SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DANIELLE NERONI REILLY, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered March 10, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree (two counts), burglary in the first degree (two counts), burglary in the second degree, attempted robbery in the first degree, robbery in the second degree (three counts) and attempted robbery in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is modified on the law by reversing that part convicting defendant of burglary in the second degree under count three of the indictment and dismissing that count and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), two counts of robbery in the first degree (§ 160.15 [3]), one count of burglary in the second degree (§ 140.25 [2]), and three counts of robbery in the second degree (§ 160.10 [1], [2] [a]). County Court sentenced defendant to various concurrent and consecutive terms of imprisonment. Defendant was later resentenced, with the court reducing the term of postrelease supervision on count nine of the indictment and directing that "all other sentences imposed will remain the same." In appeal No. 2, defendant appeals from that resentence.

As defendant contends and the People correctly concede in appeal No. 1, count three of the indictment, charging burglary in the second degree, must be dismissed as a lesser inclusory concurrent count of counts one and two, charging burglary in the first degree (*see* CPL 300.40 [3] [b]; *People v Clark*, 90 AD3d 1576, 1577 [4th Dept 2011], *lv denied* 18 NY3d 992 [2012]; *People v Ali*, 89 AD3d 1417, 1418 [4th Dept

2011], *lv denied* 18 NY3d 922 [2012]). We therefore modify the judgment accordingly.

Defendant also contends in appeal No. 1 that the court should have suppressed his statements to the police because they were rendered involuntary by the investigator's coercive promises. Although the record on appeal contains a transcript from the *Huntley* hearing, it does not include any subsequent determination of the issues raised at that hearing. We thus conclude that defendant, "by failing to seek a ruling on that part of his omnibus motion seeking to suppress his statements and by failing to object to the admission in evidence of his statements at trial," has abandoned his contention that the statements should have been suppressed (*People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). Even assuming, arguendo, that the court at some point denied that part of defendant's omnibus motion seeking to suppress his statements, we cannot consider "the merits of defendant's contention inasmuch as it was 'defendant's obligation to prepare a proper record' . . . , and defendant failed to include in the record on appeal his omnibus motion challenging the admissibility of the statements . . . and the court's suppression ruling" (*id.*).

Defendant further contends in appeal No. 1 that there was an insufficient foundation for the admission in evidence of two exhibits containing surveillance videos. We disagree. Exhibit 25 was properly authenticated by the testimony of a witness to the recorded events (*see People v Wemette*, 285 AD2d 729, 730 [3d Dept 2001], *lv denied* 97 NY2d 689 [2001]; *see generally People v Patterson*, 93 NY2d 80, 84 [1999]), and exhibit 26 was properly authenticated by one of the operators or maintainers of the equipment (*see People v Oquendo*, 152 AD3d 1220, 1220-1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]; *People v Lee*, 80 AD3d 1072, 1073-1074 [3d Dept 2011], *lv denied* 16 NY3d 832 [2011]; *see generally Patterson*, 93 NY2d at 84).

Defendant's contention in appeal No. 1 that the prosecutor impermissibly questioned the investigator and defendant about defendant's pretrial silence is not preserved for our review (*see People v Thomas*, 169 AD3d 1451, 1451 [4th Dept 2019]; *People v Boop*, 118 AD3d 1273, 1273 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]), and in any event lacks merit. Although as a general rule a prosecutor may not use a defendant's pretrial silence to impeach his or her trial testimony, that general rule is inapplicable where, as here, " 'a defendant speaks to the police and omits exculpatory information which he [or she] presents for the first time at trial' " (*People v Harris*, 57 AD3d 1523, 1524 [4th Dept 2008], *lv denied* 12 NY3d 817 [2009]; *see generally People v Savage*, 50 NY2d 673, 680-682 [1980], *cert denied* 449 US 1016 [1980]).

With respect to the rebuttal evidence presented at trial, defendant contends in appeal No. 1 that there was an inadequate foundation for the exhibits, that the evidence did not constitute proper rebuttal evidence, and that the exhibits were improperly withheld from discovery. During the People's offer of proof, defense counsel objected to the admission of the evidence on the ground that it

would create a "hearsay issue." Defendant has thus "failed to preserve his present contentions for our review, because they differ from th[at] raised before the trial court" (*People v Marra*, 96 AD3d 1623, 1625 [4th Dept 2012], *affd* 21 NY3d 979 [2013]; *see also People v Benton*, 87 AD3d 1304, 1305 [4th Dept 2011], *lv denied* 19 NY3d 862 [2012]; *People v Comerford*, 70 AD3d 1305, 1305 [4th Dept 2010]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In appeal No. 1, defendant further contends that he was denied a fair trial by numerous instances of prosecutorial misconduct on summation. Even assuming, arguendo, that defendant preserved his contention that the prosecutor improperly commented on matters not in evidence or became an unsworn witness when she played the surveillance videos during her summation and commented on the people and actions depicted therein, we nevertheless reject that contention. The videos were admitted in evidence and, although they were not played for any witness during the trial, the prosecutor's comments during summation were based on matters in evidence or were "fairly inferrable" from the testimony as well as the videos themselves (*People v Ashwal*, 39 NY2d 105, 110 [1976]; *cf. People v Wragg*, 26 NY3d 403, 411-412 [2015]).

Defendant's remaining contentions in appeal No. 1 concerning prosecutorial misconduct are not preserved for our review inasmuch as defendant failed to object to those alleged improprieties (*see People v Bassett*, 112 AD3d 1321, 1322 [4th Dept 2013], *lv denied* 23 NY3d 960 [2014]). In any event, "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Freeman*, 78 AD3d 1505, 1505-1506 [4th Dept 2010], *lv denied* 15 NY3d 952 [2010] [internal quotation marks omitted]; *see People v Dexter*, 259 AD2d 952, 954 [4th Dept 1999], *affd* 94 NY2d 847 [1999]).

Inasmuch as defense counsel was made fully aware of the precise contents of the jury's substantive notes, we conclude that "[t]he court . . . complied with its meaningful notice obligations under CPL 310.30, and [defense] counsel was required to object in order to preserve for appellate review any challenge [in appeal No. 1] to the trial court's procedure" (*People v Morris*, 27 NY3d 1096, 1098 [2016]; *see People v Nealon*, 26 NY3d 152, 160-161 [2015]; *People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). In any event, defendant's challenge to that procedure lacks merit.

Contrary to defendant's further contentions in appeal No. 1, we conclude that the verdict is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) 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 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We have reviewed defendant's remaining contention in appeal No. 1 and conclude that it lacks merit.

Inasmuch as the resentence in appeal No. 2 supersedes the original sentence in appeal No. 1, defendant's contentions related to the

sentence must be addressed in appeal No. 2, and "the appeal from the judgment in appeal No. [1] insofar as it imposed sentence must be dismissed" (*People v Hazzard* [appeal No. 1], 173 AD3d 1763, 1764 [4th Dept 2019]). Defendant failed to preserve for our review his contention that he was penalized for asserting his right to trial (*see People v Warmley*, 179 AD3d 1537, 1539 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]), but we nevertheless retain the power to review the severity of the resentence under our broad and plenary "sentence-review power" (*People v Delgado*, 80 NY2d 780, 783 [1992]). We conclude, however, that the resentence is not unduly harsh or severe.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

634

KA 18-00308

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAH SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DANIELLE NERONI REILLY, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Monroe County Court (Melchor E. Castro, A.J.), rendered July 28, 2017. Defendant was resentenced upon his conviction of attempted robbery in the second degree.

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

Same memorandum as in *People v Smith* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

658.1

KA 19-00791

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDRA GRIFFIN, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered October 17, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed on each count to a determinate term of three years of imprisonment, and as modified the judgment is affirmed and the matter is remitted to Yates County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon her conviction of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and sentencing her to concurrent determinate terms of five years of imprisonment, followed by a period of two years of postrelease supervision. Preliminarily, as defendant contends and the People correctly concede, even if defendant executed a valid waiver of the right to appeal at the underlying plea proceeding, it would not encompass her challenge to the severity of the sentence imposed following her violation of probation (*see People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Tedesco*, 143 AD3d 1279, 1279 [4th Dept 2016], *lv denied* 28 NY3d 1075 [2016]). We agree with defendant that the sentence is unduly harsh and severe. In light of defendant's young age, minimal criminal history, and prior efforts to address her substance abuse issues, as well as the nonviolent nature of the underlying crimes and the relatively minor infractions for which she was discharged from her treatment program thereby resulting in her violation of probation, we modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence on each count to a determinate term of imprisonment of three years, to be followed by the two years of postrelease supervision imposed by County Court, with the sentences

remaining concurrent.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

661

KA 19-01305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD BRYANT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered May 6, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order classifying him as a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) upon his conviction for attempted aggravated sexual battery in Tennessee, defendant argues that County Court erred in assessing five points under risk factor two for "sexual contact" with the victim. We agree.

"For risk level classification purposes, the definition[s] of terms set forth in the Penal Law are utilized" (*People v Parrish*, 159 AD3d 1238, 1239 [3d Dept 2018]), and the Penal Law defines "sexual contact" as "any touching of the *sexual or other intimate parts* of a person for the purpose of gratifying sexual desire of either party" (Penal Law § 130.00 [3] [emphasis added]). Here, the record is devoid of any evidence, much less the requisite clear and convincing evidence (*see generally People v Pettigrew*, 14 NY3d 406, 408 [2010]), that defendant touched the victim's "sexual or other intimate parts." Rather, the record contains only a statement from the victim that defendant "touched her inappropriately." An "inappropriate" touch, however, encompasses a far broader array of conduct than that classified as "sexual conduct" by section 130.00 (3). In the absence of evidence that defendant's "inappropriate" touch in this case amounted to "sexual contact" as defined by section 130.00 (3), the

victim's statement does not satisfy the People's burden to prove, by clear and convincing evidence, that five points should be assessed under risk factor two.

Moreover, although defendant was indicted for aggravated sexual battery under Tennessee law—an offense that includes "sexual contact" as an element (*see* Tenn Code Ann §§ 39-13-501 [6]; 39-13-504 [a])—he was ultimately convicted only of *attempted* aggravated sexual battery, and it is well established that " 'the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred' " (*People v Hinson*, 170 AD3d 1385, 1387 [3d Dept 2019], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006]). Thus, contrary to the court's determination, defendant's mere indictment for aggravated sexual battery does not satisfy the People's burden to prove by clear and convincing evidence that five points should be assessed under risk factor two. The People's reliance on *People v Jewell* (119 AD3d 1446 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]) is misplaced; in that case, the victim's grand jury testimony, which was submitted to the SORA court, proved the requisite "sexual contact" for purposes of risk factor two (*id.* at 1447-1448). Here, in contrast, the People did not submit grand jury testimony or any other evidence to demonstrate that defendant actually subjected the victim to "sexual contact" as defined by Penal Law § 130.00 (3).

Defendant is a presumptive level one sex offender without the five points improperly assessed under risk factor two. We therefore modify the order accordingly. Finally, inasmuch as the People explicitly declined to seek an upward departure at the SORA hearing, their present request to remit "for further proceedings to determine whether an upward departure may be warranted" is unpreserved and beyond our review (*see People v Current*, 147 AD3d 1235, 1238 [3d Dept 2017]; *cf. People v Felice*, 100 AD3d 609, 610 [2d Dept 2012]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

662

KA 18-01093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN CROMIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered March 12, 2018. The judgment convicted defendant upon a plea of guilty of possessing a sexual performance by a child (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of five counts of possessing a sexual performance by a child (Penal Law § 263.16). We reject defendant's contention that his waiver of the right to appeal is invalid. Contrary to defendant's contention, County Court's oral colloquy amply established that the right to appeal was "separate and distinct" from those rights automatically forfeited by pleading guilty (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bryant*, 28 NY3d 1094, 1096 [2016]) and did not "utterly mischaracterize[] the nature of the right . . . defendant was being asked to cede" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — [Mar. 30, 2020] [internal quotation marks omitted]). Indeed, we note with approval the court's reliance on the Model Colloquy, which "neatly synthesizes . . . the governing principles" regarding the waiver of the right to appeal (*id.* at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Additionally, the court informed defendant, before he entered his plea, "that the waiver would be a condition of the plea, and . . . the court assured itself prior to the completion of the plea proceeding . . . that defendant adequately understood the right that [he] was forgoing" (*People v Love*, 179 AD3d 1541, 1542 [4th Dept 2020], *lv denied* 35 NY3d 994 [2020] [internal quotation marks omitted]; *see generally People v Bradshaw*, 18 NY3d 257, 264-265 [2011]).

Defendant's valid waiver of the right to appeal encompasses his

challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

693

CA 19-01036

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

DALAINE M. PIESKER AND THOMAS R. PIESKER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PRICE LEASING CORPORATION, DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP, HAWTHORNE (STEPHEN D. STRAUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 25, 2019. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Dalaine M. Piesker (plaintiff) was injured in a motor vehicle accident while driving a truck owned by defendant. Plaintiffs are residents of New York, and defendant has an office and transacts business in New York, but the accident occurred in Virginia. Plaintiffs thereafter commenced this negligence action in New York. Supreme Court subsequently granted defendant's motion to dismiss the complaint on forum non conveniens grounds, reasoning that defendant would be prejudiced by litigating this action in New York because it would be unable to subpoena either the Virginia State Police officers who investigated the accident or the medical providers who treated plaintiff in Virginia immediately following the accident. We reverse.

"[W]here a plaintiff is a New York resident, a defendant bears the heavy burden of establishing that New York is an inappropriate forum before plaintiff's choice of forum will be disturbed" (*Homola v Longshore Transp. Sys.*, 204 AD2d 1052, 1052 [4th Dept 1994]; *see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1461 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]). Defendant failed to meet that heavy burden here. Although "New York courts lack the authority to subpoena out-of-state nonparty witnesses" (*Matter of OxyContin II*, 76 AD3d 1019, 1021 [2d Dept 2010]), defendant submitted no evidence establishing that the investigating police officers and the emergency medical providers would not testify

voluntarily in New York. The court's speculation to the contrary is unsupported by the record. In any event, both New York and Virginia are parties to the Uniform Interstate Depositions and Discovery Act (*see* CPLR 3119; Va Code Ann § 8.01-412.10), and defendant could, if necessary, depose the subject witnesses in Virginia and thereafter introduce those depositions at trial in lieu of in-person testimony in New York (*see* CPLR 3117 [a] [3] [ii]). Thus, the court erred in dismissing the complaint on forum non conveniens grounds (*see Corines v Dobson*, 135 AD2d 390, 390-393 [1st Dept 1987]; *see also Cellino & Barnes, P.C.*, 117 AD3d at 1461; *Homola*, 204 AD2d at 1052-1053).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

695.2

KA 18-01273

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARREL WHITEN, DEFENDANT-APPELLANT.

M. BENJAMIN SUSMAN, AUBURN, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered January 16, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) after his conviction of strangulation in the second degree (Penal Law § 121.12) and rape in the third degree (§ 130.25 [1]). We reject defendant's contention that County Court erred in assessing 15 points for inflicting physical injury on the victim. The SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines) incorporates the Penal Law definition of physical injury in Penal Law § 10.00 (9), i.e., "impairment of physical condition or substantial pain" (*see* Guidelines at 8). "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Here, the People submitted the victim's affidavit wherein she averred that defendant, during a violent confrontation leading up to the rape, wrapped his legs around her rib cage and repeatedly squeezed until she lost consciousness. Although the record does not establish that the victim sought medical care, the victim averred that she heard one of her ribs "pop" as defendant restricted her ability to breathe and that she experienced great pain before becoming unconscious (*see People v Pohl*, 160 AD3d 1453, 1453-1454 [4th Dept 2018], *lv denied* 32

NY3d 940 [2018]; *People v Kraatz*, 147 AD3d 1556, 1556-1557 [4th Dept 2017]). We thus conclude that the People established this risk factor by clear and convincing evidence (*see People v Cox*, 181 AD3d 1184, 1186 [4th Dept 2020], *lv denied* 35 NY3d 909 [2020]; *see generally* Correction Law § 168-n [3]).

Contrary to defendant's further contention, defense counsel was not ineffective in failing to request a downward departure from defendant's presumptive risk level inasmuch as such a request had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Allport*, 145 AD3d 1545, 1545-1546 [4th Dept 2016]; *People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

712

CA 19-01361

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

KEVIN KNETSCH, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

DELMONTE CORPORATION, ET AL., DEFENDANTS,
J.M. SMUCKER COMPANY AND BIG HEART PET
BRANDS, INC., DEFENDANTS-APPELLANTS-RESPONDENTS.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (GERARD RATH OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 16, 2019. The order granted in part and denied in part the respective posttrial motions of the parties.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 2, 2020,

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

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

713

CA 19-02232

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

MARK A. SHAW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SCEPTER, INC., DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY MARTOCCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER F. DEFRANCESCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered October 16, 2019. The order granted the motion of defendant for summary judgment dismissing the complaint, and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is premised on alleged violations of 12 NYCRR 23-1.5 (c) (3) and 23-9.2 (a) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained while unloading a man lift from the back of a flatbed truck onto premises owned by defendant. In order to unload the lift, plaintiff climbed into the lift's basket, which extended from the body of the lift towards the front of the truck. The basket itself was one foot over the flatbed, and the flatbed was three feet off the ground. When plaintiff tried to maneuver the lift, it unexpectedly rolled off the back of the flatbed, falling to the ground and causing the basket to come crashing down onto the flatbed. Plaintiff now appeals from an order granting defendant's motion for summary judgment dismissing the complaint and denying plaintiff's cross motion for partial summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims. We agree with plaintiff that Supreme Court erred in granting the motion with respect to the Labor Law § 240 (1) claim and the § 241 (6) claim insofar as it is premised on alleged violations of 12 NYCRR 23-1.5 (c) (3) and 23-9.2 (a). Therefore, we modify the order accordingly.

The court granted the motion with respect to the Labor Law §§ 240 (1) and 241 (6) claims on a ground not raised by defendant, i.e., that

plaintiff was not engaged in an activity protected under the Labor Law. We agree with plaintiff that defendant was not entitled to summary judgment on that ground. To fall under the protection of section 240 (1), "the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, [or] altering . . . of a building or structure' " (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]) or must have "involve[d] . . . such activities" (*McMahon v HSM Packaging Corp.*, 302 AD2d 1012, 1013 [4th Dept 2003]; *see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1325-1326 [4th Dept 2014]). Section 241 (6), similarly, "covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]; *see also Foots*, 119 AD3d at 1326).

Delivery of equipment is a covered activity if the equipment is being delivered to an active construction site (*see generally Serrano v TED Gen. Contr.*, 157 AD3d 474, 475 [1st Dept 2018]; *Hyatt v Young*, 117 AD3d 1420, 1421 [4th Dept 2014]) or is being "readied for immediate use" (*Sprague v Louis Picciano, Inc.*, 100 AD2d 247, 250 [3d Dept 1984], *lv denied* 62 NY2d 605 [1984]; *see also Kusayev v Sussex Apts. Assoc., LLC*, 163 AD3d 943, 944 [2d Dept 2018]). Delivery of equipment is not a covered activity if it is being delivered to an inactive construction site and is merely being "stockpil[ed] for future use" (*Parot v City of Buffalo*, 174 AD2d 1034, 1034 [4th Dept 1991]; *see also Kusayev*, 163 AD3d at 944).

Here, there is no dispute that plaintiff was delivering and unloading equipment at a work site. There is, however, no evidence regarding what was happening on that site. The deposition testimony submitted on the motion does not contain any information about when the project was to begin or if it had already started. Because it is unclear precisely " 'what type of work . . . plaintiff was performing at the time of the injury' " (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]), we conclude that defendant is not entitled to judgment as a matter of law with respect to the Labor Law §§ 240 (1) and 241 (6) claims on the ground that plaintiff was not engaged in a protected activity (*see Foots*, 119 AD3d at 1325; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

We also agree with plaintiff that the court erred in granting the motion with respect to the Labor Law § 240 (1) claim on the alternative ground that plaintiff was not subject to an elevation-related risk. "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). Although a fall from a flatbed truck generally does not present the sort of elevation-related risk that Labor Law § 240 (1) is intended to cover (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]; *Grabar v Nichols, Long & Moore Constr. Corp.*, 147 AD3d 1489, 1489-1490 [4th Dept 2017], *lv denied* 29 NY3d 909 [2017]), we have distinguished

those cases in which a falling object causes the injured worker to fall (*see Hyatt v Young*, 117 AD3d 1420, 1420-1421 [4th Dept 2014]; *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1566 [4th Dept 2010]). Here, it was the falling lift that caused plaintiff to fall onto the flatbed truck and sustain injury, and thus we conclude that the harm to plaintiff "flow[ed] directly from the application of the force of gravity" to the lift (*Runner*, 13 NY3d at 604; *see generally Potter*, 71 AD3d at 1566).

Although we agree with plaintiff that the court erred in granting the motion with respect to the Labor Law § 240 (1) claim for those reasons, we nevertheless reject plaintiff's contention that the court erred in denying his cross motion with respect to that claim (*see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

Furthermore, we agree with plaintiff that the court erred in granting the motion with respect to the Labor Law § 241 (6) claim insofar as it is premised on alleged violations of 12 NYCRR 23-9.2 (a) and 23-1.5 (c) (3) on the alternative grounds that plaintiff's reliance on the former was "misplaced" and that plaintiff's reliance on the latter was improper because it was first asserted in opposition to the motion. "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (*Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 959 [2d Dept 2012]; *see Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014]). Section 23-9.2 (a) is sufficiently specific, imposing "an affirmative duty on employers to 'correct[ ] by necessary repairs or replacement' 'any structural defect or unsafe condition' in equipment or machinery '[u]pon discovery' or actual notice of the structural defect or unsafe condition" (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009]). Section 23-1.5 (c) (3) is also sufficiently specific (*see Salerno v Diocese of Buffalo, N.Y.*, 161 AD3d 1522, 1524 [4th Dept 2018]), and imposes a similar duty (*see* 12 NYCRR 23-1.5 [c] [3]). Although plaintiff alleged a violation of section 23-1.5 (c) (3) for the first time in opposition to the motion, a plaintiff may be entitled to leave to amend his or her bill of particulars where, as here, he or she makes a showing of merit, raises no new factual allegations or legal theories, and causes the defendant no prejudice (*see Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]; *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]). Contrary to the parties' assertions, we conclude that there are issues of fact whether the lift was defective and, if so, whether defendant had the requisite notice of the defect, and those issues preclude summary judgment to either party with respect to the section 241 (6) claim insofar as it is premised on alleged violations of 12 NYCRR 23-9.2 (a) and 23-1.5 (c) (3) (*see generally Misicki*, 12 NY3d at 521). At his deposition, plaintiff testified that the lift could not be unloaded from the truck by using the truck's winch because the lift's freewheeling mechanism was defective, and he further testified that he reported the defect to his employer. Another employee, however, provided deposition testimony that he used the exact same man lift approximately 100 times and that

it had no mechanical issues.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

762

CA 20-00057

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

VIRGINIA F. KLEIST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL STERN, DEFENDANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (Paula L. Feroleto, J.), entered November 14, 2019. The judgment, among other things, determined that plaintiff was not entitled to equitable relief.

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

Memorandum: Plaintiff commenced this action seeking to enjoin defendant from violating certain covenants and restrictions applicable to property owners within the Chautauqua Shores subdivision and to require him to remove any buildings that were in violation thereof. On a prior appeal from an order granting the motion of defendant for a directed verdict and dismissing the amended complaint, we modified the order by denying the motion in part and reinstating the amended complaint to the extent it alleges violations of paragraphs four and five of the covenants and restrictions, and granted a new trial with respect to those claims (*Kleist v Stern*, 174 AD3d 1451, 1452 [4th Dept 2019]). A second nonjury trial was held before a different justice, at which the parties stipulated to using all of the proof from the first nonjury trial, and then defendant called two witnesses. At the conclusion of the trial, Supreme Court issued a judgment determining that if defendant was in violation of the fifth paragraph of the covenants and restrictions, plaintiff was not entitled to equitable relief because she also would be in violation of that same paragraph. The court further determined that defendant violated the fourth paragraph of the covenants and restrictions, but that plaintiff was not entitled to equitable relief after the court considered various factors in balancing the equities. We affirm.

We reject plaintiff's contention that the court erred in determining that she violated the fifth paragraph of the covenants and

restrictions, which provided that "[n]o building shall be constructed . . . closer than 100 feet from the lake line." There was conflicting evidence presented at trial whether defendant's covered porch was in violation of that paragraph, and there was evidence presented that the majority of the lakefront properties had one- or two-story decks, porches, and patios that were located in the setbacks, including plaintiff's deck. The court never decided whether there was a violation of the fifth paragraph of the covenants and restrictions, but implicitly determined that decks, porches, and patios—whether one-story or two-story, covered or uncovered—were the same inasmuch as they either all violated the fifth paragraph of the covenants and restrictions or they all did not. We conclude that the court's determination was reached upon a fair interpretation of the evidence (*see generally Bubba's Bagels of Wesley Hills, Inc. v Bergstol*, 18 AD3d 411, 412 [2d Dept 2005]). We thus agree with the court that if defendant was indeed in violation of that paragraph of the covenants and restrictions, plaintiff was not entitled to equitable relief because she was also in violation of it (*see Gallon v Hussar*, 172 App Div 393, 400 [2d Dept 1916]; *cf. Rowland v Miller*, 139 NY 93, 103 [1893]; *see also Hauser v Hauser*, 162 AD3d 992, 993 [2d Dept 2018]; *see generally Mandalay Prop. Owners Assn. v Keiseheuer*, 291 AD2d 483, 483 [2d Dept 2002]).

We reject plaintiff's further contention that the court erred in denying her equitable relief upon defendant's admitted violation of the fourth paragraph of the covenants and restrictions. That paragraph provides that "[n]o building shall be constructed on any lot so that any part thereof shall be closer than . . . ten (10) feet from the side . . . lot line." The evidence at trial demonstrated that the right side of the house was eight feet one inch from the side lot line. Contrary to plaintiff's implicit contention, a party is not automatically entitled to equitable relief when a violation of a restrictive covenant is established (*see Forstmann v Joray Holding Co.*, 244 NY 22, 29 [1926]; *see also DiMarzo v Fast Trak Structures*, 298 AD2d 909, 910-911 [4th Dept 2002]). Whether a party is entitled to equitable relief upon a violation of a restrictive covenant depends on the particular circumstances of each case (*see Forstmann*, 244 NY at 29; *Goodfarb v Freedman*, 76 AD2d 565, 574 [2d Dept 1980]). A court should determine whether enforcing the covenant and restriction would substantially harm the defendant without any substantial benefit to the plaintiff (*see Forstmann*, 244 NY at 29; *Goodfarb*, 76 AD2d at 574; *Fanning v Grosfent*, 58 AD2d 366, 367 [3d Dept 1977]). The court has discretion whether to grant an equitable remedy after balancing the equities (*see Evangelical Lutheran Church v Sahlem*, 254 NY 161, 167 [1930]; *Goodfarb*, 76 AD2d at 574).

We agree with the court that plaintiff is not entitled to equitable relief (*see generally DiMarzo*, 298 AD2d at 911; *Westmoreland Assn. v West Cutter Estates*, 174 AD2d 144, 151-152 [2d Dept 1992]). As the court noted, defendant knew, or should have known, of the side setback violation on the right side, yet he chose to construct his house in disregard of the fourth paragraph of the covenants and restrictions, defendant did not act in good faith with respect to that

violation, and the hardship was self imposed (*see Westmoreland Assn.*, 174 AD2d at 151-152). As the court further noted, however, enforcement of the restriction would have little benefit to plaintiff inasmuch as the violation had no impact on the value of plaintiff's home, the violation did not detract from any neighbor's view of the lake, and the violation occurred on the side of defendant's property that was not adjacent to another residential lot. A balancing of the equities under all the circumstances of the case established that plaintiff was not entitled to injunctive relief for the right side lot line violation (*see Sunrise Plaza Assoc. v International Summit Equities Corp.*, 288 AD2d 300, 301 [2d Dept 2001], *lv denied* 97 NY2d 612 [2002]; *see also Fanning*, 58 AD2d at 367-368).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

773

KA 14-02245

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KESEAN R. MCKENZIE-SMITH, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Francis A. Affronti, J.), rendered November 19, 2013. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree (three counts) and attempted robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), defendant contends that the conviction is not supported by legally sufficient evidence with respect to the element of identity. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise conclude that the verdict is not against the weight of the evidence with respect to identity (*see People v Bloodworth*, 179 AD3d 1534, 1535 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]; *People v Thomas*, 176 AD3d 1639, 1640-1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that his right to be present during questioning of prospective jurors regarding “bias, hostility, or predisposition to believe or discredit the testimony of potential witnesses” was violated (*People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). At the start of jury selection, there was no discussion of defendant’s right to be present at the bench during sidebar conferences with prospective jurors, nor did defendant waive that right during the first pass of jury selection. During that pass, Supreme Court excused a prospective

juror for cause, and defendant's counsel exercised a peremptory challenge to another prospective juror, both of whom had approached the bench for side bar conferences with the court and counsel. After that pass, the prosecutor noted the lack of an *Antommarchi* waiver.

With respect to the prospective juror excused by the court for cause, it is well settled that "reversal is not required where the defendant's attorney does not exercise a choice to exclude a prospective juror, such as where a prospective juror is excused for cause" (*People v Wilkins*, 175 AD3d 867, 868 [4th Dept 2019], *lv granted* — AD3d — [Oct. 8, 2019] [4th Dept 2019]). Here, although defense counsel stated that he did not oppose excusing the juror for cause, "the court had already made its determination when that statement was made, and thus 'defendant's presence [at the conference regarding that prospective juror] could not have afforded him . . . any meaningful opportunity to affect the outcome' " (*id.*, quoting *People v Roman*, 88 NY2d 18, 26 [1996], *rearg denied* 88 NY2d 920 [1996]).

A second prospective juror was peremptorily excused by defendant's counsel, however, and, during a sidebar conference at which defendant was not present, that juror was questioned "to search out [her] bias, hostility or predisposition to believe or discredit the testimony of potential witnesses" (*Antommarchi*, 80 NY2d at 250). Consequently, we conclude that, "absent a knowing and voluntary waiver by defendant of his right to be present at that sidebar conference, his conviction cannot stand" (*People v McAdams*, 22 AD3d 885, 886 [3d Dept 2005]). The only evidence in the record concerning a waiver consists of a conversation between the court, defendant's counsel and codefendant's counsel that occurred after the prospective juror was excused, in which codefendant's counsel indicated that he had just discussed with codefendant the right to approach the bench during such conferences, and defendant's counsel merely assented. Inasmuch as the discussion was vague and prospective, and there is no indication that defendant or defendant's counsel were waiving defendant's *Antommarchi* rights retrospectively, that conversation is insufficient to establish that defendant waived those rights concerning the questioning of the prospective juror at issue here. We therefore reverse the judgment of conviction and grant a new trial.

We have considered defendant's remaining contentions and conclude that they lack merit, or they are academic in light of our determination.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

774

CAF 19-01010

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

IN THE MATTER OF RICHARD PHALEN,
PETITIONER-APPELLANT,

V ORDER

JOLYNN M. GORSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 25, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition to modify a prior order of visitation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Daniels v Jones*, 144 AD3d 1420, 1420 [3d Dept 2016]; *Matter of Smith v Cashaw*, 129 AD3d 1551, 1551 [4th Dept 2015]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

775

CAF 19-00907

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

IN THE MATTER OF RANDOLPH GORSKI AND
BARBARA GORSKI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD PHALEN, RESPONDENT-APPELLANT,
AND JOLYNN GORSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

THE WILLIAMS LAW FIRM, LLP, BATAVIA (THOMAS D. WILLIAMS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 25, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioners custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent-appellant challenges the finding of extraordinary circumstances and the order is affirmed without costs.

Memorandum: Petitioners petitioned for custody of their granddaughter, the subject child in this proceeding. Following a hearing, Family Court found the extraordinary circumstances necessary to inquire into the child's best interests, and further found that the child's interests were best served in petitioners' custody. The court thus granted the petition and awarded supervised visitation to respondents, the child's parents. Respondent father then appealed from that order. During the pendency of the appeal, however, the court entered an order on consent of the parties that continued custody with petitioners and awarded respondents unsupervised visitation with the child.

The later consent order renders moot the father's challenge to the court's finding regarding the child's best interests (*see Matter of Wallace v Eure*, 181 AD3d 1329, 1329 [4th Dept 2020]; *Matter of Daniels v Jones*, 144 AD3d 1420, 1420 [3d Dept 2016]), but not his challenge to the court's finding of extraordinary circumstances (*see*

Matter of Green v Green, 139 AD3d 1384, 1385 [4th Dept 2016]; *Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585 [4th Dept 2014]). Contrary to the father's contention, the fourth ordering paragraph in the consent order—which purports to reserve his right to challenge the entirety of the order on appeal—is ineffective and unenforceable because "litigants have no authority to 'stipulate to enlarge our appellate jurisdiction' " (*Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1556 [4th Dept 2018]; *see Commissioner of Social Servs. of City of N.Y. v Harris*, 26 AD3d 283, 286 [1st Dept 2006]). Indeed, it is well established that litigants " 'cannot, by agreement between them, . . . predetermine the scope of [appellate] review' " (*Dumond*, 166 AD3d at 1556, quoting *Amherst & Clarence Ins. Co. v Cazenovia Tavern*, 59 NY2d 983, 984 [1983], *rearg denied* 60 NY2d 644 [1983]; *see Matter of Shaw*, 96 NY2d 7, 13 [2001], citing *Robinson v Oceanic Steam Nav. Co.*, 112 NY 315, 324 [1889]). We therefore dismiss the father's appeal except insofar as he challenges the finding of extraordinary circumstances (*see generally Matter of Maria P. [Anthony P.]*, 182 AD3d 1028, 1029 [4th Dept 2020]; *Matter of Jason M. [Joshua M.]* [appeal No. 2], 181 AD3d 1206, 1207 [4th Dept 2020]). On the merits, we reject the father's challenges to the court's finding of extraordinary circumstances for reasons stated in the court's written decision dated March 18, 2019.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

821

TP 20-00254

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

IN THE MATTER OF CHRISTIAN CABALLERO, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH 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 11, 2020) 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 a determination, following a tier III disciplinary hearing, that he violated several inmate rules. To the extent that petitioner contends that the determination finding that he violated inmate rules 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), and 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]) is not supported by substantial evidence, we note that his plea of guilty to those violations precludes our review of his contention (*see Matter of Ingram v Annucci*, 151 AD3d 1778, 1778 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Matter of Williams v Annucci*, 133 AD3d 1362, 1363 [4th Dept 2015]). Although we agree with petitioner that his hearing was not commenced or concluded within the regulatory time period, "it is well settled that, '[a]bsent a showing that substantial prejudice resulted from the delay, the regulatory time limits are construed to be directory rather than mandatory' " (*Matter of Sierra v Annucci*, 145 AD3d 1496, 1497 [4th Dept 2016]; *see Matter of McMillian v Lempke*, 149 AD3d 1492, 1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]). Here, petitioner has failed to show any prejudice from the delay and, as a result, "the failure to [commence and] complete the hearing in a

timely manner does not warrant annulment of the determination" (*Matter of Watson v Annucci*, 173 AD3d 1606, 1607 [4th Dept 2019]). Contrary to the final contention of petitioner, we conclude that "the inmate misbehavior report[] provided him with adequate notice of the charges as required by 7 NYCRR 251-3.1 (c)" (*Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

827.1

KA 20-01138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARRY HABBERFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 10, 2018. The judgment convicted defendant upon her plea of guilty of assault in the second degree.

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

Same memorandum as in *People v Habberfield* ([appeal No. 1] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

827

KA 18-02045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARRY HABBERFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Livingston County Court (Dennis S. Cohen, J.), rendered October 25, 2018. Defendant was resentenced upon her conviction of assault in the second degree.

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [7]) and, in appeal No. 1, she appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 2 was superseded by the resentence in appeal No. 1, the appeal from the judgment in appeal No. 2 insofar as it imposed sentence must be dismissed (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]). We otherwise affirm the judgment in appeal No. 2 and affirm the resentence in appeal No. 1.

In appeal No. 2, defendant contends that her plea was not knowingly, voluntarily, or intelligently entered. We conclude that defendant " 'failed to preserve that contention for our review by moving to withdraw [the] plea or to vacate the judgment of conviction' " (*People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *see People v Trinidad*, 23 AD3d 1060, 1061 [4th Dept 2005], *lv denied* 6 NY3d 760 [2005]). This case does not fall within the "rare exception to the preservation rule" (*Trinidad*, 23 AD3d at 1061; *see People v Lopez*, 71 NY2d 662, 666 [1988]).

We reject defendant's contention in appeal No. 1 that County

Court should have held a hearing to address certain alleged errors in the presentence report. Although defendant "object[ed] to several of th[o]se errors at sentencing," because she did not specifically request a hearing, that issue is unpreserved for our review (*People v Elmore*, 175 AD3d 1003, 1006 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *see People v Russell*, 133 AD3d 1199, 1200 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). In any event, defendant's contention is without merit because there is nothing in the record to establish that the court relied on any of the alleged errors in imposing sentence (*see People v Ferguson*, 177 AD3d 1247, 1250 [4th Dept 2019]; *Elmore*, 175 AD3d at 1006).

Finally, in appeal No. 1, we conclude that the resentence is not unduly harsh or severe.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

832

CA 19-01813

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

BRYAN G. BROCKWAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (PETER L. VEECH OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered August 7, 2019. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on a patch of snow and ice located outside the Chautauqua County Courthouse. The complaint alleged that a dangerous or defective condition existed as a result of defendant's negligent snow and ice removal operations and procedures, and its failure to provide "a means of ingress/egress with a handrail." We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

Defendant established its entitlement to judgment as a matter of law by submitting evidence that it did not receive prior written notice of the allegedly dangerous or defective condition as required by Chautauqua County Local Law No. 4-09 (*see Brick v City of Niagara Falls*, 121 AD3d 1591, 1592 [4th Dept 2014]). In opposition, plaintiff failed to raise a triable issue of fact whether such prior written notice was given (*see Scovazzo v Town of Tonawanda*, 83 AD3d 1600, 1601 [4th Dept 2011]). Further, plaintiff failed to raise an issue of fact regarding the applicability of an exception to the prior written notice requirement, i.e., as relevant here, that defendant "affirmatively created the defect through an act of negligence" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129-130 [2011]; *see generally Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). A municipality " 'may not be held liable for the mere passive failure to remove all snow and ice' " or to install a handrail because "[s]uch acts are acts of omission rather than affirmative acts of negligence" (*Alfano v City*

of New Rochelle, 259 AD2d 645, 645 [2d Dept 1999]; *see Davidson v Town of Chili*, 35 AD3d 1246, 1247 [4th Dept 2006], *lv denied* 8 NY3d 809 [2007]; *Gorman v Ravesi*, 256 AD2d 1134, 1135 [4th Dept 1998]). Here, plaintiff's submissions establish only defendant's alleged "nonfeasance, as opposed to affirmative negligence," and the exception to the prior written notice requirement for affirmative acts of negligence therefore does not apply (*Gorman*, 256 AD2d at 1135).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

850

CAF 19-01997

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

IN THE MATTER OF SUSAN Y. HILKERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAURIE PARSONS-O'DELL, RESPONDENT-RESPONDENT,
AND ANTHONY HEAD, RESPONDENT-APPELLANT.

IN THE MATTER OF ANTHONY HEAD,
PETITIONER-APPELLANT,

V

LAURIE PARSONS-O'DELL AND SUSAN Y. HILKERT,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

ROBERT A. DINIERI, CLYDE, ATTORNEY FOR THE CHILD.

EDWIN P. FRICK, SODUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered September 3, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner-respondent Susan Y. Hilkert and respondent-petitioner Anthony Head shall share joint custody of the subject children.

It is hereby ORDERED that said appeal from the order insofar as it concerns the oldest child of respondent-petitioner is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent-petitioner father appeals from an order that, inter alia, awarded the father and petitioner-respondent maternal grandmother (grandmother) joint legal custody of the two subject children, with primary physical custody to the grandmother. Initially, we dismiss as moot the appeal from the order insofar as it concerns the oldest child because he has attained the age of majority (*see Matter of Susan T. v Crystal T.*, 175 AD3d 1829, 1830 [4th Dept 2019]).

Contrary to the father's contention, the grandmother met her

burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether it is in the best interests of the younger child (child) to award her custody (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]). "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Matter of Steeno v Szydlowski*, 181 AD3d 1224, 1225 [4th Dept 2020] [internal quotation marks omitted]). "Examples of extraordinary circumstances found by courts include prolonged separation, disruption of custody for a prolonged period of time and attachment of the child to the custodian . . . , sibling separation . . . , psychological bonding of the child to the custodian and potential harm to the child . . . , the biological parent's abdication of parental rights and responsibilities . . . and the child's poor relationship with the biological parent" (*Matter of Banks v Banks*, 285 AD2d 686, 687 [3d Dept 2001]). Here, the evidence at the hearing established that the child's biological mother is deceased, respondent Laurie Parsons-O'Dell, who previously had custody of the child, relinquished custody, and the father had gone years without seeing the child.

It is well settled that, "once extraordinary circumstances are found, the court must then make the disposition that is in the best interest[s] of the child" (*Bennett*, 40 NY2d at 548), and we conclude that Family Court's custody determination is in the child's best interests (*see Matter of Stent v Schwartz*, 133 AD3d 1302, 1303 [4th Dept 2015], *lv denied* 27 NY3d 902 [2016]). Here, the evidence at the hearing established that the child has been doing well in school while living with the grandmother pursuant to a temporary order, and the grandmother appears to be willing to foster a relationship between the child and the father. The father, on the other hand, had only just before the hearing reconnected with the younger child, and the father's request for physical custody of the child, which would require the child to move to the father's residence in South Carolina, is against the child's wishes.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

851

CAF 20-00011

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

IN THE MATTER OF SUSAN Y. HILKERT,
PETITIONER-RESPONDENT,

V ORDER

LAURIE PARSONS-O'DELL, RESPONDENT-RESPONDENT,
AND ANTHONY HEAD, RESPONDENT-APPELLANT.

IN THE MATTER OF ANTHONY HEAD,
PETITIONER-APPELLANT,

V

LAURIE PARSONS-O'DELL AND SUSAN Y. HILKERT,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

ROBERT A. DINERI, CLYDE, ATTORNEY FOR THE CHILD.

EDWIN P. FRICK, SODUS, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered November 21, 2019 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, adjudged that petitioner-respondent Susan Y. Hilkert and respondent-petitioner Anthony Head shall share joint custody of the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

863

KA 16-00425

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD L. SALTERS, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 10, 2015. The judgment convicted defendant, upon a plea of guilty, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in granting the People's motion for a pretrial protective order concerning the identity of certain prosecution witnesses. By pleading guilty, however, defendant forfeited that contention because "the forfeiture occasioned by a guilty plea extends to claims premised upon, inter alia, . . . motions relating to discovery," such as the People's motion for a protective order here (*People v Gerber*, 182 AD2d 252, 260 [2d Dept 1992], *lv denied* 80 NY2d 1026 [1992]; *see People v Perry*, 50 AD3d 1244, 1245 [3d Dept 2008], *lv denied* 10 NY3d 963 [2008]; *People v Oliveri*, 49 AD3d 1208, 1209 [4th Dept 2008]). Our ruling in *People v Wilson* (159 AD3d 1600, 1601 [4th Dept 2018]) is limited to alleged *Brady* violations and, given the absence of a *Brady* claim in this case, has no applicability here. Defendant's related argument that his guilty plea was coerced "because of the restrictions imposed by [the] protective order[] . . . is belied by the record, which reveals that [he] acknowledged under oath that nobody was forcing, threatening, or coercing him to plead guilty, and that he was entering the plea[]" in order to serve his best interests (*People v Weston*, 145 AD3d 746, 747 [2d Dept 2016], *lv denied* 29 NY3d 1088 [2017]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

882.1

CAF 19-01343

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

IN THE MATTER OF MATILDA B.

YATES COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GERALD B. AND PHYLLIS B., RESPONDENTS-APPELLANTS.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT GERALD B.

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

DANIELLE A. WARD, PENN YAN, FOR PETITIONER-RESPONDENT.

JOSEPH S. DRESSNER, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Yates County (Jason L. Cook, J.), entered November 26, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, both respondent mother and respondent father appeal from an order that terminated their parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to respondents' contentions, we conclude that petitioner established " 'by clear and convincing evidence that [respondents], by reason of mental illness, [are] presently and for the foreseeable future unable to provide proper and adequate care for [the] child[ ]' " (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Testimony from petitioner's expert psychologists established that the child "would be in danger of being neglected if [she] returned to [their] care at the present time or in the foreseeable future" (*Jason B.*, 160 AD3d at 1434).

We also reject respondents' contentions that they were denied effective assistance of counsel (*see Jason B.*, 155 AD3d at 1576; *Matter of Deon M. [Vernon B.]*, 155 AD3d 1586, 1586 [4th Dept 2017], *lv*

denied 30 NY3d 910 [2018]). Contrary to respondents' contentions that they should have been provided with separate counsel, respondents made a motion to Family Court requesting that the same counsel represent both of them, which the court properly granted (*see generally Matter of Jason C.*, 268 AD2d 587, 587-588 [2d Dept 2000]), and thus respondents waived any challenge to joint representation (*see generally Matter of Aaron W. v Shannon W.*, 96 AD3d 960, 962 [2d Dept 2012]). In any event, respondents failed to establish that there were not strategic or other legitimate explanations for counsel's choices during the underlying proceedings (*see Jason B.*, 155 AD3d at 1576; *Deon M.*, 155 AD3d at 1586).

The father's contention that the court should have recused itself is unpreserved because he failed to request that relief at the factfinding hearing (*see generally Matter of Justin T. [Wanda T.–Joseph M.]*, 154 AD3d 1338, 1339-1340 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]), and we decline to address that issue in the interest of justice (*see generally Matter of Reska v Browne*, 182 AD3d 1052, 1053 [4th Dept 2020]; *Matter of Tumario B. [Valerie L.]*, 83 AD3d 1412, 1412 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]).

We reject the father's contention that the court erred in admitting into evidence certain permanency reports inasmuch as the reports were admissible under the business record exception to the hearsay rule (*see* CPLR 4518 [a]; *Matter of Shirley A.S. [David A.S.]*, 90 AD3d 1655, 1655 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Matter of Noemi D.*, 43 AD3d 1303, 1304 [4th Dept 2007], *lv denied* 9 NY3d 814 [2007]).

Finally, with respect to the father's contention that the court should have granted him a suspended judgment, we conclude that the issue is unpreserved (*see Justin T.*, 154 AD3d at 1339-1340) and, in any event, "[t]here is no statutory provision providing for a suspended judgment when parental rights are terminated based on mental illness" (*Matter of Dionne W.*, 267 AD2d 1096, 1097 [4th Dept 1999]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

887

TP 20-00263

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

IN THE MATTER OF SALVATORE CUPPUCCINO,
PETITIONER,

V MEMORANDUM AND ORDER

JOHN HARPER, SUPERINTENDENT, MOHAWK CORRECTIONAL
FACILITY, RESPONDENT.

SALVATORE CUPPUCCINO, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Oneida County [Patrick F. MacRae, J.], entered February 10, 2020) to review a determination of respondent. The determination found after a tier II 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 II disciplinary hearing, that he violated inmate rule 121.12 (7 NYCRR 270.2 [B] [22] [iii] [telephone program violation]). Contrary to petitioner's contention, the misbehavior report, hearing testimony, and documentary evidence constitute substantial evidence supporting the determination that petitioner violated that inmate rule (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Clark v Annucci*, 170 AD3d 1499, 1499 [4th Dept 2019]). Moreover, inasmuch as the charge under that inmate rule was not dependent upon a separate charge of being out of place under inmate rule 109.10 (7 NYCRR 270.2 [B] [10] [i]), which the Hearing Officer found had not been substantiated, there is nothing inconsistent about the Hearing Officer's determination (*see generally Matter of Davis v Annucci*, 137 AD3d 1437, 1438 [3d Dept 2016]).

Contrary to petitioner's further contention, the record does not establish any bias on the part of the Hearing Officer or that his determination flowed from any alleged bias (*see Matter of Cornell v Annucci*, 173 AD3d 1760, 1760 [4th Dept 2019]). We reject the contention of petitioner that respondent failed to make an adequate

response to his administrative appeal inasmuch as respondent was "not required to articulate the factors relied on in affirming, on administrative appeal, the determination of guilt" (*Matter of Pender v Fischer*, 69 AD3d 1099, 1100 [3d Dept 2010], *lv denied* 14 NY3d 708 [2010]). We have reviewed petitioner's remaining contention and conclude that it is without merit.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

894

CA 19-02265

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

IN THE MATTER OF RUSSELL E. BROOKS, II,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT M. PALMIERI, MAYOR OF CITY OF UTICA,
AND CITY OF UTICA, RESPONDENTS-RESPONDENTS.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (BENJAMIN D. HEFFLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 23, 2019 in a CPLR article 78 proceeding. The judgment granted the motion of respondents to dismiss the petition.

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

Memorandum: Petitioner, a former fire chief for respondent City of Utica, commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul a determination denying his application for line-of-duty sick leave pursuant to General Municipal Law § 92-d. Respondents moved to dismiss the petition on the ground that, inter alia, the proceeding is moot. Petitioner now appeals from a judgment granting the motion on that ground.

General Municipal Law § 92-d provides for sick leave benefits to certain employees with qualifying World Trade Center conditions, as defined by section two of the Retirement and Social Security Law (*see* General Municipal Law § 92-d [1]). After filing the petition in this case, however, petitioner reached the mandatory retirement age pursuant to Retirement and Social Security Law § 370 (b) and retired with the maximum amount of accrued sick leave. " 'It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal' " (*Hughes v Gates*, 217 AD2d 966, 967 [4th Dept 1995], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). Under the circumstances here, Supreme Court properly dismissed the petition as moot. This proceeding is "not of the class

that should be preserved as an exception to the mootness doctrine" (*Hearst Corp.*, 50 NY2d at 715).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

903

KA 19-01027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL VALENTINE, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered March 14, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). On appeal, defendant contends that County Court erred in assessing him 15 points under risk factor 11 and 15 points under risk factor 14.

Although we agree with defendant that the People did not establish by clear and convincing evidence that defendant was abusing drugs or alcohol at the time of the sex offense or that he had the requisite pattern of drug or alcohol use required for the court's assessment of points under risk factor 11 (*see People v Kowal*, 175 AD3d 1057, 1057-1058 [4th Dept 2019]), we reject defendant's contention that the court erred in assessing 15 points under risk factor 14 for release without supervision. Risk factor 14 "is premised on the theory that a sex offender should be supervised by a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders," and the risk assessment guidelines direct that "[a]n offender who is released without such intensive supervision is assessed points in this category" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). Here, defendant was not released to the supervision of a parole or probation officer, but rather on conditional discharge, and thus he was not subject to supervision as contemplated by risk factor 14 (*see generally People v Miller*, 77 AD3d 1386, 1387 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]). Even after the points assessed under risk factor 11 are subtracted, however, defendant remains a presumptive level three risk.

We reject defendant's further contention that the court erred in denying his request for a downward departure from his presumptive risk level. Certain of defendant's alleged mitigating factors were already accounted for by the risk assessment guidelines, and defendant failed to establish the existence of the remaining factors by the requisite preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 861-864 [2014]). Even assuming, arguendo, that defendant established the mitigating factors not already contemplated by the risk assessment guidelines by a preponderance of the evidence, we nevertheless conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see generally People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

905

KA 17-01821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAEQUAN P. MCCALL, DEFENDANT-APPELLANT.

CARRIE BLEAKLEY, CONFLICT DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 21, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). Defendant contends that County Court failed to make the necessary determination whether he was eligible for youthful offender treatment (*see* CPL 720.10 [3]; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). We reject that contention. "[A] court in an armed felony case can satisfy its obligation under *Middlebrooks* by declining to adjudicate the defendant a youthful offender after consideration on the record of factors pertinent to a determination whether an eligible youth should be adjudicated a youthful offender" (*People v McCall*, 177 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020] [internal quotation marks omitted]; *see People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]; *see also People v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]). Here, the court "implicitly resolved the threshold issue of eligibility in defendant's favor" (*People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]; *see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in refusing to grant him youthful offender status (*see McCall*, 177 AD3d at 1396; *Rice*, 175 AD3d at 1826;

Macon, 169 AD3d at 1440), particularly in light of the seriousness of the offense and defendant's failure to accept any responsibility (*see People v Ford*, 144 AD3d 1682, 1683 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]), and we perceive no basis for exercising our discretion in the interest of justice to adjudicate defendant a youthful offender (*cf. Keith B.J.*, 158 AD3d at 1160-1161; *People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

909

KA 18-01929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALAND S., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 8, 2018. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was convicted upon his plea of guilty of burglary in the second degree (Penal Law §§ 20.00, 140.25 [2]) and was sentenced to a period of probation and ordered to pay, inter alia, restitution. Defendant now appeals from a judgment revoking the sentence of probation and imposing an indeterminate term of incarceration. At the sentencing on the violation of probation, Supreme Court converted the outstanding amount of restitution to a civil judgment.

Defendant's contention that the amount of restitution is not supported by the record is not properly before us (*see generally People v Panek*, 256 AD2d 1238, 1239 [4th Dept 1998], *lv denied* 93 NY2d 856 [1999]). Where, as here, "a resentence occurs more than thirty days after the original sentence, a defendant who has not previously filed a notice of appeal from the judgment may not appeal from the judgment, but only from the resentence" (CPL 450.30 [3]; *see generally People v Ralston*, 303 AD2d 1010, 1011 [4th Dept 2003]).

Defendant also contends that the court erred in converting the outstanding restitution to a civil judgment and that we should thus vacate the civil judgment because it violates the statutory framework of CPL article 720 inasmuch as the civil judgment carries lingering financial consequences if left unpaid and has been docketed by the clerk in a way that leaves certain information regarding the money judgment accessible to public view. That contention, however, is not

properly before us on this appeal (*see generally People v Abujudeh*, 121 AD3d 1532, 1533 [4th Dept 2014], *lv denied* 25 NY3d 1158 [2015]; *People v Baron*, 133 AD2d 833, 834-835 [2d Dept 1987], *lv denied* 70 NY2d 929 [1987]; *see also People v Spencer*, 145 AD3d 1508, 1509 [4th Dept 2016], *lv denied* 29 NY3d 1037 [2017]).

Defendant next contends that the sentence is unduly harsh and severe. As an initial matter, we agree with defendant that his release to parole supervision does not render moot his challenge to the severity of the sentence because he remains under the control of the Parole Board until his sentence has terminated (*see People v Barber*, 106 AD3d 1533, 1533 [4th Dept 2013]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

923

CAF 19-00708

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

IN THE MATTER OF BRYLEIGH E.N.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEREK G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered July 27, 2018 in a proceeding pursuant to Family Court Act article 10. The order found that respondent had committed a felony sex offense against the subject child.

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

Same memorandum as in *Matter of Bryleigh E.N. (Derek G.)* ([appeal No. 2] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

924

CAF 19-00709

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

IN THE MATTER OF BRYLEIGH E.N.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEREK G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered October 11, 2018 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that the subject child is an abused child and a severely abused child.

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

Memorandum: In appeal No. 1, respondent father appeals from an order entered pursuant to Family Court Act article 10 determining that he committed a felony sex offense against his daughter (*see* Family Ct Act §§ 1012 [e] [iii] [A]; 1051 [e]; Social Services Law § 384-b [8] [a] [ii]). In appeal No. 2, the father appeals from an order of fact-finding and disposition that, inter alia, determined that the subject child is an abused child and a severely abused child (*see* Family Ct Act §§ 1012 [e] [iii] [A]; 1051 [e]; Social Services Law § 384-b [8] [a] [ii]) and released the child to the custody of the nonrespondent mother (*see* Family Ct Act § 1054 [a]). In appeal No. 3, the father appeals from an order granting the petition of Livingston County Department of Social Services (DSS) seeking termination of his parental rights pursuant to Social Services Law § 384-b.

As a preliminary matter, we note that the appeal from the order of fact-finding and disposition in appeal No. 2 brings up for review the propriety of the order in appeal No. 1, and we therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father’s contention in appeal No. 2, DSS established by clear and convincing evidence that the father committed

the crime of criminal sexual act in the first degree against his daughter (Penal Law § 130.50 [3]) and thereby established that the child is severely abused (*see Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]; *Matter of Chelsey B. [Michael W.]*, 89 AD3d 1499, 1499-1500 [4th Dept 2011], *lv denied* 18 NY3d 807 [2012]; *see also* Family Ct Act §§ 1046 [b] [ii]; 1051 [e]; Social Services Law § 384-b [8] [d]). Contrary to the father's further contention in appeal No. 2, the child's out-of-court statements were sufficiently corroborated by, inter alia, the consistency of the child's account that the father touched and made oral contact with her genitals, as well as witness testimony that the child engaged in identical behaviors that she had attributed to the father and that the child engaged in age-inappropriate sexual behavior with other children. In addition, a caseworker for child protective services (CPS) testified that she found the child's account credible because the child could give specific details of the abuse and where it occurred and because the child's sexual and aggressive behaviors were consistent with behaviors seen in children proven to have been sexually abused. There was also testimony from the mother that the child reacted vocally and negatively when a physician sought to touch her genitals when examining the child for a urinary tract infection. Inasmuch as the degree of corroboration required to establish the reliability of the child's out-of-court statements is low (*see Matter of East v Giles*, 134 AD3d 1409, 1411 [4th Dept 2015]), and as Family Court judges have "considerable discretion" in determining whether the child's statements have been reliably corroborated (*Matter of Nicole V.*, 71 NY2d 112, 119 [1987], *rearg denied* 71 NY2d 890 [1988]), we conclude that the above evidence constituted sufficient corroboration (*see* Family Ct Act § 1046 [a] [vi]; *Brooke T.*, 156 AD3d at 1411; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490-1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *Matter of Breanna R.*, 61 AD3d 1338, 1340 [4th Dept 2009]). Because Family Court's finding is supported by the record, we see no reason to disturb it (*see Brooke T.*, 156 AD3d at 1411; *Chelsey B.*, 89 AD3d at 1500).

We agree with the father's contention in appeal No. 3, however, that DSS had no standing to bring a petition to terminate his parental rights pursuant to Social Services Law § 384-b and that the court had no jurisdiction to entertain it. That statute applies to destitute or dependent children in situations where termination of parental rights will free them for adoption (§ 384-b [1] [b]; [3] [a]; [10]). The child herein is neither a destitute nor a dependent child within the meaning of the Social Services Law (*see* § 371 [3], [7]), and there is no indication in the record that an adoption was planned for the child (*see Matter of Anastasia I. [Svetlana T.–Aaron M.I.]*, 118 AD3d 1480, 1481 [4th Dept 2014]; *Matter of Cadence SS. [Amy RR.–Joshua SS.]*, 103 AD3d 126, 128-129 [3d Dept 2012], *lv denied* 21 NY3d 853 [2013]; *Matter of Lucinda G.*, 122 Misc 2d 416, 417, 422 [Fam Ct, Delaware County 1983]; *see also Matter of Julian P. [Melissa P.–Zachary L.]*, 106 AD3d 1383, 1384 [3d Dept 2013]). Indeed, at the first appearance of this matter, the court granted temporary full custody to the mother with the consent of DSS and did not thereafter make any other custody order. We reject the position of DSS, adopted by the court, that a

directive in the order in appeal No. 2, by which the court released the child into the custody of the mother pursuant to Family Court Act § 1054 (*see* § 1052 [a] [ii]), rendered the termination proceeding authorized by Social Services Law § 384-b applicable to the child and the father. On the basis of the above analysis, we reverse the order in appeal No. 3 and dismiss the petition seeking termination of the father's parental rights to the child.

The father's contentions in appeal No. 3 that he was deprived of due process and meaningful representation because he appeared only by telephone during the termination proceeding have been rendered moot by our reversal of the order in appeal No. 3 and dismissal of the petition granted in that order. To the extent that the father's claim of ineffective assistance of counsel survives with respect to certain CPS reports dealing with the mother, we conclude that the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brandon v King*, 137 AD3d 1727, 1729 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016] [internal quotation marks omitted]; *see People v Benevento*, 91 NY2d 708, 712 [1998]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court

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

925

CAF 19-01611

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

IN THE MATTER OF BRYLEIGH E.N.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEREK G., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered August 6, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Bryleigh E.N. (Derek G.)* ([appeal No. 2] — AD3d — [Oct. 9, 2020] [4th Dept 2020]).

Entered: October 9, 2020

Mark W. Bennett
Clerk of the Court